

STAND. COM. REP. NO.

829

Honolulu, Hawaii

March 6, 2009

RE: H.B. No. 618

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

Sir:

Your Committee on Finance, to which was referred H.B. No. 618
entitled:

"A BILL FOR AN ACT RELATING TO THE UNIFORM PRUDENT MANAGEMENT
OF INSTITUTIONAL FUNDS ACT,"

begs leave to report as follows:

The purpose of this bill is to conform the law governing the
spending of endowment funds with modern investment and expenditure
practices by enacting the Uniform Prudent Management of
Institutional Funds Act.

The Department of the Attorney General, Commission to Promote
Uniform Legislation, National Tropical Botanical Garden, Hawai'i
Community Foundation, Hawai'i Alliance of Nonprofit Organizations,
and Hawai'i Pacific University testified in support of this bill.

As affirmed by the record of votes of the members of your
Committee on Finance that is attached to this report, your
Committee is in accord with the intent and purpose of H.B. No. 618
and recommends that it pass Third Reading.

HB618 HSCR FIN HMS 2009-2666



Respectfully submitted on
behalf of the members of the
Committee on Finance,


MARCUS R. OSHIRO, Chair



HSCR 829

State of Hawaii
House of Representatives
The Twenty-fifth Legislature

Record of Votes of the Committee on Finance

Bill/Resolution No.: HB 618		Committee Referral: CPC, FIN		Date: March 2, 2009	
<input type="checkbox"/> The committee is reconsidering its previous decision on the measure.					
The recommendation is to: <input checked="" type="checkbox"/> Pass, unamended (as is) <input type="checkbox"/> Pass, with amendments (HD) <input type="checkbox"/> Hold <input type="checkbox"/> Pass short form bill with HD to recommit for future public hearing (recommit)					
FIN Members		Ayes	Ayes (WR)	Nays	Excused
1. OSHIRO, Marcus R. (C)		✓			
2. LEE, Marilyn B. (VC)		✓			
3. AQUINO, Henry J.C.		✓			
4. AWANA, Karen Leinani		✓			
5. BROWER, Tom		✓			
6. CHOY, Isaac W.		✓			
7. COFFMAN, Denny		✓			
8. HAR, Sharon E.		✓			
9. KEITH-AGARAN, Gilbert S.C.		✓			
10. LEE, Chris		✓			
11. NISHIMOTO, Scott Y.		✓			
12. SAGUM, Roland D., III		✓			
13. TOKIOKA, James Kunane		✓			
14. WOOLEY, Jessica		✓			
15. YAMASHITA, Kyle T.		✓			
16. PINE, Kymberly Marcos		✓			
17. WARD, Gene					✓
TOTAL (17)		16	0	0	1
The recommendation is: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted If joint referral, _____ did not support recommendation. committee acronym(s)					
Vice Chair's or designee's signature: <u>Marilyn B. Lee</u>					
Distribution: Original (White) – Committee Duplicate (Yellow) – Chief Clerk's Office Duplicate (Pink) – HMSO					

A BILL FOR AN ACT

RELATING TO THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT.

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

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER

5 UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

6 § -1 Short title. This chapter may be cited as the
7 Uniform Prudent Management of Institutional Funds Act.

8 § -2 Definitions. As used in this chapter, unless the
9 context otherwise requires:

10 "Activity and use limitations" means the relief of poverty,
11 the advancement of education or religion, the promotion of
12 health, the promotion of a governmental purpose, or any other
13 purpose the achievement of which is beneficial to the community.

14 "Community foundation" means a community foundation or
15 community trust recognized as exempt from federal income tax and
16 referred to in section 170(c) of the Internal Revenue Code of
17 1986, as amended, and which meets the single entity requirements



1 of United State Treasury Regulations sections 1.170A(e)(10-14)
2 adopted thereunder.

3 "Endowment fund" means an institutional fund or part
4 thereof that, under the terms of a gift instrument, is not
5 wholly expendable by the institution on a current basis. The
6 term does not include assets that an institution designates as
7 an endowment fund for its own use.

8 "Gift instrument" means a record or records, including an
9 institutional solicitation, under which property is granted to,
10 transferred to, or held by an institution as an institutional
11 fund.

12 "Institution" means:

- 13 (1) A person, other than an individual, organized and
14 operated exclusively for charitable purposes;
15 (2) A government or governmental subdivision, agency, or
16 instrumentality, to the extent that it holds funds
17 exclusively for a charitable purpose; or
18 (3) A trust that had both charitable and noncharitable
19 interests, after all noncharitable interests have
20 terminated.

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



- 1 (1) Program-related assets;
- 2 (2) A fund held for an institution by a trustee that is
- 3 not an institution, unless the fund is held
- 4 exclusively for the benefit of a community foundation;
- 5 or
- 6 (3) A fund in which a beneficiary that is not an
- 7 institution has an interest, other than an interest
- 8 that could arise upon violation or failure of the
- 9 purposes of the fund.

10 "Person" means an individual, corporation, business trust,
11 estate, trust, partnership, limited liability company,
12 association, joint venture, public corporation, government or
13 governmental subdivision, agency, or instrumentality, or any
14 other legal or commercial entity.

15 "Program-related asset" means an asset held by an
16 institution primarily to accomplish a charitable purpose of the
17 institution and not primarily for investment.

18 "Record" means information that is inscribed on a tangible
19 medium or that is stored in an electronic or other medium and is
20 retrievable in perceivable form.

21 § -3 Standard of conduct in managing and investing
22 institutional fund. (a) Subject to the intent of a donor



1 expressed in a gift instrument, an institution, in managing and
2 investing an institutional fund, shall consider the charitable
3 purposes of the institution and the purposes of the
4 institutional fund.

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

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

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

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

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

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



- 1 (1) In managing and investing an institutional fund, the
2 following factors, if relevant, must be considered:
3 (A) General economic conditions;
4 (B) The possible effect of inflation or deflation;
5 (C) The expected tax consequences, if any, of
6 investment decisions or strategies;
7 (D) The role that each investment or course of action
8 plays within the overall investment portfolio of
9 the fund;
10 (E) The expected total return from income and the
11 appreciation of investments;
12 (F) Other resources of the institution;
13 (G) The needs of the institution and the fund to make
14 distributions and to preserve capital; and
15 (H) An asset's special relationship or special value,
16 if any, to the charitable purposes of the
17 institution.
- 18 (2) Management and investment decisions about an
19 individual asset must be made not in isolation but
20 rather in the context of the institutional fund's
21 portfolio of investments as a whole and as a part of
22 an overall investment strategy having risk and return



1 objectives reasonably suited to the fund and to the
2 institution.

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

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

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

21 (6) A person that has special skills or expertise, or is
22 selected in reliance upon the person's representation



1 that the person has special skills or expertise, has a
2 duty to use those skills or that expertise in managing
3 and investing institutional funds.

4 § -4 Appropriation for expenditure or accumulation of
5 endowment fund; rules of construction. (a) Subject to the
6 intent of a donor expressed in the gift instrument an
7 institution may appropriate for expenditure or accumulate so
8 much of an endowment fund as the institution determines is
9 prudent for the uses, benefits, purposes, and duration for which
10 the endowment fund is established. Unless stated otherwise in
11 the gift instrument, the assets in an endowment fund are donor-
12 restricted assets until appropriated for expenditure by the
13 institution. In making a determination to appropriate or
14 accumulate, the institution shall act in good faith, with the
15 care that an ordinarily prudent person in a like position would
16 exercise under similar circumstances, and shall consider, if
17 relevant, the following factors:

- 18 (1) The duration and preservation of the endowment fund;
- 19 (2) The purposes of the institution and the endowment
20 fund;
- 21 (3) General economic conditions;
- 22 (4) The possible effect of inflation or deflation;



1 (5) The expected total return from income and the
2 appreciation of investments;

3 (6) Other resources of the institution; and

4 (7) The investment policy of the institution.

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

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

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

16 (2) Do not otherwise limit the authority to appropriate
17 for expenditure or accumulate under subsection (a).

18 **§ -5 Delegation of management and investment functions.**

19 (a) Subject to any specific limitation set forth in a gift
20 instrument or in law other than this chapter, an institution may
21 delegate to an external agent the management and investment of
22 an institutional fund to the extent that an institution could



1 prudently delegate under the circumstances. An institution
2 shall act in good faith, with the care that an ordinarily
3 prudent person in a like position would exercise under similar
4 circumstances, in:

5 (1) Selecting an agent;

6 (2) Establishing the scope and terms of the delegation,
7 consistent with the purposes of the institution and
8 the institutional fund; and

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

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

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

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



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

4 § -6 Release or modification of restrictions on
5 management, investment, or purpose. (a) If the donor consents
6 in a record, an institution may release or modify, in whole or
7 in part, a restriction contained in a gift instrument on the
8 management, investment, or purpose of an institutional fund. A
9 release or modification may not allow a fund to be used for a
10 purpose other than a charitable purpose of the institution.

11 (b) The court, upon application of an institution, may
12 modify a restriction contained in a gift instrument regarding
13 the management or investment of an institutional fund if the
14 restriction has become impracticable or wasteful, if it impairs
15 the management or investment of the fund, or if, because of
16 circumstances not anticipated by the donor, a modification of a
17 restriction will further the purposes of the fund. The
18 institution shall notify the attorney general of the
19 application, and the attorney general must be given an
20 opportunity to be heard. To the extent practicable, any
21 modification must be made in accordance with the donor's
22 probable intention.



1 (c) If a particular charitable purpose or a restriction
2 contained in a gift instrument on the use of an institutional
3 fund becomes unlawful, impracticable, impossible to achieve, or
4 wasteful, the court, upon application of an institution, may
5 modify the purpose of the fund or the restriction on the use of
6 the fund in a manner consistent with the charitable purposes
7 expressed in the gift instrument. The institution shall notify
8 the attorney general of the application, and the attorney
9 general must be given an opportunity to be heard.

10 (d) If an institution determines that a restriction
11 contained in a gift instrument on the management, investment, or
12 purpose of an institutional fund is unlawful, impracticable,
13 impossible to achieve, or wasteful, the institution, without
14 application to the court, but with the consent of the attorney
15 general, may modify the purpose of the fund or the restriction
16 on the use of the fund in a manner consistent with the
17 charitable purposes expressed in the gift instrument if the fund
18 subject to the restriction has a total value of less than
19 \$250,000.

20 (e) If an institution determines that a restriction
21 contained in a gift instrument on the management, investment, or
22 purpose of an institutional fund is unlawful, impracticable,



1 impossible to achieve, or wasteful, the institution, sixty days
2 after notification to the attorney general, may release or
3 modify the restriction, in whole or part, if:

4 (1) The institutional fund subject to the restriction has
5 a total value of less than \$50,000;

6 (2) More than twenty years have elapsed since the fund was
7 established; and

8 (3) The institution uses the property in a manner
9 consistent with the charitable purposes expressed in
10 the gift instrument.

11 § -7 **Reviewing compliance.** Compliance with this chapter
12 is determined in light of the facts and circumstances existing
13 at the time a decision is made or action is taken, and not by
14 hindsight.

15 § -8 **Application to existing institutional funds.** This
16 chapter applies to institutional funds existing on or
17 established after the effective date of this Act. As applied to
18 institutional funds existing on the effective date of this Act
19 this chapter governs only decisions made or actions taken on or
20 after that date.

21 § -9 **Relation to electronic signatures in global and**
22 **national commerce act.** This chapter modifies, limits, and



1 supersedes the Electronic Signatures in Global and National
2 Commerce Act, 15 U.S.C. section 7001 et seq., but does not
3 modify, limit, or supersede section 101 of that act, 15 U.S.C.
4 section 7001(a), or authorize electronic delivery of any of the
5 notices described in section 103 of that act, 15 U.S.C. section
6 7003(b)."

7 SECTION 2. Chapter 517D, Hawaii Revised Statutes, is
8 repealed.

9 SECTION 3. This Act shall take effect on July 1, 2009.

10

INTRODUCED BY: *J. Phil. Keenan*
[Signature]

JAN 23 2009



Report Title:

Uniform Prudent Management of Institutional Funds Act

Description:

Enacts Uniform Prudent Management of Institutional Funds Act to replace and update existing Uniform Management of Institutional Funds Act. Provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations. Provides additional protections for charities and also protects the interests of donors. Modernizes rules governing expenditures from endowment funds. Gives institutions ability to cope more easily with fluctuations in the value of the endowment. Updates provisions governing the release and modification of restrictions on charitable funds to permit more efficient management of these funds.



**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON H.B. No. 618

**RELATING TO THE UNIFORM PRUDENT MANAGEMENT
OF INSTITUTIONAL FUNDS ACT.**

**BEFORE THE SENATE COMMITTEE ON COMMERCE AND CONSUMER
PROTECTION**

DATE: Wednesday, March 18, 2009, at 8:30 a.m.
Conference Room 229, State Capitol

PERSON(S) TESTIFYING: ELIZABETH KENT or KEN TAKAYAMA
Commission to Promote Uniform Legislation

E-MAIL to: CPNTestimony@Capitol.hawaii.gov

Chair Baker and Members of the Senate Committee on Commerce and
Consumer Protection:

Hawaii's uniform law commissioners support the passage of House Bill No. 618. This is a version of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) that includes some modifications suggested by charitable institutions in Hawaii.

This act, like its predecessor the Uniform Management of Institutional Funds Act of 1972, provides statutory guidelines for management, investment, and expenditures of endowment funds held by charitable institutions. The new act expressly provides for diversification of assets, pooling of assets, and total return investment, to implement whole portfolio management, bringing the law governing charitable institutions in line with modern investment and expenditure practice.

Laws substantially similar to this have been adopted by 26 states and the District of Columbia. Attached is a brief summary of UPMIFA for your information.

We note that this committee heard the Senate companion version of this measure, S.B. No. 121, on February 17, 2009.

We urge your support of this bill.

UPMIFA

uniform prudent management of institutional funds act

A SUMMARY

At its annual meeting in July 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Prudent Management of Institutional Funds Act (UPMIFA) and recommended it for enactment by the legislatures of the various states. UPMIFA is designed to replace the existing Uniform Management of Institutional Funds Act (UMIFA), which was approved by NCCUSL in 1972 and has since been enacted in 47 states. UMIFA was a pioneering statute, providing uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as “endowments” to those institutions. Those rules supported two general principles: 1) that assets would be invested prudently in diversified investments that sought growth as well as income, and 2) that appreciation of assets could prudently be spent for the purposes of any endowment fund held by a charitable institution. These two principles have been the twin lodestars of asset management for endowments since UMIFA became the law of the land in nearly all U.S. jurisdictions.

UPMIFA continues these fundamental principles as a needed upgrade of UMIFA. Both investment in assets and expenditure for charitable purposes have grown exponentially in the 35 years since UMIFA was drafted; asset management theory and practice have also advanced. UPMIFA, as an up-date and successor to UMIFA, establishes an even sounder and more unified basis for charitable fund management than UMIFA has done.

INVESTMENT

In 1972, UMIFA represented a revolutionary advance over prevailing practices which imposed upon endowments the limited investment opportunities available for managing trust assets – even endowments not organized as trusts. By stating the first prudent investor rule in statutory law, UMIFA allowed endowments to invest in any kind of assets, to pool endowment funds for investment purposes, and to delegate investment management to other persons (e.g., professional investment advisors), as long as the governing board of the charitable institution exercised ordinary business care and prudence in making these decisions. A range of factors guided the exercise of prudence.

UPMIFA incorporates the experience gained in the last 35 years under UMIFA by providing even stronger guidance for investment management and enumerating a more exact set of rules for investing in a prudent manner. It requires investment “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” It requires prudence in incurring investment costs, authorizing “only costs that are appropriate and reasonable.” Factors to be considered in investing are expanded to include, for example, the effects of inflation. UPMIFA emphasizes that investment decisions must be made in relation to the overall resources of the institution and its charitable purposes. No investment decision may be made in isolation, but must be made in light of the fund’s entire portfolio, and as a part of an investment strategy “having risk and return objectives reasonably suited to the fund and to the institution.” A charitable institution must diversify assets as an affirmative obligation unless “special circumstances” dictate otherwise. Assets must be reviewed within a reasonable time after they come into the possession of the institution in order to conform them to the investment



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strategy and objectives of the fund. Investment experts, whether in-house or hired for the purpose, are held to a standard of care consistent with that expertise.

UMIFA initiated the era of modern portfolio management for charitable institutions. UPMIFA provides the standards and guidelines that subsequent experience tells us are the most appropriate for the purpose. Charitable institutions will have more precise standards to guide them. Courts will have more precise standards with which to measure prudence in the event of a challenge. The result should be more money for programs supported by charitable funds, including endowments.

EXPENDITURE

UMIFA initiated the concept of total return expenditure of endowment assets for charitable program purposes, expressly permitting prudent expenditure of both appreciation and income and replacing the old trust law concept that only income (*e.g.*, interest and dividends) could be spent. Thus, asset growth and income could be appropriated for program purposes, subject to the rule that a fund could not be spent below "historic dollar value."

UPMIFA builds upon UMIFA's rule on appreciation, but it eliminates the concept of "historic dollar value." UPMIFA, instead, provides better guidance on prudence and makes the need for a floor on spending unnecessary. UPMIFA states that the institution "may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines to be prudent for the uses, benefits, purposes and duration for which the endowment fund is established." Seven criteria guide the institution in its yearly expenditure decisions: "1) duration and preservation of the endowment fund; 2) the purposes of the institution and the endowment fund; 3) general economic conditions; 4) effect of inflation or deflation; 5) the expected total return from income and the appreciation of investments; 6) other resources of the institution; and, 7) the investment policy of the institution." These standards mirror the standards that apply to investment decision-making, thus unifying both investment and expenditure decisions more concretely.

UPMIFA includes an optional provision that allows states to enact another kind of safeguard against excessive expenditure. If a state does not want to rely solely upon the rule of prudence provided in UPMIFA, the state may adopt a provision that creates a rebuttable presumption of imprudence if an institution expends an amount greater than seven percent of fair market value of a fund, calculated in an averaging formula over three years. While the seven percent rule is likely not to be necessary, it is available for those states that may be uncomfortable with the general standards.

RELEASE OR MODIFICATION OF RESTRICTIONS

UPMIFA recognizes and protects donor intent more broadly than UMIFA did, in part by providing a more comprehensive treatment of the modification of restrictions on charitable funds. Sometimes a restriction imposed by a donor becomes impracticable or wasteful or may impair the management of a fund. The donor may consent to release the restriction, if the donor is still alive and able to do so, but if the donor is not available the charity can ask for court approval of a modification of the restriction. The trust law doctrines of cy pres (modifying a



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purpose restriction) and deviation (modifying a management restriction) probably already apply to charitable funds held by nonprofit corporations. UPMIFA makes this clear. Under UMIFA, the only option with respect to a restriction was release of the restriction. UPMIFA instead authorizes a modification that a court determines to be in accordance with the donor's probable intention. If the charity asks for court approval of a modification, the charity must notify the state's chief charitable regulator and the regulator may participate in the proceeding.

UPMIFA adds a new provision that allows a charity to modify a restriction on a small (less than \$25,000) and old (over 20 years old) fund without going to court. If a restriction has become impracticable or wasteful, the charity may notify the state charitable regulator, wait 60 days, and then, unless the regulator objects, modify the restriction in a manner consistent with the charitable purposes expressed in any documents that were part of the original gift.

CONCLUSION

UPMIFA reflects and incorporates the 35 years of experience that has accumulated under the original UMIFA. Rather than changing institutional investment or expenditure practices, it brings them up to date and unifies them across a broad range of charitable funds. The better charitable institutions manage investments and prudently control expenditures, the more money they should have for program purposes.





March 16, 2009

Chair Rosalyn Baker
Senate Commerce and Consumer Protection Committee
Hawaii State Senate
State Capitol, Room 229
Honolulu, HI 96813

RE: HB 618, Relating to Uniform Prudent Management of Institutional Funds Act

Dear Chair Baker and members of the Senate Commerce and Consumer Protection Committee:

The Hawai'i Alliance of Nonprofit Organizations supports HB 618, in particular the move to allow charitable organizations to spend below the historic gift value of an endowment.

The current economic environment requires nonprofit organizations to be as resourceful as possible in identifying resources to sustain their good work in the community. HB 618 provides for this kind of latitude with regard to the treatment of nonprofit endowment revenue and offers appropriate guidelines for prudent use of these funds.

We are in support of public policy that provides flexibility to nonprofit organizations allowing them greater efficiency and capacity to meet their mission and deliver valuable services.

HANO unites and strengthens the nonprofit sector as a collective force to improve the quality of Hawai'i. It works in the areas of leadership and convenings, advocacy and public policy, research and information, communications, professional development and products and services for its members.

Thank you for the opportunity to provide written testimony in support of this measure.

Lisa Maruyama
President and CEO