

By: Paxton

H.B. No. 860

A BILL TO BE ENTITLED

AN ACT

relating to management, investment, and expenditure of institutional funds and adoption of the Uniform Prudent Management of Institutional Funds Act.

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

SECTION 1. Chapter 163, Property Code, is amended to read as follows:

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

Sec. 163.001. SHORT TITLE. This chapter may be cited as the Uniform Prudent Management of Institutional Funds Act.

Sec. 163.002. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that:

(1) institutions organized and operated exclusively for a charitable purpose perform essential and needed services in the state;

(2) uncertainty exists regarding the prudence standards for the management and investment of charitable funds and for endowment spending by institutions described by Subdivision (1); and

(3) the 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

1 of achieving growth and maintaining purchasing power without  
2 adversely affecting the availability of funds for current  
3 expenditure.

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

10 Sec. 163.003. DEFINITIONS. In this chapter:

11 (1) "Charitable purpose" means the promotion of a  
12 scientific, educational, philanthropic, or environmental purpose,  
13 social welfare, the arts and humanities, or another civic or public  
14 purpose described by Section 501(c)(3) of the Internal Revenue Code  
15 of 1986.

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

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

25 (4) "Institution" means:

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

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

4           (C) a trust that had both charitable and  
5 noncharitable interests, after all noncharitable interests have  
6 terminated.

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

10           (A) program-related assets;

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

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

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

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

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

27           Sec. 163.004. STANDARD OF CONDUCT IN MANAGING AND INVESTING

1 INSTITUTIONAL FUND. (a) Subject to the intent of a donor expressed  
2 in a gift instrument, an institution, in managing and investing an  
3 institutional fund, shall consider the charitable purposes of the  
4 institution and the purposes of the institutional fund.

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

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

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

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

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

24 (A) general economic conditions;

25 (B) the possible effect of inflation or  
26 deflation;

27 (C) the expected tax consequences, if any, of

1 investment decisions or strategies;

2 (D) the role that each investment or course of  
3 action plays within the overall investment portfolio of the fund;

4 (E) the expected total return from income and the  
5 appreciation of investments;

6 (F) other resources of the institution;

7 (G) the needs of the institution and the fund to  
8 make distributions and to preserve capital; and

9 (H) an asset's special relationship or special  
10 value, if any, to the charitable purposes of the institution.

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

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

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

24 (5) Within a reasonable time after receiving property,  
25 an institution shall make and carry out decisions concerning the  
26 retention or disposition of the property or to rebalance a  
27 portfolio, in order to bring the institutional fund into compliance

1 with the purposes, terms, and distribution requirements of the  
2 institution as necessary to meet other circumstances of the  
3 institution and the requirements of this chapter.

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

9 Sec. 163.005. APPROPRIATION FOR EXPENDITURE OR  
10 ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION. (a)

11 Subject to the intent of a donor expressed in the gift instrument,  
12 an institution may appropriate for expenditure or accumulate so  
13 much of an endowment fund as the institution determines is prudent  
14 for the uses, benefits, purposes, and duration for which the  
15 endowment fund is established. Unless stated otherwise in the gift  
16 instrument, the assets in an endowment fund are donor-restricted  
17 assets until appropriated for expenditure by the institution. In  
18 making a determination to appropriate or accumulate, the  
19 institution shall act in good faith, with the care that an  
20 ordinarily prudent person in a like position would exercise under  
21 similar circumstances, and shall consider, if relevant, the  
22 following factors:

23 (1) the duration and preservation of the endowment  
24 fund;

25 (2) the purposes of the institution and the endowment  
26 fund;

27 (3) general economic conditions;

1           (4) the possible effect of inflation or deflation;

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

4           (6) other resources of the institution; and

5           (7) the investment policy of the institution.

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

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

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

17           (2) do not otherwise limit the authority to  
18 appropriate for expenditure or accumulate under Subsection (a).

19           Sec. 163.006. DELEGATION OF MANAGEMENT AND INVESTMENT  
20 FUNCTIONS. (a) Subject to any specific limitation set forth in a  
21 gift instrument or in law other than this chapter, an institution  
22 may delegate to an external agent the management and investment of  
23 an institutional fund to the extent that an institution could  
24 prudently delegate under the circumstances. An institution shall  
25 act in good faith, with the care that an ordinarily prudent person  
26 in a like position would exercise under similar circumstances, in:

27           (1) selecting an agent;

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

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

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

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

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

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

21           Sec. 163.007. RELEASE OR MODIFICATION OF RESTRICTIONS ON  
22 MANAGEMENT, INVESTMENT, OR PURPOSE. (a) If the donor consents in a  
23 record, an institution may release or modify, in whole or in part, a  
24 restriction contained in a gift instrument on the management,  
25 investment, or purpose of an institutional fund. A release or  
26 modification may not allow a fund to be used for a purpose other  
27 than a charitable purpose of the institution.



1       (b) The court, upon application of an institution, may  
2 modify a restriction contained in a gift instrument regarding the  
3 management or investment of an institutional fund if the  
4 restriction has become impracticable or wasteful, if it impairs the  
5 management or investment of the fund, or if, because of  
6 circumstances not anticipated by the donor, a modification of a  
7 restriction will further the purposes of the fund. Chapter 123  
8 applies to a proceeding under this subsection. To the extent  
9 practicable, any modification must be made in accordance with the  
10 donor's probable intention.

11       (c) If a particular charitable purpose or a restriction  
12 contained in a gift instrument on the use of an institutional fund  
13 becomes unlawful, impracticable, impossible to achieve, or  
14 wasteful, the court, upon application of an institution, may modify  
15 the purpose of the fund or the restriction on the use of the fund in  
16 a manner consistent with the charitable purposes expressed in the  
17 gift instrument. Chapter 123 applies to a proceeding under this  
18 subsection.

19       (d) If an institution determines that a restriction  
20 contained in a gift instrument on the management, investment, or  
21 purpose of an institutional fund is unlawful, impracticable,  
22 impossible to achieve, or wasteful, the institution, 60 days after  
23 receipt of notice by the attorney general, may release or modify the  
24 restriction, in whole or part, if:

25               (1) the institutional fund subject to the restriction  
26 has a total value of less than \$25,000;

27               (2) more than 20 years have elapsed since the fund was

1 established; and

2 (3) the institution uses the property in a manner  
3 consistent with the charitable purposes expressed in the gift  
4 instrument.

5 (e) The notification to the attorney general under  
6 Subsection (d) must be accompanied by a copy of the gift instrument  
7 and a statement of facts sufficient to evidence compliance with  
8 Subsections (d)(1), (2), and (3).

9 Sec. 163.008. REVIEWING COMPLIANCE. Compliance with this  
10 chapter is determined in light of the facts and circumstances  
11 existing at the time a decision is made or action is taken, and not  
12 by hindsight.

13 Sec. 163.009. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL  
14 AND NATIONAL COMMERCE ACT. This chapter modifies, limits, and  
15 supersedes the provisions of the Electronic Signatures in Global  
16 and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does  
17 not modify, limit, or supersede Section 101 of that Act (15 U.S.C.  
18 Section 7001(a)) or authorize electronic delivery of any of the  
19 notices described in Section 103 of that Act (15 U.S.C. Section  
20 7003(b)).

21 Sec. 163.010. UNIFORMITY OF APPLICATION AND CONSTRUCTION.  
22 In applying and construing this chapter, consideration must be  
23 given to the need to promote uniformity of the law with respect to  
24 the subject matter of this chapter among states that enact a law  
25 substantially similar to this chapter.

26 Sec. 163.011. APPLICABILITY OF OTHER PARTS OF CODE.  
27 Subtitle B, Title 9 (the Texas Trust Code), does not apply to any

1 institutional fund subject to this chapter.

2 ~~[Sec. 163.001. SHORT TITLE. This chapter may be cited as~~  
3 ~~the Uniform Management of Institutional Funds Act.~~

4 ~~[Sec. 163.002. LEGISLATIVE FINDINGS AND PURPOSE. (a) The~~  
5 ~~legislature finds that:~~

6 ~~[(1) publicly and privately supported educational,~~  
7 ~~religious, and charitable organizations perform essential and~~  
8 ~~needed services in the state;~~

9 ~~[(2) uncertainty regarding legal restrictions on the~~  
10 ~~management, investment, and expenditure of endowment funds of the~~  
11 ~~organizations has in many instances precluded obtaining the highest~~  
12 ~~available return on endowment funds; and~~

13 ~~[(3) the organizations, their officers, directors,~~  
14 ~~and trustees, and the citizens of this state will benefit from~~  
15 ~~removal of the uncertainty and by permitting endowment funds to be~~  
16 ~~invested for the long-term goals of achieving growth and~~  
17 ~~maintaining purchasing power without adversely affecting~~  
18 ~~availability of funds for current expenditure.~~

19 ~~[(b) The purpose of this chapter is to provide guidelines~~  
20 ~~for the management, investment, and expenditure of endowment funds~~  
21 ~~of publicly and privately supported educational, religious, and~~  
22 ~~charitable organizations in order to eliminate the uncertainty~~  
23 ~~regarding legal restrictions on the management, investment, and~~  
24 ~~expenditure of the funds and to enable the organizations to~~  
25 ~~maximize their resources.~~

26 ~~[Sec. 163.003. DEFINITIONS. In this chapter:~~

27 ~~[(1) "Endowment fund" means an institutional fund, or~~

1 ~~any part of such a fund, not wholly expendable by the institution on~~  
2 ~~a current basis under the terms of the applicable gift instrument.~~

3 ~~[(2) "Gift instrument" means a will, deed, grant,~~  
4 ~~conveyance, agreement, memorandum, writing, or other governing~~  
5 ~~document, including the terms of any institutional solicitations~~  
6 ~~from which an institutional fund resulted, under which property is~~  
7 ~~transferred to or held by an institution as an institutional fund.~~

8 ~~[(3) "Governing board" means the body responsible for~~  
9 ~~the management of an institution or of an institutional fund.~~

10 ~~[(4) "Historic dollar value" means the aggregate fair~~  
11 ~~market value in dollars of:~~

12 ~~[(A) an endowment fund at the time it became an~~  
13 ~~endowment fund;~~

14 ~~[(B) each subsequent donation to the fund at the~~  
15 ~~time it is made; and~~

16 ~~[(C) each accumulation made pursuant to a~~  
17 ~~direction in the applicable gift instrument at the time the~~  
18 ~~accumulation is added to the fund.~~

19 ~~[(5) "Institution" means an incorporated or~~  
20 ~~unincorporated organization organized and operated exclusively for~~  
21 ~~educational, religious, or charitable purposes, an institution of~~  
22 ~~higher education, or a foundation chartered for the benefit of an~~  
23 ~~institution of higher education. The term does not include a~~  
24 ~~private foundation as defined by Section 509(a) of the Internal~~  
25 ~~Revenue Code of 1986.~~

26 ~~[(6) "Institutional fund" means a fund held by an~~  
27 ~~institution for its exclusive use, benefit, or purposes, except a~~

1 ~~fund held for an institution by a trustee that is not an institution~~  
2 ~~or a fund in which a beneficiary that is not an institution has an~~  
3 ~~interest other than possible rights that could arise on violation~~  
4 ~~or failure of the purposes of the fund.~~

5 ~~[(7) "Institution of higher education" has the meaning~~  
6 ~~assigned by Section 61.003, Education Code.~~

7 ~~[Sec. 163.004. EXPENDITURES. (a) A governing board may~~  
8 ~~appropriate for expenditure, for the uses and purposes for which~~  
9 ~~the fund is established, the net appreciation, realized and~~  
10 ~~unrealized, in the fair market value of the assets of an endowment~~  
11 ~~fund over the historic dollar value of the fund to the extent~~  
12 ~~prudent under the standard provided by Section 163.007.~~

13 ~~[(b) A determination of the historic dollar value made in~~  
14 ~~good faith by the governing board is conclusive.~~

15 ~~[(c) Subsection (a) does not limit the authority of the~~  
16 ~~governing board to expend funds as permitted under other law, the~~  
17 ~~terms of the applicable gift instrument, or the charter or articles~~  
18 ~~of incorporation of the institution.~~

19 ~~[(d) Subsection (a) does not apply if the applicable gift~~  
20 ~~instrument indicates the donor's intention that the net~~  
21 ~~appreciation not be expended. A restriction on the expenditure of~~  
22 ~~net appreciation may not be implied from a designation of a gift as~~  
23 ~~an endowment or from a direction or authorization in the applicable~~  
24 ~~gift instrument to use only "income." This rule of construction~~  
25 ~~applies to gift instruments executed or in effect before, on, or~~  
26 ~~after the effective date of this chapter.~~

27 ~~[Sec. 163.005. INVESTMENT AUTHORITY. In addition to an~~

1 ~~investment authorized by other law or by the applicable gift~~  
2 ~~instrument, and without restriction to investments a fiduciary may~~  
3 ~~make, the governing board, subject to any specific limitations in~~  
4 ~~the applicable gift instrument or the applicable law other than law~~  
5 ~~relating to investments by a fiduciary, may:~~

6 ~~[(1) invest an institutional fund in any real or~~  
7 ~~personal property, including mortgages, stocks, bonds, debentures,~~  
8 ~~and other securities of profit or nonprofit corporations, shares in~~  
9 ~~or obligations of associations, partnerships, or individuals, and~~  
10 ~~obligations of any governmental entity, whether or not the property~~  
11 ~~produces a current return;~~

12 ~~[(2) retain property contributed by a donor to an~~  
13 ~~institutional fund;~~

14 ~~[(3) include all or any portion of an institutional~~  
15 ~~fund in a pooled or common fund maintained by the institution; and~~

16 ~~[(4) invest all or any portion of an institutional~~  
17 ~~fund in a pooled or common fund, including shares or interests in~~  
18 ~~regulated investment companies, mutual funds, common trust funds,~~  
19 ~~investment partnerships, real estate investment trusts, or similar~~  
20 ~~organizations in which funds are commingled and investment~~  
21 ~~determinations are made by persons other than the governing board.~~

22 ~~[Sec. 163.006. DELEGATION OF INVESTMENT MANAGEMENT. Except~~  
23 ~~as provided by the applicable gift instrument, the governing board~~  
24 ~~may:~~

25 ~~[(1) delegate to its committees, officers, or~~  
26 ~~employees of the institution or the fund, and other agents,~~  
27 ~~including investment counsel, the authority to act for the board in~~

1 ~~investment of institutional funds,~~

2 ~~[(2) contract with independent investment advisors,~~  
3 ~~investment counsel, investment managers, banks, or trust companies~~  
4 ~~to act for the board in investment of institutional funds; and~~

5 ~~[(3) authorize payment of compensation for investment~~  
6 ~~advisory or management services.~~

7 ~~[Sec. 163.007. STANDARD OF CONDUCT. In the administration~~  
8 ~~of the powers to appropriate appreciation, to make and retain~~  
9 ~~investments, to develop and apply investment and spending policies,~~  
10 ~~and to delegate investment management of institutional funds,~~  
11 ~~members of a governing board shall exercise ordinary business care~~  
12 ~~and prudence under the facts and circumstances prevailing at the~~  
13 ~~time of the action or decision. The members shall consider both the~~  
14 ~~long-term and short-term needs of the institution in carrying out~~  
15 ~~its educational, religious, or charitable purposes, its present and~~  
16 ~~anticipated financial requirements, the expected return on its~~  
17 ~~investments, price level trends, and general economic conditions.~~

18 ~~[Sec. 163.008. RELEASE OF RESTRICTIONS ON USE OR~~  
19 ~~INVESTMENT. (a) With the written consent of the donor, the~~  
20 ~~governing board may release, in whole or in part, a restriction~~  
21 ~~imposed by the applicable gift instrument on the use or investment~~  
22 ~~of an institutional fund.~~

23 ~~[(b) If written consent of the donor cannot be obtained~~  
24 ~~because of the donor's death, disability, unavailability, or~~  
25 ~~impossibility of identification, the governing board may apply in~~  
26 ~~the name of the institution to the district court for release of a~~  
27 ~~restriction imposed by a gift instrument on the use or investment of~~

1 ~~an institutional fund. The attorney general must be notified of the~~  
2 ~~application and given an opportunity to intervene in the same~~  
3 ~~manner as provided by Chapter 123 for a proceeding involving a~~  
4 ~~charitable trust. If the court finds that the restriction is~~  
5 ~~obsolete, inappropriate, or impracticable, it may by order release~~  
6 ~~the restriction in whole or in part. A release under this~~  
7 ~~subsection may not change an endowment fund to another type of fund.~~

8 ~~[(c) A release under this section may not allow a fund to be~~  
9 ~~used for a purpose other than the educational, religious, or~~  
10 ~~charitable purposes of the affected institution.~~

11 ~~[(d) This section does not limit the application of the~~  
12 ~~doctrine of "cy pres."~~

13 ~~[Sec. 163.009. APPLICABILITY OF OTHER PARTS OF CODE.~~  
14 ~~Subtitle B, Title 9 (the Texas Trust Code), does not apply to any~~  
15 ~~institutional fund subject to this chapter.]~~

16 SECTION 2. Sections 43.006(a) and (k), Education Code, are  
17 amended to read as follows:

18 (a) The State Board of Education may delegate investment  
19 authority [~~and contract~~] for the investment of the permanent school  
20 fund to the same extent as an institution [~~the governing board of an~~  
21 ~~institution of higher education~~] with respect to an institutional  
22 fund under Chapter 163, Property Code.

23 (k) In this section, "institution" [+

24 [~~(1) "Governing board"~~] and "institutional fund" have  
25 the meanings assigned by Chapter 163, Property Code.

26 [~~(2) "Institution of higher education" has the meaning~~  
27 ~~assigned by Section 61.003.~~]



1 SECTION 3. Section 66.08(a), Education Code, is amended to  
2 read as follows:

3 (a) The board may delegate investment authority [~~and~~  
4 ~~contract~~] for the investment of the permanent university fund to  
5 the same extent as an institution [~~the governing board of an~~  
6 ~~institution of higher education~~] with respect to an institutional  
7 fund under Chapter 163, Property Code.

8 SECTION 4. Section 66.08(o)(2), Education Code, is amended  
9 to read as follows:

10 (2) "Institution" and "institutional fund"  
11 [~~"Governing board," "institutional fund," and "institution of~~  
12 ~~higher education"~~] have the meanings assigned by Chapter 163,  
13 Property Code.

14 SECTION 5. (a) Chapter 163, Property Code, as amended by  
15 this Act, applies only to an institutional fund existing on or  
16 established after the effective date of this Act.

17 (b) With respect to an institutional fund existing on the  
18 effective date of this Act, Chapter 163, Property Code, as amended  
19 by this Act, applies only to an action taken or decision made  
20 relating to the institutional fund occurring after August 31, 2007.  
21 An action taken or decision made relating to the institutional fund  
22 that occurs before the effective date of this Act is governed by  
23 Chapter 163, Property Code, as that chapter existed before  
24 amendment by this Act, and that chapter is continued in effect for  
25 that purpose.

26 SECTION 6. This Act takes effect September 1, 2007.