



## **NYPMIFA: Important Changes to Laws Governing Not-For-Profit Organizations**

On September 17th 2010, New York State enacted the New York Prudent Management of Institutional Funds Act (NYPMIFA) which significantly changes the rules governing how not-for-profit organizations manage, invest and spend their endowment funds. The Act applies to all public charitable organizations, private foundations and practically every corporation formed under the New York Not-For-Profit Corporation Law. The new law provides institutions with more flexibility in spending from endowment funds giving them greater access to funds needed to support their programs and services that may be struggling due to the recent economic downturn.

NYPMIFA eliminates the historic dollar value limitation on spending, allowing institutions to dip into the original dollar value of the endowment fund as long as the governing board deems it prudent. Prior to this law, not-for-profit corporations were only allowed to spend income earned by an endowment fund (ie. interest, dividends, royalties, etc). The adoption of NYPMIFA eradicates the historic floor on spending and now allows an organization to spend endowment fund assets after considering the following eight factors; preservation of the endowment fund, purposes of the fund, general economic conditions, possible effects of inflation or deflation, total return, other resources available, the investment policy of the institution and where appropriate, alternatives to expenditure.

The Act includes a notable provision that is intended to ensure against excessive spending, creating a rebuttable presumption of imprudence if more than 7% of the fair market value of an endowment fund is spent in any one year. This 7% rebuttable presumption applies only to funds created on or after the effective NYPMIFA date, September 17, 2010. *Though it's important to note that an appropriation of less than 7% is not presumptively prudent, the institution must still take proper measures to uphold the outlined prudence standard.*

The NYPMIFA standard of prudence also applies to the delegation of investment and management funds to outside professionals. The institution must exercise its duty of care and act prudently in selecting, continuing or terminating an external agent such as an investment advisor, investment manager or bank or trust company. Outside agents also owe a duty to exercise with reasonable care, skill and caution to comply with the scope of the delegation. Any contract that delegates a management or investment function must provide that the contract can be terminated at any time without penalty (with up to 60 days notice). *Although not required by the Act, we recommend that an organization keep detailed records describing the nature and extent of the consideration that the governing board gave to each of these factors when making investment decisions.*



Donors of endowment funds in existence before September 17, 2010, must be given the opportunity to opt out of NYPMIFA's new spending rules. The Act requires 90 days advance notice be made to the donor, if alive and identifiable, with reasonable efforts before appropriating from the endowment fund for the first time. The notice must ask the donor to indicate whether the organization may spend as much of his or her gift as it determines is prudent or if the endowment fund must maintain the historic dollar value of the gift. The notice also must include an explanation of the potential impact that each choice would have on spending from the fund. Donor notice is not required if the gift instrument already permits spending below historic value, if it already expressly limits spending or if the donor never included a separate statement restricting funds when the donation was made.

Even prior to this law, an organization could always seek release of donor-imposed restrictions placed on management or use of funds by obtaining the written approval of the donor or seek court release with prior notice to the Attorney General. NYPMIFA now expands the situation under which an institution may seek a release or modification of a restriction on an endowment fund by allowing an institution to seek release in the court even if the donor is available. For funds of less than \$100,00 or more than 20 years old organizations can release or modify restrictions without court involvement by simply giving prior notice to the donor (if available) and the Attorney General.

There are a number of steps and actions that not-for-profit entities must take to ensure their organization is in compliance with the new law. Here are a few first steps that we recommend. We would be happy to help you prepare any of the documents described below and to work with you in educating your board about these new requirements.

***1. Educate your governing boards about the requirements and changes resulting from this Act.***

Make sure that all board directors and members are aware of the revised standards of conduct for managing and investing funds, delegating management and the new rules pertaining to donor restrictions.

***2. Promptly adopt a written investment policy incorporating the standards of NYPMIFA.***

NYPMIFA requires organizations to adopt a written investment policy. The policy should reflect the detailed guidance on prudent investing as well as the new law's rules on investment strategy and delegation of investment management. The creation or revisions of an organization's policy must be sure to include the eight factor prudence standard for managing and investing, a diversification requirement, an overall investment strategy and the guideline's for delegation of investment management.



**3. Set up procedures to send out notifications to existing donors, giving them the opportunity to opt out of the new rules.**

As set forth in NYPMIFA, the notice must include substantially the following language:

*Attention, Donor:*

*Please check box #1 or #2 below and return to the address shown above:*

#1. *The institution may spend as much of my gift as may be prudent.*

#2. *The institution may not spend below the original dollar value of my gift.*

*If you check box #1 above, the institution may spend as much of your endowment gift (including all or part of the original value of your gift) as may be prudent under the criteria set forth in Article 5-A of the Not-for-Profit Corporation Law (The New York Prudent Management of Institutional Funds Act).*

*If you check box #2 above, the institution may not spend below the original dollar value of your endowment gift but may spend the income and the appreciation over the original dollar value if it is prudent to do so. The criteria for the expenditure of endowment funds set forth in Article 5-A of the Not-for-Profit Corporation Law (NYPMIFA).*

During the 90 day notice period, a donor may modify the gift instrument — with or without the consent of the organization — to prohibit application of NYPMIFA’s spending rules. If the donor does not respond within the 90 days, these new spending rules will apply to the gift. *Organizations must keep records of the actions taken in compliance with these notice requirements.*

**4. Revise solicitation materials for endowment funds to include new disclosure requirements.**

NYPMIFA requires organizations to make the following disclosure in all solicitations for contributions to an endowment:

*Unless otherwise restricted by the gift instrument pursuant to paragraph (B) of Section 553 of the Not-for-Profit Corporation Law, the institution may expend so much of an endowment fund as it deems prudent after considering the factors set forth in paragraph (A) of Section 553 of the Not-for-Profit Corporation Law.*

# CLIENT ADVISORY

July 2011



The solicitation disclosure language is designed to alert donors to the fact that unless otherwise *specifically* restricted by a gift instrument, the organization will be allowed to expend so much of an endowment fund as it deems prudent after considering the eight NYPMIFA prudence factors governing appropriation decisions.

Accordingly, all solicitation materials for endowed funds will need to be revised to reflect this new rule, and the policy should include a statement of the rule.



*Clients who have any further questions or concerns about the information contained in this Advisory should not hesitate to contact us.*

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