

NEW RULES FOR HANDLING ENDOWMENT FUNDS

Nonprofit Alert
October 6, 2010

Attorneys

Catherine Eberl

Charities now have more flexibility in determining spending from their endowment funds, but with that flexibility comes increased responsibility. On September 17, New York finally enacted a version of the Uniform Prudent Management of Institutional Funds Act (UPMIFA), which has previously been enacted in some form by 46 other states.

Under prior law, charities were prohibited from spending from an endowment fund if such spending would bring the value of the fund below its “historic dollar value,” i.e., the total value of monies contributed to the fund by its donors. The decline of stocks and other investments during the past several years meant that many endowment funds dropped below their historic dollar value. As a result, charities could not make any distributions from those funds, except to the extent that the funds had actual earnings.

The new law removes the historic dollar value restriction. Now, a charity’s board must determine how much can be spent prudently from an endowment by considering a number of factors. These include general economic conditions, the effect of inflation or deflation, expected total return, other available resources, preservation of the fund, and the purposes of the charity and the fund. The board must document the basis for its decisions on endowment fund spending, including its consideration of each specified factor. There is a rebuttable presumption that spending more than seven percent of a fund’s average value is imprudent.

Before it can apply the new standard to an existing endowment fund, a charity must notify donors who are “available” and give them 90 days in which to opt out of the new standard. A “donor” includes a person designated in the fund agreement or gift instrument to act on behalf of the actual donor, and a donor is “available” if he or she is living (or, for entities, if it is in existence and conducting activities) and can be identified and located with reasonable efforts.

The new law also makes it easier for charities to release or modify fund restrictions. Charities can now modify a restriction with the donor’s consent, whereas previously they could only release restrictions. For a fund with less than \$100,000 that is more than 20 years old, a charity no longer needs court consent to modify or release a restriction that is impracticable, wasteful, unlawful, or impossible to achieve. A charity can now take such action by giving advance notice to the donor,

NEW RULES FOR HANDLING ENDOWMENT FUNDS

if available, and to the attorney general's office, provided the attorney general does not object and the charity uses the fund in a manner consistent with the intent of the original gift.

Charities now need to review their endowment funds, adopt a policy for determining prudent spending, and institute a procedure for notifying available donors of the proposed change. They also are required to adopt a written investment policy that includes the standards set out in the new law.

For assistance with these and other UPMIFA matters, we invite you to contact the following Hodgson Russ attorneys:

Sharon M. Kelly
716.848.1634
skelly@hodgsonruss.com

Thomas R. Hyde
716.848.1358
thyde@hodgsonruss.com

Catherine B. Eberl
716.848.1237
ceberl@hodgsonruss.com