S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

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Introduced by M. of A. BING, BRODSKY, ROSENTHAL, CASTRO, DenDEKKER, FIELDS, SCHIMMINGER, ESPAILLAT -- Multi-Sponsored by -- M. of A. DelMONTE, MAYERSOHN, MENG, MILLMAN, TITONE -- read once and referred to the Committee on Corporations, Authorities and Commissions -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Corporations, Authorities and Commissions in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported and referred to the Committee on Codes -- reported and referred to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules

AN ACT to amend the not-for-profit corporation law, the religious corporations law, the estates, powers and trusts law, the surrogate's court procedure act and the executive law, in relation to adopting a prudent management of institutional funds standard; and to repeal certain provisions of the not-for-profit corporation law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The not-for-profit corporation law is amended by adding a new article 5-A to read as follows:

ARTICLE 5-A

PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

SECTION 550. SHORT TITLE.
551. DEFINITIONS.
552. STANDARD OF CONDUCT IN MANAGING AND INVESTING AN INSTITUTIONAL FUND.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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553. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.
554. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.
555. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.
556. REVIEWING COMPLIANCE.
557. APPLICATION TO EXISTING INSTITUTIONAL FUNDS.
558. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

S 550. SHORT TITLE.

THIS ARTICLE MAY BE KNOWN AND MAY BE CITED AS THE "NEW YORK PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT".

S 551. DEFINITIONS.

AS USED IN THIS ARTICLE:

(A) "CHARITABLE PURPOSE" MEANS THE RELIEF OF POVERTY, THE ADVANCEMENT OF EDUCATION OR RELIGION, THE PROMOTION OF HEALTH, THE PROMOTION OF A GOVERNMENTAL PURPOSE, OR ANY OTHER PURPOSE THE ACHIEVEMENT OF WHICH IS BENEFICIAL TO THE COMMUNITY INCLUDING ANY PURPOSE THAT IS CHARITABLE UNDER THE LAWS OF THE STATE OF NEW YORK.

(A-1) "DONOR" MEANS THE PERSON WHO GRANTS OR TRANSFERS PROPERTY TO AN INSTITUTION PURSUANT TO A GIFT INSTRUMENT, OR A PERSON DESIGNATED IN THE APPLICABLE GIFT INSTRUMENT TO ACT IN THE PLACE OF THE DONOR, BUT DOES NOT OTHERWISE INCLUDE THE PERSON'S EXECUTORS, HEIRS, SUCCESSORS, ASSIGNS, TRANSFEREES, OR DISTRIBUTEES.

(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 MAY DESIGNATE AS AN ENDOWMENT FUND FOR ITS OWN USE, CONSISTENT WITH THE TERMS OF THE APPLICABLE GIFT INSTRUMENT.

(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: (1) A PERSON, OTHER THAN AN INDIVIDUAL, ORGANIZED AND OPERATED EXCLUSIVELY FOR CHARITABLE PURPOSES; (2) A TRUST THAT HAD BOTH CHARITABLE AND NONCHARITABLE INTERESTS, AFTER ALL NONCHARITABLE INTERESTS HAVE TERMINATED; OR (3) ANY CORPORATION DESCRIBED IN SUBPARAGRAPH FIVE OF PARAGRAPH (A) OF SECTION 102 (DEFINITIONS). WHENEVER ANY PROVISION OF THIS ARTICLE IMPOSES ANY OBLIGATION ON, OR REQUIRES ANY ACTION TO BE TAKEN BY, AN INSTITUTION, SUCH OBLIGATION IS IMPOSED ON, AND SUCH ACTION SHALL BE AUTHORIZED BY, THE GOVERNING BOARD OF SUCH INSTITUTION.

(E) "INSTITUTIONAL FUND" MEANS A FUND HELD BY AN INSTITUTION. THIS TERM SHALL NOT INCLUDE: (1) PROGRAM-RELATED ASSETS; (2) A FUND HELD FOR AN INSTITUTION BY A TRUSTEE THAT IS NOT AN INSTITUTION; OR (3) 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) "NOTICE" MEANS INFORMATION GIVEN BY AN INSTITUTION AS REQUIRED BY THIS ARTICLE. AN INSTITUTION WILL BE CONSIDERED TO HAVE GIVEN NOTICE IF NOTICE IS GIVEN PERSONALLY IN WRITING OR SENT TO THE RECIPIENT'S LAST KNOWN ADDRESS ON RECORD WITH THE INSTITUTION, OR, IF NO ADDRESS IS ON RECORD WITH THE INSTITUTION, IF THE INSTITUTION MAKES REASONABLE EFFORTS TO ATTEMPT TO FIND AND NOTIFY THE RECIPIENT. IF THE NOTICE IS MAILED, SUCH NOTICE IS GIVEN WHEN DEPOSITED IN THE UNITED STATES MAIL, WITH POSTAGE THEREON PREPAID. IF THE NOTICE IS DELIVERED BY ELECTRONIC MEANS,

SUCH AS VIA FACSIMILE OR EMAIL, SUCH NOTICE IS GIVEN WHEN THE NOTICE IS SENT.

(G) "PERSON" MEANS AN INDIVIDUAL, CORPORATION, BUSINESS TRUST, ESTATE, TRUST, PARTNERSHIP, LIMITED LIABILITY COMPANY, ASSOCIATION, JOINT VENTURE, OR ANY OTHER LEGAL ENTITY.

(H) "PROGRAM-RELATED ASSET" MEANS AN ASSET HELD BY AN INSTITUTION NOT FOR INVESTMENT UNDER THE TERMS OF THE GIFT INSTRUMENT, BUT PRIMARILY TO ACCOMPLISH A PROGRAMMATIC PURPOSE OF THE INSTITUTION.

(I) "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.

(J) A DONOR IS "AVAILABLE" IF SUCH DONOR (1) IS LIVING OR, IF THE DONOR IS NOT A NATURAL PERSON, IS IN EXISTENCE AND CONDUCTING ACTIVITIES; AND (2) CAN BE IDENTIFIED AND LOCATED WITH REASONABLE EFFORTS.

(K) "EXTERNAL AGENT" MEANS AN INDEPENDENT INVESTMENT ADVISOR, INVESTMENT COUNSEL OR MANAGER, BANK, OR TRUST COMPANY.

S 552. STANDARD OF CONDUCT IN MANAGING AND INVESTING AN INSTITUTIONAL FUND.

(A) SUBJECT TO THE INTENT OF A DONOR EXPRESSED IN A GIFT INSTRUMENT, AN INSTITUTION, IN MANAGING AND INVESTING AN INSTITUTIONAL FUND, SHALL CONSIDER THE PURPOSES OF THE INSTITUTION AND THE PURPOSES OF THE INSTITUTIONAL FUND.

(B) IN ADDITION TO COMPLYING WITH THE DUTY OF LOYALTY IMPOSED BY LAW OTHER THAN THIS ARTICLE, 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.

(C) IN MANAGING AND INVESTING AN INSTITUTIONAL FUND, AN INSTITUTION CONSISTENT WITH SECTION 717 (DUTY OF DIRECTORS AND OFFICERS):

(1) 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

(2) SHALL MAKE A REASONABLE EFFORT TO VERIFY FACTS RELEVANT TO THE MANAGEMENT AND INVESTMENT OF THE FUND.

(D) AN INSTITUTION MAY POOL TWO OR MORE INSTITUTIONAL FUNDS FOR PURPOSES OF MANAGEMENT AND INVESTMENT.

(E) EXCEPT AS OTHERWISE PROVIDED BY A GIFT INSTRUMENT, THE FOLLOWING RULES APPLY:

(1) IN MANAGING AND INVESTING AN INSTITUTIONAL FUND, THE FOLLOWING FACTORS, IF RELEVANT, MUST BE CONSIDERED: (A) GENERAL ECONOMIC CONDITIONS; (B) THE POSSIBLE EFFECT OF INFLATION OR DEFLATION; (C) THE EXPECTED TAX CONSEQUENCES, IF ANY, OF INVESTMENT DECISIONS OR STRATEGIES; (D) THE ROLE THAT EACH INVESTMENT OR COURSE OF ACTION PLAYS WITHIN THE OVERALL INVESTMENT PORTFOLIO OF THE FUND; (E) THE EXPECTED TOTAL RETURN FROM INCOME AND THE APPRECIATION OF INVESTMENTS; (F) OTHER RESOURCES OF THE INSTITUTION; (G) THE NEEDS OF THE INSTITUTION AND THE FUND TO MAKE DISTRIBUTIONS AND TO PRESERVE CAPITAL; AND (H) AN ASSET'S SPECIAL RELATIONSHIP OR SPECIAL VALUE, IF ANY, TO THE PURPOSES OF THE INSTITUTION.

(2) 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.

(3) EXCEPT AS OTHERWISE PROVIDED BY LAW OTHER THAN THIS ARTICLE, AN INSTITUTION MAY INVEST IN ANY KIND OF PROPERTY OR TYPE OF INVESTMENT CONSISTENT WITH THIS ARTICLE.

(4) AN INSTITUTION SHALL DIVERSIFY THE INVESTMENTS OF AN INSTITUTIONAL FUND UNLESS THE INSTITUTION PRUDENTLY DETERMINES THAT, BECAUSE OF SPECIAL CIRCUMSTANCES, THE PURPOSES OF THE FUND ARE BETTER SERVED WITHOUT DIVERSIFICATION. AN INSTITUTION SHALL REVIEW A DECISION NOT TO DIVERSIFY AS FREQUENTLY AS CIRCUMSTANCES REQUIRE, BUT AT LEAST ANNUALLY.

(5) 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 ARTICLE.

(6) A PERSON THAT 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.

(F) EACH INSTITUTION SHALL ADOPT A WRITTEN INVESTMENT POLICY SETTING FORTH GUIDELINES ON INVESTMENTS AND DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS IN ACCORD WITH THE STANDARDS OF THIS ARTICLE.

S 553. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(A) SUBJECT TO THE INTENT OF A DONOR EXPRESSED IN THE GIFT INSTRUMENT, 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:

(1) THE DURATION AND PRESERVATION OF THE ENDOWMENT FUND;

(2) THE PURPOSES OF THE INSTITUTION AND THE ENDOWMENT FUND;

(3) GENERAL ECONOMIC CONDITIONS;

(4) THE POSSIBLE EFFECT OF INFLATION OR DEFLATION;

(5) THE EXPECTED TOTAL RETURN FROM INCOME AND THE APPRECIATION OF INVESTMENTS;

(6) OTHER RESOURCES OF THE INSTITUTION;

(7) WHERE APPROPRIATE AND CIRCUMSTANCES WOULD OTHERWISE WARRANT, ALTERNATIVES TO EXPENDITURE OF THE ENDOWMENT FUND, GIVING DUE CONSIDERATION TO THE EFFECT THAT SUCH ALTERNATIVES MAY HAVE ON THE INSTITUTION; AND

(8) THE INVESTMENT POLICY OF THE INSTITUTION.

FOR EACH DETERMINATION TO APPROPRIATE FOR EXPENDITURE, THE INSTITUTION SHALL KEEP A CONTEMPORANEOUS RECORD DESCRIBING THE CONSIDERATION THAT WAS GIVEN BY THE GOVERNING BOARD TO EACH OF THE FACTORS ENUMERATED IN THIS PARAGRAPH.

(B) TO LIMIT THE AUTHORITY TO APPROPRIATE FOR EXPENDITURE OR ACCUMULATE UNDER PARAGRAPH (A) OF THIS SECTION, A GIFT INSTRUMENT MUST SPECIFICALLY STATE THE LIMITATION. TERMS IN A GIFT INSTRUMENT SETTING FORTH A SPECIFIC SPENDING LEVEL, RATE, OR AMOUNT, OR EXPLICITLY MODIFYING OR OVERRIDING THE PROVISIONS OF PARAGRAPH (A) OF THIS SECTION, WILL LIMIT

THE AUTHORITY OF THE INSTITUTION TO APPROPRIATE FOR EXPENDITURE OR ACCUMULATE UNDER PARAGRAPH (A) OF THIS SECTION.

(C) 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:

(1) CREATE AN ENDOWMENT FUND OF PERMANENT DURATION UNLESS OTHER LANGUAGE IN THE GIFT INSTRUMENT LIMITS THE DURATION OR PURPOSE OF THE FUND; AND

(2) DO NOT OTHERWISE LIMIT THE AUTHORITY TO APPROPRIATE FOR EXPENDITURE OR ACCUMULATE UNDER PARAGRAPH (A) OF THIS SECTION.

(D) A REBUTTABLE PRESUMPTION OF IMPRUDENCE SHALL APPLY TO GIFT INSTRUMENTS EXECUTED UPON OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE AS FOLLOWS: THE APPROPRIATION FOR EXPENDITURE IN ANY YEAR OF AN AMOUNT GREATER THAN SEVEN PERCENT OF THE FAIR MARKET VALUE OF AN ENDOWMENT FUND, CALCULATED ON THE BASIS OF MARKET VALUES DETERMINED AT LEAST QUARTERLY AND AVERAGED OVER A PERIOD OF NOT LESS THAN FIVE YEARS IMMEDIATELY PRECEDING THE YEAR IN WHICH THE APPROPRIATION FOR EXPENDITURE IS MADE, CREATES A REBUTTABLE PRESUMPTION OF IMPRUDENCE. FOR AN ENDOWMENT FUND IN EXISTENCE FOR FEWER THAN FIVE YEARS, THE FAIR MARKET VALUE OF THE ENDOWMENT FUND MUST BE CALCULATED FOR THE PERIOD THE ENDOWMENT FUND HAS BEEN IN EXISTENCE. THIS SUBSECTION DOES NOT:

(1) APPLY TO AN APPROPRIATION FOR EXPENDITURE PERMITTED UNDER LAW OTHER THAN THE CHAPTER OF THE LAWS OF 2010 THAT ENACTED THIS ARTICLE OR BY THE GIFT INSTRUMENT; OR

(2) CREATE A PRESUMPTION OF PRUDENCE FOR AN APPROPRIATION FOR EXPENDITURE OF AN AMOUNT LESS THAN OR EQUAL TO SEVEN PERCENT OF THE FAIR MARKET VALUE OF THE ENDOWMENT FUND.

(E)(1) WITH RESPECT TO A GIFT INSTRUMENT EXECUTED BY THE DONOR BEFORE THE EFFECTIVE DATE OF THIS ARTICLE AN INSTITUTION MUST PROVIDE NINETY DAYS NOTICE TO THE DONOR, IF THE DONOR IS THEN AVAILABLE, BEFORE APPLYING PARAGRAPH (A) OF THIS SECTION FOR THE FIRST TIME, DURING WHICH TIME THE DONOR MAY CLARIFY OR AMEND THE GIFT INSTRUMENT TO PROHIBIT THE APPLICATION OF PARAGRAPH (A) OF THIS SECTION. SUCH NOTICE SHALL INCLUDE A FORM FOR USE BY THE DONOR, WHICH SHALL CONTAIN LANGUAGE SUBSTANTIALLY AS FOLLOWS:

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 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 (THE PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT) WILL NOT APPLY TO YOUR GIFT.

IF THE DONOR DOES NOT RESPOND WITHIN NINETY DAYS FROM THE DATE NOTICE WAS GIVEN, PARAGRAPHS (A), (B), AND (C) OF THIS SECTION SHALL BE APPLIED.

(2) THIS PARAGRAPH SHALL NOT APPLY IF: (A) THE GIFT INSTRUMENT PERMITS APPROPRIATION FOR EXPENDITURE FROM THE ENDOWMENT FUND WITHOUT REGARD FOR THE FUND'S HISTORIC DOLLAR VALUE; (B) THE GIFT INSTRUMENT LIMITS THE INSTITUTION'S AUTHORITY TO APPROPRIATE FOR EXPENDITURE IN ACCORDANCE WITH PARAGRAPH (B) OF THIS SECTION; OR (C) THE GIFT CONSISTS OF FUNDS RECEIVED AS A RESULT OF AN INSTITUTIONAL SOLICITATION WITHOUT A SEPARATE STATEMENT BY THE DONOR EXPRESSING A RESTRICTION ON THE USE OF FUNDS.

(F) WHEN AN INSTITUTION ACTS PURSUANT TO PARAGRAPH (A) OR (E) OF THIS SECTION, IT SHALL KEEP A RECORD OF SUCH ACTION.

S 554. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(A) SUBJECT TO ANY SPECIFIC LIMITATION SET FORTH IN A GIFT INSTRUMENT OR IN LAW OTHER THAN THIS ARTICLE, 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 AS REQUIRED BY SECTION SEVEN HUNDRED SEVENTEEN OF THIS CHAPTER, IN:

(1) SELECTING, CONTINUING OR TERMINATING AN AGENT, INCLUDING ASSESSING THE AGENT'S INDEPENDENCE INCLUDING ANY CONFLICTS OF INTEREST SUCH AGENT HAS OR MAY HAVE;

(2) ESTABLISHING THE SCOPE AND TERMS OF THE DELEGATION, INCLUDING THE PAYMENT OF COMPENSATION, CONSISTENT WITH THE PURPOSES OF THE INSTITUTION AND THE INSTITUTIONAL FUND; AND

(3) MONITORING THE AGENT'S PERFORMANCE AND COMPLIANCE WITH THE SCOPE AND TERMS OF THE DELEGATION.

(B) IN PERFORMING A DELEGATED FUNCTION, AN AGENT OWES A DUTY TO THE INSTITUTION TO EXERCISE REASONABLE CARE, SKILL AND CAUTION TO COMPLY WITH THE SCOPE AND TERMS OF THE DELEGATION.

(C) AN INSTITUTION THAT COMPLIES WITH PARAGRAPH (A) OF THIS SECTION IS NOT LIABLE FOR THE DECISIONS OR ACTIONS OF AN AGENT TO WHICH THE FUNCTION WAS DELEGATED.

(D) 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.

(E) EACH CONTRACT, IF ANY, PURSUANT TO WHICH AUTHORITY IS SO DELEGATED SHALL PROVIDE THAT IT MAY BE TERMINATED BY THE INSTITUTION AT ANY TIME, WITHOUT PENALTY, UPON NOT MORE THAN SIXTY DAYS NOTICE.

(F) AN INSTITUTION MAY DELEGATE MANAGEMENT AND INVESTMENT FUNCTIONS TO ITS COMMITTEES, OFFICERS, OR EMPLOYEES AS AUTHORIZED BY THE LAWS OF THIS STATE OTHER THAN THIS ARTICLE, AS SET FORTH IN, INTER ALIA, SECTION 514 (DELEGATION OF INVESTMENT MANAGEMENT).

(G) NOTHING IN THIS ARTICLE SHALL IMPAIR THE OPERATION OF SECTION 717 (DUTY OF DIRECTORS AND OFFICERS).

S 555. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(A) 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.

(B) A 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. THE INSTITUTION SHALL NOTIFY THE DONOR, IF AVAILABLE, AND THE ATTORNEY GENERAL OF THE APPLICATION, AND THE ATTORNEY GENERAL AND SUCH DONOR MUST BE GIVEN AN OPPORTUNITY TO BE HEARD. TO THE EXTENT PRACTICABLE, ANY MODIFICATION MUST BE MADE IN ACCORDANCE WITH THE DONOR'S PROBABLE INTENTION.

(C) IF A PARTICULAR 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 PURPOSES EXPRESSED IN THE GIFT INSTRUMENT. THE INSTITUTION SHALL NOTIFY THE DONOR, IF AVAILABLE, AND THE ATTORNEY GENERAL OF THE APPLICATION, AND THE ATTORNEY GENERAL AND SUCH DONOR MUST BE GIVEN AN OPPORTUNITY TO BE HEARD.

(D)(1) IF AN INSTITUTION DETERMINES THAT A RESTRICTION CONTAINED IN A GIFT INSTRUMENT ON THE MANAGEMENT, INVESTMENT, OR PURPOSE OF AN INSTITUTIONAL FUND IS UNLAWFUL, IMPRACTICABLE, IMPOSSIBLE TO ACHIEVE, OR WASTEFUL, THE INSTITUTION, NINETY DAYS AFTER NOTIFICATION TO THE ATTORNEY GENERAL, MAY RELEASE OR MODIFY THE RESTRICTION, IN WHOLE OR PART, IF:

(A) THE INSTITUTIONAL FUND SUBJECT TO THE RESTRICTION HAS A TOTAL VALUE OF LESS THAN ONE HUNDRED THOUSAND DOLLARS;

(B) MORE THAN TWENTY YEARS HAVE ELAPSED SINCE THE FUND WAS ESTABLISHED; AND

(C) THE INSTITUTION USES THE PROPERTY IN A MANNER CONSISTENT WITH THE PURPOSES EXPRESSED IN THE GIFT INSTRUMENT.

(2) NOTICE TO THE ATTORNEY GENERAL SHALL CONTAIN: (A) AN EXPLANATION OF (I) THE INSTITUTION'S DETERMINATION THAT THE RESTRICTION MEETS THE REQUIREMENTS SET FORTH IN SUBPARAGRAPH ONE OF THIS PARAGRAPH AND (II) THE PROPOSED RELEASE OR MODIFICATION; (B) A COPY OF A RECORD OF THE INSTITUTION APPROVING THE RELEASE OR MODIFICATION; AND (C) A STATEMENT OF THE PROPOSED USE OF THE INSTITUTIONAL FUND AFTER SUCH RELEASE OR MODIFICATION.

(3) IF THE ATTORNEY GENERAL DOES NOT NOTIFY THE INSTITUTION WITHIN NINETY DAYS, THE INSTITUTION MAY PROCEED WITH THE RELEASE OR MODIFICATION.

(4) NOTICE SHALL ALSO BE GIVEN TO THE DONOR, AS DEFINED IN PARAGRAPH (A-1) OF SECTION 551 (DEFINITIONS), IF AVAILABLE, PROVIDED, HOWEVER, THAT SUCH NOTICE SHALL NOT BE REQUIRED FOR FUNDS DESCRIBED IN CLAUSE (B) OF SUBPARAGRAPH TWO OF PARAGRAPH (E) OF SECTION 553 (APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION).

(E) FOR PURPOSES OF THIS SECTION, AN INSTITUTION MAY APPLY TO THE FOLLOWING COURTS TO RELEASE OR MODIFY A RESTRICTION CONTAINED IN A GIFT INSTRUMENT:

(1) TO THE SUPREME COURT OF THE JUDICIAL DISTRICT WHEREIN THE INSTITUTION HAS ITS OFFICE OR PRINCIPAL PLACE OF CARRYING OUT THE PURPOSES FOR WHICH IT WAS FORMED; OR

(2) WHERE THE APPLICABLE GIFT INSTRUMENT IS A WILL, TO THE SURROGATE'S COURT IN WHICH SUCH WILL IS PROBATED.

(F) THIS SECTION SHALL NOT LIMIT THE APPLICATION OF THE DOCTRINE OF CY PRES.

S 556. REVIEWING COMPLIANCE.

COMPLIANCE WITH THIS ARTICLE SHALL BE DETERMINED IN LIGHT OF THE FACTS AND CIRCUMSTANCES EXISTING AT THE TIME A DECISION IS MADE OR ACTION IS TAKEN, AND NOT RETROSPECTIVELY.

S 557. APPLICATION TO EXISTING INSTITUTIONAL FUNDS.

THIS ARTICLE SHALL APPLY TO INSTITUTIONAL FUNDS EXISTING ON OR ESTABLISHED AFTER THE EFFECTIVE DATE OF THIS ARTICLE. AS APPLIED TO INSTITUTIONAL FUNDS EXISTING ON THE EFFECTIVE DATE OF THIS ARTICLE, THIS ARTICLE SHALL GOVERN ONLY DECISIONS MADE OR ACTIONS TAKEN ON OR AFTER THAT DATE.

S 558. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

THIS ARTICLE MODIFIES, LIMITS, AND SUPERSEDES THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, 15 U.S.C. SECTION 7001 ET SEQ., BUT DOES NOT MODIFY, LIMIT, OR SUPERSEDE SECTION 101 OF THAT ACT, 15 U.S.C. SECTION 7001(A), OR AUTHORIZE ELECTRONIC DELIVERY OF ANY OF THE NOTICES DESCRIBED IN SECTION 103 OF THAT ACT, 15 U.S.C. SECTION 7003(B).

S 2. Subparagraphs 13, 14 and 17 of paragraph (a) of section 102, section 512, paragraphs (c) and (d) of section 513, and section 522 of the not-for-profit corporation law are REPEALED.

S 3. The closing paragraph of paragraph (a) and paragraph (b) of section 406 of the not-for-profit corporation law, as added by chapter 331 of the laws of 1971, are amended to read as follows:

Except as provided in paragraph (b), this paragraph applies notwithstanding any other provision of the certificate of incorporation or any direction in [an] A GIFT instrument [referred to in section 513 (Administration of assets received for specific purposes)].

(b) Paragraph (a) shall not apply to the extent that it conflicts with any mandatory direction in [an] A GIFT instrument [by which assets referred to in section 513 were transferred to the corporation] EXECUTED prior to the effective date of this section unless such conflicting direction is removed as impracticable under article eight of the estates, powers and trusts law or in any other manner provided by law. The absence of a specific provision in the [section 513 instrument] GIFT INSTRUMENT for the current use of the principal of the fund, or the presence in such an instrument of a provision, as to the principal of a fund, limited to the principal's being held, invested and reinvested, is not such a conflicting mandatory direction.

S 4. Section 406 of the not-for-profit corporation law is amended by adding a new paragraph (e) to read as follows:

(E) FOR PURPOSES OF THIS SECTION, THE TERM GIFT INSTRUMENT SHALL HAVE THE MEANING SET FORTH IN SECTION 551 (DEFINITIONS).

S 5. Paragraph (b) of section 513 of the not-for-profit corporation law, as amended by chapter 690 of the laws of 1978, is amended to read as follows:

(b) Except as may be otherwise permitted under article eight of the estates, powers and trusts law or section [522 (Release of restrictions on use or investment)] 555 (RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE), the governing board shall apply all assets thus received to the purposes specified in the gift instrument AS DEFINED IN SECTION 551 (DEFINITIONS) and to the payment of the reasonable and proper expenses of administration of such assets. The governing board shall cause accurate accounts to be kept of such assets separate and apart from the accounts of other assets of the corporation. Unless the terms of the particular gift instrument provide otherwise, the treasurer shall make an annual report to the members (if there be members)

or to the governing board (if there be no members) concerning the assets held under this section and the use made of such assets and of the income thereof.

S 6. Paragraph (a) of section 514 of the not-for-profit corporation law, as added by chapter 690 of the laws of 1978, is amended to read as follows:

(a) Except as otherwise provided by the applicable gift instrument AS DEFINED IN SECTION 551 (DEFINITIONS), the governing board may [(1)] delegate to its committees, officers or employees of the corporation or the fund[, or agents, including investment counsel,] the authority to act in place of the governing board in investment and reinvestment of institutional funds[, (2) contract with independent investment advisors, investment counsel or managers, banks, or trust companies, so to act, and (3) authorize the payment of compensation for investment advisory or management services, advisors, investment counsel or managers, banks or trust companies, so to act] AS DEFINED IN SECTION 551 (DEFINITIONS). Each contract, IF ANY, pursuant to which authority is so delegated shall provide that it may be terminated by the governing board at any time, without penalty, upon not more than sixty days' notice. SECTION 554 (DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS) SHALL GOVERN EXTERNAL DELEGATION.

S 7. Paragraph (a) of section 717 of the not-for-profit corporation law, as amended by chapter 690 of the laws of 1978, is amended to read as follows:

(a) Directors and officers shall discharge the duties of their respective positions in good faith and with [that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions] THE CARE AN ORDINARILY PRUDENT PERSON IN A LIKE POSITION WOULD EXERCISE UNDER SIMILAR CIRCUMSTANCES. [In the administration of the powers to make and retain investments pursuant to section 512 (Investment authority), to appropriate appreciation pursuant to section 513 (Administration of assets received for specific purposes), and to delegate] THE FACTORS SET FORTH IN SUBPARAGRAPH ONE OF PARAGRAPH (E) OF SECTION 552 (STANDARD OF CONDUCT IN MANAGING AND INVESTING AN INSTITUTIONAL FUND), IF RELEVANT, MUST BE CONSIDERED BY A GOVERNING BOARD DELEGATING investment management of institutional funds pursuant to section 514 (Delegation of investment management)[, a governing board shall consider among other relevant considerations the long and short term needs of the corporation in carrying out its purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions] FOR PURPOSES OF THIS PARAGRAPH, THE TERM INSTITUTIONAL FUND IS DEFINED IN SECTION 551 (DEFINITIONS).

S 8. Paragraphs (c) and (e) of subdivision 1 of section 2-b of the religious corporations law, paragraph (c) as amended by chapter 623 of the laws of 1992, paragraph (e) as added by chapter 690 of the laws of 1978, are amended to read as follows:

(c) The following provisions of the not-for-profit corporation law shall not apply to religious corporations: subparagraphs (7) and (8) of paragraph (a) of section one hundred twelve, section one hundred thirteen, section one hundred fourteen, section two hundred one, section three hundred three, section three hundred four, section three hundred five, section three hundred six, article four except section four hundred one, section five hundred fourteen, that portion of section five hundred [twenty-two (b)] FIFTY-FIVE (B) AND SECTION FIVE HUNDRED FIFTY-FIVE (C) which reads "[The attorney general shall be notified of the

application and shall be given an opportunity to be heard] THE INSTITUTION SHALL NOTIFY THE DONOR, IF AVAILABLE, AND THE ATTORNEY GENERAL OF THE APPLICATION, AND THE ATTORNEY GENERAL AND SUCH DONOR MUST BE GIVEN AN OPPORTUNITY TO BE HEARD", section six hundred five, section six hundred seven, section six hundred nine, section eight hundred four, article nine except section nine hundred ten, article ten except as provided in section eleven hundred fifteen, section eleven hundred two, and article fifteen except paragraph (c) of section fifteen hundred seven.

(e) No action shall be taken by the trustees of an incorporated Roman Catholic church, or of a Ruthenian Greek Catholic church, under section five hundred [twenty-two] FIFTY-FIVE of the not-for-profit corporation law [(Release of restrictions on use or investment)] (RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE) without the consent of the archbishop or bishop of the diocese to which such church belongs or in case of their absence or inability to act, without the consent of the vicar general or administrator of such diocese.

S 9. Paragraph (e) of section 8-1.1 of the estates, powers and trusts law, as amended by chapter 686 of the laws of 1967, is amended to read as follows:

(e) Any accumulation of income from property subject to a disposition in trust for a religious, charitable, educational or benevolent purpose, or otherwise acquired by such trust, shall in all respects, including its reasonableness, amount and duration, be within the jurisdiction of the supreme court or the surrogate's court, as the case may be. In exercising such jurisdiction, (1) any accumulation of income which might otherwise be applied for the purposes of the trust may be prohibited or limited, despite a valid direction therefor in the trust instrument or authority therefor under 8-1.7 and (2) such an accumulation may be authorized by order of the court despite the absence of a direction therefor in the trust instrument. THIS PARAGRAPH SHALL NOT RESTRICT IN ANY MANNER THE ABILITY TO RELEASE OR MODIFY RESTRICTIONS RELATING TO INSTITUTIONAL FUNDS UNDER SECTION 555 OF THE NOT-FOR-PROFIT CORPORATION LAW.

S 10. Paragraph (j) of section 8-1.1 of the estates, powers and trusts law is amended to read as follows:

(j) Whenever a voluntary association or committee has received, by public subscription, a fund for a charitable or benevolent purpose from more than one thousand contributors, a portion of which remains unexpended after the expiration of five years from the time of its receipt, and it appears that a literal compliance with the terms of the subscription is impracticable, the supreme court may make an order directing that such unexpended balance be transferred for administration and application to such domestic corporation as in the judgment of the court will most effectively accomplish the general purpose for which such fund was collected, free from any restriction, limitation or direction upon which the subscription was made; and on the transfer of such fund to the corporation designated in the order, such voluntary association, its officers and trustees, or such committee and its officers shall be fully exonerated and discharged from all liability to account for such fund. THIS PARAGRAPH SHALL NOT RESTRICT IN ANY MANNER THE ABILITY TO RELEASE OR MODIFY RESTRICTIONS RELATING TO INSTITUTIONAL FUNDS UNDER SECTION 555 OF THE NOT-FOR-PROFIT CORPORATION LAW.

S 11. Section 8-1.7 of the estates, powers and trusts law is amended by adding a new paragraph (b) to read as follows:

(B) THIS SECTION SHALL NOT RESTRICT IN ANY MANNER THE APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUNDS AS SET FORTH IN SECTION 553 OF THE NOT-FOR-PROFIT CORPORATION LAW.

S 12. Subparagraph 1 of paragraph (e) of section 11-2.3 of the estates, powers and trusts law, as added by chapter 609 of the laws of 1994, is amended to read as follows:

(1) the term "trustee" includes a personal representative, trustee, guardian, donee of a power during minority, guardian under article eighty-one of the mental hygiene law, committee of the property of an incompetent person, and conservator of the property of a conservatee, BUT DOES NOT INCLUDE AN INSTITUTIONAL FUND AS DEFINED IN SECTION 551 OF THE NOT-FOR-PROFIT CORPORATION LAW;

S 13. Subdivision 1 of section 2115 of the surrogate's court procedure act, as added by chapter 609 of the laws of 1994, is amended to read as follows:

1. At any time during the administration of a trust and irrespective of the pendency of a particular proceeding, the court with jurisdiction of the trust may review the reasonableness of the costs of a delegation by the trustee under section 11-2.3 of the estates, powers and trusts law AND UNDER SECTION 554 OF THE NOT-FOR-PROFIT CORPORATION LAW.

S 14. Subdivision 2 of section 174-b of the executive law, as amended by chapter 43 of the laws of 2002, is amended to read as follows:

2. Any solicitation used by or on behalf of any charitable organization shall provide a clear description of the programs and activities for which it has requested and has expended or will expend contributions or shall include therein a statement that, upon request, a person may obtain from the organization such a description. IF THE SOLICITATION IS BY AN INSTITUTION SUBJECT TO ARTICLE FIVE-A OF THE NOT-FOR-PROFIT CORPORATION LAW, AND IS FOR AN ENDOWMENT FUND, THE SOLICITATION MUST INCLUDE A STATEMENT THAT, UNLESS OTHERWISE RESTRICTED BY THE GIFT INSTRUMENT PURSUANT TO PARAGRAPH (B) OF SECTION FIVE HUNDRED FIFTY-THREE 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 FIVE HUNDRED FIFTY-THREE OF THE NOT-FOR-PROFIT CORPORATION LAW.

S 15. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgement shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

S 16. This act shall take effect immediately.