Memorandum 90-3

Subject: Study L-3012 - Proposed Revision of Recommendation Relating to Uniform Management of Institutional Funds Act

At the July 1989 meeting, the Commission approved a recommendation to revise the California Uniform Management of Institutional Funds Act, for introduction in the 1990 legislative session. (A copy of the recommendation is attached as Exhibit 4, exhibit pages 13-24.) At the November-December 1989 meeting, the Commission deferred introducing a bill to implement this recommendation because of serious policy issues that have been raised since the Commission considered this matter in July. This memorandum considers the issues that have been raised, and proposes a revision of the recommendation to deal with the legitimate concerns that have been expressed. The staff believes that a bill can be introduced this session to implement a revised form of the recommendation if the Commission approves a recommendation at the January 1990 meeting.

Budgetary Appropriations Based on Both Realized and Unrealized Gains

We have received an interesting letter from Daniel A. Wingerd, Associate Vice President of The Common Fund, a large investment management service for non-profit educational institutions. As reported in Mr. Wingerd's letter (attached as Exhibit 1), The Common Fund manages investments for 97 educational institutions in California. (See the material at exhibit pages 5-8 for a list of member institutions nationally.)

Mr. Wingerd urges the Commission to restore the language of the official text of the Uniform Management of Institutional Funds Act permitting the governing board of an institution to take both realized and unrealized appreciation into account in making budgetary appropriations. (See Section 18502 on page 10 of the attached recommendation.) Mr. Wingerd's letter provides important information that was lacking in our earlier discussions of this question. Hence, it is appropriate to reconsider the issue. The staff finds Mr. Wingerd's arguments persuasive, particularly in light of his expertise and experience in this area. The Attorney General's office has not provided any concrete data, nor do we believe that they have produced a convincing argument for limiting appropriations to realized appreciation.

Consider the experience of Mr. Wingerd, who reports that he has

> repeatedly encountered difficulty with California institutions whose desire it is to better structure their endowment portfolio, but who feel decidedly constrained by the California code with respect to spending.
>
> Specifically, in those instances where spending from "total return" would facilitate a well-balanced portfolio of equity-weighted investments, institutions with spending needs in the range of 6-7% are compelled by California's nearly-unique requirements to weight their portfolio in favor of yield-oriented, fixed-income investments.

Unfortunately, while this produces income in the short run, the failure to invest adequately in equity investments impairs the institutions' financial standing over a longer period of time since they fail to keep pace with inflation. (You should read the letter in Exhibit 1 for the full text of Mr. Wingerd's comments.)

Mr. Wingerd's experience is consistent with the arguments made in the studies supporting the official text of UMIFA:

> [T]oo often the desperate need of some institutions for funds to meet current operating expenses has led their managers, contrary to their best long-term judgment, to forgo investments with favorable growth prospects if they have a low current yield.
>
> [I]t would be far wiser to take capital gains as well as dividends and interest into account in investing for the highest overall return consistent with the safety and preservation of the funds invested. If the current return is insufficient for the institution's needs, the difference between that return and what it would have been under a more restrictive policy can be made up by use of a prudent portion of capital gains.
>
> [7A U.L.A. 707, quoting W. Cary & C. Bright, The Law and Lore of Endowment Funds 5-6 (1969).]

The Prefatory Note of UMIFA makes the following point:

> The Act authorizes the appropriation of net appreciation. "Realization" of gains and losses is an artificial, meaningless concept in the context of a nontaxable eleemosynary institution. If gains and losses had to be realized before being taken into account, a major objective of the Act, to avoid distortion of sound investment policies, would be frustrated. If only realized capital gains could be taken into account, trustees or managers might be forced to sell their best assets, appreciated property, in order to produce spendable gains and conceivably might spend realized gains even when, because of unrealized losses, the fund has no net appreciation.

Technically, the California version of UMIFA, by providing only for appropriations based on realized appreciation, ignores the fact that there may be a net loss if the balance of unrealized appreciation is taken into account. In effect, then, the California statute not only causes eleemosynary institutions to skew their investments in favor of current income, it invites boards to act irresponsibly by ignoring unrealized losses in value.

The California statute also imposes serious transactional costs by forcing institutions to sell valuable assets in order to "realize" the appreciation and take advantage of this provision. It should also be remembered that if gains are not used as determined by the directors of an eleemosynary institution in furtherance of its purposes, but are simply accumulated, when the institution terminates, the gains may go to a different organization or a different purpose, by application of *cy pres*. Finally, it bears repeating that only California and Kansas, of the 30 states that have enacted UMIFA, have omitted the authority to base appropriations on unrealized appreciation.

We have also received a letter from Richard C. Levi, President of the UC San Diego Foundation, urging the restoration of the authority to make appropriations based on both realized and unrealized gains. (See Exhibit 2, at exhibit page 9.) Mr. Levi writes:

> The UC San Diego Foundation adheres to an endowment investment philosophy that reflects investment over the long-term, as is appropriate for endowment funds that are held in perpetuity. Because of the California version of UMIFA, the Foundation must weight its endowment investment portfolio in favor of yield-oriented, fixed income

investments to meet payout requirements and is constrained from weighing the portfolio more heavily toward equity investments with their greater growth potential.

The UC San Diego Foundation Board of Trustees recommends that the California Law Revision Commission revise the California version of UMIFA and allow payout on total return utilizing both realized and unrealized gains.

In consideration of these remarks, the staff recommends that the Commission consider conforming the California statute to the Uniform Act by permitting the prudent appropriation of net appreciation, both realized and unrealized. If this recommendation is approved, Section 18502 would read as follows:

§ 18502. Appropriation of net appreciation for current use

18502. The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by Section 18506. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

Comment. Section 18502 is the same in substance as Section 2 of the Uniform Management of Institutional Funds Act (1972). As to the construction of provisions drawn from uniform acts, see Probate Code Section 2. This provision in the first sentence permitting the appropriation of net appreciation, whether realized or unrealized, supersedes the first sentence of former Education Code Section 94602 which limited the authority of the governing board to appropriation of "realized net appreciation." The second sentence of Section 18502 continues the third sentence of former Education Code Section 94602 without change. The second sentence of former Education Code Section 94602, providing a rolling five-year averaging rule, is not continued because it is not consistent with the policy of the uniform act set forth in the first sentence of this section.

Cy Pres Standard

George T. Gregory, Stanford University Staff Counsel, has written objecting to the revision of the standard for releasing restrictions in gift instruments. (See Exhibit 3, at exhibit pages 10-12.) The standard is set out in proposed Section 18507, at page 14-15 of the recommendation (see Exhibit 4, at exhibit pages 22-23). Section 18507 would replace the existing provision for releasing "obsolete or impracticable" restrictions with a provision for releasing restrictions that are "illegal, impossible to fulfill, or impracticable." As noted in the Comment to Section 18507, the intent of this proposed revision is to conform the UMIFA standard with general principles of *cy pres*. Mr. Gregory correctly notes that the intent of the Uniform Act was to permit restrictions to be removed more easily than under the traditional *cy pres* rule. Mr. Gregory raises a valid point.

The standard was changed in proposed Section 18507 in response to strenuous opposition from the Attorney General's office. Commissioners may remember the discussion in which the "obsolete" standard was characterized as equivalent to matters of fashion, such as the width of neckties. This trivializes the important principles involved and ignores the intent of the statute. Remember that the provision for release of a restriction on the use of an endowment fund under UMIFA applies only in judicial proceedings and that the Attorney General must be given notice of the institution's application. The governing boards of eleemosynary institutions remain subject to their fiduciary responsibilities. The power of the court under UMIFA to release a restriction that is "obsolete or impracticable" does not permit the court to approve a redirection of the fund away from the educational, religious, charitable, or other eleemosynary purpose of the institution involved. See proposed Section 18507(b)-(c). It should also be noted that UMIFA requires the institution first to seek the consent of the donor and provides for a court petition only if consent cannot be obtained "by reason of the donor's death, disability, unavailability, or impossibility of identification." See proposed Section 18507(a)-(b).

When this matter was considered earlier this year, the Attorney General's office did not provide any evidence supporting the argument that the "obsolete" standard of existing California law and of the Uniform Act should be eliminated. And yet the "obsolete" standard has been applicable in this state, and many others, for over 15 years. In fact, most states adopted the complete language of the UMIFA standard which permits release of "obsolete, <u>inappropriate,</u> or impracticable" restrictions. It appears that only Georgia, Illinois, and Ohio, along with California, adopted more limited standards, or conformed to general *cy pres* concepts. Mr. Gregory is not asking that the "inappropriate" standard be adopted, only that the existing statute permitting release of "obsolete" restrictions be retained. The staff agrees. We do not believe that the unsupported speculations of the Attorney General's office have met the burden needed to revise the existing language.

The staff recommends that the existing language be restored to the Commission's recommendation. This would mean substituting "obsolete or impracticable" in proposed Section 18507 for the phrase "illegal, impossible to fulfill, or impracticable."

There is another alternative that would satisfy Mr. Gregory's objection, and presumably be more acceptable to the Attorney General's office. This is to retain the existing law as applied to private colleges and universities that are now covered by it, and apply the more restrictive standard to the institutions that would be newly covered by the revised UMIFA. The staff does not favor this approach, since it would be best if one standard were to apply to all institutions subject to UMIFA. The dual standard approach would result in some serious anomalies, since public universities would be operating under a different standard than private universities. (Of course, this anomaly could be avoided by applying the "obsolete" standard to both private and public colleges and universities.)

If the Commission decides to adopt a dual standard, it could be implemented as follows:

§ 18507. Release of restriction in gift instruments

18507. (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the superior court of the county in which the principal activities of the institution are conducted, or other court of competent jurisdiction, for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. No court has jurisdiction to release a restriction on an institutional fund under this part unless the Attorney General is a party to the proceedings. ~~If~~ Subject to subdivision (e), if the court finds that the restriction is illegal, impossible to fulfill, or impracticable, it may by order release the restriction in whole or in part. A release under this subdivision may not change an endowment fund to a fund that is not an endowment fund.

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

(d) This section does not limit the application of the doctrine of cy pres.

<u>(e) With respect to an application for release of a restriction under subdivision (b) made by a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western College and Universities, the court may by order release the restriction in whole or in part if the court finds that the restriction is obsolete or impracticable.</u>

<u>**Comment.**</u> Section 18507 restates former Education Code Section 94607 without substantive change, except that the standard for releasing restrictions under subdivision (b) has been revised to refer to restrictions that are "illegal, impossible to fulfill, or impracticable" rather than "obsolete or impracticable." This revision is intended to conform this provision with the *cy pres* doctrine. See, e.g., Estate of Loring, 29 Cal. 2d 423, 436, 175 P.2d 524 (1946); Estate of Mabury, 54 Cal. App. 3d 969, 984-85, 127 Cal. Rptr. 233 (1976); Society of California Pioneers v. McElroy, 63 Cal. App. 2d 332, 337-38, 146 P.2d 962 (1944); Restatement (Second) of Trusts § 399 (1957). <u>As provided in subdivision (e), the "obsolete or impracticable" standard remains applicable to the release of restrictions on institutional funds held by the private colleges and universities that were covered by the former statute. See the Comment to Section 18501.</u>

In the second sentence of subdivision (b), the phrase "release a restriction on" has been substituted for the phrase "modify any use of" in former Education Code Section 94607(b) for consistency with the remainder of this section.

<u>Subdivisions (a)-(d) of</u> Section 18507 ~~is~~ <u>are</u> the same in substance as Section 7 of the Uniform Management of Institutional Funds Act (1972), except for some variations in subdivision (b). As to the construction of provisions drawn from uniform acts, see Section 2.

Respectfully submitted,

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September 25, 1989

Dear Mr. Uhlrich:

Thank you for your prompt response to our request for information pertaining to the Revised Staff Draft of the CLRC's "Tentative Recommendation Relating to Revision of the Uniform Management of Institutional Funds Act." Having received the information requested, my purpose is to comment upon 1978 Cal. Stat. ch. 806, Section 2 with respect to the restriction against the expenditure of "unrealized appreciation."

The Common Fund is a unique investment management service for non-profit educational institutions, created in response to the Ford Foundation's review of endowment management in 1969-70 and authorized as a non-profit, tax-exempt investment manager in 1971 by special action in the Congress of the United States. Serving over 1000 independent schools, colleges and universities (both public and private) throughout the U.S., The Common Fund now manages roughly $8.5 billion in pooled assets, of which roughly $4.6 billion of pooled "endowment" assets now constitutes the largest single educational endowment in the country.

In this capacity, The Common Fund is the manager of investments for ninety-seven educational institutions in the State of California, including 44 private colleges, universities, or graduate institutions; 22 state colleges, universities or their foundations and associations; and 31 private independent schools. Assets under management from these 97 institutions total $607 million, so that clearly in the case of the largest endowments (e.g., Stanford, U.C. Regents (System), U.S.C., etc.) The Common Fund is a manager of only part of their endowment assets.

As the Western Regional Representative of The Common Fund, my personal responsibility extends to all but a very few of these accounts. During the course of the last several years, I have repeatedly encountered difficulty with California institutions whose desire it is to better structure their endowment portfolio, but who feel decidedly constrained by the California code with respect to spending.

Specifically, in those instances where spending from "total return" would facilitate a well-balanced portfolio of equity-weighted investments, institutions with spending needs in the range of 6-7% are compelled by California's nearly-unique requirements to weight their portfolio in favor of yield-oriented, fixed-income investments. (As your staff have noted, California is one of two states to impose this limitation among the thirty states which have adopted the UMIFA.) When recently informed that the staff of the Commission was recommending a change in the language of the code which would permit the expenditure of "unrealized gain," we were delighted. Subsequently informed that, under strenuous opposition from the Attorney General's office, that recommendation was deleted from the draft "Tentative Recommendation" by staff, we felt the issue to be of sufficient importance to register our concern.

This present limitation on spending has several substantial and deleterious effects upon endowment management, and consequently upon education in our State.
(1) Under pressure from academic departments hard-pressed for current revenues, public university foundations and private colleges alike are compelled to seek high-yield instruments which provide little or no opportunity for capital appreciation. (2) Mistakenly believing that expenditure of "yield only" from bond portfolios adequately protects the principal of the endowment, more and more institutions are willing to spend <u>all</u> or most of their bond yields, ignoring the fact that endowments <u>must</u> grow at least at the rate of inflation in order to retain the purchasing power of those assets. The ironic consequence of this restriction in the California law is that (a) California endowments have a legislatively-imposed limitation on growth compared with other states, and (b) by resorting to the expenditure of relatively high bond yields, California institutions are spending more-- **<u>in the short run.</u>**

I emphasize the last point because such a spending policy benefits the present by mortgaging the future. We do our best, in our advisory role with these institutions, to educate them on the fact that a lower spending rate today will yield higher income, both nominal and real, tomorrow (e.g., an endowment that allocates its assets to 60% equity investments and 40% fixed-income, and that spends 5% of its average annual asset value will actually have more to spend from the 11th year and beyond than the institution with the same asset mix that spends 7%). However--- and this is the principal point of our concern--- **this logic and this arithmetic do not apply unless the portfolio is equity-weighted. Even where spending is maintained at a 5% level, a bond-weighted portfolio is necessitated when unrealized appreciation cannot be spent;** hence, the endowment remains "flat" or nearly so in nominal dollars, and is more likely to lose ground to inflation.

Without wishing to further belabor a point already well established by your staff in its original draft recommendation, it is simply a fact that California educational institutions are managing their endowments at a significant disadvantage. In an economic and tax environment which continues to witness decreases in per-capita state allocations to higher education (a condition that is likely to worsen as California college enrollments swell into the next century), schools should not be faulted for attempting the survival of hard-pressed departments by keeping spending rates high. Unfortunately, for them and for our state, the failure to proportionately increase the equity holdings of the portfolio needed to sustain such spending is prevented by law.

We have written at the request of several California state institutions who participate in The Common Fund. Needless to say, we do not pretend to speak for all. However, the politics of this issue are such that many concerned endowment executives in our state will not likely express their views on the public record. This should not be mistaken by the California Law Review Commission as disinterest or acquiescence on their part.

To the extent that the Commission is interested in further discussion, we are willing to meet with you for this purpose. We would also be happy to provide data from our research in this area to illustrate and support the concerns expressed here, upon request.

Sincerely,

Dan A. Wingerd

Daniel A. Wingerd
Associate Vice President

cc: George Keane, President
David Storrs, Senior Vice President

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Members of the Common Fund

Private Colleges and Universities

Adelphi University, NY
Adrian College, MI
Albion College, MI
Alderson-Broaddus College, WV
Alfred University, NY
Allegheny College, PA
Allentown College, PA
Alma College, MI
Alverno College, WI
American Baptist Seminary of the West, CA
American College, PA
American Graduate School of International Management, AZ
American University in Cairo, NY
American University of the Caribbean, FL
American University in Beirut, NY
American University, DC
Amherst College, MA
Anatolia College, NY
Antioch University, OH
Asbury Theological Seminary, KY
Assumption College, MA
Auburn University, AL
Augsburg College, MN
Augustana College, IL
Augustana College, SD
Austin College, TX
Azusa Pacific University, CA
Baldwin-Wallace College, OH
Bank Street College of Education, NY
Baptist Bible College of Denver, CO
Baylor College of Dentistry, TX
Beirut University College, NY
Belmont Abbey College, NC
Belmont College, TN
Beloit College, WI
Benedict College, SC
Bentley College, MA
Berea College, KY
Bethany Bible College, CA
Bethany College, KS
Bethany Lutheran College, MN
Bethel College, KS
Bethel College and Seminary, MN
Biola University, CA
Bluffton College, OH
Boston College, MA
Boston Conservatory, MA
Boston University, MA
Bowdoin College, ME
Bradley University, IL
Brandeis University, MA
Bridgeport, University of, CT
Bridgewater College, VA
Brown University, RI
Bryant College, RI
Bryn Mawr College, PA
Bucknell University, PA
Buena Vista College, IA
California Institute of Technology, CA
California Lutheran University, CA
California School of Professional Psychology, CA
Calvin College, MI
Campbellsville College, KY
Canisius College, NY
Capital University, OH
Carleton College, MN
Carlow College, PA
Carnegie-Mellon University, PA
Case Western Reserve University, OH
Catherine Laboure College, MA
Catholic University of America, DC
Central University of Iowa, IA
Centre College of Kentucky, KY
Chamberlayne Junior College, MA
Champlain College, VT
Chapman College, CA
Chatham College, PA
Christian Brothers College, TN
Christopher Newport College, VA
City University, WA
Claremont University Center, CA
Clark University, MA
Clarkson University, NY
Clearwater Christian College, FL
Colby College, ME
Colby-Sawyer College, NH
College Misericordia, PA
Colorado Mountain College, CO
Columbia Bible College & Seminary, SC
Columbia Christian College, OR
Columbia College, SC
Columbia University, NY
Cornell College, IA
Cornell University, NY
Creighton University, NE
Culinary Institute of America, NY
Culver-Stockton College, MO
CBN University, VA
D'Youville College, NY
Dallas Theological Seminary, TX
Dartmouth College, NH
Davis & Elkins College, WV
Dayton, University of, OH
De Paul University, IL
Dean Junior College, MA
Deep Springs College, NV
Delaware Valley College of Science & Agriculture, PA
Denison University, OH
Denver, University of, CO
Dickinson College, PA
Dillard University, LA
Doane College, NE
Dominican School of Philosophy & Theology, CA
Dominican College of Blauvelt, NY
Dordt College, IA
Dr. William M. Scholl College of Podiatric Medicine, IL
Drew University, NJ
Drexel University, PA
Duke University, NC
Earlham College, IN
Eastern Nazarene College, MA
Eastman Dental Center, NY
Eden Institute, NJ
Elizabeth Seton College, NY
Elizabethtown College, PA
Elmhurst College, IL
Elon College, NC
Embry-Riddle Aeronautical University, FL
Emory University, GA
Endicott College, MA
Evansville, University of, IN
Fairfield University, CT
Faulkner University, AL
Florida Community College, FL
Fordham University, NY
Franklin College of Indiana, IN
Franklin Pierce College, NH
Franklin Pierce Law Center, NH
Fresno Pacific College, CA
Friends Seminary of the NYQM, NY
Friends University, KS
Furman University, SC
Gallaudet University, DC
Garrett-Evangelical Theological Seminary, IL
George Washington University, DC
Georgetown College, KY
Georgetown University, DC
Georgetown University, Woodstock Theological Center, DC
Gettysburg College, PA
Gonzaga University, WA
Goshen College, IN
Graceland College, IA
Graduate Theological Union, CA
Grand Rapids Baptist College & Seminary, MI
Guam, University of, GU
Guilford College, NC
Gustavus Adolphus College, MN
Gwynedd-Mercy College, PA
GMI Engineering & Management Institute, MI
Hahnemann Medical College & Hospital, PA
Hamline University, MN
Hampden-Sydney College, VA
Hampshire College, MA
Hampton University, VA
Hardin-Simmons University, TX
Hartford College for Women, CT
Hartford Graduate Center, CT
Hartford, University of, CT
Harvard University, MA
Harvey Mudd College, CA
Haverford College, PA
Hendrix College, AR
Hesston College, KS
Hilbert College, NY
Hiram College, OH
Hobart and William Smith Colleges, NY
Hofstra University, NY
Holy Cross, College of the, MA
Holy Family College, PA
Hope College, MI
Howard University, DC
Huntingdon College, AL
Idaho, The College of, ID
Illinois College, IL
Illinois Institute of Technology, IL
Illinois Wesleyan University, IL
Illinois, University of, IL
Iowa, State University, IA
Iowa, University of, IA
John Brown University, AR
John Carroll University, OH
John F. Kennedy University, CA
Johns Hopkins University, MD
Judson College, IL
Juniata College, PA
Kalamazoo College, MI
Kenyon College, OH
Keuka College, NY
Keystone Junior College, PA
King's College, PA
Knox College, IL
La Salle College, PA
Lafayette College, PA
Lambuth College, TN
Lasell Junior College, MA
Lawrence University, WI
Lehigh University, PA
Lesley College, MA
Lewis & Clark College, OR
LeMoyne College, NY
Life Chiropractic College-West, CA
Lindenwood Colleges, MO
Long Island University, NY
Los Angeles College of Chiropractic, CA
Loyola Marymount University, CA
Loyola University of Chicago, IL
Lutheran Bible Institute, WA
Lutheran Theological Seminary at Philadelphia, PA
Macalester College, MN
MacCormac College, IL
MacMurray College, IL
Madonna College, MI
Malone College, OH
Manchester College, IN
Manhattanville College, NY
Marian College, IN
Marion College, IN
Marquette University, WI

Mary Hardin-Baylor, University of, TX
Maryville College, MO
Maryville College, TN
Marywood College, PA
Massachusetts Institute of Technology, MA
Massachusetts School of Professional Psychology, MA
McMurry College, TX
McPherson College, KS
Meadville Theological School of Lombard College, IL
Meharry Medical College, TN
Memphis College of Art, TN
Mercer University, GA
Mercy College, NY
Mercy College of Detroit, MI
Meredith College, NC
Merrimack College, MA
Messiah College, PA
Middlebury College, VT
Millikin University, IL
Mills College, CA
Millsaps College, MS
Minneapolis Society of Fine Arts, MN
Mitchell College, CT
Monmouth College, IL
Monterey Institute of International Studies, CA
Moravian College, PA
Mount Holyoke College, MA
Mount Olive College, NC
Mount St. Clare College, IA
Mount Saint Mary College, NY
Mount Saint Mary's College, MD
Mount Saint Vincent, College of, NY
Mount Vernon College, DC
Muhlenberg College, PA
National College of Education, IL
Nazareth College of Rochester, NY
New College of California, CA
New England College, NH
New England College of Optometry, MA
New England School of Law, MA
New England, University of, ME
New Haven, University of, CT
New Rochelle, College of, NY
New York Chiropractic College, NY
New York Law School, NY
New York Theological Seminary, NY
New York University, NY
Niagara University, NY
Nichols College, MA
Northern Baptist Theological Seminary, IL
Northern Illinois University Foundation, IL
Northland College, WI
Northwestern College, IA
Northwestern College of Chiropractic, MN
Northwestern University, IL
Northwood Institute, MI
Norwich University, VT
Notre Dame of Maryland, College of, MD
Notre Dame College, NH
Notre Dame College of California, CA
Notre Dame College of Ohio, OH
Notre Dame, University of, IN
Oakwood College, AL
Oberlin College, OH
Occidental College, CA
Ohio College of Podiatric Medicine, OH
Ohio Dominican College, OH
Ohio Northern University, OH
Ohio Wesleyan University, OH
Oklahoma Baptist University, OK
Oklahoma Christian College, OK
Olivet College, MI
Olivet Nazarene College, IL
Osteopathic Medicine of the Pacific, College of, CA
Ouachita Baptist University, AR
Pace University, NY
Pacific Lutheran Theological Seminary, CA
Pacific Lutheran University, WA
Pacific University, OR
Parker College of Chiropractic, TX
Paul Smith's College of Arts & Science, NY
Pepperdine University, CA
Philadelphia College of Art, PA
Philadelphia College of Textiles & Science, PA
Point Loma Nazarene College, CA
Polk Community College Foundation, FL
Polytechnic University, NY
Pomona College, CA
Pratt Institute, NY
Princeton University, NJ
Providence College, RI
Quinnipiac College, CT
Randolph-Macon College, VA
Redlands, University of, CA
Reed College, OR
Regis College, MA
Regis College, CO
Rensselaer Polytechnic Institute, NY
Rhode Island School of Design, RI
Rhodes College, TN
Richmond, University of, VA
Rider College, NJ
Ripon College, WI
Roanoke College, VA
Robert Morris College, IL
Robert Morris College, PA
Rochester Institute of Technology, NY
Rochester, University of, NY
Rockefeller University, NY
Rocky Mountain Mineral Law Foundation, CO
Rollins College, FL
Roosevelt University, IL
Rosary College, IL
Rosemont College, PA
Russell Sage College, NY
Sacred Heart University, CT
St. Ambrose College, IA
St. Andrew's Presbyterian College, NC
St. Anselm College, NH
St. Augustine's College, NC
St. Benedict, College of, MN
St. Bonaventure University, NY
St. Edward's University, TX
St. Francis College, NY
St. Francis, College of, IL
St. John Fischer College, NY
St. John's College, MD
St. John's College, Sante Fe, NM
St. John's Provincial Seminary, MI
St. John's University, MN
St. John's University, NY
St. Joseph's Collegiate Institute, NY
St. Joseph's University, PA
St. Lawrence University, NY
St. Louis University, MO
St. Mary College, KS
St. Mary's College, IN
St. Michael's College, VT
St. Norbert College, WI
St. Olaf College, MN
St. Paul Bible College, MN
St. Teresa, College of, MN
St. Thomas Seminary, CT
St. Thomas, College of, MN
St. Vincent College, PA
San Francisco Conservatory of Music, CA
San Francisco Theological Seminary, CA
San Francisco, University of, CA
Santa Clara University, CA
Seattle Pacific Foundation, WA
Seton Hill College, PA
Skidmore College, NY
Smith College, MA
South, University of the, TN
Southeastern Baptist Theological Seminary, NC
Southern California College of Optometry, CA
Southern California, University of, CA
Southern College of Optometry, TN
Southern College of Seventh-Day Adventists, TN
Southern Methodist University, TX
Southern Nazarene University, OK
Southern Seminary Junior College, VA
Southwestern College, KS
Southwestern Legal Foundation, TX
Spartanburg Methodist College, SC
Springfield College, MA
Stanford University, CA
Sterling Institute, VT
Stevens Institute of Technology, NJ
Stonehill College, MA
Suffolk University, MA
Swarthmore College, PA
Sweet Briar College, VA
Syracuse University, NY
Tampa, University of, FL
Texas Christian University, TX
Trinity Christian College, IL
Trinity College, CT
Trinity College of Vermont, VT
Trinity University, TX
Tufts University, MA
Tulane University, LA
Tulsa, University of, OK
Tuskegee University, AL
Union Theological Seminary, NY
Union University, NY
Union University, Dudley Observatory, NY
Upsala College Foundation, NJ
Ursuline College, OH
Utah, University of, UT
Valley Forge Military Academy Foundation & Junior College, PA
Valparaiso University, IN
Vanderbilt University, TN
Vassar College, NY
Vermont Law School, VT
Villanova University, PA
Virginia Wesleyan College, VA
Viterbo College, WI
Voorhees College, SC
Wabash College, IN
Wagner College, NY
Wake Forest University, NC
Walla Walla College, WA
Washington University, MO
Wellesley College, MA
Wells College, NY
Wentworth Institute of Technology, MA
Wesleyan University, CT
West Florida, University of, FL
West Virginia Wesleyan College, WV
Westbrook College, ME
Western New England College, MA
Westminster Choir College, NJ
Wheaton College, IL
Wheaton College, MA
Whitman College, WA
Whittier College, CA
Wilberforce University, OH
Wilkes College, PA
Willamette University, OR
Williams College, MA
Wingate College, NC
Wittenberg University, OH
Wood Junior College, MS
Wooster, College of, OH
Worcester Polytechnic Institute, MA
Xavier University of Louisiana, LA
Yale University, CT
Yeshiva University, NY

Public Colleges and Universities

Alabama, University of, AL
Alabama at Birmingham, University of, AL
Alabama at Huntsville, University of, AL
Amarillo College, TX
Amarillo College Foundation, TX
Arizona State University, AZ
Arkansas at Little Rock, University of, AR
Arkansas at Fayetteville, University of, AR
Arkansas Foundation, University of, AR
Arkansas Medical Sciences Center, University of, AR
Bakersfield College Foundation, CA
Bristol Community College, MA
California Polytechnic State University Foundation, CA
California School of Professional Psychology, CA
California State College, CA
California State University, Forty-niner Shops, CA
California State University, San Bernadino Foundation, CA
California State University, Chico, Associated Students, CA
California State University, Fresno Association, CA
California State University, Fullerton Foundation, CA
California State University, Hayward Foundation, CA
California State University, Long Beach Foundation, CA
California State University, Los Angeles Foundation, CA
California State University, Northridge, CA
California, University of, The Regents of, CA
California, University of, Los Angeles, CA
California, University of, at San Diego Foundation, CA
Cape Cod Community College Educational Foundation, MA
Central Michigan University, MI
Cincinnati, University of, OH
City University of New York
- Central Administration Foundation
- City College
- College of Staten Island
- F.H. LaGuardia Community College
- Graduate Division
- Herbert H. Lehman Foundation
- John Jay College of Criminal Justice
- Medgar Evers College
- New York City Technical College

Clinch Valley College of the University of Virginia, VA
Clinton Community College Foundation, NY
Coast Guard Foundation, CT
Colorado School of Mines Foundation, CO
Colorado, University of, CO
Colorado, Foundation, University of, CO
Columbus College, GA
Columbus College Foundation, GA
Community College of Philadelphia, PA
Delaware State College, DE
Eastern Michigan University, MI
Eastern Washington University Foundation, WA
Edison Community College, FL
Evergreen State College
Ferris State College, MI
Florida Foundation, University of, FL
Florida International University Foundation, FL
Georgia State University Foundation, GA
Glassboro State College, NJ
Grand Valley State College, MI
Guam, University of, GU
Illinois, University of, IL
Indiana University Foundation, IN
Iowa State University, IA
Iowa, University of, IA
James Madison University, VA
Kansas State University Foundation, KS
Kansas University Endowment Association, KS
Kent State University Foundation, OH
Kentucky, University of, KY
Lander College Foundation, SC
Lincoln University, PA
Maine, Pulp & Paper Foundation, University of, ME
Maine, University of, ME
Mary Washington College, VA
Maryland, Univ. of, Law School, Westminster Preservation Trust, MD
Medical College of Virginia, VA
Miami-Dade Community College Foundation, FL
Michigan State University, MI
Michigan, University of, MI
Micronesia, College of
Minnesota, University of, MN
Mississippi, University of, MS
Mississippi Foundation, University of, MS
Monterey Peninsula Community College, CA
Nevada System, University of, NV
New Hampshire, University System of, NH
New Mexico, University of, NM
New River Community College, VA
North Carolina State University
- Agriculture Foundation
- Dairy Foundation
- Design Foundation
- Educational Foundation
- Engineering Foundation
- Forestry Foundation
- 4-H Development Foundation
- Humanities Foundation
- Physical & Mathematical Sciences Foundation
- Pulp & Paper Foundation
- Tobacco Foundation
- University Foundation
- Veterinary Medicine

North Carolina, University of
- UNC Chapel Hill
- Dental Foundation
- Journalism Foundation
- Law Foundation
- School of Nursing
- Pharmacy Foundation
- UNC Press
- School of Public Health Alumni Association

North Dakota, University of, ND
North Iowa Area Community College Foundation, IA
North Shore Community College, MA
Northeast Missouri State University, MO
Northern Illinois University Foundation, IL
Northern Iowa, University of, IA
Ocean County College, NJ
Ohio University Fund, OH
Old Dominion University, VA
Old Dominion University Foundation, VA
Oregon State Board of Higher Education, OR
Pittsburgh, University of, PA
Purdue University, IN
Ramapo College of New Jersey, NJ
Rappahannock Community College Educational Foundation, VA
Saginaw Valley State College, MI
San Diego State University Foundation, CA
San Diego State University, Aztec Shops Ltd., CA
San Francisco State University, Frederick Burk Foundation, CA
Shippensburg University Foundation, PA
Sonoma State University Academic Foundation, CA
South Dakota School of Mines & Technology, SD
Southeastern Massachusetts University Foundation, MA
Southern Mississippi Foundation, University of, MS
Southwest Missouri State University Foundation, MO
State University of New York
- Albany, Alumni Association
- Albany, University Auxiliary Services
- Albany, University Fund
- Alfred, Auxiliary Campus Enterprises
- Alfred, Educational Foundation, NY
- Binghamton Foundation
- Buffalo, Faculty & Student Association
- Canton, College Association
- Canton, College Foundation
- Delhi, College Foundation
- Delhi, Agriculture & Technical College
- Farmingdale, Agriculture & Technical College
- Fredonia, College Foundation
- Geneseo, Foundation
- Morrisville, Agriculture & Technical College
- Oswego, Alumni Association
- Plattsburgh, College Auxiliary Services
- Plattsburgh, Foundation
- Potsdam, Auxiliary & College Education Services
- Potsdam, College Foundation
- Purchase, College Association, Inc.
- Saratoga Springs, Empire State College Foundation
- Stony Brook, Faculty/Student Association
- Syracuse, Health Science Center
- Utica, College of Technology

Temple University, PA
Tennessee, University of, TN
Texas, University of, TX
U.S. Department of Agriculture Graduate School, DC
Virginia Commonwealth University, VA
Virginia Military Institute Foundation, VA
Virginia Polytechnic Institute, VA
Virginia, University of
- Clinch Valley College
- Colgate Darden Graduate Business School
- School of Law
- Real Estate Foundation

Washington Pulp & Paper Foundation, University of, WA
Wayne State University, MI
West Florida, University of, FL
Western Oregon State College, OR
Western Washington University Foundation, WA
William & Mary, College of, VA
- Endowment Association
- Marshall-Wythe School of Law

Wisconsin Law Alumni Association, WI
Wisconsin, University of, River Falls Foundation, WI
Wright State University Foundation, OH

Independent Schools

Albuquerque Academy, NM
Allen-Stevenson School, NY
Allendale-Columbia, NY
American Embassy School, The, DC
Asheville School, NC
Avery Coonley School, IL
Baldwin School, PA
Beauvior School, DC
Beaver Country Day School, MA
Belmont Day School, MA
Bement School, MA
Benedictine Military School, GA
Benet Academy, IL
Berkeley Carroll Street School, NY
Bishop School, CA
Blair Academy, NJ
Blake Schools, MN
Brearley School, NY
Breck School, MN
Brewster Academy, NH
Bridgton Academy, ME
Brunswick School, CT
Buckley School, CA
Bullis School, MD
Calhoun School, NY
Cambridge Friends School, MA
Cape Cod Academy, MA
Carrabassett Valley Academy, ME
Cate School, CA
Catlin Gabel School, OR
Center for Creative Studies, MI
Chadwick School, CA
Chapin School, NJ
Chapin School, NY
Charles River School, MA
Chestnut Hill School, MA
Chicago Junior School, IL
Children's Storefront, NY
Choate Rosemary Hall, CT
Colorado Academy, CO
Columbus Academy, OH
Cranbrook Educational Community, MI
Crossroads School for Arts & Sciences, CA
Dalton Schools, NY
Dana Hall School, MA
Darlington School, GA
Darrow School, NY
Day School, NY
Daycroft School, CT
Dedham Country Day School, MA
Deerfield Academy, MA
Dexter School, MA
Drew College Preparatory School, CA
Dublin School, NH
Eaglebrook School, Allen Chase Foundation, MA
East Woods School, NY
Elisabeth Morrow School, NJ
Emma Willard School, NY
Episcopal Academy, PA
Episcopal School in the City of New York, NY
Ethel Walker School, CT
Ethical Culture Schools, NY
Evergreen Montessori School, MD
Fenn School, MA
Field School, DC
Flintridge Preparatory School, CA
Forman School, CT
Forth Worth Country Day School, TX
Francis W. Parker School, IL
Friends Academy, MA
Friends Academy, NY
Fryeburg Academy, ME
Garden School, NY
Germantown Friends School, PA
Glenwood School for Boys, IL
Gould Academy, ME
Green Acres School, MD
Green Meadow Waldorf School, NY
Greenhills School, MI
Greenwich Country Day School, CT
Grymes Memorial School, VA
Gunnery School, CT
Hackley School, NY
Hamden Hall School, CT
Hampton Roads Academy, VA
Harding Academy, TN
Harley School, NY
Haverford School, PA
Hawken School, OH
Head-Royce School, CA
Hill School, PA
Hockaday School, TX
Hudson School, NJ
Hun School of Princeton, NJ
Hyde School, ME
Indian Creek School, MD
Indian Mountain School, CT
John Thomas Dye School, CA
Katharine Branson School, CA
Katherine Delmar Burke School, CA
Kent School, CT
Key School, MD
Kimberton Farms School, PA
Laguna Blanca School, CA
Lake Forest Country Day School, IL
Lamplighter School, TX
Lawrence Academy, MA
Le Jardin Academy, HI
Learning Disabilities Foundation-Landmark School, MA
Linden Hall, PA
Linden Hill School, MA
Little Red School House, NY
Long Trail School, VT
Low-Heywood Thomas School, CT
Loyola School, NY
Madeira School, VA
Marin Country Day School, CA
Masters School, NY
McCallie School, TN
Mead School, CT
Meadowbrook School of Weston, MA
Middlesex School, MA
Millbrook School, NY
Milton Academy, MA
Miss Porter's School, CT
Montclair Kimberly Academy, NJ
Montgomery Bell Academy, TN
Montgomery School, PA
Moorestown Friends School, NJ
Mount St. Michael Academy, NY
Nashotah House, WI
New Canaan Country School, CT
New Hampton School, NH
The New Lincoln School, NY
New York Military Academy, NY
Newgrange School, NJ
Nichols School, NY
Nightingale-Bamford School, NY
Noble & Greenough School, MA
Norfolk Academy, VA
North Shore Country Day School, IL
North Yarmouth Academy, ME
Northfield Mt. Hermon School, MA
Northwest Village School, CT
Norwalk Montessori Association, CT
Notre Dame Academy, CA
Oak Knoll School, NJ
Oakwood School, CA
Oakwood School, NY
Oakwood School, Children's Achievement Center, VA
Olney Friends School, OH
Overlake School, WA
Paideia School, GA
Park School, MA
Peck School, NJ
Pennington School, NJ
Perkiomen School, PA
Philadelphia School, PA
Phillips-Andover Academy, MA
Phillips-Exeter Academy, NH
Pine Crest School, FL
Polytechnic School, CA
Pomfret School, CT
Poughkeepsie Day School, NY
Primary Day School, MD
Princeton Day School, NJ
Principia Corporation, MO
Purnell School, NJ
Putnam Indian Field School, CT
Putney School, VT
Rectory School, CT
Regis High School, NY
Renbrook School, CT
Rippowam Cisqua School, NY
Riverview School, MA
Robert Louis Stevenson School, CA
Rudolph Steiner School, NY
Rye Country Day School, NY
Sacred Heart, Academy of the, LA
Sacred Heart, Schools of the, CA
St. Albans School for Boys, DC
St. Andrew's Episcopal School, LA
St. Andrew's School, RI
St. Ann's School, NY
St. Bernard's School, NY
St. Catherine's School, VA
St. Cecilia Academy, TN
St. Francis High School, KY
St. Francis Preparatory School, NY
St. Francis Xavier Parochial School, NY
St. George's School, RI
St. John's Country Day School, FL
St. John's Episcopal School, TX
St. Louis Country Day School, MO
St. Luke's School, CT
St. Mark's School of Texas, TX
St. Mary's Catholic High School, CT
St. Mary's Episcopal Day School, FL
St. Matthew's Parish School, CA
St. Paul Academy and Summit School, MN
St. Sebastian's School, MA
St. Thomas More School, CT
Salisbury School, CT
San Francisco University High School, CA
Severn School, MD
Shady Hill School, MA
Shady Side Academy, PA
Shattuck-St. Mary's School, MN
Sheridan School, DC
Shipley School, PA
Shore Country Day School, MA
Sidwell Friends School, DC
Staten Island Academy, NY
Stoneleigh-Burnham School, MA
Stony Brook School, NY
Storm King School, NY
Suffield Academy, CT
Summit School, NC
Tabor Academy, MA
Taft School, CT
Thacher School, CA
Thayer Academy, MA
Tilton School, NH
Town School, NY
Trinity School, GA
Turtle Bay Music School, NY
University School of Milwaukee, WI
Vanguard School of Lake Wales, FL
Vanguard School, PA
Vermont Academy, VT
Virginia Episcopal School, VA
Waldorf School of Garden City, NY
Wardlaw-Hartridge School, NJ
Washington Montessori School, CT
Watkinson School, CT
Wayland Academy, WI
Westlake School for Girls, CA
Westminster School, CT
Westminster School, GA
Westover School, CT
Westridge School for Girls, CA
Wheeler School, RI
Williams School, VA
Williston Northampton School, MA
Winchester Thurston School, PA
Woodberry Forest School, VA
Woodland Country Day School, NJ
Xavier University Preparatory School, LA
York School, CA

The Common Fund
363 Reef Road
P.O. Box 940
Fairfield, CT 06430
203-254-1211

The
UC San Diego
Foundation
University of California, San Diego
Mail Code: Q-011
La Jolla, California 92093
(619) 534-4490

December 8, 1989

Mr. Stan G. Ulrich
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Dear Mr. Ulrich:

The UC San Diego Foundation is interested in registering its support of a revision to the California version of the Uniform Management of Institutional Funds Act (UMIFA) with regard to the section prohibiting expenditure of "unrealized gains."

The UC San Diego Foundation adheres to an endowment investment philosophy that reflects investment over the long-term, as is appropriate for endowment funds that are held in perpetuity. Because of the California version of UMIFA, the Foundation must weight its endowment investment portfolio in favor of yield-oriented, fixed income investments to meet payout requirements and is constrained from weighing the portfolio more heavily toward equity investments with their greater growth potential.

The UC San Diego Foundation Board of Trustees recommends that the California Law Revision Commission revise the California version of UMIFA and allow payout on total return utilizing both realized and unrealized gains.

Sincerely,

Richard C. Levi

Richard C. Levi
President

STANFORD UNIVERSITY

OFFICE OF THE
VICE PRESIDENT AND GENERAL COUNSEL
(415) 723-9611

P.O. BOX N
STANFORD, CALIFORNIA 94309
Facsimile #723-4323
415-723-4406

August 31, 1989

SEP 05 1989
RECEIVED

California Law Revision Committee
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Uniform Management of Institutional Funds Act

Gentlemen and Ladies:

This is in reference to the Draft Recommendation in Section 18507 (copy attached). The comment states that the change in language "is intended to conform this provision with the cy pres doctrine."

The change in the draft language appears to be a significant step back from the concept of the Uniform Act. I participated in the discussions that led to the original Uniform Act, and I recall that the intent was to make it easier to remove restrictions than under traditional cy pres doctrine.

If the Act's language is conformed to cy pres doctrine, the distinct utility of this part of the Act appears materially reduced. Also, it makes confusing the remaining reference to cy pres in the Act inself.

Please let know if you would like to discuss.

Very truly yours,

George Gregory

George T. Gregory
Staff Counsel

GTG:jlv

Attachment

__Comment.__ Section 18506 restates former Education Code Section 94606 without substantive change. See the Comment to Section 18500. The standard of care in subdivision (a) is consistent with the general standard of care provided by Section 16040.

__Note.__ John C. Hoag, Ticor Title Insurance, suggests adding the word "conveying" following "selling" in the second line of this section. (See Exhibit 1, at exhibits p. 3.) The staff is not clear on the need for this language. The language in question is the same as that in the Trust Law and should not be changed only here.

__§ 18507. Release of restriction in gift instruments__

18507. (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the superior court of the county in which the principal activities of the institution are conducted, or other court of competent jurisdiction, for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. No court has jurisdiction to release a restriction on an institutional fund under this part unless the Attorney General is a party to the proceedings. If the court finds that the restriction is illegal, impossible to fulfill, or impracticable, it may by order release the restriction in whole or in part. A release under this subdivision may not change an endowment fund to a fund that is not an endowment fund.

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

(d) This section does not limit the application of the doctrine of cy pres.

__Comment.__ Section 18507 restates former Education Code Section 94607 without substantive change, except that the standard for releasing restrictions under subdivision (b) has been revised to refer to restrictions that are "illegal, impossible to fulfill, or impracticable" rather than "obsolete or impracticable." This revision is intended to conform this provision with the *cy pres* doctrine. See, e.g., Estate of Loring, 29 Cal. 2d 423, 436, 175 P.2d 524 (1946); Estate of Mabury, 54 Cal. App. 3d 969, 984-85, 127 Cal. Rptr. 233 (1976); Society of California Pioneers v. McElroy, 63 Cal. App. 2d 332, 337-38, 146 P.2d 962 (1944); Restatement (Second) of Trusts § 399 (1957).

In the second sentence of subdivision (b), the phrase "release a restriction on" has been substituted for the phrase "modify any use of" in former Education Code Section 94607(b).

Section 18507 is the same in substance as Section 7 of the Uniform Management of Institutional Funds Act (1972), except for some variations in subdivision (b). As to the construction of provisions drawn from uniform acts, see Section 2.

<u>§ 18508. Status of governing boards</u>

18508. Nothing in this part alters the status of governing boards, or the duties and liabilities of directors, under other laws of this state.

<u>Comment.</u> Section 18508 continues former Education Code Section 94610 without change, except for the language relating to duties and liabilities of directors which is new. The purpose of this new provision is to make clear that the duties and liabilities of directors of incorporated institutions are governed by the relevant statute and not by this part. See, e.g., Corp. Code §§ 5231-5231.5 (directors of nonprofit public benefit corporations), 7231-7231.5 (directors of nonprofit mutual benefit corporations), 9240-9241 (directors of nonprofit religious corporations).

<u>Note.</u> Luther J. Avery approves of the clarification of the relationship between the Corporations Code and UMIFA. (See Exhibit 4, at exhibits p. 6.) However, he is concerned about possible liability of directors for actions taken before the operative date:

> *For example, if an institution has been using the endowment principles of the UMIFA and an attorney is asked for an opinion on the propriety of the conduct of the directors prior to 1990, how does one respond? Moreover, it is not clear in the proposed language how the institution is to deal with the situation more appropriately governed by the Uniform Principal and Income Act (Probate Code 16300, et seq.). Will the institution be authorized to utilize either uniform act at the institution's discretion? Can the institution given funds to distribute "income" only by the terms of the gift instrument accumulate income or distribute asset appreciation? What if such acts occurred prior to 1990? Is a subsequent director liable for the acts of the pre-1990 directors?*

The staff is not convinced that this recommendation should attempt to deal with the issue raised by Mr. Avery concerning liability of directors for actions taken before extension of UMIFA. In this connection, note that Section 3(f) of the Probate Code provides that no

RECOMMENDATION

relating to

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

California enacted the Uniform Management of Institutional Funds Act in 1973 as a pilot study, subject to a five-year sunset provision and restricted to certain accredited private colleges and universities.[1] The official text of the Uniform Management of Institutional Funds Act has a much broader scope, applying to private educational, religious, charitable, and eleemosynary institutions and to governmental organizations holding funds for such purposes.[2] Apparently, the pilot study was successful, since the sunset provision was repealed in 1978.[3] However, the restricted scope of the act was retained and the authority to use unrealized, as opposed to realized, appreciation was deleted from the statute.[4]

The Commission recommends that the California version of the Uniform Management of Institutional Funds Act be applied to the same organizations covered by the original uniform act. No persuasive reasons have been given for continuing the restrictions that applied under the original pilot study. None of the other 29 jurisdictions that have enacted the uniform act has so drastically restricted its scope.[5] The problems faced by charitable organizations that are treated by the uniform act are not unique to private colleges and universities.[6] The effect of this recommendation would be to

1. See 1973 Cal. Stat. ch. 950, § 1 (enacting Civil Code §§ 2290.1- 2290.12). The California version of the act applies only to private incorporated or unincorporated educational institutions accredited by the Association of Western Colleges and Universities. The sunset clause was enacted by 1973 Cal. Stat. ch. 950, § 3. The act was moved to Education Code Sections 94600-94610 when the Civil Code trust provisions were generally repealed in connection with enactment of the new Trust Law. See 1986 Cal. Stat. ch. 820, §§ 7, 24.

2. See Unif. Management Inst. Funds Act § 1(1) (1972).

3. 1978 Cal. Stat. ch. 806, § 1.

4. 1978 Cal. Stat. ch. 806, § 2.

5. See annotations at 7A U.L.A. 714-27 (1985) & Supp. at 177-78 (1989).

6. In addition, the Commission recommends that the act be moved to the Probate Code. The Education Code is not an ideal location if the act's coverage is expanded beyond private colleges and universities. It is appropriate to place the expanded act with the Trust Law, since the Trust Law also applies to charitable trusts. See Prob. Code § 15004.

extend the benefits of the uniform act to all educational, religious, charitable, and eleemosynary institutions. Specifically, these institutions would be able (1) to use realized appreciation of endowment funds, subject to a fiduciary duty of care, (2) to delegate day-to-day investment management to committees and employees and hire investment advisory or management services, and (3) to release illegal, impossible, or impracticable restrictions on the use of endowment funds with the donor's consent or on petition to a court and notice to the Attorney General.[7] Extending the act's application would also provide guidance as to a board's power to invest and manage property and the standard of care governing the exercise of a board's powers[8] where the board is not governed by some other statute.[9]

7. For the existing provisions that would apply under a broadened statute, see Educ. Code §§ 94602 (use of appreciation), 94605 (delegation of authority), 94607 (release of restrictions). See generally Prefatory Note, Unif. Management Inst. Funds Act (1972), 7A U.L.A. 706-09 (1985). The proposed law would replace the "obsolete or impracticable" standard for releasing restrictions on use of endowments under Education Code Section 94607 with the *cy pres* standard applicable to restrictions that are "illegal, impossible to fulfill, or impracticable."

8. For the existing provisions that would apply under a broadened statute, see Educ. Code §§ 94604 (investment authority), 94606 (standard of care).

9. The proposed law would provide that UMIFA does not alter the duties and liabilities of governing boards under other laws. See, e.g., Corp. Code §§ 5231-5231.5 (directors of nonprofit public benefit corporations), 7231-7231.5 (directors of nonprofit mutual benefit corporations), 9240-9241 (directors of nonprofit religious corporations). Similarly, the proposed law would not displace any limitations on the expenditure of public funds by governmental organizations.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 5240 of the Corporations Code, to add Part 7 (commencing with Section 18500) to Division 9 of the Probate Code, and to repeal Chapter 6 (commencing with Section 94600) of Part 59 of Division 10 of Title 3 of the Education Code, relating to the Uniform Management of Institutional Funds Act.

The people of the State of California do enact as follows:

Corporations Code § 5240 (amended). Investments under Nonprofit Public Benefit Corporations Law

SECTION 1. Section 5240 of the Corporations Code is amended to read:

5240. (a) This section applies to all assets held by the corporation for investment. Assets which are directly related to the corporation's public or charitable programs are not subject to this section.

(b) Except as provided in subdivision (c), in investing, reinvesting, purchasing, acquiring, exchanging, selling and managing the corporation's investment, the board shall do the following:

(1) Avoid speculation, looking instead to the permanent disposition of the funds, considering the probable income, as well as the probable safety of the corporation's capital.

(2) Comply with additional standards, if any, imposed by the articles, bylaws or express terms of an instrument or agreement pursuant to which the assets were contributed to the corporation.

(c) No investment violates this section where it conforms to provisions authorizing such investment contained in an instrument or agreement pursuant to which the assets were contributed to the corporation. No investment violates this section or Section 5231 where it conforms to provisions requiring such investment contained in an instrument or agreement pursuant to which the assets were contributed to the corporation.

(d) In carrying out duties under this section, each director shall act as required by subdivision (a) of Section 5231, may rely upon others as permitted by subdivision (b) of Section 5231, and shall have the benefit of subdivision (c) of Section

5231, and the board may delegate its investment powers as permitted by Section 5210.

(e) Nothing in this section shall be construed to preclude the application of the Uniform Management of Institutional Funds Act, ~~Chapter 3~~ *Part 7* (commencing with Section ~~2290.1~~ *18500*) of ~~Title 8 of Part 4 of~~ Division ~~3~~ *9* of the ~~Civil~~ *Probate* Code, if that act would otherwise be applicable, *but nothing in the Uniform Management of Institutional Funds Act alters the status of governing boards, or the duties and liabilities of directors, under this part.*

Comment. Subdivision (e) of Section 5240 is revised to correct a cross-reference and to add language consistent with Probate Code Section 18508.

Education Code §§ 94600-94610 (repealed). Uniform Management of Institutional Funds Act

SEC. 2. Chapter 6 (commencing with Section 94600) of Part 59 of Division 10 of Title 3 of the Education Code is repealed.

Note. Comments to repealed sections are set out at the end of this recommendation, at pages [15-16].

Probate Code §§ 18500-18509 (added). Uniform Management of Institutional Funds Act

SEC. 3. Part 7 (commencing with Section 18500) is added to Division 9 of the Probate Code, to read:

PART 7. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

§ 18500. Short title

18500. This part may be cited as the Uniform Management of Institutional Funds Act.

Comment. Section 18500 continues Education Code Section 94600 without change. The Uniform Management of Institutional Funds Act has been relocated from the Education Code, where it applied only to certain private institutions of higher education. See Section 18501(e) and the Comment thereto. As to the construction of provisions drawn from uniform acts, see Section 2. See also Section 11 (severability).

§ 18501. Definitions

18501. As used in this part:

(a) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

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

(c) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(d) "Historic dollar value" means the aggregate fair value in dollars of (1) an endowment fund at the time it became an endowment fund, (2) each subsequent donation to the endowment fund at the time it is made, and (3) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the endowment fund.

(e) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes.

(f) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (1) a fund held for an institution by a trustee that is not an institution or (2) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

Comment. Section 18501 restates former Education Code Section 94601 without substantive change, except that the definition of "institution" has been substantially expanded. As revised, the definition of "institution" is the same as that provided in Section 1(1) of the Uniform Management of Institutional Funds Act (1972). Former Education Code Section 94601(a) defined "institution" as a "private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities to the extent that it holds funds exclusively for any of such purposes."

Section 18501 lists the definitions in alphabetical order, unlike former Education Code Section 94601. The definition of "historic dollar value" in subdivision (d) has been revised by adding "endowment" preceding "fund" in the second and third clauses.

Section 18501 is the same in substance as Section 1 of the Uniform Management of Institutional Funds Act (1972), except for the omission of the provision in Section 2(5) of the uniform act making conclusive a good faith determination of historic dollar value. As to the construction of provisions drawn from uniform acts, see Section 2.

§ 18502. Expenditure of asset net appreciation for current use

18502. The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the realized net appreciation in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by Section 18506. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

Comment. The first sentence of Section 18502 restates the first sentence of former Education Code Section 94602 without substantive change. This section is the same as Section 2 of the Uniform Management of Institutional Funds Act (1972), except that the authority to appropriate unrealized appreciation is omitted. As to the construction of provisions drawn from uniform acts, see Section 2. The phrase "net appreciation, realized in the fair value" in the former section has been revised for clarity to read "realized net appreciation in the fair value." See the Comment to Section 18500.

The second sentence of Section 18502 continues the third sentence of former Education Code Section 94602 without change. The second sentence of former Education Code Section 94602, providing a rolling five-year averaging rule, has been omitted as obsolete since the elimination of authority to appropriate unrealized net appreciation by amendment in 1978. See 1978 Cal. Stat. ch. 806, § 2, amending former Civil Code § 2290.2, the predecessor to former Educ. Code § 94602.

§ 18503. Construction of gift instrument

18503. (a) Section 18502 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended.

(b) If the gift instrument includes a designation of the gift as an endowment or a direction or authorization to use only "income," "interest," "dividends," or "rents, issues, or profits," or "to preserve the principal intact," or a direction or authorization that contains other words of similar meaning:

(1) A restriction on the expenditure of net appreciation need not be implied solely from the designation, direction, or authorization, if the gift instrument became effective before the Uniform Management of Institutional Funds Act became applicable to the institution.

(2) A restriction on the expenditure of net appreciation may not be implied solely from the designation, direction, or authorization, if the gift instrument becomes effective after the Uniform Management of Institutional Funds Act became applicable to the institution.

(c) The effective dates of the Uniform Management of Institutional Funds Act are the following:

(1) January 1, 1974, with respect to a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities.

(2) January 1, 1991, with respect to an institution not described in paragraph (1).

Comment. Subdivision (a) of Section 18503 restates former Education Code Section 94603(a) without substantive change. Subdivisions (b) and (c)(1) restate former Education Code Section 94603(b) without substantive change. Subdivision (c)(2) applies a consistent rule of construction to institutions (as defined in Section 18501(e)) that were not covered by the former law. See the Comment to Section 18501.

Subdivisions (a) and (b) are the same in substance as the first two sentences of Section 3 of the Uniform Management of Institutional Funds Act (1972). As to the construction of provisions drawn from uniform acts, see Section 2.

§ 18504. Investment authority

18504. In addition to an investment otherwise authorized by law or by the applicable gift instrument, the governing board, subject to any specific limitations set forth in the applicable gift instrument, may do any or all of the following:

(a) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, deeds of trust, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations or partnerships, and obligations of any government or subdivision or instrumentality thereof.

(b) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

(c) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution.

(d) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

Comment. Section 18504 continues former Education Code Section 94604 without change, except that in subdivision (a) a reference to deeds of trust has been added and an unnecessary comma following the word "associations" has been omitted. The forms of investment listed in subdivisions (a) and (d) following the word "including" are illustrations and not limitations on the general authority provided in these subdivisions. As to the construction of provisions drawn from uniform acts, see Section 2.

§ 18505. Delegation of investment management

18505. Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may do the following:

(a) Delegate to its committees, officers, or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds.

(b) Contract with independent investment advisers, investment counsel or managers, banks, or trust companies, so to act.

(c) Authorize the payment of compensation for investment advisory or management services.

Comment. Section 18505 continues former Education Code Section 94605 without change. This section is the same in substance as Section 5 of the Uniform Management of Institutional Funds Act (1972). As to the construction of provisions drawn from uniform acts, see Section 2.

§ 18506. Standard of care

18506. (a) When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property, appropriating appreciation, and delegating investment management for the benefit of an institution, the members of the governing board shall act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the institution. In the course of administering the fund pursuant to this standard, individual investments shall be considered as part of an overall investment strategy.

(b) In exercising judgment under this section, the members of the governing board shall consider the long and short term needs of the institution in carrying out its educational, religious, charitable or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, general economic conditions, the appropriateness of a reasonable proportion of higher risk investment with respect to institutional funds as a whole, income, growth, and long-term net appreciation, as well as the probable safety of funds.

Comment. Section 18506 restates former Education Code Section 94606 without substantive change. See the Comment to Section 18500. The standard of care in subdivision (a) is consistent with the general standard of care provided by Section 16040.

§ 18507. Release of restriction in gift instruments

18507. (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the superior court of the county in which the principal activities of the institution are conducted, or other court of competent jurisdiction, for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. No court has jurisdiction to release a restriction on an institutional fund under this part unless the Attorney General is a party to the proceedings. If the court finds that the restriction is illegal, impossible to fulfill, or impracticable, it may by order release the restriction in whole or in part. A release under this subdivision may not change an endowment fund to a fund that is not an endowment fund.

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

(d) This section does not limit the application of the doctrine of cy pres.

Comment. Section 18507 restates former Education Code Section 94607 without substantive change, except that the standard for releasing restrictions under subdivision (b) has been revised to refer to restrictions that are "illegal, impossible to fulfill, or impracticable" rather than "obsolete or impracticable." This revision is intended to conform this provision with the *cy pres* doctrine. See, e.g., Estate of Loring, 29 Cal. 2d 423, 436, 175 P.2d 524 (1946); Estate of Mabury, 54 Cal. App. 3d 969, 984-85, 127 Cal. Rptr. 233 (1976); Society of California Pioneers v. McElroy, 63 Cal. App. 2d 332, 337-38, 146 P.2d 962 (1944); Restatement (Second) of Trusts § 399 (1957).

In the second sentence of subdivision (b), the phrase "release a restriction on" has been substituted for the phrase "modify any use of" in former Education Code Section 94607(b) for consistency with the remainder of this section.

Section 18507 is the same in substance as Section 7 of the Uniform Management of Institutional Funds Act (1972), except for some variations in subdivision (b). As to the construction of provisions drawn from uniform acts, see Section 2.

§ 18508. Status of governing boards

18508. Nothing in this part alters the status of governing boards, or the duties and liabilities of directors, under other laws of this state.

Comment. Section 18508 continues former Education Code Section 94610 without change, except that the language relating to duties and liabilities of directors is new. The purpose of the new language is to make clear that the duties and liabilities of directors of incorporated institutions are governed by the relevant statute and not by this part. See, e.g., Corp. Code §§ 5231-5231.5 (directors of nonprofit public benefit corporations), 7231-7231.5 (directors of nonprofit mutual benefit corporations), 9240-9241 (directors of nonprofit religious corporations).

§ 18509. Laws relating to expenditure of public funds

18509. Nothing in this part limits the application of any law relating to the expenditure of public funds.

Comment. Section 18509 is a new provision that makes clear the relation of the Uniform Management of Institutional Funds Act to any other law concerning expenditure of public funds. See, e.g., Gov't Code § 53601. Thus, under Section 18509, if other law provides greater limitations on the expenditure of public funds, that law prevails over any provision of this part that might otherwise have been applicable.

COMMENTS TO REPEALED SECTIONS

Education Code § 94600 (repealed). Short title

Comment. Former Section 94600 is continued in Probate Code Section 18500 without change. The Uniform Management of Institutional Funds Act has been moved from the Education Code since it has been expanded to apply to religious, charitable, and other eleemosynary institutions.

Education Code § 94601 (repealed). Definitions

Comment. Former Section 94601 is restated in Probate Code Section 18501 without substantive change, except that the definition of "institution" in subdivision (a) has been substantially expanded in the new provision. Additional technical changes have been made. See Prob. Code § 18501 and the Comment thereto.

Education Code § 94602 (repealed). Expenditure of asset net appreciation for current use

Comment. The first sentences of former Section 94602 is restated in Probate Code Section 18502 without substantive change. The second sentence is omitted as obsolete. See the Comment to Prob. Code § 18502. The third sentence is continued in the second sentence of Probate Code Section 18502 without change.

Education Code § 94603 (repealed). Construction of gift instrument

Comment. Former Section 94603 is restated in Probate Code Section 18503 without substantive change. See the Comment to Prob. Code § 18503.

Education Code § 94604 (repealed). Authority of board to invest and reinvest

Comment. Former Section 94604 is continued in Probate Code Section 18504 without change, except that the comma following the word "associations" in subdivision (a) is omitted.

Education Code § 94605 (repealed). Delegation of authority

Comment. Former Section 94605 is continued in Probate Code Section 18505 without change.

Education Code § 94606 (repealed). Standard of care

Comment. Former Section 94606 is restated in Probate Code Section 18506 without substantive change, except as noted in the Comment to Probate Code Section 18506.

Education Code § 94607 (repealed). Release of restriction in gift instruments

Comment. Former Section 94607 is restated in Probate Code Section 18507 without substantive change. See the Comment to Prob. Code § 18507.

Education Code § 94608 (repealed). Severability

Comment. Former Section 94608 is omitted because it is unnecessary. See Prob. Code § 11 (severability).

Education Code § 94609 (repealed). Application and construction

Comment. Former Section 94609 is omitted because it is unnecessary. See Prob. Code § 2(b) (interpretation of uniform acts).

Education Code § 94610 (repealed). Status of governing boards

Comment. Former Section 94610 is restated in Probate Code Section 18508 without substantive change. See the Comment to Prob. Code § 18507.