March 2011

NYPMIFA Revisited:

A Summary Incorporating the Attorney General's Recent Guidance

On March 17, 2011, the New York Attorney General issued guidance concerning the New York Prudent Management of Institutional Funds Act ("NYPMIFA"). We take this opportunity to provide an updated summary of NYPMIFA that incorporates selected aspects of the Attorney General's guidance. For the convenience of readers who are already familiar with NYPMIFA, we use gray shading to highlight the elements of this summary that are drawn from the new guidance.

What Is Covered by NYPMIFA?

Broadly speaking, NYPMIFA addresses three main topics: (1) management and investment of "institutional funds"; (2) appropriations from "endowment funds"; and (3) release of donor restrictions on institutional funds.

- **"*Institution*"**: The term "institution" includes New York not-for-profit, educational and religious corporations as well as certain wholly charitable trusts. Most wholly charitable trusts, however, fall outside of NYPMIFA as a practical matter, due to the definition of "institutional fund," below. Notably, the definition of "institution" is not limited to charities. Hence, nonprofit social clubs, trade associations and social welfare organizations formed under the New York Not-for-Profit Corporation Law are generally subject to NYPMIFA.

- **"*Institutional Fund*"**: This term is defined broadly as a "fund held by an institution." However, there are a few exclusions, including: (1) assets held for programmatic purposes, which as a practical matter would exclude assets such as buildings or facilities being used by the organization or an organization's collections or archives, and (2) funds held for an institution by a trustee that is not itself an institution (i.e., wholly charitable trusts with an individual, bank, or trust company as trustee). Note, though, that wholly charitable trusts are subject to similar prudent investor rules on management and investing under the laws generally applicable to trusts, as well as trust-law rules governing the distinction between income and principal.

- **"*Endowment Fund*"**: An "endowment fund" is an institutional fund (or part thereof) that under the terms of the gift instrument is "not wholly expendable on a current basis," which means that the donor has placed a restriction of some kind on the amount that may be spent from the fund. Thus, a fund that is restricted only as to purposes, but not as to the amount that may be spent, would be an institutional fund but not an endowment fund. Also, a board-designated endowment fund is not an endowment fund because it is not donor restricted.

The technical definition of "endowment fund" is significant because ***many organizations – including most private foundations – do not have endowment funds in this technical sense***, which means that they will not be subject to the law's requirements concerning endowment fund appropriations. However, private foundations and other funders may wish to be informed about the NYPMIFA endowment appropriation rules, if they plan to *make* endowment grants.

On the other hand, all New York organizations, even those without endowment funds in the technical sense, are subject to the other aspects of NYPMIFA, in particular the new rules governing how they manage and invest their institutional funds.

It is important to understand, however, that by "New York" organizations we mean ***organizations formed under New York State law – not organizations that were incorporated or otherwise formed outside New York but conduct activities in the state***. Organizations typically look to the state where they are organized for the laws governing their internal affairs, such as the management of investments and the appropriation of endowment funds. The Attorney General's guidance does not indicate otherwise in the case of NYPMIFA.

Management and Investment of Institutional Funds

NYPMIFA updates prior law to bring it in line with more current conceptions of prudent investing. The duty of care imposed on those who are responsible for investment of institutional funds remains essentially the same (though the language has been slightly modified) – the care of "an ordinarily prudent person in a like position under similar circumstances." But this standard now applies to "each person" responsible for managing and investing an institutional fund. And NYPMIFA establishes detailed guidelines concerning how the duty of care must be exercised. Key points to understand include the following:

- ***Factors to Consider***: When managing and investing an institutional fund, an organization must consider the purposes of the organization and the purposes of the institutional fund. Subject to the intent of a donor expressed in a gift instrument, an organization must consider, if relevant:

  (1) general economic conditions;
  (2) the possible effect of inflation or deflation;
  (3) the expected tax consequences, if any, of investment decisions or strategies;
  (4) the role that each investment or course of action plays within the overall investment portfolio of the fund;
  (5) the expected total return from income and the appreciation of investments;
  (6) other resources of the organization;
  (7) the needs of the organization and the fund to make distributions and to preserve capital; and
  (8) an asset's special relationship or special value, if any, to the purposes of the organization.

- ***Appropriate Decision-Making in Context***: An organization must make management and investment decisions about an asset in the context of the overall portfolio as part of an overall strategy that takes into consideration risk and return objectives appropriate to the organization. The management costs incurred must also be reasonable and appropriate in relation to the assets of the organization, its purposes, and the skills available to it.

- ***Types of Assets and Diversification***: An organization may pool institutional funds for investment purposes and may invest in any kind of property or investment (unless a gift instrument says otherwise), but the organization must diversify a fund's investments unless it prudently determines that because of special circumstances the purposes of the fund are better served without diversification. A decision not to diversify must be revisited at least once a year, and each decision not to diversify should be documented.

- ***Delegation of Investment Management***: An organization may delegate the management and investment function to an external agent – and will not be liable for the decisions or actions of the agent – so long as the organization exercises prudence in (a) selecting, continuing, or terminating the agent; (b) establishing the scope and terms of the delegation; and (c) monitoring the agent. An organization may also delegate these functions to its committees, officers, or employees. As was the case under prior law, any contract that delegates the management or investment of institutional funds to an external agent must provide that the organization may terminate the contract, at any time and without penalty, on up to 60 days' prior notice. NYPMIFA imposes an affirmative duty to assess the "independence" of external agents selected to manage and invest institutional funds, including any conflicts of interest the agent has or may have.

> **AG Guidance**:
>
> The Attorney General has stated that boards must be diligent in assessing the independence of an outside investment agent both before and after retaining the agent, as an outside investment agent should be selected based on the agent's competence, experience, past performance, and proposed compensation and "not on any business or personal relationships between the agent and board members or other insiders." The Attorney General has recommended that boards adopt policies that "require full disclosure of relationships with outside agents and implement practices that ensure objective oversight by the board." We note that an organization's existing conflict of interest policy may already be adequate to address this concern, but should nonetheless be reviewed to confirm that it is.

- ***Investment Policy.*** NYPMIFA requires organizations to have a policy "setting forth guidelines on investments and delegation of management and investment functions in accord with the standards" of the new statute. Even organizations that already have written investment policies may have to update them to ensure that they are "in accord" with the standards of the new law. The length and detail of an organization's policy could vary significantly depending on its holdings, as what is appropriate for a sophisticated organization with multiple investment managers is unlikely to be appropriate for a small organization that has only cash or cash equivalents. No deadline is established for organizations to develop an appropriate investment policy.

Endowment Spending

NYPMIFA is based on the Uniform Prudent Management of Institutional Funds Act, or UPMIFA, which was adopted by the National Conference of Commissioners on Uniform State Laws in 2006. UPMIFA grew out of the economic downturn of 2001 and was designed to address precisely the type of situation that many organizations faced after the economic crisis of 2008, namely, underwater endowment funds. As the drafters of UPMIFA explained in their prefatory comments, UPMIFA was intended to modernize the law and also to give greater flexibility to organizations coping with fluctuations in the value of endowment funds.

In its original form, UPMIFA contemplated that states would eliminate the absolute prohibition on appropriating the historic dollar value of an endowment fund – that is, the bar to making an appropriation when an endowment fund was worth less than the dollar amount contributed to it or when the appropriation would cause an endowment fund to fall below that amount. In proposing such a rule, the drafters of UPMIFA cited various shortcomings of the existing prohibition on appropriating historic dollar value, including the arbitrariness of the standard and the lack of consideration given to the effects of inflation. In place of the old rule, UPMIFA contemplated that boards would ordinarily have the flexibility to appropriate whatever portion of an endowment fund they deemed prudent, provided they addressed seven specific prudence factors (described below).

New York, however, added an eighth prudence factor (also described below) and decided to impose unique limitations on the flexibility that UPMIFA contemplated. Whereas UPMIFA treated all endowment funds the same, NYPMIFA created at least three statutory categories of endowment fund, each category subject to a different spending regime:

Category 1: Funds governed by a gift instrument executed before September 17, 2010 ("existing funds") whose donor is no longer "available" and existing funds received as part of a general institutional solicitation
Category 2: Existing funds whose donor is still "available"
Category 3: Funds governed by a gift instrument executed on or after September 17, 2010

An "available" donor is a donor that (1) is living or, if the donor is not a natural person, is in existence and conducting activities; and (2) is able to "be identified and located with reasonable efforts."

Category 1 – "Old" Endowments: Funds Established by Gift Instruments Executed Before September 17, 2010 Whose Donors Are Not *Available*

If an endowment fund was established by a gift instrument executed before September 17, 2010 by a donor who is no longer "available" or if an endowment fund was established as part of an institutional solicitation, the endowment fund automatically enjoys the full flexibility envisioned by UPMIFA. Hence, an organization may appropriate a prudent portion of the endowment fund based on the NYPMIFA standard of prudence (discussed in greater detail below), absent an express limitation in the gift instrument, such as a prohibition on appropriating or spending historic dollar value or a provision limiting appropriations to the organization's annual endowment draw.

Category 2 – "Recent" Endowments: Funds Established by Gift Instruments Executed Before September 17, 2010 Whose Donors Are Available

For an endowment fund governed by a gift instrument executed before September 17, 2010 by a donor who is still "available" and which was not solicited as part of an institutional solicitation, NYPMIFA creates a novel "opt in, opt out" feature requiring an organization to send a form of notice to the donor, at least 90 days before making an appropriation under NYPMIFA, containing language substantially as follows:

> *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 a donor does not respond to the notice within 90 days, or if the donor responds by checking Box #1, the organization may then avail itself of NYPMIFA's rules for making appropriations from the endowment fund created by the donor.

- ***Further Exclusions from the Notice Requirement***: In addition to the exclusion for endowment funds received as part of an institutional solicitation, the new notice procedure is not necessary to the extent the gift instrument expressly permits spending below the original dollar value of the endowment fund. Also, the new notice procedure is not sufficient to override specific spending restrictions set by the donor (such as a restriction limiting expenditures from the fund to the organization's annual endowment spending draw). In cases where a donor has imposed specific limitations on the level, rate, or amount of spending from an endowment fund, the organization would need to continue to comply with the specific restrictions or seek their release, either by the donor or a court.

This new notice procedure raised a host of interpretive questions, some of which the Attorney General has addressed in the new guidance.

AG Guidance:

The Attorney General has indicated that under its interpretation of the statute, a notice must be sent to available endowment fund donors who executed gift instruments prior to September 17, 2010. According to the Attorney General, the organization must send the notice before appropriating from the endowment fund.

However, the Attorney General has expressed the view that "the Legislature did not intend the notice requirement to harm organizations by prohibiting any appropriation of endowment funds before the notice process is completed." Consequently, the guidance concludes, a "reasoned interpretation" of the statutory notice requirement is that during the 90-day notice period after the notice has been sent, the organization may make prudent appropriations of income and appreciation (i.e., just as the organization could do under prior law).

If, within the 90-day period, the donor returns the notice and checks Box #2 indicating that the donor does not wish the fund to be spent below its original dollar value, the organization may appropriate only income and appreciation from the fund thereafter. If, however, either the 90-day period expires without a response from the donor or the donor returns the notice with Box #1 checked, the organization is free to apply the NYPMIFA endowment spending rules and appropriate a prudent portion of the fund thereafter, even if the fund is already below its original dollar value or the appropriation would cause the fund to drop below its original dollar value.

If, prior to the issuance of the Attorney General's guidance, an organization appropriated from an endowment fund with an available donor before sending notice to the donor, the guidance states that the organization should promptly send the notice. If the organization had appropriated below the fund's original dollar value and the donor returns the notice having checked Box #2, the guidance states that the organization must restore the fund to its original dollar value.

The Attorney General has indicated that for available donors whose current address is unknown, the organization should make reasonable efforts to locate the donor, including internet searches and contacting known associates of the donor, such as an attorney who represented the donor when the gift was made. According to the Attorney General, the organization should document its efforts to locate donors.

Category 3 – "New" Endowments: Funds Established by Gift Instruments Executed on or After September 17, 2010

UPMIFA contains an optional provision creating a rebuttable presumption that an appropriation from an endowment fund in any year greater than 7% of its fair market value is imprudent. Most states elected not to include this presumption. New York adopted the presumption, but only with respect to endowment funds governed by gift instruments executed on or after September 17, 2010. New York requires that the fair market value of such an endowment fund be calculated as a quarterly (or more frequent) average over a period of at least five years or the fund's existence, if shorter.

One important caveat about the presumption of imprudence: There is no "safe harbor" of prudence for appropriations of 7% or less, so organizations should not assume that the prudence of an appropriation decision is established simply by making appropriations at or below the 7% level.

The Attorney General did not provide guidance on how the presumption will work in practice. The drafters of UPMIFA indicated that the presumption does not shift the burden of persuasion to the organization. Rather, if sufficient evidence establishes, by a preponderance of the evidence, the facts necessary to raise the presumption, then the organization would have only the burden of production of other evidence that would tend to demonstrate that its decision was prudent. If New York courts adopt the approach advanced by the drafters of UPMIFA, the Attorney General would still bear the burden of *persuasion* in a case alleging that a board had acted imprudently in making an appropriation in excess of the 7% level.

AG Guidance:

The Attorney General's guidance notes that, although fair market value for purposes of the presumption of imprudence must be calculated over a period of at least five years, an organization's spending policy may be based on the fair market value of endowment funds averaged over a shorter period. Hence, "[a]ll spending policies should be reviewed to determine how they interact with the presumption of imprudence. If necessary, institutions must perform a separate calculation, averaging the fund's fair market value over at least the preceding five years, in order to determine whether a proposed appropriation would be presumptively imprudent."

The 7% presumption does not apply to an appropriation permitted under the gift instrument. For example, the presumption will not apply to a gift instrument that permits an appropriation in any year in excess of 7% of the fair market value of an endowment fund under certain specified conditions. Organizations may wish to consider whether there are circumstances where endowment gift agreements should specifically mandate appropriations in excess of 7% or otherwise state the donor's intention that some greater appropriation would be in keeping with the donor's wishes.

New Endowment Fund Solicitation Disclosure

Under NYPMIFA, organizations soliciting new endowment gifts must provide a new disclosure in their solicitation materials. This requirement is also unique to New York. If the solicitation is for an endowment fund, the solicitation must include a statement that, unless otherwise restricted by the gift instrument pursuant to N-PCL § 553(b), the organization may expend so much of an endowment fund as it deems prudent after considering the factors set forth in N-PCL § 553(a).

The Standard of Prudence for Endowment Fund Appropriations

When making a determination to appropriate or accumulate with respect to existing endowment funds, the board of an organization must "act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances" and 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 organization;
(7) the investment policy of the organization; and
(8) 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 organization.

AG Guidance:

Organizations often have questions about the timing of expenditures from an endowment fund after an appropriation has been made. The Attorney General clarified that funds appropriated for expenditure "need not be spent immediately; such funds may be appropriated on one date and spent at a later date or over a period of time."

The Attorney General has stated that it believes the eighth prudence factor, which is unique to New York, was intended to ensure that boards do not "automatically decide" to appropriate from endowment funds when circumstances warrant

considering other reasonable alternatives. For example, if an endowment fund has diminished in value, "the board may determine that it is appropriate to take steps to avoid or reduce further spending of the fund." Such steps could include, according to the Attorney General, fundraising efforts, expense reductions, sale of non-essential assets, or reductions in non-essential staff. Deferral of expenditure might also be considered. The Attorney General has said that the board "should identify the particular alternatives that might be appropriate," discuss the extent to which these steps might be feasible, and document this consideration of alternatives to endowment spending.

The Attorney General's guidance suggests that the Attorney General considers historic, or original, dollar value to have continuing relevance in the prudence analysis. First, the guidance states that in the case of endowment funds for which an available donor returns the required notice having checked Box #2, "as under prior law, if an institution appropriates below the historic dollar value of ... an endowment fund (for example, as a result of applying a spending policy), it is the view of this Office that the institution has a duty ... to restore the endowment fund to its historic dollar value." Second, the guidance quotes, with evident approval, the following passage from the commentary by the drafters of UPMIFA:

> *Although [UPMIFA] does not require that a specific amount be set aside as "principal," [UPMIFA] assumes that the institution will act to preserve the "principal" (i.e., to maintain the purchasing power of the amounts contributed to the fund) while spending "income" (i.e., making a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions). Thus, an institution should monitor principal in an accounting sense, identifying the original value of the fund (the historic dollar value) and the increases in value necessary to maintain the purchasing power of the fund.*

For each determination to make an appropriation from an endowment fund, NYPMIFA requires a contemporaneous record describing the consideration given to each of the eight factors listed above.

AG Guidance:

The Attorney General has cautioned that "it is not sufficient to state in a conclusory fashion that the board considered a particular factor; rather, the record should describe the substance of the consideration given to each factor," and if the factor was deemed not relevant to the board's decision, "the record should explain why."

For an organization with dozens or even hundreds of endowment funds, many of them held for specific purposes or subject to other specific donor restrictions, this requirement to document consideration given to each factor may present a substantial new burden,

because the rationale for spending a particular portion may not be the same in all cases. Endowment funds subject to similar or identical restrictions, however, ordinarily could be considered as a group. Organizations will need to develop a process to address this requirement.

AG Guidance:

In the Attorney General's view, the statute "contemplates that decisions to appropriate from endowment funds will ordinarily be made on a fund-by-fund basis and documented in a separate contemporaneous record for each endowment fund." Although group treatment of funds may be feasible, the Attorney General has cautioned that "the decision to treat a group of endowment funds as [a] similarly situated group should be made with care to ensure that any decision to appropriate from the funds collectively would be justified if the factors ... were applied to each fund individually."

Moreover, the Attorney General has indicated that a governing board "should develop written procedures for determining when a group of funds is similarly situated for this purpose." The Attorney General has stated that relevant factors could include the purposes of the funds as stated in the gift instruments, the spending restrictions imposed in the gift instrument, the durations of the funds, the financial conditions of the funds, and whether the funds are invested similarly. "[I]f the governing board ... makes a single decision to appropriate from multiple endowment funds that are similarly situated, it is this Office's view that the decision may be documented in one contemporaneous record."

Allocation of Reasonable Expenses; Annual Report

NYPMIFA retains the provision in prior law permitting a governing board to apply assets given to the organization to the payment of reasonable and proper expenses of the administration of such assets, in addition to applying the assets towards the purposes specified in the gift instrument. NYPMIFA also retains the provision in prior law requiring that, unless the terms of a particular gift instrument provide otherwise, the organization's treasurer must make an annual report to the members (if there are members) or to the governing board (if there are no members) concerning assets given to the organization for specific purposes and the use made of such assets and the income thereof.

New Accounting Considerations Under NYPMIFA

UPMIFA and its prudence standard occasioned important changes in nonprofit accounting rules, and now that NYPMIFA has come to New York, organizations will need to be attentive to these changes. Organizations with bond or other covenants premised on maintaining a certain amount of "unrestricted" assets may face particular issues, because endowment

appreciation that was "unrestricted" under the old accounting rules may now be treated as "temporarily restricted."

Donor or Judicial Release of Restrictions

NYPMIFA permits an organization's board to release an endowment restriction upon consent of the donor, as had also been the case under prior law. NYPMIFA expands the circumstances under which judicial modification of the restriction is appropriate. In addition, NYPMIFA introduces a provision that permits an organization to release or modify a restriction on an endowment fund without court approval, upon 90 days' notice to the Attorney General, in instances where the fund's value is less than $100,000, more than 20 years have elapsed since its establishment, and the property will be used consistently with the gift's charitable purposes.

AG Guidance:

For petitions for judicial release of restrictions, the Attorney General's guidance recommends that organizations submit a draft petition to the Charities Bureau for review and discussion before filing the petition with the court in order to help resolve potential issues and expedite the process.

For "small, old funds" – funds older than 20 years whose total value is less than $100,000 – the Attorney General has stated that, if a donor is available, an organization must first attempt to obtain the donor's consent before filing a notice with the Attorney General. If the donor is not available or is unwilling to consent, the organization must follow the procedure in the statute requiring the making of a record approving the release or modification of the restriction (e.g., a board resolution). The organization must submit a copy of this record together with the required written notice explaining why the donor's restriction has become unlawful, impracticable, impossible to achieve, or wasteful as well as the proposed use of the fund if the restriction is released. In addition to the statutory requirements, the notice to the Attorney General should include a copy of the gift instrument and other documentary evidence supporting the age and value of the fund. If the donor is available, the organization should include copies of notice given to the donor and any correspondence between the organization and the donor with regard to the proposed release or modification. The guidance says that the Attorney General will notify the organization within 90 days if the Charities Bureau has questions or requires further information or if the Charities Bureau objects to the release or modification. If such notice is received, the Attorney General has stated that an organization may not release or modify the restriction until it receives a further written notice from the Attorney General indicating that any questions or objections have been resolved.

NYPMIFA presents a number of key action items for organizations subject to the new law, such as the need to update their investment policies and the need to send a notice to available donors of existing endowment funds before making UPMIFA-style appropriations. For a list of action items and a fuller analysis of the new law, please see our earlier Alert, available at http://www.pbwt.com/resources/publications/new-york-version-of-upmifa/.

The full text of the Attorney General's guidance can be found at http://www.CharitiesNYS.com/pdfs/NYPMIFA-Guidance-March-2011.pdf. The guidance states that it represents only the views of the Attorney General's Charities Bureau concerning NYPMIFA and states that "the meaning and effect of the provisions of [NYPMIFA] are ultimately matters for determination by the Courts of this State." Although the guidance "is intended to assist charities and other institutions in complying with [NYMIFA's] new requirements," the guidance "is not a substitute for legal advice from an attorney." The guidance states that it is subject to change and may be supplemented from time to time.

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