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#### Practice Areas

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## Good Company

### From UMIFA to UPMIFA: Changes in NH Law Ease Restrictions on Expenditures From Endowments

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By almost any measure, 2008 was a difficult year for charitable institutions that manage endowment funds. As many institutions experienced greater pressure to distribute more funds to satisfy the needs of their recipients, substantial declines in the stock market decreased the overall value of most endowments. In New Hampshire, the enactment of the Uniform Prudent Management of Investment Funds Acts (UPMIFA) in 2008 provides greater flexibility (if not relief from market conditions) for endowments in appropriating dollars for expenditure as compared to the law's predecessor, the Uniform Management of Investment Funds Acts (UMIFA). UPMIFA, unlike UMIFA, enables most endowments to make distributions based on the aggregate assets of a fund, whether or not the assets have fallen below the total amount contributed to the fund.

To illustrate the benefits of UPMIFA, consider the evolution of the law governing endowment distributions. Prior to the enactment of UMIFA, trust law generally restricted institutions to spending the "current income" from endowments, which primarily consisted of paid interest and dividends on fixed income securities actually earned and received. These restrictions encouraged institutions to invest almost exclusively in low-risk, fixed income securities with attractive yields but little upside for significant capital appreciation. As a consequence, institutions experienced slow endowment growth and, in some circumstances, negative real growth when inflation outpaced interest rates.

UMIFA loosened the common law restrictions somewhat by providing institutions the authority to spend the appreciation in the value of the assets in an endowment fund. Under UMIFA, an institution was entitled to expend that portion of the appreciation in the value of invested endowment funds which exceeded the fund's historic dollar value. Historic dollar value (which remains relevant under UPMIFA in certain circumstances discussed below) is generally defined as the sum of the value of the initial donation at the time the endowment fund was created, plus the value of any additional donations to the fund at the time the additional donations are made.

UPMIFA, as adopted in New Hampshire, eliminates the concept of historic dollar value entirely for larger funds (funds with aggregate assets of greater than two million dollars) and instead allows the trustees of these funds to spend an amount they deem prudent. UPMIFA, as compared to UMIFA, provides more guidance as to what trustees may consider in meeting the standard for prudence. New Hampshire law now states that a charity must act "in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances," and

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enumerates the following seven factors:

#### **NH RSA 292-B:4**

By moving away from the concept of historic dollar value and toward a more precisely articulated definition of prudence, UPMIFA allows trustees to consider the current spending power of an endowment when making decisions on expenditures, as opposed to only the amounts that have been contributed to the fund over time. In a challenging economic climate, this change may prove beneficial. For example, a fund that, under UMIFA, would have been considered underwater (that is, historic dollar value exceeds aggregate asset values) and thus unable to expend funds, may now make expenditures so long as it does so in accordance with the statutory standard for prudence.

While UMIFA may be gone, some of its provisions have endured. Historic dollar value, for example, remains relevant for funds with an aggregate value of less than two million dollars. Under UPMIFA, these funds are required to notify the attorney general at least 60 days prior to an appropriation for expenditure of an amount that would cause the value of the fund to fall below its historic dollar value. During the 60-day notification period, the attorney general may require the charitable institution to obtain court approval for the proposed expenditure.

Additionally, New Hampshire's version of UPMIFA retains the seven percent imprudence presumption on all foundations that was law under UMIFA. Any appropriation for expenditure of an amount greater than seven percent of the fair market value of an endowment fund creates a rebuttable presumption of imprudence on the part of the fund's trustees. If a charitable institution spends an amount that exceeds seven percent of the fair market value of the institution's funds, it will be presumed that the governing board has acted imprudently unless the board demonstrates that such spending is in fact prudent.

Of course, UPMIFA certainly does not alleviate the squeeze from market conditions that many endowments are experiencing. And while there are still accounting issues associated with these changes in the law that need to be resolved, UPMIFA is a step in the right direction. By allowing endowments to expend funds even if asset values have dropped below their historic dollar values, the law now affords endowments greater flexibility to fulfill their charitable missions, even in this difficult market environment.

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