



March 13, 2009

Via email: CPCtestimony@Capitol.hawaii.gov

The Honorable Robert N. Herkes, Chair
The Honorable Glenn Wakai, Vice Chair
House Committee on Consumer Protection
State Capitol
Honolulu, HI 96813

RE: S.B 121 SD1 Regarding the Uniform Prudent Management of Institutional Funds Act

Dear Chair Herkes and Members of the Consumer Protection Committee:

I am Donna Vuchinich, President of the University of Hawai'i Foundation (the "Foundation"). The Foundation supports S.B. 121 to enact the Uniform Prudent Management of Institutional Funds Act or "UPMIFA". The Foundation works closely with the University of Hawai'i to raise, invest and manage private donations for the benefit of the University.

This legislation updates and modernizes Hawaii's Uniform Management of Institutional Funds Act, codified at HRS Chapter 517D. S.B. 121 contains the Uniform Law Commission's Uniform Prudent Management of Institutional Funds Act. We believe adoption of UPMIFA will allow the Foundation to better serve the University and its needs and the intent of the Foundation's donors.

UPMIFA provides additional and more detailed standards to be followed by charities in the investment and management of their endowment funds--important to both honor donor intent and better serve charitable needs in our community. This legislation also provides further guidance on the factors to be considered by a charity in determining appropriate payout amounts from their endowment funds and greatly flexibility to deal with the significant fluctuations in market value of endowment funds charities are currently experiencing in today's market environment. Finally, UPMIFA streamlines the provisions of prior law regarding the release of restrictions on endowment funds to allow more efficient management including new procedures for releasing restrictions on small endowment funds in coordination with the Attorney General's office. Since promulgated in 2006 by the ULC, as of today, 28 states have adopted versions of UPMIFA and it is currently under consideration in 9 more states. We believe this swift response evidences both the merit of this important legislation as well as the need for its adoption.

We respectfully ask you to pass S.B. 121. Thank you for your consideration and for the opportunity to testify.

Sincerely,

Donna Vuchinich
President

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

**ON S.B. No. 121, S.D. 1
RELATING TO THE UNIFORM PRUDENT MANAGEMENT
OF INSTITUTIONAL FUNDS ACT.**

**BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION &
COMMERCE**

DATE: Monday, March 16, 2009, at 2:15 p.m.
Conference Room 325, State Capitol

PERSON(S) TESTIFYING: ELIZABETH KENT or KEN TAKAYAMA
Commission to Promote Uniform Legislation

E-MAIL to CPCtestimony@Capitol.hawaii.gov

Chair Herkes and Members of the House Committee on Consumer Protection & Commerce:

Hawaii's uniform law commissioners support the passage of Senate Bill No. 121, S.D. 1. This is a version of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) that includes some modifications suggested by charitable institutions in Hawaii.

This act, like its predecessor the Uniform Management of Institutional Funds Act of 1972, provides statutory guidelines for management, investment, and expenditures of endowment funds held by charitable institutions. The new act expressly provides for diversification of assets, pooling of assets, and total return investment, to implement whole portfolio management, bringing the law governing charitable institutions in line with modern investment and expenditure practice.

Laws substantially similar to this have been adopted by 26 states and the District of Columbia. Attached is a brief summary of UPMIFA for your information.

We note that this committee heard the House companion version of this measure, H.B. No. 618, on January 29, 2009.

We urge your support of this bill.

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A SUMMARY

At its annual meeting in July 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Prudent Management of Institutional Funds Act (UPMIFA) and recommended it for enactment by the legislatures of the various states. UPMIFA is designed to replace the existing Uniform Management of Institutional Funds Act (UMIFA), which was approved by NCCUSL in 1972 and has since been enacted in 47 states. UMIFA was a pioneering statute, providing uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as "endowments" to those institutions. Those rules supported two general principles: 1) that assets would be invested prudently in diversified investments that sought growth as well as income, and 2) that appreciation of assets could prudently be spent for the purposes of any endowment fund held by a charitable institution. These two principles have been the twin lodestars of asset management for endowments since UMIFA became the law of the land in nearly all U.S. jurisdictions.

UPMIFA continues these fundamental principles as a needed upgrade of UMIFA. Both investment in assets and expenditure for charitable purposes have grown exponentially in the 35 years since UMIFA was drafted; asset management theory and practice have also advanced. UPMIFA, as an up-date and successor to UMIFA, establishes an even sounder and more unified basis for charitable fund management than UMIFA has done.

INVESTMENT

In 1972, UMIFA represented a revolutionary advance over prevailing practices which imposed upon endowments the limited investment opportunities available for managing trust assets – even endowments not organized as trusts. By stating the first prudent investor rule in statutory law, UMIFA allowed endowments to invest in any kind of assets, to pool endowment funds for investment purposes, and to delegate investment management to other persons (e.g., professional investment advisors), as long as the governing board of the charitable institution exercised ordinary business care and prudence in making these decisions. A range of factors guided the exercise of prudence.

UPMIFA incorporates the experience gained in the last 35 years under UMIFA by providing even stronger guidance for investment management and enumerating a more exact set of rules for investing in a prudent manner. It requires investment "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." It requires prudence in incurring investment costs, authorizing "only costs that are appropriate and reasonable." Factors to be considered in investing are expanded to include, for example, the effects of inflation. UPMIFA emphasizes that investment decisions must be made in relation to the overall resources of the institution and its charitable purposes. No investment decision may be made in isolation, but must be made in light of the fund's entire portfolio, and as a part of an investment strategy "having risk and return objectives reasonably suited to the fund and to the institution." A charitable institution must diversify assets as an affirmative obligation unless "special circumstances" dictate otherwise. Assets must be reviewed within a reasonable time after they come into the possession of the institution in order to conform them to the investment



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strategy and objectives of the fund. Investment experts, whether in-house or hired for the purpose, are held to a standard of care consistent with that expertise.

UMIFA initiated the era of modern portfolio management for charitable institutions. UPMIFA provides the standards and guidelines that subsequent experience tells us are the most appropriate for the purpose. Charitable institutions will have more precise standards to guide them. Courts will have more precise standards with which to measure prudence in the event of a challenge. The result should be more money for programs supported by charitable funds, including endowments.

EXPENDITURE

UMIFA initiated the concept of total return expenditure of endowment assets for charitable program purposes, expressly permitting prudent expenditure of both appreciation and income and replacing the old trust law concept that only income (e.g., interest and dividends) could be spent. Thus, asset growth and income could be appropriated for program purposes, subject to the rule that a fund could not be spent below "historic dollar value."

UPMIFA builds upon UMIFA's rule on appreciation, but it eliminates the concept of "historic dollar value." UPMIFA, instead, provides better guidance on prudence and makes the need for a floor on spending unnecessary. UPMIFA states that the institution "may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines to be prudent for the uses, benefits, purposes and duration for which the endowment fund is established." Seven criteria guide the institution in its yearly expenditure decisions: "1) duration and preservation of the endowment fund; 2) the purposes of the institution and the endowment fund; 3) general economic conditions; 4) effect of inflation or deflation; 5) the expected total return from income and the appreciation of investments; 6) other resources of the institution; and, 7) the investment policy of the institution." These standards mirror the standards that apply to investment decision-making, thus unifying both investment and expenditure decisions more concretely.

UPMIFA includes an optional provision that allows states to enact another kind of safeguard against excessive expenditure. If a state does not want to rely solely upon the rule of prudence provided in UPMIFA, the state may adopt a provision that creates a rebuttable presumption of imprudence if an institution expends an amount greater than seven percent of fair market value of a fund, calculated in an averaging formula over three years. While the seven percent rule is likely not to be necessary, it is available for those states that may be uncomfortable with the general standards.

RELEASE OR MODIFICATION OF RESTRICTIONS

UPMIFA recognizes and protects donor intent more broadly than UMIFA did, in part by providing a more comprehensive treatment of the modification of restrictions on charitable funds. Sometimes a restriction imposed by a donor becomes impracticable or wasteful or may impair the management of a fund. The donor may consent to release the restriction, if the donor is still alive and able to do so, but if the donor is not available the charity can ask for court approval of a modification of the restriction. The trust law doctrines of cy pres (modifying a



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purpose restriction) and deviation (modifying a management restriction) probably already apply to charitable funds held by nonprofit corporations. UPMIFA makes this clear. Under UMIFA, the only option with respect to a restriction was release of the restriction. UPMIFA instead authorizes a modification that a court determines to be in accordance with the donor's probable intention. If the charity asks for court approval of a modification, the charity must notify the state's chief charitable regulator and the regulator may participate in the proceeding.

UPMIFA adds a new provision that allows a charity to modify a restriction on a small (less than \$25,000) and old (over 20 years old) fund without going to court. If a restriction has become impracticable or wasteful, the charity may notify the state charitable regulator, wait 60 days, and then, unless the regulator objects, modify the restriction in a manner consistent with the charitable purposes expressed in any documents that were part of the original gift.

CONCLUSION

UPMIFA reflects and incorporates the 35 years of experience that has accumulated under the original UMIFA. Rather than changing institutional investment or expenditure practices, it brings them up to date and unifies them across a broad range of charitable funds. The better charitable institutions manage investments and prudently control expenditures, the more money they should have for program purposes.





March 13, 2009

Chair Robert Herkes
House Committee on Consumer Protection & Commerce
Hawaii State House of Representatives
State Capitol, Room 325
Honolulu, HI 96813

RE: SB 121, SD 1, Relating to Uniform Prudent Management of Institutional Funds Act

Dear Chair Herkes and members of the House Consumer Protection & Commerce Committee:

The Hawai'i Alliance of Nonprofit Organizations supports SB 121, SD 1, in particular the move to allow charitable organizations to spend below the historic gift value of an endowment.

The current economic environment requires nonprofit organizations to be as resourceful as possible in identifying resources to sustain their good work in the community. SB 121 provides for this kind of latitude with regard to the treatment of nonprofit endowment revenue and offers appropriate guidelines for prudent use of these funds.

We are in support of public policy that provides flexibility to nonprofit organizations allowing them greater efficiency and capacity to meet their mission and deliver valuable services.

HANO unites and strengthens the nonprofit sector as a collective force to improve the quality of Hawai'i. It works in the areas of leadership and convenings, advocacy and public policy, research and information, communications, professional development and products and services for its members.

Thank you for the opportunity to provide written testimony in support of this measure.

Lisa Maruyama
President and CEO



HAWAII COMMUNITY FOUNDATION
TESTIMONY OF KATHARINE LLOYD
ON BEHALF OF HAWAII COMMUNITY FOUNDATION
TO THE CONSUMER PROTECTION AND COMMERCE COMMITTEE,
HOUSE OF REPRESENTATIVES

**SUBJECT: TESTIMONY IN SUPPORT OF SB 121 – RELATING TO THE UNIFORM
PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACTS**

Dear Representative Robert N. Herkes and members of the Consumer Protection and Commerce Committee,

On behalf of the Hawai'i Community Foundation, a 501(c)3 publicly supported charitable organization, I want to express and urge the critical importance to the Hawai'i non-profit community of SB 121 and strongly urge you to continue to move the passage of SB 121 by this Committee.

The Hawai'i Community Foundation is organized to benefit the people of the State of Hawai'i and currently has more than 400 endowment funds dedicated for various charitable purpose. Like most all charitable organizations in Hawai'i, Hawai'i Community Foundation has been very seriously affected by the downturn in the U.S. economy that began in December 2007. As a result, a majority of the endowment funds we hold are below "historic gift value".

For many charitable institutions like the Hawai'i Community Foundation, the existing law limits making grants from endowed funds when the funds are below historic gift value. This is most problematic during economic downturns when charitable needs are greatest. The new law will:

- Allow nonprofits to spend endowment monies below historic gift value when circumstances warrant it. [The safety net is defining "when circumstances warrant it" is that nonprofits must still spend only what is prudent under the circumstances **and** must abide by donor intent as set forth in gift documents.]
- Provide guidance for nonprofits in their spending decisions and specifically that costs must be managed prudently in relationship to the assets.
- Provide new procedures for releasing restrictions on small funds that have been held for more than 20 years.

Hawai'i Community Foundation urges favorable action by this Committee and the House of Representatives.

Katharine P. Lloyd, General Counsel & Vice President of Operations