HB 1596

THE HOUSE OF REPRESENTATIVES
Tuesday, March 6, 2007

House Bill No. 1596

HOUSE BILL NO. 1596 - By: DUNCAN of the House and COFFEE of the Senate.

An Act relating to property; creating the Uniform Prudent Management of Institutional Funds Act; providing short title; defining terms; establishing standards of conduct for management and investing of institutional funds; providing authority for appropriating for expenditure or accumulation of endowment fund; establishing rules of construction; authorizing delegation of management and investment functions; providing standard of care for certain functions; providing for release or modification of certain restrictions; providing notification requirements; providing standard for review of compliance; providing applicability to existing institutional funds; providing relationship to certain federal act; providing for uniformity of application and construction; amending 60 O.S. 2001, Sections 301.3, 301.5 and 301.7, which relate to the Oklahoma Charitable Fiduciary Act; modifying definitions; modifying references to certain act; repealing 60 O.S. 2001, Sections 300.1, 300.2, 300.3, 300.4, 300.5, 300.6, 300.7, 300.8, 300.9 and 300.10, which relate to the Uniform Management of Institutional Endowment Funds Act; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.11 of Title 60, unless there is created a duplication in numbering, reads as follows:

SHORT TITLE. Sections 1 through 10 of this act shall be known and may be cited as the "Uniform Prudent Management of Institutional Funds Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.12 of Title 60, unless there is created a duplication in numbering, reads as follows:

DEFINITIONS. In the Uniform Prudent Management of Institutional Funds Act:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) a person, other than an individual, organized and operated exclusively for charitable purposes;

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(C) a trust that has both charitable and noncharitable interests, after all noncharitable interests have terminated.

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(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or

(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.13 of Title 60, unless there is created a duplication in numbering, reads as follows:

STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

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(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than the Uniform Prudent Management of Institutional Funds Act, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or strategies;

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(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) the expected total return from income and the appreciation of investments;

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than the Uniform Prudent Management of Institutional Funds Act, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes,

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terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of the Uniform Prudent Management of Institutional Funds Act.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.14 of Title 60, unless there is created a duplication in numbering, reads as follows:

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

(a) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) the duration and preservation of the endowment fund;

(2) the purposes of the institution and the endowment fund;

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(3) general economic conditions;

(4) the possible effect of inflation or deflation;

(5) the expected total return from income and the appreciation of investments;

(6) other resources of the institution; and

(7) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(1) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(2) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a) of this section.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.15 of Title 60, unless there is created a duplication in numbering, reads as follows:

DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than the Uniform Prudent Management of Institutional Funds Act, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An

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institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) of this section is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than the Uniform Prudent Management of Institutional Funds Act.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.16 of Title 60, unless there is created a duplication in numbering, reads as follows:

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

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard.

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(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, sixty (60) days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

(1) The institutional fund subject to the restriction has a total value of less than Twenty-five Thousand Dollars ($25,000.00);

(2) More than twenty (20) years have elapsed since the fund was established; and

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.17 of Title 60, unless there is created a duplication in numbering, reads as follows:

REVIEWING COMPLIANCE. Compliance with the Uniform Prudent Management of Institutional Funds Act is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.18 of Title 60, unless there is created a duplication in numbering, reads as follows:

APPLICATION TO EXISTING INSTITUTIONAL FUNDS. The Uniform Prudent Management of Institutional Funds Act applies to institutional funds existing on or established after November 1, 2007. As applied to institutional funds existing on

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November 1, 2007, the Uniform Prudent Management of Institutional Funds Act governs only decisions made or actions taken on or after that date.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.19 of Title 60, unless there is created a duplication in numbering, reads as follows:

RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The Uniform Prudent Management of Institutional Funds Act modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 300.20 of Title 60, unless there is created a duplication in numbering, reads as follows:

UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing the Uniform Prudent Management of Institutional Funds Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. AMENDATORY 60 O.S. 2001, Section 301.3, is amended to read as follows:

Section 301.3 As used in ~~this act~~ <u>the Oklahoma Charitable Fiduciary Act</u>:

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1. "Charitable organization" means an incorporated or unincorporated organization:

a. domiciled in the State of Oklahoma,

b. recognized under Section 501(c)(3) of the Internal Revenue Code as being organized and operated exclusively for charitable, religious, educational, or other eleemosynary purposes,

c. which has been in existence for at least five (5) years if the organization administers charitable trusts which benefit private individuals,

d. having a governing board of which a majority of its members are persons who are qualified by education or experience to provide direction of the charitable organization in the administration of its charitable trusts,

e. having a governing board of which at least forty percent (40%) of its members are residents of the State of Oklahoma, provided that upon proper application the Attorney General may waive this requirement, and

f. which has filed the comprehensive annual audit required by Section ~~10~~ 301.9 of this ~~act~~ title;

2. "Charitable trust" means:

a. a trust which qualifies as a charitable remainder unitrust under the Internal Revenue Code,

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b. a trust which qualifies as a charitable remainder annuity trust under the Internal Revenue Code,

c. a trust which is described as a charitable lead trust in the Internal Revenue Code,

d. a fund which qualifies as a pooled income fund under the Internal Revenue Code,

e. an ~~institutional~~ endowment fund as that term is defined in the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act,

f. a trust providing for the welfare, maintenance, support, and education of minor issue of a decedent who has made a gift in the document creating the trust for the benefit of the minor issue to the charitable organization administering the trust or one or more of its affiliated charitable organizations at the decedent's death and the total of all gifts made to the charitable organization administering the trust or one or more of its affiliated charitable organizations at the decedent's death is as large as the largest distribution made to another person who is not a charitable organization, but in no event shall the total of all gifts made to the charitable organization administering the trust or one or more of its affiliated charitable organizations be less than twenty-five percent (25%) of the property which is available for distribution, or

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g. any other irrevocable or revocable trust in which:

(1) one or more gifts of either trust income or principal, whether outright or in trust, are irrevocably made to or for the benefit of a charitable organization,

(2) if the irrevocable gift is of income or principal which is distributed before the termination of the trust, the total of all such irrevocable gifts of income or principal made to the charitable organization administering the trust or one or more of its affiliated charitable organizations is as large as the largest distribution to another beneficiary entitled to receive distributions of income or principal from the trust before the termination of the trust who is not the charitable organization administering the trust or an affiliated charitable organization, but in no event shall the total of all such irrevocable gifts of income or principal made to the charitable organization administering the trust or one or more of its affiliated charitable organizations before the termination of the trust be less than twenty-five percent (25%) of the income or principal available for distribution from the trust,

(3) if the irrevocable gift is of the remainder of the trust which is distributed upon the termination of the trust, the total of all irrevocable gifts of the remainder of the trust made to the

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charitable organization administering the trust or one or more of its affiliated charitable organizations is as large as the largest distribution made to another remainderman who is not the charitable organization administering the trust or an affiliated charitable organization, but in no event shall the total of all irrevocable gifts of the remainder of the trust made to the charitable organization administering the trust or one or more of its affiliated charitable organizations be less than twenty-five percent (25%) of the remainder of the trust which is available for distribution at the termination of the trust, and

(4) if distributions of income from the trust are made to beneficiaries who are not charitable organizations, such distributions are in an amount specified by the donor in the governing instrument, or, if not in an amount specified by the donor in the governing instrument, are in an amount not less than five percent (5%) of the value of the principal of the trust determined annually, reduced by distributions of current income from the trust to charitable organizations, if any; and

3. "Affiliated charitable organization" means another charitable organization which directly or indirectly controls or is under direct or indirect common control with the charitable organization acting in a fiduciary capacity.

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SECTION 12. AMENDATORY 60 O.S. 2001, Section 301.5, is amended to read as follows:

Section 301.5 In addition to the powers conferred on fiduciaries by the Oklahoma Trust Act, the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act, and the Oklahoma Uniform Prudent Investor Act, all charitable organizations acting as trustees of charitable trusts shall expressly be permitted to exercise the following powers:

1. To limit the investment of property received in trust to investments in real or personal property; securities including bonds, stocks, all kinds of negotiable and nonnegotiable paper; and other investment instruments, which are consistent with the charitable, religious, educational, or other eleemosynary purposes of the charitable organization;

2. To make distributions from an institutional endowment fund as that term is defined in the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act in a manner that will provide a consistent source of funds to charitable organizations benefited by such charitable trusts;

3. For assets held in an institutional endowment fund as that term is defined in the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act, to invest in loans of money upon adequate collateral security to affiliated charitable organizations provided that the charitable organization serving in a fiduciary capacity conforms to the standard for care set forth in the document creating the trust or, in the absence of a standard of care in the document creating the trust, to the standard of care

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for fiduciaries as set forth in the Oklahoma Trust Code, the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act, and the Oklahoma Uniform Prudent Investor Act, and provided further that the loan furthers the charitable, religious, educational and other eleemosynary purposes of the affiliated charitable organization;

4. To recover costs and expenses to include a reasonable charge for administrative overhead incurred in administering charitable trusts to include costs incurred for investment counselors, advisors and agents; and

5. To delegate the investment of assets of charitable trusts and the administration of charitable trusts to state banks in Oklahoma having trust powers, national banking associations having trust powers, and trust companies having trust powers.

SECTION 13. AMENDATORY 60 O.S. 2001, Section 301.7, is amended to read as follows:

Section 301.7 A. Definitions. For purposes of this section:

1. "Common charitable trust fund" means a fund composed of assets from two or more charitable trusts and other charitable assets which are pooled for investment;

2. "Other charitable assets" means assets owned by an affiliated charitable organization or assets contributed to the charitable organization administering the common charitable trust fund in exchange for the issuance of charitable gift annuity contracts; and

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3. "Affiliated charitable organization" means another charitable organization which directly or indirectly controls or is under direct or indirect common control with the charitable organization administering a common charitable trust fund.

B. Powers. Any charitable organization acting as a trustee of charitable trusts in this state may:

1. Establish one or more common charitable trust funds for the exclusive purpose of furnishing investments to itself as fiduciary, to itself and others as cofiduciaries, or to affiliated charitable organizations;

2. Invest funds which it holds for investment in such common charitable trust funds, unless:

a. the investment is prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship,

b. consent to investment in the common charitable trust fund is intentionally withheld in writing by a cofiduciary, or

c. a cofiduciary that is not a charitable organization has the right to direct the management of the common charitable trust fund; and

3. Employ and delegate to investment advisors, investment counselors, state banks in Oklahoma having trust powers, national banking associations having trust powers, and trust companies having trust powers the discretion to make specific investment decisions provided that the charitable organization shall at all times maintain ultimate control of the management of the common charitable trust fund.

C. Common charitable trust fund investments.

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1. A charitable organization administering a common charitable trust fund shall not commingle its administrative and operating funds with its common charitable trust funds but may place its endowment and funds its governing board has designated as endowment in its common charitable trust funds.

2. Each charitable trust and each other charitable asset shall be deemed to own a proportionate share of each asset of the common charitable trust fund.

3. In determining whether the investment in the common charitable trust fund by the charitable trust is a proper investment for assets held by a fiduciary, the charitable organization acting as fiduciary may consider the common charitable trust fund as a whole and shall not be prohibited from making the investment if any one or more of the assets of the common charitable trust fund are nonincome producing or might not otherwise be considered proper investments for a fiduciary account.

4. The charitable organization administering a common charitable trust fund may limit investments in its common charitable trust funds to investments which are compatible with or further the charitable, religious, educational, or other eleemosynary purposes of the charitable organization administering the common charitable trust fund.

5. The charitable organization administering a common charitable trust fund consisting solely of assets held in an ~~institutional~~ endowment fund, as that term is defined in the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act, may invest such assets in loans upon adequate collateral security to an affiliated charitable organization provided that the charitable organization administering the common charitable trust fund conforms to the standard for care set forth in the

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documents creating the trusts or, in the absence of a standard of care in the documents creating the trusts, to the standard of care for fiduciaries as set forth in the Oklahoma Trust Code, the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act, and the Oklahoma Uniform Prudent Investor Act, and provided further that the loan furthers the charitable, religious, educational and other eleemosynary purposes of the affiliated charitable organization.

6. In selecting investments and when making investment decisions pursuant to this subsection, the charitable organization shall be bound by the provisions of ~~this act~~ the Oklahoma Charitable Fiduciary Act, the Oklahoma Trust Act, the ~~Oklahoma~~ Uniform Prudent Management of Institutional ~~Endowment~~ Funds Act, and the Oklahoma Uniform Prudent Investor Act, unless otherwise provided by law.

7. Nothing in this subsection shall diminish the standard of care of a fiduciary of charitable trust funds or institutional endowment funds.

D. Reporting.

1. The charitable organization administering a common charitable trust fund shall keep records which shall at all times show all necessary and proper matters related to the administration of the common charitable trust fund to include the proportionate interest in the common charitable trust fund of each trust or investment account of an affiliated charitable organization.

2. Within one hundred twenty (120) days following the end of the common charitable trust fund's fiscal year, the charitable organization administering a common charitable trust fund shall make a report of the condition of the common charitable trust

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fund. This report shall include, as of the date of the report, a list of the investments comprising the common charitable trust fund and the value placed on each investment on such list by the charitable organization. The report shall also include a statement of income and disbursements since the last report and appropriate comments as to any investment in default as to payment of principal or interest. The reasonable expenses of preparing the report may be charged to the common charitable trust fund.

3. The charitable organization shall send a copy of the latest report required by this subsection annually to each person to whom a regular periodic accounting of the trusts or other charitable assets participating in the common charitable trust fund ordinarily would be rendered, or shall advise each such person annually that the report is available and that a copy will be furnished without charge upon request.

E. Recovery of costs. The charitable organization administering a common charitable trust fund may recover its costs of administration of the common charitable trust fund to include a reasonable charge for administrative overhead and the fees and costs of investment advisors, counselors and agents.

F. Accounting to court. Unless ordered by a court of competent jurisdiction, the charitable organization administering common charitable trust funds is not required to render an accounting to the court with regard to such funds. The charitable organization administering a common charitable trust fund may, by application to the district court, secure approval of such an accounting after such notice, and on such conditions as the court may establish.

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SECTION 14. REPEALER 60 O.S. 2001, Sections 300.1, 300.2, 300.3, 300.4, 300.5, 300.6, 300.7, 300.8, 300.9 and 300.10, are hereby repealed.

SECTION 15. This act shall become effective November 1, 2007.

COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY AND PUBLIC SAFETY, dated 03-05-07 - DO PASS, As Coauthored.

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