BOARD OF TRUSTEES
DIVESTMENT TASK FORCE

Fiduciary Responsibilities

July 7, 2016

Standards of Conduct

Duties of the Director:

- Make decisions exclusively for the benefit of the institution (Duty of Loyalty)
- Good faith with the care of an ordinarily prudent person (Duty of Care)
- Promote the institution's mission (Duty of Obedience)

Colorado Law

Uniform Prudent Management of Institutional Funds Act

CRS § 15-1-1103. Standard of conduct in managing and investing institutional funds

(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 this part 11, each person responsible for managing and investing an institutional fund shall manage and invest the institutional fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

Other Guidance - Colorado Law

Colorado Non Profit Corporations Act

CRS § 7-128-401. General standards of conduct for directors and officers

(1) Each director shall discharge the director's duties as a director, including the director's duties as a member of a committee of the board, and each officer with discretionary authority shall discharge the officer's duties under that authority:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation.

Investment Committee Charter (Draft)

- **Committee Role**

  The Committee's role is one of active oversight, engagement with the university administration, and reporting to the Board of Trustees relative to the purpose enumerated above. The Committee will help carry out the Board of Trustee's basic fiduciary responsibility which can be categorized into three duties:

  - Undivided Loyalty – to make decisions solely and exclusively for the benefit of the institution.
  - Reasonable Care – to act "in good faith and with the care an ordinary prudent person in a like position would exercise under similar circumstances." This is reinforced by the Uniform Prudent Management of Institutional Funds Act (UPMIFA) which was adopted by the State of Colorado in 2008.
  - Duty of Obedience – to promote the University's mission within legal limits.

1. Duty of Loyalty

- Undivided Loyalty – to make decisions solely and exclusively for the benefit of the institution.

2. Duty of Obedience

- Duty of Obedience – to promote the University's mission within legal limits.

3. Duty of Care

- Duty to Exercise Reasonable Care
  - To act “in good faith and with the care an ordinary prudent person in a like position would exercise under similar circumstances.”

Duty of Care – Factors to Consider

CRS. § 15-1-1103 (e)(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;

(D) The role that each investment or course of action plays within ***the overall investment portfolio*** of the institutional 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 institutional 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.

Overall Investment Strategy

CRS § 15-1-1103 (e)(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 institutional fund and to the institution.

Diversification

CRS § 15-1-1103 (e)(2):

(3) (A)n 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 institutional fund are better served without diversification.

Principles v. Application

"There are no universally accepted and enduring theories of financial markets or prescriptions for investment that can provide clear and specific guidance to trustees and courts."

–Restatement (Third) of Trusts § 227, comment (f)

Cited Reasons Against Divestiture

- A University's mission is education, not environmental protection.
- There is a fiduciary obligation to maximize the return on our investments and sustain the purchasing power of our endowment to support our programs, faculty, and students.
- Divesting from fossil-fuel and similar companies will increase the cost of managing endowment and divert the time of the staff and investment committee.
- Divesting from fossil-fuel companies may exclude potentially effective investment opportunities, limit our choices of funds and managers, and harm companies that are also working on meaningful change.
- Investment is not simply in companies, but rather with managers who employ complex investment strategies or invest in groups of funds that don't disclose specific holdings.

Cited Reasons Against Divestiture

- Investment decisions are for the long-term and are intended to sustain the institution in perpetuity; they cannot react to political or social movements that change each decade.
- Donors may object to our using their contribution to advance an agenda not related to their philanthropic purpose.
- The issue of climate change is politically charged. Divestment arguments can focus on partisan concerns that are divisive in our community.
- Divestment has not been shown to be an effective at bringing about change.
- More effective influence for fossil-fuel industries may include exercising rights as shareholders and voting proxies.

See, *e.g.*, Gumas and Nava, “Socially Responsible Investing: Lessons from the Field.” *Trusteeship*, July/Aug 2014.

University of Vermont

"A move away from the use of commingled funds to meet divestment objectives would be financially imprudent." [citing costs, adverse consequences to long term returns and diversification, increases in volatility of portfolio and inconsistency with investment policy.]

* * * * *

"Adherence to the investment objectives in the [investment policy] does not preclude consideration of moral, ethical, and social criteria in selecting investments or participating in proxy voting or shareholder resolutions. However, the primary responsibility of the ISC is to steward endowment fund assets in a manner consistent with prudent fiduciary practices."

Greater Flexibility in Considering ESG/ETI

Dept. of Labor Interpretive Bulletin, IB 2015-1 (Interpreting ERISA Req'ts):

The Department re-emphasized that under ERISA, the focus of a plan fiduciary on rate of return and risk to beneficiaries is paramount:

> The fiduciary is required to minimize the risk of large losses, as well as to act solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to the plan's participants and beneficiaries.
>
> Plan fiduciaries are expected to consider ESG issues when such issues potentially impact financial returns or risk.
>
> Further, plan fiduciaries may consider ESG goals when deciding among investments with commensurate financial return and risk characteristics ("Tie Breaker").

University of Hawaii

Final Report and Recommendation

Task Group on Divestment and Sustainability:

Reasons for divestment:

1. Effects of CO_2 on global warming, which will lead to destabilization in the world; and
2. Fossil fuel companies are not sustainable, given the threat they pose to human lives.

Divestment Considerations

Broader decisions carry greater risks of violating the law

- University of California – coal and oil sands
  - $200M of $100B endowment / 0.2%
- University of Hawaii – fossil fuels
  - 5-7% of $66M endowment
  - Recommendation to divest from fossil fuel producers, “in a responsible manner,” that “consider[s] investment and management fees,” “while meeting investment goals and guidelines.”

Divestment Considerations

- Continued compliance with legal responsibilities:
  - Duty of Loyalty – best interests of the University
  - Duty of Obedience – whether decision promotes the University's mission
  - Duty of Care – whether decision is prudent
  - Eight factors in C.R.S. § 15-1-1103 (e)(1)

    (including economic conditions, overall portfolio, returns, need for distributions/preserve capital, etc.)
  - Decisions in context of total portfolio
  - Diversification

Questions:

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