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Is It Prudent to Be Responsible? The Legal Rules for Charities That Engage in Socially Responsible Investing and Mission Investing

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ABSTRACT

Fiduciaries who invest assets held by a charity must act as prudent investors. This Article examines the legal rules that apply to these fiduciaries, examining the duty of loyalty and the duty of prudent administration for trustees of charitable trusts and directors of nonprofit corporations. The Article focuses on the duty to act as a prudent investor and the question of whether a charitable fiduciary can consider the charity's mission or purpose when making investment decisions. Recent developments in the laws that regulate investing by fiduciaries provide guidance, and the Article concludes that these rules permit consideration of a charity's mission as one of many factors a prudent investor considers. The Article briefly examines the history of socially responsible investing, reviews the development of mission investing, and discusses three types of socially responsible investing: screens, proxy voting, and community investing. Recent data show improvements in the returns of screened funds and increased interest by charities in mission investing. Fiduciaries must exercise care and judgment in making investment decisions, but mission investing can meet the legal standards that apply to fiduciaries as long as the fiduciaries act with prudence.

INTRODUCTION: CHARITIES AND INVESTMENT DECISION-MAKING

¶1 Socially responsible investing by charities gained notoriety in the 1970s and 1980s, when colleges and universities faced pressure to divest holdings in South Africa to make an anti-apartheid statement.[1] At that time, critics raised concerns about whether a

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[1] Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 NEB. L. REV. 209 (1986); *see* John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 72 (1980). Socially responsible investing, or ethical investing, can trace its roots to the anti-slavery efforts of Quakers in the 18th century. Benjamin J. Richardson, *Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment*, 46 OSGOODE HALL L.J. 243, 245 (2008), *available at* http://ohlj.ca/english/documents/OHLJ46-2_Richardson_PuttingEthicsintoEnvironmentalLaw.pdf.

university or other fiduciary could legally engage in socially responsible investing.[2] Discussions at Yale University led to the development of criteria for the exercise of investment responsibility by a university, with a focus on self-regulation to avoid participation in social injury through investments.[3] Since the 1970s, investment companies have developed socially responsible funds for private investors.[4] Charities continue to ponder what factors to consider in making investment decisions and whether socially responsible investing should play a role.

¶2 Statutory laws on prudent investing—the Uniform Prudent Investor Act (UPIA)[5] and the Uniform Prudent Management of Institutional Funds Act (UPMIFA)[6]—provide guidance on investment decision-making by charities, supplementing common law. UPIA applies to charities organized as trusts, and UPMIFA applies primarily to charities organized as nonprofit corporations.[7] The rules in the two uniform Acts on investment decision-making are almost identical because UPMIFA drew its language from UPIA.[8]

¶3 This Article will identify several types of investment decision-making that bring into consideration factors beyond the typical risk and return analysis that investors use to make decisions. This Article will analyze the law that applies to investment decision-making by charities, and conclude that consideration of the charity's mission as a factor is both appropriate and legal. The Article does not suggest that investing for mission should undercut the prudent investor rule. Rather, the Article explains that fiduciaries managing a charity must make investment decisions that consider the factors that a prudent investor should consider and argues that the charity's mission may be an appropriate factor to consider as part of that process.

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[2] *See* Langbein & Posner, *supra* note 1, at 76.

[3] *See* JOHN G. SIMON, CHARLES W. POWERS & JON P. GUNNEMANN, THE ETHICAL INVESTOR/ UNIVERSITIES AND CORPORATE RESPONSIBILITY vii (1972), *available at* http://acir.yale.edu/pdf/EthicalInvestor.pdf. During 1968 and 1969, administrators, trustees, faculty, and students at Yale engaged in a series of meetings to discuss whether universities should consider "the social consequences of corporate activities from which these institutions derive an endowment return." *Id.* As an outgrowth of those discussions, in the 1969–70 academic year, an interdisciplinary seminar considered questions related to socially responsible investing. *Id.* The professors who led the seminar produced a book, informed by the discussions in the seminar, which outlined criteria for the exercise of investment responsibility by a university. *Id.* at ix. The criteria are narrow and focus on self-regulation by universities "to avoid participation in social injury" through investments. *Id.* at 14.

[4] *See, e.g.*, CALVERT INVESTMENTS, http://www.calvert.com; DOMINI SOC. INVESTMENTS, http://www.domini.com; *PAX World Mutual Funds*, PAX WORLD INVESTMENTS, http://www.paxworld.com/funds/pax-world-mutual-funds.

[5] UNIF. PRUDENT INVESTOR ACT (1994).

[6] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (2006).

[7] UNIF. PRUDENT INVESTOR ACT prefatory note; UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(4)(5). UPMIFA applies to entities of all sorts that hold funds exclusively for charitable purposes but excludes trusts unless a charity is the trustee of the trust. *Id.*

[8] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. UPMIFA does not incorporate a duty of loyalty directly and refers to other law–either trust law or nonprofit corporation law–for that rule. *Id.* at § 3(b).

I. INVESTING TO SERVE A CHARITABLE PURPOSE[9]

¶4 This Article uses three terms to describe three different types of investment assets or investment strategies: program-related assets, socially responsible investing, and mission investing. The Article draws a distinction between the terms "socially responsible investing" and "mission investing" that may not be widely used.[10] The Article employs this distinction to clarify issues faced by charitable fiduciaries when the fiduciaries make investment decisions. Beyond this Article, however, the term "socially responsible investing," or "SRI," is commonly used to encompass the type of investing the Article terms "mission investing."[11]

A. Program-Related Assets

¶5 A charity may hold program-related assets to carry out its programs. A university needs classrooms, science laboratories, and dormitories. A soup kitchen may own a building with a kitchen, dining room, food storage room, and office space. An animal shelter will need a building and some amount of land to house and exercise the animals. All of these assets have some financial value, but the charities hold the assets for their functional value. A piece of land or a building may increase in value, and in rare cases, could be a source of financial gain for the charity, but a charity will not make a decision to purchase an asset of this sort with investment return as the primary consideration. The possibility of investment return may be a factor in deciding which building to buy, but the primary consideration will be the building's usefulness as a place to conduct charitable activities.[12]

¶6 UPMIFA defines a program-related asset as "an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment."[13] UPMIFA excludes program-related assets from its requirement that a charity invest funds prudently.[14] As the comments to UPMIFA point out, however, even

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[9] This Article uses the term "charitable" in its traditional, trust law sense and therefore includes purposes such as educational purposes. The Uniform Trust Code defines "charitable purpose" as "the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community." UNIF. TRUST CODE § 405(a) (2005). UPMIFA adopts the same definition. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(1). As the comment to this subsection in UPMIFA explains, the "standard derives from the English Statute of Charitable Uses, enacted in 1601." *Id.* at § 2(1) cmt. This Article uses the term "charity" to refer to an organization created for charitable purposes, whether organized as a charitable trust or as a nonprofit corporation.

[10] *See* SARAH COOCH & MARK KRAMER, COMPOUNDING IMPACT: MISSION INVESTING BY U.S. FOUNDATIONS 10 (2007) (discussing terminology and the inconsistency that exists in the way the terms are used). The Cooch and Kramer study uses the term "mission investing" in the way this Article uses the term. The study notes that "mission-related investing" is also used but sometimes is limited to market-rate investments or investments made by endowments. *Id.*

[11] *See, e.g.*, Joel C. Dobris, *SRI—Shibboleth or Canard (Socially Responsible Investing, That Is),* 42 REAL PROP. PROB. & TRUST J. 755, 757 (2008) (noting among five reasons that people engage in SRI are that people want investments to "match the mission").

[12] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(7).

[13] *Id.*

[14] *Id.* § 2(5). The Drafting Committee considered making UPMIFA applicable to all assets held by a charity, and if the Act had applied to all assets held by a charity, the usefulness of a program-related asset would have been a factor to consider in determining the prudence of the investment. *See* Memorandum

assets used "primarily" for a charitable purpose may also serve an investment purpose.[15] Although UPMIFA does not apply to those assets, the duty of prudence that applies to all decision-making by a charity's fiduciaries requires the charity to examine the investment component of the asset and use that information to inform decision-making with respect to that asset.[16] The charity should consider the cost of the asset, as well as the possibility of an investment return in the future.[17]

¶7 UPIA does not exclude program-related investments and therefore impliedly includes them, so any asset held by a charitable trust will be subject to the investment standard of UPIA. UPIA directs the trustee to consider the purposes of the trust[18] and also directs the trustee to consider the special value of an asset to the trust's purposes,[19] so a trustee of a charitable trust can invest in a program-related asset within the constraints of UPIA. However, the trustee should consider the economic factors of the investment, just as directors of a nonprofit corporation making a decision about a program-related asset consider those factors under the general duty of care and prudence.[20]

¶8 The Internal Revenue Code uses the term "program-related investment" to exclude certain assets from § 4944, the provision that imposes a penalty on a private foundation that invests in an asset that would "jeopardize the carrying out of its exempt purposes."[21] Section 4944 defines a program-related investment as one "the primary purpose of which is to accomplish one or more of the [charity's exempt purposes] . . . and no significant purpose of which is the production of income or the appreciation of property."[22] The § 4944 definition is somewhat different from the UPMIFA definition,[23] but the difference is not relevant for purposes of this Article. Both definitions apply to assets a charity owns primarily for program purposes and not to assets owned primarily for investment purposes. This Article focuses on assets which serve primarily as financial investments but which also serve some program purposes.

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from Susan Gary, Reporter, UMIFA Drafting Comm. to UMIFA Drafting Comm. (Oct. 20, 2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/umoifa/memo1003.htm [hereinafter UMIFA Drafting Comm. Memo]. The appeal of having the prudent investor rules of UPMIFA apply to all assets would have been that some assets have mixed purposes, both investment and program. *See id.* After consideration, the Drafting Committee decided that treating assets that serve only incidental investment purposes as "investments" did not make sense. *See id.* The university classrooms, the dining room for the soup kitchen, and the kennels for the animal shelter do not serve investment purposes in the usual sense, and seemed out of place in a statute that provides rules on prudent investment. *See id.*

[15] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(7) cmt. (noting that a program providing loans to inner-city businesses may serve both a charitable and an investment purpose).

[16] *See* REV. MODEL NONPROFIT CORP. ACT § 8.30 (1988).

[17] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(7) cmt.

[18] UNIF. PRUDENT INVESTOR ACT § 2(a) (1994).

[19] *Id.* § 2(c)(8).

[20] REV. MODEL NONPROFIT CORP. ACT § 8.30.

[21] I.R.C. § 4944(c) (2006). *See infra* text accompanying notes 166–74.

[22] § 4944(c).

[23] The UPMIFA drafting committee changed "significant purpose" to "primarily for investment" in an attempt to make it more difficult for a charity to disguise a failed investment as a program-related investment. *See* UMIFA Drafting Comm. Memo, *supra* note 14.

B. Socially Responsible Investing

¶9 In general, the idea behind socially responsible investing is that investment decision makers should consider social or ethical issues as well as financial ones in making decisions about investments.[24] Advocates argue that investments can, and should, effect positive social change as well as generate financial returns.[25] Socially responsible investing, also called social investing, gained adherents in the 1970s.[26] At that time, pension funds and universities, in particular, faced growing pressure to engage in socially responsible investing.[27] In particular, concerns over apartheid in South Africa led to calls for universities to divest from companies that engaged in business there;[28] pension funds of state employees were pushed to invest in businesses located in the state;[29] and union pension plans began to invest in "socially desirable projects."[30] The concept also gained critics who raised concerns about whether socially responsible investing by fiduciaries violated the fiduciary duty of loyalty.[31]

¶10 Socially responsible investing has developed in breadth and depth since the 1970s.[32] Socially responsible funds created in the 1970s and 1980s either screened out

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[24] Maria O'Brien Hylton, *"Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market*, 42 AM. U.L. REV. 1, nn.2–3 (1993) (citing several attempts at defining socially responsible investing). In their 1980 critique of socially responsible investing, John Langbein and Richard Posner defined the term to mean "excluding the securities of certain otherwise attractive companies from an investor's portfolio because the companies are judged to be socially irresponsible, and including the securities of certain otherwise unattractive companies because they are judged to be behaving in a socially laudable way." Langbein & Posner, *supra* note 1, at 73. They explained that they used "attractive" and "unattractive" to "refer to the conventional objective of investment, which is to make money." *Id.* In contrast, a recent study explains that "[s]ocially responsible investing (SRI) is an investment process that considers the social and environmental consequences of investments, both positive and negative, within the context of rigorous financial analysis." SOCIAL INVESTMENT FORUM, 2005 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 2 (2006), *available at* http://www.socialinvest.org/pdf/research/Trends/2005%20Trends%20Report.pdf [hereinafter TRENDS].

[25] Maria Markham Thompson, *Socially Responsible Investing Has Become a Mainstream Practice*, 50 CHRON. HIGHER EDUC. B24 (2004), *available at* http://chronicle.com/article/Socially-Responsible-Investing/36437/.

[26] Langbein & Posner, *supra* note 1, at 72 (citing EMPLOYEE BENEFIT RESEARCH INSTITUTE, SHOULD PENSION ASSETS BE MANAGED FOR SOCIAL/POLITICAL PURPOSES? (Dallas L. Salisbury ed. 1980)) (considering social investing by pension funds and university endowment funds); ANNE SIMPSON, THE GREENING OF GLOBAL INVESTMENT: HOW THE ENVIRONMENT, ETHICS, AND POLITICS ARE RESHAPING STRATEGIES 27 (1991) (summarizing the history of ethical investment in the U.S. dating back to 1928 when religious organizations began to engage in social investing).

[27] *See* Langbein & Posner, *supra* note 1, at 72–73.

[28] Hylton, *supra* note 24, at 3 (describing South African apartheid as the issue that attracted the attention of "virtually every socially responsible fund").

[29] *See* Langbein & Posner, *supra* note 1, at 72.

[30] *See, e.g.*, *id.* at 72 (describing a United Auto Workers' labor contract that applied a social investing requirement to "up to ten percent of new pension contributions").

[31] *See id.* at 96 (arguing "that social investing is contrary to trust law").

[32] *See* TRENDS, *supra* note 24, at 1–2 (tracking growth in socially responsible investments from $40 billion in 1984 to $2.29 trillion in 2005); Lewis D. Solomon & Karen C. Coe, *Social Investments by Nonprofit Corporations and Charitable Trusts: A Legal and Business Primer for Foundation Managers and Other Nonprofit Fiduciaries*, 66 U.M.K.C. L. REV. 213, 213 (1997)**;** Thompson, *supra* note 25; *see also*, Cooch & Kramer, *supra* note 10, at 14–26 (providing data on trends in mission investing); SOCIAL INVESTMENT FORUM, 2007 REPORT ON SOCIALLY RESPONSIBLE TRENDS IN THE UNITED STATES: EXECUTIVE SUMMARY ii (2007), *available at* http://www.socialinvest.org/resources/pubs/ (follow "2007 Report on Socially

companies with poor social or environmental records[33] or focused on a particular issue, like apartheid.[34] In recent years, funds have continued to develop exclusionary screens,[35] and in addition, funds now employ inclusionary screens that look for companies with good corporate performance on a variety of social and environmental issues.[36] Socially responsible investors may also evaluate corporate governance and use shareholder advocacy and community investment as strategies.[37]

¶11 Diversification has become easier because socially responsible funds are now available across a broad range of share classes and in different investment styles.[38] Socially responsible investing now provides a variety of choices, and allows investors to focus on issues of particular concern to them. For charities, the development of choices, both in terms of investment options and in terms of types of issues addressed by the funds, has meant that a charity can more easily make carrying out its mission a factor in making decisions about investments.

C. Mission Investing

¶12 "Mission investing," as this Article uses the term, means something different from socially responsible investing. Mission investing means that a charity uses some of its investment assets, as distinguished from its program-related assets, in ways that accomplish its investment objectives while also supporting its charitable mission.[39] The charity considers its mission as a factor in making investment decisions, and does not

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Responsible Investing Trends in the United States Executive Summary" hyperlink; then fill out request form; then document will be emailed to you) [hereinafter TRENDS (2007)] ("From 2005–2007 alone SRI assets increased more than 18 percent while the broader universe of professionally managed assets increased less than 3 percent."). The Responsible Endowments Coalition, created in 2004, has brought together students, alumni, and faculty from thirty-five universities and colleges. RESPONSIBLE ENDOWMENTS COALITION, http://www.endowmentethics.org (last visited Mar. 23, 2010) ("Responsible investment . . . can support environmental progress and social justice all while making great financial returns."). In 2008, Cambridge Associates, an investment consulting firm for foundations and endowments, announced its launch of a mission investing division. *See* MARK KRAMER & ANNE STETSON, A BRIEF GUIDE TO THE LAW OF MISSION INVESTING FOR U.S. FOUNDATIONS 5 (2008). Three foundations, the Heron Foundation, Meyer Memorial Trust, and the Annie E. Casey Foundation, supported the development of this division. *Id.*

[33] TRENDS, *supra* note 24, at 4.

[34] *Id.*

[35] *Id.* at 7–8, Figure 2.5 (identifying the five most common social screens: tobacco, alcohol, gambling, defense/weapons, community relations). See Perry S. Bechky, *Darfur, Divestment, and Dialog*, 30 U. PA. J. INT'L L. 823 (2009), for an interesting discussion of recent divestment efforts focused on Sudan, including a description of the work of the Sudan Divestment Task Force.

[36] *See* TRENDS, *supra* note 24, at 3 ("Generally, social investors seek to own profitable companies that make positive contributions to society."). The Jessie Smith Noyes Foundation lists inclusionary screens that direct managers to identify companies with an environmental commitment and a commitment to reduce adverse environmental impacts, companies that support sustainable agriculture, companies that facilitate pay equity, and companies whose labor practices and compensation standards support collective bargaining, living wage, and pay equity. *Jessie Smith Noyes Foundation Investment Policy*, JESSIE SMITH NOYES FOUNDATION, http://www.noyes.org/taxonomy/term/10 [hereinafter Noyes Investment Policy].

[37] *See* TRENDS, *supra* note 24, at 16–27.

[38] *See id.* at 7 (reporting at least 201 screened funds and more than 370 share classes). The 2007 survey reported 260 screened funds. TRENDS (2007), *supra* note 32, at ii.

[39] Dobris, *supra* note 11, at 768 (describing mission investing as "making fuzzy the formerly clear boundary between investing for gain and granting for charitable purposes").

ignore the other factors a prudent investor should consider. Mission investing assumes that when an investment decision maker considers the best interests of a charity, the decision maker can use the charity's mission as a factor, while also analyzing the potential financial gain from an investment. The investment may either yield an investment return similar to investments made without consideration of mission, or the mission-related benefits may outweigh any reduced financial benefits. If the charity decides to accept somewhat lower financial returns in order to obtain mission-related benefits, then the investment may be considered an expenditure decision as well as an investment decision.[40]

II. LEGAL RULES APPLICABLE TO INVESTING BY CHARITIES

A. *Fiduciary Duties*

¶13 Trust law has developed strict fiduciary rules to protect the interests of beneficiaries who have beneficial but not legal title to the property held in trust.[41] A fiduciary holds legal but not beneficial title to assets and may be tempted to try to benefit personally from the position of legal control.[42] Fiduciary duties also apply in corporate law, where shareholders own beneficial interests and the directors manage the business. For charities, the fiduciary duties carry particular importance because the "beneficiary" may be a charitable purpose or an indefinite number of unidentified beneficiaries and not an identifiable person.[43] Oversight of charitable management is limited,[44] so the legal rules are of particular importance. Whether a charity is organized as a charitable trust or as a nonprofit corporation, the rules provide guidance to persons managing charities.

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[40] A determination of the financial "cost" of a mission investment will be difficult. Empirical work examining the period 1992–2007 found that investments in companies that scored high on social responsibility factors such as community, employee relations and the environment had a performance advantage related to investments based on conventional investment strategies. *See* MEIR STATMAN & DENYS GLUSHKOV, THE WAGES OF SOCIAL RESPONSIBILITY, SOCIAL INVESTMENT FORUM 21 (2008), *available at* http://www.socialinvest.org/resources/research/documents/2008WinningPrize-Moskowitz.pdf. Investments in companies associated with tobacco, alcohol, gambling, firearms, military, or nuclear operations, left investors at a return disadvantage. *Id.*

[41] *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 640–43 (1995) ("The trust relationship of necessity puts the beneficiaries of a trust at the peril of the trustees' misbehavior—for example, if the trustees should misappropriate or mismanage the trust's assets. The central concern of modern trust law is to safeguard against those dangers.").

[42] *See also* GEORGE T. BOGERT, TRUSTS 342 (6th ed. 1987). In a discussion of the duty of loyalty, Bogert's treatise on Trusts says: "It is a well-known quality of human nature that it is extremely difficult, or perhaps impossible, for an individual to act fairly in the interests of others whom he represents and at the same time to consider his own financial advantage." *Id.* at 342.

[43] This Article discusses investments by fiduciaries of charities and not other fiduciaries, for example those managing pensions. The analysis of socially responsible investing by pension managers must address the fact that a pension plan has identifiable beneficiaries. A charity does not, which means consideration of the interests of the beneficiaries can, and should, consider mission rather than individual people.

[44] Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law and Tax Law*, 21 U. HAW. L. REV. 593, 609 (2000).

B. Duty of Loyalty

1. Meaning of the Duty of Loyalty

¶14 The duty of loyalty applies to the trustees and directors who manage a charity. In trust law, the duty of loyalty is the trustee's duty to act "solely in the interests of the beneficiaries."[45] The trustee must put the trustee's duties to the trust first and cannot act for personal benefit. If a trustee interacts with the trust on the trustee's own account, for the trustee's personal interests, such self-dealing can constitute a breach of the duty of loyalty.[46] Under trust law, a beneficiary can void a self-dealing transaction unless the trust document authorized the transaction; a court approved the transaction; the statute of limitations has run; the beneficiary consented to or ratified the transaction; the beneficiary released the trustee; or the trustee entered into the transaction before becoming the trustee.[47]

¶15 Nonprofit corporation statutes apply the duty of loyalty to charities organized as nonprofit corporations. A nonprofit director must act "in a manner the director reasonably believes to be in the best interests of the corporation."[48] A conflict of interest transaction is voidable unless the transaction was fair at the time it was entered into; was approved by the board of directors acting in good faith and with a reasonable belief that the transaction was fair to the charity, after disclosure to the board of the material facts and the interest of the conflicted director; or was approved by the attorney general or a court.[49]

¶16 In both trust law and nonprofit corporation law, the duty of loyalty is structured to prevent a fiduciary from taking advantage of the trust for personal gain. Thus, the focus of the duty of loyalty under both trust and nonprofit corporate law has been on self-dealing by the trustee.

2. Application to Investment Decision-Making

¶17 Clearly, a fiduciary should not make an investment decision for the charity based on private benefit to the fiduciary.[50] Even if the fiduciary does not benefit personally, however, a comment to the Restatement (Third) of Trusts explains that the duty of loyalty treats as improper a trustee's decision to invest in a manner that benefits a third party or a non-trust objective.[51] The beneficiaries' interests must come first, but then the question

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[45] UNIF. TRUST CODE § 802(a) (2005); *see* RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2007) ("[A] trustee has a duty to administer the trust solely in the interest of the beneficiaries."). John Langbein has argued that a "best interests" standard would better serve trust beneficiaries. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?* 114 YALE L. J. 929, 980–86 (2005). The duty of loyalty developed in the common law of trusts, long before the Uniform Trust Code codified the duty. *See* BOGERT, *supra* note 42, at § 95, 341–47.

[46] UNIF. TRUST CODE § 802(b).

[47] *Id.* § 802(b)(1)–(5). A self-dealing transaction is not automatically void but instead is voidable by a beneficiary. Even if no exception is met, a beneficiary can choose not to void a self–dealing transaction. *Id.*

[48] REV. MODEL NONPROFIT CORP. ACT § 8.30 (1988).

[49] *Id.* § 8.31(a)–(b).

[50] Beneficiaries can consent to transactions that would otherwise be self-dealing, but the transaction must be in the sole or best interests of the beneficiaries. *See supra* text accompanying notes 45–47.

[51] RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. f (2007).

becomes how one views the "sole interests" or "best interests" of the beneficiaries. Traditionally, the view has been that the trustee's duty relates only to the beneficiaries' financial interests.[52] Yet nothing in the duty of loyalty requires the trustee to exclude consideration of a beneficiary's non-financial interests.

¶18 The view of what constitutes the sole interests or best interests appears to be changing.[53] With respect to private investors, commentators have questioned whether the investors' sole interests lie in maximizing returns without regard to the types of investments the trust makes.[54] Meir Statman, a professor of finance at Santa Clara University who studies investor behavior, comments that investment advice that ignores beneficiaries' non-monetary interests is "fundamentally flawed."[55] He notes that financial advisors regularly tell investors with concerns about environmental degradation to invest in companies that pollute and then use the investment returns to fund charities that fight pollution.[56] Statman views this kind of advice as irrational. Statman discusses private investors, but his analysis of the interests of private individuals is instructive with respect to the interests of trust beneficiaries. At issue for a trustee is determining the interests of the beneficiaries, and Statman suggests that if one asks private individuals about preferences for investing assets, their interests may well include non-monetary interests.[57]

¶19 Turning to charities, determining the sole interests or best interests of a charitable purpose or even specific charitable entities becomes more complicated than considering the interests of private beneficiaries. A charity wants to maximize income within its risk tolerance and use the income for its charitable purposes. The charity may also want to use its investments to support its charitable mission. How does the duty of loyalty apply to mission investing or socially responsible investing by charities?

¶20 A fiduciary's own views of socially responsible investing may conflict with the charitable purposes of the charity. If a fiduciary decides to invest in a particular asset because doing so will be "best for the world" in some general way, or because the investment will support a cause the fiduciary favors, then making the investment decision on those grounds could be a breach of the duty of loyalty. If the investment does well

[52] Many scholars writing about the duty of loyalty have assumed that a beneficiary's interests in a trust are only financial interests. *See, e.g.*, Langbein & Posner, *supra* note 1, at 96 ("[A] trustee who sacrifices the beneficiary's financial well-being for any other object breaches both his duty of loyalty to the beneficiary and his duty of prudence in investment.").

[53] Joel Dobris has recently stated that the duty of loyalty may encompass non-monetary interests. He writes, with respect to private trusts:

> If a fiduciary invests in SRI at a cost in risk or return to please himself, that is a breach of the duty of loyalty. If he does it to please some of the beneficiaries and there is a financial cost, he's breaching his duty of impartiality (to the non-SRI beneficiaries) and his duty to invest competently. If truly all of the beneficiaries want SRI investing, they can set aside any relevant duties, or it could be claimed they were in the receipt of psychic income.

Dobris, *supra* note 11, at n. 27.

[54] *See id.*

[55] *See* Meir Statman, *Why You're Not a Rational Investor*, FORTUNE MAG., Nov. 7, 2007, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/11/12/101008311/index.htm.

[56] *See id.*

[57] *Id.* (quoting an investor as saying "I consider it a luxury that I now have the ability to invest more in line with my values").

financially, no one is likely to complain, but even so, a fiduciary who invests for reasons unrelated to the charity has not acted in the sole interests of the charity.

¶21 If, instead, the fiduciary uses the interests of the charity to inform investment decision-making, doing so may be within the scope of the duty of loyalty. The fiduciary must act for the sole interests or best interests of the charity, and those interests may include non-monetary interests. Thus, mission investing is consistent with the duty of loyalty. Although no court has adopted this analysis, revisions to comments to the Restatement (Third) of Trusts suggest that the law, or at least legal thinking, is headed toward this understanding of how the duty of loyalty applies to investing by charities.[58]

¶22 In a critique of 1970s social investing, Professors Langbein and Posner pointed out that a trustee owes a duty of loyalty to the trust beneficiaries to carry out the purposes of the trust.[59] The broad approach to social investing taken at the time—the idea of investing in socially desirable projects that have general social utility but no particular connection to the mission of the trust—meant that trustees who engaged in social investing were not concerned solely with the interests of the beneficiaries.[60] Langbein and Posner concluded that the duty of loyalty forbids social investing "in its current form."[61] They explained that the social principles embodied in the idea of social investing were "poorly specified"[62] and that the criteria used to identify "socially irresponsible companies" were "dubious."[63] At that time, issues involved in deciding which investments were socially responsible may have been unrelated to the purpose of the charity.[64] Langbein and Posner noted that social investing could confer a non-economic value on the trust beneficiary that might compensate for any loss of economic value in the investment.[65] Given the type of social investing engaged in at the time, however, Langbein and Posner concluded that the non-economic value did not directly benefit the beneficiaries of the trust.[66]

¶23 Concurring with these arguments against social investing, the comment to the UPIA's section on the duty of loyalty includes a strongly worded statement against socially responsible investing:

> No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor

[58] *See* discussion *infra* Part C. The duty of loyalty provision in the 1992 version of Restatement (Third) of Trusts did not include a reference to social investing. RESTATEMENT (THIRD) OF TRUSTS § 170 (1992). Neither did the prudent investor rule. *Id.* § 227.

[59] Langbein & Posner, *supra* note 1, at 96–97 (explaining that a trustee breaches the duty of loyalty owed to the trust if someone other than the beneficiary benefits at the expense of the beneficiary).

[60] *See id.* at 96–97.

[61] *Id.* at 110–11.

[62] *Id.* at 83 ("[T]here is no consensus about which social principles to pursue and about which investments are consistent or inconsistent with those principles.").

[63] *Id.* at 84.

[64] *See* SIMON, POWERS & GUNNEMANN, *supra* note 3, at 156–60 (identifying as a rationale for a university to engage in socially responsible investing the need to "foster a climate conducive to education.").

[65] Langbein & Posner, *supra* note 1, at 94.

[66] *Id.* at 95. Much of the Langbein and Posner article focuses on investing by trustees of private trusts and pension funds and then applies its analysis to charitable trusts. *Id.* at 110–11.

> of the interests of the persons supposedly benefitted by pursuing the particular social cause.[67]

The comment does not discuss mission investing and ignores the argument that investing for a social purpose could be consistent with the interests of beneficiaries.[68]

¶24 In 2007, the Restatement (Third) of Trusts added language from the UPIA to the Restatement's commentary on its section on the duty of loyalty.[69] The Restatement comment notes that "[n]ot surprisingly, considerable disagreement continues about what loyalty should require in this context."[70] The comment then cites articles addressing the issue in the context of pension plans and does not discuss investing by charities.[71] Although this Restatement comment does not directly address investing by charities, it does include a reference to the Restatement section on prudent investment.[72] The comment on prudent investment draws a distinction between socially responsible investing and mission investing, although the comment does not use those terms in making the distinction.[73]

¶25 The Restatement's section on prudent investment includes the requirement that the trustee must conform to the duty of loyalty.[74] The comment to that section explains that the trustee cannot invest trust assets to promote the trustee's personal views on social or political causes.[75] The comment notes that the terms of the trust may permit investing based on social or political issues[76] and that beneficiaries may consent to such investing.[77] Next, the comment turns to investing by charities:

> [S]ocial considerations may be taken into account in investing the funds of charitable trusts to the extent the charitable purposes would justify an expenditure of trust funds for the social issue or cause in question or to the

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[67] UNIF. PRUDENT INVESTOR ACT § 5 cmt. (1994). Professor Langbein served as Reporter for UPIA and as Reporter wrote the comments.

[68] *See id.* "Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below-market returns." *Id.*

[69] RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. f (2007).

[70] *Id.*

[71] *See id.* The comment cites to two articles addressing the issue in the context of pension plans. *Id.* Pension plans have identifiable beneficiaries and are beyond the scope of this Article.

[72] *Id.*

[73] RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. c (2007). ("[S]ocial considerations may be taken into account in investing the funds of charitable trusts to the extent the charitable purposes would justify an expenditure of trust funds for the social issue or cause in question or to the extent the investment decision can be justified on grounds of advancing, financially or operationally, a charitable activity conducted by the trust.").

[74] *Id.* § 90(c)(1).

[75] *Id.* § 90 cmt. c.

[76] *Id.* A trust agreement can always permit a trustee to invest in a way that would otherwise constitute self-dealing. For example, a settlor anticipating the importance of non-financial considerations may relieve the trustee of potential liability for dealing with shares in a family business in which the trustee also owns shares. A settlor could also direct the trustee to consider social issues in investing.

[77] *Id.* A beneficiary can consent to a self-dealing transaction by the trustee. *See* UNIF. TRUST CODE § 802(b)(4) (2005) (stating that a trustee's transaction with the trust property that is self-dealing is permitted if the beneficiary consented to or ratified the transaction, or released the trustee in compliance with § 1009).

> extent the investment decision can be justified on grounds of advancing, financially or operationally, a charitable activity conducted by the trust.[78]

This comment may be the clearest legal articulation of the application of the duty of loyalty to mission investing. The comment suggests that a trustee can consider the charitable purpose of a trust as a factor in making investment decisions. Although the Restatement and this comment apply to charities organized as trusts, trust law has long served as a source of guidance for nonprofit corporations and seems a particularly appropriate source in this context.[79]

C. Prudent Investor Standard

1. Prudent Investor Act—Rules for Charitable Trusts

¶26 Another fiduciary duty, the duty of prudent administration or the duty of care, applies more directly to investment decision-making by trustees.[80] In general, a trustee must manage a trust as a prudent person would, exercising reasonable care, skill, and caution.[81] The rules on investing trust assets lie within this duty of prudence. As early as 1830, the common law required a trustee to act with prudence when investing assets of a trust.[82] The prudence standard evolved over time, reflecting changes in the application of the standard and changes in investing practices.[83] As modern portfolio theory became more widely understood, the time came for a significant re-articulation of the standard.

¶27 The American Law Institute revised provisions in the Restatement (Third) of Trusts that applied to investment decision-making by trustees, creating, in 1992, the prudent investor rule.[84] The Uniform Law Commission built on the Restatement project and in 1994 approved UPIA. This uniform Act provides rules on investing by trustees[85] and has been widely adopted.[86]

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[78] RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. c (2007).

[79] *See* UNIF. PRUDENT INVESTOR ACT, prefatory note (1994) (citing RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 379, cmt. b (1992)) ("[T]he duties of the members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust.").

[80] *See* RESTATEMENT (THIRD) OF TRUSTS § 77 (2007) ("(1) The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. (2) The duty of prudence requires the exercise of reasonable care, skill, and caution.").

[81] *See id.* at § 77(2).

[82] *See* Harvard Coll. v. Armory, 26 Mass. 446, 471–73 (1830).

[83] John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 643–46 (1996) (providing a history of prudent investing under trust law and the reasons for the changes to trust law).

[84] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 (2007) ("The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust."); Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992).

[85] See Langbein, *supra* note 83, for a complete explanation of UPIA and a discussion of trust-investment law.

[86] Forty-four states have adopted UPIA. *A Few Facts About the Uniform Prudent Investor Act*, NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM ST. L., http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upria.asp (last visited Nov. 20, 2010) [hereinafter *A Few Facts About UPIA*]. Maryland is listed as "substantially similar" and is counted in this

¶28 UPIA's investment rules direct trustees to invest and manage trust assets as a prudent investor would, exercising reasonable care, skill, and caution in doing so;[87] to consider the entire portfolio in making investments and to allocate risk across the portfolio;[88] and to diversify trust assets unless the purposes of the trust are better served by not diversifying.[89] UPIA encourages trustees to delegate some investment responsibilities and provides a safe harbor for a trustee who exercises "reasonable care, skill, and caution" in selecting an agent, setting the terms of the delegation, and monitoring the agent.[90]

¶29 The standard of care in UPIA directs a trustee to consider a number of factors, some relating to economic conditions and some relating to the trust itself and the needs of the beneficiaries. The trustee shall consider the "purposes, terms, distribution requirements, and other circumstances of the trust."[91] Thus, for a charitable trust, its charitable purposes become factors to consider in making investment decisions. In addition, the trustee shall consider, if relevant, "an asset's special relationship or special value, if any, to the purposes of the trust."[92] The comment to UPIA § 2 explains that this factor permits a trustee to take into account non-financial preferences of a beneficiary, such as sentimental attachment to heirlooms or other prized assets.[93] For a charity, an asset may be related to the charitable purpose.[94]

2. UMIFA and UPMIFA—Rules for Nonprofit Corporations

¶30 In 1972, the Uniform Law Commission approved the Uniform Management of Institutional Funds Act (UMIFA), an Act developed to provide legal guidance for charities organized as nonprofit corporations.[95] At the time the Uniform Law Commission developed the Act a great deal of uncertainty existed concerning the fiduciary duties of directors of nonprofit corporations with respect to investment decision-making.[96] UMIFA adopted rules that reflected changes in thinking about

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Article as one of the forty-four states in the list. The District of Columbia and the U.S. Virgin Islands have also adopted UPIA. *Id.* See Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J. L. & ECON. 681 (2007), for a discussion of the effect of UPIA on investment decision-making.

[87] UNIF. PRUDENT INVESTOR ACT § 2(a) (1994).

[88] *See* UNIF. PRUDENT INVESTOR ACT § 2(b).

[89] *Id.* at § 3.

[90] *Id.* at § 9. *See* Langbein, *supra* note 83, at 650–52 (describing the traditional nondelegation rule and the importance for prudent investing of the changes wrought by UPIA); RESTATEMENT (SECOND) OF TRUSTS § 171 cmt. h (1959) ("A trustee cannot properly delegate to another power to select investments.").

[91] UNIF. PRUDENT INVESTOR ACT § 2(a).

[92] *Id.* at § 2(c)(8).

[93] *Id.* at § 2 cmt.

[94] A program-related asset is one related to the charitable purpose of the trust. *See* discussion *supra* Part I.A.

[95] Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1288 (2007).

[96] *See id.* at 1284–87 (describing the report prepared by William Cary and Craig Bright that highlighted the uncertainty because the law relating to charitable organizations was "rudimentary and vague" and called for statutory reform).

investment decision-making: prudent decision-making that included diversification, a total return concept, and delegation. Forty-eight jurisdictions adopted UMIFA.[97]

¶31 The prudence standards of UMIFA provided useful guidance to directors of nonprofit corporations. Thirty-five years later, the development of UPIA provided a catalyst for the decision to revise UMIFA.[98] In 2006, the Uniform Law Commission approved a revised Act with a new name: the Uniform Prudent Management of Institutional Funds Act (UPMIFA).[99] UPMIFA still applies to nonprofit corporations and not to trusts,[100] but today the rules on investing are the same whether UPIA or UPMIFA applies.

¶32 UPMIFA uses language from the Revised Model Nonprofit Corporation Act to state the overall duty of care for prudent investing.[101] Under UPMIFA, a charitable manager must act "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[102] The Act then uses language from UPIA to provide more specific guidance for those managing and investing charitable funds.[103] UPMIFA directs the persons responsible for managing and investing the funds of an institution to act as a prudent investor would, directly mirroring the language from UPIA. UPMIFA includes the two factors noted above that direct the fiduciary to consider non-financial aspects of an investment. The Act directs the decision maker to consider "the charitable purposes of the institution and the purposes of the institutional fund"[104] in managing and investing assets for the charity and adds that the fiduciary may consider, if relevant, "an asset's special relationship or special value, if any, to the charitable purposes of the institution."[105]

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[97] *A Few Facts About the Uniform Management of Institutional Funds Act*, NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM ST. L., http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-umifa.asp (last visited Oct. 27, 2010).

[98] *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note (2006). See Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1280–88 (2007), for a detailed discussion of the history and adoption of UPMIFA.

[99] Press Release, Nat'l Conference of Commissioners on Unif. State Laws, Major Overhaul of Rules Governing Charitable Institutions Approved, (July 13, 2006), http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=163.

[100] UPMIFA, like UMIFA, applies to all charities, but the Acts do not apply to charitable funds managed in trust form unless a charity is the trustee. The Acts do not cover charitable funds managed by corporate or individual trustees. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (2006) at §1(2)(i); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §2(5)(B).

[101] MODEL NONPROFIT CORP. ACT § 8.30(a) (1988) states:

> (a) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
>
> > (1) in good faith;
> >
> > (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> >
> > (3) in a manner the director reasonably believes to be in the best interests of the corporation.

[102] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3(b).

[103] *Id.* § 3 cmt. In 1992 the Prefatory Note to UPIA explained that the standards of UPIA "can be expected to inform the investment responsibilities of directors and officers of charitable corporations." *Id.* Thus, UPMIFA clarified the meaning of prudent investing for directors of charities. *Id.*

[104] *Id.* at § 3(a).

[105] *Id.* § 3(e)(1)(H).

3. The Prudent Investor Rule and Mission Investing

¶33 Whether UPIA or UPMIFA applies, the prudent investor rule directs a charity to consider its charitable purposes in making investment decisions.[106] Under the prudent investor rule, consideration of the charitable purposes may affect the time horizon for investments and the level of risk the charity should consider. A charity may consider its purposes to select investments that may further those purposes. Although a charity should not invest for vague social benefits unrelated to the charity's mission, an examination of investment options can include consideration of ways in which the investments can support the charity's mission.

¶34 In making any investment decisions, judgment is critical. The trustees or directors must think through complex issues involving the charity's mission and the best way to carry out that mission. The trustees or directors may delegate the actual selection of investments to appropriate advisors, but the fiduciaries must set guidelines for investment advisors.[107] In developing an investment policy for an organization, the fiduciaries must be careful to determine what strategies will best support their mission. A determination of whether mission investing has a positive effect related to the charity's mission will likely be difficult because many variables affect that determination, and because the cause and effect of particular strategies may not be clear.[108] The fiduciaries may determine that a mission-related investment strategy "feels good" but does not benefit the mission.[109] In that case, the charity might conclude that it should spend its time and effort to maximize profit and then use the profit for its mission. If the fiduciaries conclude that mission investing will support the mission of the charity, they should establish a process that will result in competent decision-making about investments.[110]

¶35 In addition to considering the charity's purpose, the investment decision maker must consider a number of economic factors. A prudent investor will balance risk and return, trying to maximize overall return within the charity's level of risk tolerance. If an investment has a below-market return or carries a high level of risk, the investment may not be prudent. An important consideration in connection with mission investing will be the costs associated with investment options, not only in terms of each investment's fees and expenses, but also the amount of time the charity must spend to choose and monitor the investments. Mission investing requires additional research by someone, and the cost of that research may result in additional fees for funds or time spent by investment managers working directly for the charity.

¶36 The cost in the amount of staff time needed to engage in mission investing varies depending on the type of strategy used. The efficacy of the strategies in carrying out a

[106] UNIF. PRUDENT INVESTOR ACT §§ 2(a), 2(c)(8) (1994); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 3(e)(1)(H).

[107] UNIF. PRUDENT INVESTOR ACT §9; UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 5.

[108] *See* SIMON, POWERS & GUNNEMANN, *supra* note 3, at 100–108 (discussing the problems a university may face).

[109] Professor Dobris has written about the "psychic income" a beneficiary may receive in the private trust context, if the beneficiary supports socially responsible investing by the trustee. *See* Dobris, *supra* note 11, at n. 27. Psychic income does not apply in the charitable context because the "beneficiary" is the charitable purpose and not an individual for whom the psychic income creates a benefit.

[110] *See* SIMON, POWERS & GUNNEMANN, *supra* note 3, at 87. In developing a policy on socially responsible investing for Yale, these authors made the establishment of a "process which will yield reasonably skillful and competent decisions" one of the investment principles. *Id.*

charity's mission also varies. Issues of cost and usefulness will be discussed in the following sections in connection with three types of socially responsible investment strategies: screens, shareholder advocacy, and community investment.[111] The use of any of these strategies by a charity will depend on the charity's purposes and its ability to monitor the strategies.

i) Screens

¶37 Screens evaluate investments based on social or environmental criteria as well as financial performance. Screens may be inclusionary or exclusionary. An inclusionary screen helps identify companies in which to invest, while an exclusionary screen guides managers to avoid certain companies. An inclusionary screen, for example, might guide a manager to invest in companies that engage in sustainable environmental practices and do not pollute, or companies that support employees through fair wages and benefits and nondiscriminatory policies. An exclusionary screen might direct the manager not to invest in companies that produce tobacco or alcohol, that pollute, or that practice discriminatory employment practices.[112] Seventy-five percent of screened funds use multiple screens, and a quarter of the funds screen on a single issue.[113]

¶38 A determination of whether the use of screens in making investment decisions has any effect on the companies that are included or excluded is difficult. Numerous variables affect company behavior, and if one charity chooses to invest in a company or to shun a company, the effect of that investment decision on the company may be impossible to know. Determining the cost of a screen is easier, however, because the screened fund can be compared with a conventional fund to determine whether choosing the screened fund resulted in a lower return or in higher fees. Some SRI funds have higher expenses and fees due to the additional research required,[114] but not all SRI funds have higher costs. For example, Vanguard's FTSE Social Index reports fees of 0.25 percent.[115] Some commentators have expressed concern that a screen will adversely affect return,[116] but even in the early days of socially responsible investing, other

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[111] In 2005, assets involved in socially responsible investing were identified as 68% in social screening only, 26% in shareholder advocacy, 5% in screening and shareholder advocacy, and 1% in community investing. TRENDS, *supra* note 24, at Figure 1.1.

[112] *See, e.g.*, Noyes Investment Policy, *supra* note 36 (listing both inclusionary and exclusionary screens).

[113] TRENDS, *supra* note 24, at 8. Note that an investment manager might identify the same companies using either an inclusionary or an exclusionary screen, but the emphasis of the two types of screens is somewhat different. An inclusionary screen will identify companies that are particularly good at the sought-after behavior. For example an environmental screen might look for companies with particularly strict pollution controls. An exclusionary screen, in contrast, tells the investment manager that any company is acceptable from the standpoint of the screen as long as the company does not engage in the bad behavior that is the subject of the screen.

[114] *See* Shauna Croome-Carther, *Funds with Values*, FORBES.COM, Nov. 14, 2007, http://www.forbes.com/investoreducation/2007/11/14/sri-funds-domini-pf-education-in_sc_1114investopedia_inl.html (noting that higher fees can be attributed to the costs of additional ethical research and that SRI funds tend to be managed by smaller companies and do not have the benefits of economies of scale).

[115] Penelope Wang, *For Do-Good Funds, an Ethical Dilemma*, CNNMONEY.COM, March 22, 2007, http://money.cnn.com/magazines/moneymag/moneymag_archive/2007/04/01/8403607/index.htm.

[116] *See* Langbein & Posner, *supra* note 1, at 98–99.

observers thought that positive screens could yield financial benefits.[117] More recently, a number of studies have shown that socially responsible portfolios using screens have returns comparable to those of conventional funds.[118] In fact, some advocates of SRI now focus on the economic rather than the ethical benefits of SRI.[119]

¶39 Data concerning the performance of SRI funds exist, but analysis of that data is beyond the scope of this Article. As with many investment products, data may conflict and performance claims may be difficult to establish. Further, good managers may improve results, while poor managers may cause lower returns. Despite the limitations, one study is worth mentioning because the results are both interesting and surprising.

¶40 An empirical study published in 2006 looked at the performance of companies rather than funds to provide additional data on the benefits and costs of socially responsible investing.[120] The study found that companies with high scores on social responsibility characteristics such as diversity and employee relations outperformed companies with low ratings.[121] Thus, positive screens resulted in financial benefits to the investors. In contrast, companies typically screened out by socially responsible mutual funds, in particular tobacco, alcohol, gambling, firearms, military, and nuclear companies, outperformed stocks in other industries.[122] The study concluded that while other studies had found that socially responsible mutual funds performed at about the same level as conventional funds, those results occurred because the effects of the positive and negative screens cancelled each other out for the socially responsible funds.[123] From the standpoint of financial returns, the best result would be to invest in socially responsible companies but not screen out "sin" stocks and other companies typically shunned by SRI funds.[124] Studies such as this one provide additional data for decision makers of charities.

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[117] SIMON, POWERS & GUNNEMANN, *supra* note 3, at 137–38.

[118] Thompson, *supra* note 25; Statman & Glushkov, *supra* note 40, at 2–3 (citing four studies, from 1993, 1999, 2000, and 2005, that showed "no statistically significant difference between the returns of socially responsible mutual funds and those of conventional funds."); *see also* Solomon & Coe, *supra* note 32, at 233–50 (discussing the performance record of socially responsible funds). Jed Emerson also notes that "[i]mpact investing is not your parent's socially responsible investment strategy." Jed Emerson, *Steady Returns with Social Impact*, FORBES, Sept. 29, 2009, http://www.forbes.com/2009/09/29/emerson-calvert-sri-intelligent-investing-impact-investing.html (defining "impact investing" as an investment strategy that considers social and environmental factors, and challenging the idea that social investment is "a below-market instrument where you need to assume you will have to take a hit on your financial returns to allow for some vague effort to 'do good,'" by pointing to, among other investments, "various microfinance funds" which significantly outperformed many "strictly commercial products" over the course of a year).

[119] Richardson, *supra* note 1, at 246 ("[A] "new style of SRI" [based] "on the assumption that SRI will make investors prosperous rather than merely virtuous."). However, in a 2009 discussion on SRI for private investors, Daniel Weiner, editor of Independent Adviser for Vanguard Investors, felt compelled to say, "there is absolutely zero evidence that investors will see better performance using an SRI strategy." Michael Maiello, *Mutual Funds: Is SRI Worth the Hassle?*, FORBES, Aug. 21, 2009, http://www.forbes.com/2009/08/20/sri-mutual-funds-intelligent-investing-ethics.html. The shift from concern over taking reduced returns in order to engage in SRI to the idea that SRI might result in better returns is striking. *See id.*

[120] Statman & Glushkov, supra note 40, at 3.

[121] *Id.* at 4.

[122] *Id.*

[123] *Id.*

[124] *See* David K. Randall, *Sin Stocks Outperform Over Time, Study Says*, FORBES.COM, Oct. 21, 2009, http://www.forbes.com/2009/10/21/sin-stocks-outperform-personal-finance-sin-stocks.html (describing a study that showed that tobacco, alcohol and gambling stocks outperformed other companies by 2.5%

¶41 Even if an investment that furthers a charity's mission produces a financial result that falls below what the charity might have expected from another investment, the decision to invest for mission may still be prudent. A prudent investor considers the purposes of the charity in making investment decisions, and if an investment furthers those purposes, then a lower financial return may be acceptable. A prudent investor should not invest solely for mission without regard for financial returns, but mission can be a factor to consider, along with the other factors related to economic conditions and performance. It may be appropriate for the charity to consider part of the investment to be an expenditure, since the lost revenue is not available for use for the charity's purposes.[125]

¶42 The Jessie Smith Noyes Foundation (the Noyes Foundation) provides an example of a charity that "views its investments as an integrated component of its overall mission."[126] The Noyes Foundation has adopted an investment policy that stresses a combination of mission investing and generating returns to support its charitable mission.[127] Its spending and investment goals include producing income and capital gains to support operations and grant-making; providing capital directly to enterprises that further the mission; maintaining "the real (inflation adjusted) value of its assets over the long term;" owning equity or debt in companies that further its mission; and avoiding investments in "companies whose environmental or social impacts contribute to the issues that the Foundation's grant-making seeks to address."[128] This investment policy provides detailed guidelines for the investment managers, including benchmarks tied to performance standards.[129] The Noyes Foundation has established market index benchmarks for each asset class and expects managers to meet or exceed these benchmarks.[130] Thus, the investment policy makes clear the Noyes Foundation's expectation that its investments will not produce lower returns even though the investment choices also support its mission.

¶43 In terms of how investments support its mission, the Noyes Foundation's investment policy identifies inclusionary and exclusionary screens related to four aspects of the Foundation's mission.[131] The policy notes that to "avail itself of a full spectrum of investment diversification," the Foundation may invest in asset classes for which

annually from 1926–2006, and suggested that because many investors, including universities and pension funds, shun these stocks, the demand and therefore the price is lower than it would otherwise be).

[125] A mission investment may be prudent even if the return for that investment is less than the charity might have otherwise received. In a troubling statement on its website, Social Investment Forum considers the increasing amount of investment in SRI by "major U.S. fiduciaries" evidence that "SRI strategies do not impede financial returns" because "fiduciaries are obligated by law to seek competitive returns for the portfolios they manage." *See Performance and Socially Responsible Investments*, SOCIAL INVESTMENT FORUM, http://www.socialinvest.org/resources/performance.cfm.

[126] Noyes Investment Policy, *supra* note 36.

[127] *See id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* Indices include the Domini 400 Social Index, S&P 500 Index, Russell 2000 Value Index, and Lehman Bros. Aggregate Bond Index. *Id.*

[131] *Id.* (listing four broad categories for screens: toxic emissions, extractive industries, and environmental justice; sustainable agricultural and food systems; reproductive health and rights; a sustainable and socially just society). The Noyes Foundation also employs proxy voting. *Id.*

screening is unavailable.[132] For example, hedge funds, venture capital, and real estate may be an appropriate part of a diversified portfolio, but screening may not be feasible.[133] The Noyes Foundation reviews manager performance on a quarterly basis, and that review includes comparison of the Foundation's screened portfolio with other screened and unscreened portfolios, including the benchmarks for each asset class; adherence to the screens and values of the Foundation; interactions with companies in the portfolio through shareholder activities or otherwise; transaction costs; and portfolio balancing among the managers.[134] At least once every three years, the Noyes Foundation also reviews the relationship between its financial returns and the impact of screening.[135] The Foundation's website does not disclose the findings in those reviews, but the fact that the Noyes Foundation continues to use the screens as part of its investment strategy suggests satisfaction with the returns obtained.

¶44 The Noyes Foundation appears to be operating as a prudent investor with respect to its funds, managing them for both return and mission. The website does not provide information on actual investment performance, but if the Noyes Foundation follows the rigorous review process outlined in the investment policy, underperforming funds or managers are likely to be quickly replaced.

ii) Shareholder Advocacy—Proxy Voting

¶45 Some charities use their position as shareholders to try to influence corporate behavior.[136] Shareholder resolutions on social, environmental, and corporate governance issues have increased over the past few years.[137] A group of shareholders may use a shareholder resolution to try to change a company's behavior, even though the financial returns to shareholders have been acceptable. Even if a particular resolution fails to pass, the resolution puts the managers and directors on notice about the priorities and concerns of at least some of the company's shareholders. Shareholders may also engage in ongoing dialogue with management, sometimes as a lead-up to filing a shareholder resolution and sometimes as an alternative to filing shareholder resolutions.[138]

¶46 The Noyes Foundation's investment policy promotes shareholder advocacy as part of its mission investing and provides directions on how the Foundation should use its "voice."[139] The investment policy states that if a proxy involves program interests, the

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[132] *Id.*

[133] *Id.*

[134] *Id.* The investment policy contains detailed rules for putting a fund on "watch" status and terminating a fund if the Finance Committee loses confidence in the fund's management. *Id.*

[135] *Id.*

[136] A fiduciary holding shares as assets for a charity has a fiduciary duty to vote the shares. UNIF. TRUST CODE § 802(g) (2005); UNIF. PRUDENT INVESTOR ACT § 2(a) (1994); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3(b) (2006). Any resolution can have an impact on the company, and increasingly resolutions that address social and environmental issues appear on the ballot for proxy voting. All investors in the company will be confronted with the resolution, so a charity that can help get a resolution on the ballot may gain support for its issue more broadly. TRENDS, *supra* note 24, at 16–27.

[137] *Id.*

[138] *Id.* at 18–19 (describing dialogue as a shareholder tool and also describing dialogue between fund managers and management as a means to promote corporate social responsibility).

[139] Noyes Investment Policy, *supra* note 36.

Foundation will vote in a manner consistent with those interests.[140] When a shareholder issue involves social or environmental matters not directly related to program interests, the Foundation "will review each individual case and consult with [its] grantees, managers and others, as appropriate."[141] The investment policy provides guidelines for voting on issues of corporate governance.[142] In some cases, the Foundation may hold shares in a company that is incompatible with the Foundation's mission and use its position as a shareholder to address its concerns.[143]

¶47 Socially responsible funds may use the weight of many investors, both charities and private investors, to influence corporate behavior. In 2002, the socially responsible investing fund Domini[144] led a coalition of investors holding 500,000 shares of stock in Procter & Gamble.[145] The shareholders urged Procter & Gamble to offer Fair Trade Certified coffee[146] and eventually filed a related shareholder resolution.[147] In 2003, Procter & Gamble announced that it would begin marketing Fair Trade Certified coffee products.[148] Other factors, including pressure from consumers and humanitarian organizations, influenced Procter & Gamble, but the shareholder action played a role in the company's decision.[149]

¶48 Shareholder advocacy requires more active involvement by charities owning stock in the companies than does investing with screens, but a charity with the resources to devote to shareholder advocacy may find it an effective way to support the organization's mission,[150] and the connection between mission and investment may be more significant. Given the increased cost in time, when deciding whether to engage in shareholder advocacy, the charity must consider whether the time could be better spent on other mission-related activities.[151] Clearly, a decision to engage in this sort of mission investing requires a careful exercise of judgment by the charity's decision makers.

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] Domini Social Investments integrates social and environmental criteria into investment decisions for the funds it manages. *Welcome to Domini Social Investments*, DOMINI SOC. INVESTMENTS, http://www.domini.com/about-domini/index.htm. Domini develops and applies social and environmental standards for the funds and Wellington Management is responsible for financial standards and portfolio construction for the funds. *Id.* In 2008 Domini filed 19 shareholder resolutions. William Donovan, *Full Contact Investing*, ABOUT.COM: SOCIALLY RESPONSIBLE INVESTING, http://socialinvesting.about.com/od/srishareholders/a/socialactivism.htm.
[145] Press Release, Global Exchange, Advocacy Groups and Shareholders Persuade Procter and Gamble, GLOBAL EXCH. (Sept. 15, 2003), http://www.globalexchange.org/update/press/1043.html. Domini worked with the Center for Reflection, Education and Action (CREA), a research, education, and action organization. *Id.*
[146] Fair Trade certification requires a minimum level of compensation for small coffee farmers, a level designed to allow the farmers to support their families. *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See* Dobris, *supra* note 11, at 777 (suggesting that proxy voting and shareholder motions may be more effective than screens in changing corporate behavior).
[151] *See, e.g.*, SIMON, POWERS & GUNNEMANN, *supra* note 3, at 86 (detailing the various considerations that a university must take into account).

iii) Community Investing

¶49 Community investing typically uses capital from investors and lends it to people or businesses in underserved communities.[152] Through community investing, funds can be made available to low-income individuals, small businesses, and organizations providing services such as affordable housing. A charity may engage directly in community investing or may invest through a local organization that provides the financial services.

¶50 Many micro-finance organizations operate internationally. For example, the Grameen Foundation provides capital to micro-lenders in poor communities around the world so that they can make small loans to individuals, mostly women, to start businesses.[153] The Foundation uses several strategies to make repayments likely, and, as loans are repaid, uses the funds to make new loans.[154] Other financial services organizations operate in the United States. Community development banks and community development credit unions lend money in underserved communities to individuals who might not have access to conventional financial services.[155] For example, Bethex Federal Credit Union provides financial services to low income families in the Bronx.[156] Organized in 1970 to help "welfare mothers" who solved their cash emergencies by using a pawnshop or loan shark, the credit union now has assets of $16 million.[157] Members' accounts provide some of the funds available for lending, and low-interest or no-interest deposits from banks and foundations enlarge the lending pool.[158] After Hurricane Katrina devastated parts of New Orleans, the Hope Community Credit Union helped local residents obtain loans for businesses and home repairs.[159] These community credit unions provide financial services to low income people who might not otherwise be able to obtain loans and other services.[160]

¶51 Trinity College, in Hartford, Connecticut, provides a good example of direct community investing. By the 1990s, the area around Trinity College had become depressed and unsafe.[161] The College bought properties adjacent to its own property, fixed up the properties, and then sold them to homeowners and businesses.[162] Trinity did not intend to use the properties directly for college purposes, but did anticipate that revitalizing the area near the campus would result in benefits for the college community

[152] TRENDS, *supra* note 24, at 28–29.
[153] *What We Do*, GRAMEEN FOUND., http://www.grameenfoundation.org/what_we_do.
[154] *See id*; *see Microfinance Basics*, GRAMEEN FOUNDATION, http://www.grameenfoundation.org/what-we-do/microfinance/microfinance-basics.
[155] TRENDS, *supra* note 24, at 29–30.
[156] *About Us*, BETHEX FED. CREDIT UNION, http://bethexfcu.org/about.htm.
[157] *Id.*
[158] *Id.*
[159] *See* Tracy Fernandez Rysavy & Prianjali Mascarenhas, *Financing Hope*, YES!, http://www.yesmagazine.org/issues/go-local/financing-hope.
[160] *About Us*, NAT'L FED'N OF COMMUNITY DEV. CREDIT UNIONS, http://www.cdcu.coop/i4a/pages/index.cfm?pageid=256#About_our_members.
[161] *See* Eric Goldscheider, *College Initiates Program to Give Back to Its Neighbors*, N.Y. TIMES, Nov. 1, 2000, at B15, *available at* http://www.nytimes.com/2000/11/01/nyregion/college-initiates-program-to-give-back-to-its-neighbors.html.
[162] *See* Jane Gross, *Trinity College Leads Effort to Spark Hartford's Renewal*, N.Y. TIMES, Apr. 14, 1997, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E07EFDF163FF937A25757C0A961958260.

and would likely increase student applications.[163] Viewed entirely from an investment perspective, the acquisitions would likely not have been prudent.[164] In contrast, as assets that provided both a degree of investment potential and benefits for the purposes of the college, the purchases made sense.[165]

¶52 The impact of community investing continues to grow. For many of the charities that engage in this type of investing, the investing may be such a significant part of the charity's mission that the investments may properly be considered program-related assets. The rules of prudence apply, but the concerns about financial return will differ from the analysis applied to other types of mission investing.

III. Jeopardizing Investments—IRC § 4944

¶53 The Internal Revenue Code provides one other legal rule that applies to investment decision-making by charities, although it applies only to private foundations.[166] Section 4944 prohibits private foundations from investing in investments that jeopardize a private foundation's charitable purposes.[167] Congress enacted § 4944 as part of a group of code sections, termed the private foundation rules, added to the Internal Revenue Code in 1969.[168] Prior to 1969, Congress became concerned that foundations created and managed by an individual or a family were at risk of possible abuse by those individuals or family members.[169] The private foundation rules represented an attempt to curtail these abuses, with a particular focus on self-dealing and business holdings in donor-owned companies.[170] The rule regarding jeopardizing investments has been described as "[a] minor proposal to control trading and speculation, which the Treasury found only among a small group of foundations."[171]

¶54 Section 4944 exempts from its coverage investments that qualify as program-related investments.[172] If a foundation makes an investment to accomplish a charitable purpose of the foundation, and if the production of income is not a "significant purpose,"

[163] Gitta Morris, *How Trinity Aims to Stay Competitive*, N.Y. Times, Feb. 18, 1996, at CN1, *available at* http://www.nytimes.com/1996/02/18/nyregion/how-trinity-aims-to-stay-competitive.html; *see* Stacey Stowe, *Raising the Neighborhood: A Few Years Into Its Ambitious Plan, Trinity College Sees Results*, N.Y. Times, Oct. 29, 2000, at CT1, *available at* http://www.nytimes.com/2000/10/29/nyregion/raising-neighborhood-few-years-into-its-ambitious-plan-trinity-college-sees.html (indicating applications to Trinity have increased seventy-seven percent).

[164] Goldscheider, *supra* note 161.

[165] *Id.* The investments Trinity College made could be viewed as program-related investments. Whether considered program-related investments or mission investments, the investments served a purpose related to the mission of the college and were carried out in a prudent manner.

[166] The IRC creates two categories of charities: public charities (those that meet the requirements of § 509) and private foundations (all other charities). I.R.C. § 509 (2006). In general (and superficially) private foundations typically have one or very few donors and do not receive support from the general public. *Id.*

[167] § 4944(a)(2).

[168] *See* Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 Exempt Org. Tax Rev. 52 (2000).

[169] Congressman Wright Patman led a campaign against foundation abuse. Waldemar A. Nielsen, The Big Foundations 7 (1972); *see also* Troyer, *supra* note 168 at 63.

[170] Troyer, *supra* note 168, at 57.

[171] *Id.* at 58.

[172] I.R.C. § 4944(c) (2006); *see supra* Section I.A.

the asset will not be subject to § 4944.[173] Thus, § 4944 applies to mission investing because, by definition, a charity uses mission investing to generate investment returns as well as to carry out charitable purposes. Section 4944 meshes with the prudent investor rules already discussed.[174] An investment decision maker must weigh economic factors when engaging in mission investing and if the decision maker does so and then makes prudent investment decisions, § 4944 should not impose a penalty on the charity or the manager.

IV. DONORS

¶55 Although not directly related to the fiduciary's duties with respect to a charity, donors may play a role in connection with a charity's investments. Donors can, in a gift agreement entered into with a charity, provide directions about how a charity should invest the donated funds.[175] For example, a donor concerned with risk could direct a charity to invest only in financial instruments backed by the U.S. government. The charity could decide whether to accept such a restriction and might decline the gift on those terms. A donor might also direct the charity to engage in a particular form of mission investing. For example, a donor could require that a charity dedicated to improving health not invest in tobacco stocks.[176] Again, the charity would decide whether to accept the gift with the restriction. Finally, a donor might increase the fiduciary's discretion with respect to investment decision-making, perhaps in order to make relationship to mission a more important factor to consider.

¶56 Donors will probably not object to a charity's decision to engage in mission investing, as long as the decision makers continue to act as prudent investors. Some donors may even assume that a charity will make investment decisions that further the charity's mission, or at least do not undercut the mission. For example, a donor to a charity organized to promote sustainable forestry might be distressed to learn that the charity invested in a traditionally run timber company, unless the charity planned to use shareholder advocacy to change logging practices. If donors expect mission investing, then donor expectations may push charities to engage in more mission investing. Charities may be able to use mission investing to attract new donors, but a charity must

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[173] § 4944(c) (defining program-related investment).

[174] The regulations under § 4944 make clear that a foundation manager can avoid making jeopardizing investments by acting as a prudent investor. Treas. Reg. § 53.4944-1(a)(2). The regulations describe the type of prudence a prudent investor would exercise, without using the term "prudent investor."

[175] Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 995 (2010).

[176] Jeffrey Cooper has suggested that, under the Uniform Trust Code, a settlor of a trust could not place a negative restriction on a trustee's ability to invest in companies the settlor found repugnant, for example cigarette manufacturers. Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, The Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1193–94 (2008). Although the UTC codifies the longstanding trust law rule against capricious purposes, now termed the benefit-the-beneficiaries rule, the rule prevents settlors only from placing restrictions on investment decision-making that would override the duty to act as a prudent investor so completely that the beneficiary would lose significant benefits from the trust. John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments,* 90 B.U. L. REV. 375, 397 (2010) ("The settlor who is forbidden to direct the trustee to burn the Rembrandt is still allowed to impose any investment or administrative regime that does not offend outer limits of rationality."). People may argue about the prudence of a screen for tobacco stocks, but that sort of restriction is not so harmful as to be prohibited by the UTC.

be careful not to antagonize donors by investing imprudently, either by engaging in socially responsible investing that is not related to the charity's mission or by incurring costs that are not outweighed by mission-related benefits.

V. CONCLUSION

¶57 Little case law exists that addresses investment decision-making by managers of charities.[177] Thus, the statutes on prudent investing and the Restatements of Trusts remain the best sources of legal guidance. Neither UPIA nor UPMIFA discusses mission investing directly, but an analysis of those statutes suggests that the law permits mission investing by charities. Descriptions of the fiduciary duties of loyalty and prudence in the Restatement (Third) of Trusts support this view, and a comment to the general standard of prudent investment agrees with this interpretation of the law.[178]

¶58 Trustees and directors of charities should understand the legal rules that apply to investment decision-making by a fiduciary. Private investors can choose to engage in socially responsible investing with their own funds, but a fiduciary must act in the best interests or sole interests of the charity, without letting personal interests dictate decision-making. A fiduciary must exercise judgment carefully, and issues involved in mission investing can be complex. As long as a fiduciary acts as a prudent investor, however, the fiduciary may consider the charity's mission among the other factors that apply to prudent investing. The fiduciary should consider the efficacy of an investment in relation to the charity's mission and also the costs incurred in connection with the investment, while keeping in mind that investments may support the charitable mission in non-financial as well as financial ways. A fiduciary acting on behalf of a charity has significant discretion in making investment decisions. So long as the fiduciary exercises judgment with due regard to the factors a prudent investor should consider, the fiduciary will be in compliance with the applicable legal duties. The fiduciary can choose to include mission investing as part of the charity's investment strategy.

[177] *See* Dobris, *supra* note 11, at 773–774 (noting that very little litigation about SRI exists and suggesting that a case with a sympathetic trustee could provide "more flexibility in regard to SRI").
[178] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. c (2007).