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Is Mission Investing Prudent?*

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I. Charities and Investment Decision Making

Socially responsible investing by charities gained notoriety in the 1970s 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 university or other fiduciary could legally engage in socially responsible investing.[2]

Since the 1970s socially responsible investing has expanded exponentially for private investors.[3] Charities continue to ponder what factors to consider in making investment decisions and whether socially responsible investing should play a role. In addition, charities have begun to engage in mission investing.

New statutory law on prudent investing -- the Uniform Prudent Investor Act ("UPIA")[4] and the Uniform Prudent Management of Institutional Funds Act ("UPMIFA")[5] -- provides 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.[6] The rules in the two uniform acts on investment decision making are almost identical, because UPMIFA drew its language from UPIA.[7]

[1] *See* John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 70 MICH. L. REV. 72 (1980); Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 NEB. L. REV. 209 (1986).
[2] *See* Langbein & Posner, *supra* note 1.
[3] *See* Telis Demos, *Accounting for accountability, Fortune's annual ranking of business responsibility*, FORTUNE MAGAZINE (Nov. 1, 2007) (stating, "with trillions of dollars flowing into socially responsible investment funds and government regulators looming, what CEO doesn't have a ready list of charities or causes that the company supports to brandish in its favor?").
[4] UNIF. PRUDENT INVESTOR ACT (1994), 7B U.L.A. 16 (Supp. 1995) [hereinafter "UPIA"].
[5] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (2006) [hereinafter "UPMIFA"].
[6] *See* UPMIFA§ 2(5) (defining "institutional fund" to include a fund managed as a trust only if a charity is the trustee).
[7] *See id.* at § 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. *See* UPMIFA § 3(b).

This paper will identify several types of investment decision making that bring into consideration factors beyond the risk and return analysis that also applies to investment decision making. The paper will analyze the law as it applies to investment decision making by charities, and suggest that mission investing is both appropriate and legal.

II. Investing to Serve a Charitable Purpose[8]

For purposes of this paper I use three terms to describe three different types of investment assets or investment strategies: program-related assets, socially responsible investing, and mission investing. I draw a distinction between the terms socially responsible investing and mission investing that may not be a widely used distinction.[9] I find the distinction useful in thinking about investment decision making by charitable fiduciaries. I note, however, that the term socially responsible investing or "SRI" is commonly used to encompass what I designate as mission investing.[10]

A. Program-related assets

A charity may hold some assets, termed "program-related assets," because the charity needs the 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

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[8] 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) (2000) (amended 2005). *See, also*, RESTATEMENT (THIRD) OF TRUSTS § 28 (2003). The paper uses the term "charity" to refer to an organization created for charitable purposes, whether organized as a charitable trust or as a nonprofit corporation.
[9] *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 study uses the term mission investing in the way I use it. The study notes that "mission-related investing" is also used but sometimes is limited to market-rate investments or investments made by endowments. *Id*.
[10] *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 that people want investments to "match the mission").

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.

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."[11] UPMIFA excludes program-related assets from its requirement that a charity invest funds prudently.[12] The Drafting Committee considered making UPMIFA applicable to all assets held by a charity. 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. The appeal of having the prudent investor rules of UPMIFA apply to all assets is that some assets have mixed purposes, both investment and mission. After consideration, the Drafting Committee decided that treating assets that serve only incidental investment purposes as "investments" did not make sense. The university classrooms, the building for the soup kitchen, and the building for the animal shelter do not serve an investment purpose in the normal sense and seemed out of place in a statute that provides rules on prudent investment.

The comments to UPMIFA point out that even assets used "primarily" for a charitable purpose may also serve an investment purpose.[13] 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.[14] The

[11] UPMIFA § 2(7).
[12] *Id.* at § 2(5).
[13] *Id.* at § 2(7), cmt.
[14] *See* REV. MODEL NONPROFIT CORPORATION ACT § 8.30 (1988) [hereinafter "RMNCA"].

charity should consider the cost of the asset, as well as the possibility of an investment return in the future.

UPIA does not exclude program-related investments, 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[15] and also directs the trustee to consider the special value of an asset to the trust's purposes,[16] so a trustee of a charitable trust can invest in a program-related asset within the guidance of UPIA. The trustee will consider economic factors of the investment, just as a director making a decision about a program-related asset not subject to UPMIFA will consider those factors under the general duty of care and prudence.

The Internal Revenue Code uses the term "program-related investment" to exclude certain assets from Section 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 . . . ."[17] 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 . . . ."[18] The Section 4944 definition is somewhat different from the UPMIFA definition, but the difference does not matter for purposes of this paper. Both definitions apply to assets a charity owns primarily for program purposes and not to assets owned primarily for investment purposes. This paper focuses on assets owned primarily as investments, with program purposes being a factor but not the primary purpose.

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[15] UPIA § 2(a).
[16] *Id*. at § 2(c)(8).
[17] IRC § 4944(c). *See infra* text accompanying notes 133-40.
[18] *Id*.

B. Socially Responsible Investing

In general, the concept of socially responsible investing holds that investment decision makers should consider social or ethical issues as well as financial ones in making decisions about investments.[19] Advocates argue that investments can, and should, effect positive social change as well as generate financial returns.[20] Socially responsible investing, also called social investing, gained adherents in the 1970s.[21] Pension funds and universities, in particular, faced growing pressure to engage in social investing.[22] Concerns over apartheid in South Africa led to calls for universities to divest in companies that engaged in business in South Africa.[23] Pension funds of state employees were pushed to invest in businesses located in the state,[24] and union pension plans began to invest in "socially desirable projects."[25] The concept also gained critics who raised concerns about

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[19] *See* Maria O'Brien Hylton, "*Socially Responsible*" *Investing: Doing Good Versus Doing Well In An Inefficient Market*, 42 AM. U.L. REV. 1, 2 (1992) (citing to 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 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 "socially 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 1-2 (2005) (available at http://www.socialinvest.org/pdf/research/Trends/2005%20Trends%20Report.pdf, last checked April 20, 2008) (cited as "TRENDS").

[20] *See* Maria Markham Thompson, *Socially Responsible Investing Has Become a Mainstream Practice*, 16 CHRON. PHILANTHROPY B24-B25 (May 27, 2004).

[21] *See* Langbein & Posner, *supra* note 1, at 72 (considering social investing by pension funds and university endowment funds and citing EMPLOYEE BENEFIT RESEARCH INSTITUTE, SHOULD PENSION /ASSETS BE MANAGED FOR SOCIAL/POLITICAL PURPOSES? (D. Salisbury ed. 1980)); Hylton, *supra* note 19 at 2 (citing ANNE SIMPSON, THE GREENING OF GLOBAL INVESTMENT: HOW THE ENVIRONMENT, ETHICS, AND POLITICS ARE RESHAPING STRATEGIES 27 (1991) for a summary of the history of ethical investment in the U.S. that began in 1928 when religious organizations began to engage in social investing).

[22] *See* Langbein & Posner, *supra* note 1.

[23] *See id.* at 72-73; *see also* Hylton, *supra* note 19 at 3 (describing South African apartheid as the issue that attracted the attention of "virtually every socially responsible fund").

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

[25] *See id.* (describing a United Auto Workers labor contract that applied a social investing requirement to "up to ten percent of new pension contributions").

whether socially responsible investing by fiduciaries violated the fiduciary duty of loyalty.[26]

Socially responsible investing has developed in breadth and depth since the 1970s.[27] Socially responsible funds created in the 1970s and 1980s screened out companies with poor social or environmental records.[28] Funds often focused on a particular issue, like apartheid.[29] In recent years, funds have continued to develop exclusionary screens,[30] and in addition funds now employ inclusionary screens that look for companies with good corporate performance on a variety of social and environmental issues.[31] Socially responsible investors may also evaluate corporate governance in decision making and may use shareholder advocacy and community investment as strategies.[32]

Diversification has become easier because socially responsible funds are now available across a broad range of share classes and in different investment styles.[33] 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, has meant that a charity can make carrying out its mission a factor in making decisions about investments.

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[26] *See Id.* at 96..
[27] *See* TRENDS, *supra* note 19, 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, 214 (1997); Thompson, *supra* note 20; *see also*, Cooch & Kramer, *supra* note 9, at 14-26 (providing data on trends in mission investing).
[28] *See* TRENDS, *supra* note 19, at 1.
[29] *See* Langbein & Posner, *supra* note 1; TRENDS, *supra* note 19, at 4.
[30] *See* TRENDS, *supra* note 19, at 8 (identifying as the five most common social screens: tobacco, alcohol, gambling, defense/weapons, community relations).
[31] *See id.* at 3 (stating: "Generally social investors seek to own profitable companies that make positive contributions to society."). The Jesse 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 reproductive healthcare, and companies whose labor practices and compensation standards support collective bargaining, living wage, and pay equity. *See* http://www.noyes.org/investpol.html (last visited April 20, 2008) [hereinafter "Noyes"].
[32] *See* TRENDS, *supra* note 19, at 16-35.
[33] *See id.*, at 7 (reporting at least 201 screened funds and more than 370 share classes).

C. Mission Investing

"Mission investing" as this paper uses the term, means something different from socially responsible investing. A charity that engages in mission investing 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.[34] The charity considers its mission as a factor in making investment decisions, and does not ignore the other factors a prudent investor should consider. The investment may yield an investment return similar to investments made without consideration of mission, or the mission-related benefits may outweigh any reduced financial benefits. Mission investing assumes that when an investment decision maker considers the best interests of a charity, the decision maker considers the charity's mission as well as possible financial gain from an investment.

III. Legal Rules Applicable to Investing by Charities

A. Duty of Loyalty

1. Meaning of the Duty of Loyalty

The duty of loyalty applies to the trustees and directors who manage a charity. Developed under trust law, the duty of loyalty is the trustee's duty to act "solely in the interests of the beneficiaries."[35] 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

[34] *See* Dobris, *supra* note 10, at 768 (describing mission investing as "making fuzzy the formerly clear boundary between investing for gain and granting for charitable purposes.")
[35] UNIF. TRUST CODE § 802(a); RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2007). John Langbein has argued that a "best interests" standard would better serve trust beneficiaries. *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?* 114 Yale L. J. 929 (2005).

own account, for the trustee's personal interests, that self-dealing can constitute a breach of the duty of loyalty. Under trust law, a beneficiary can void a self-dealing transaction unless the trust 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.[36]

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."[37] 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 is 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.[38]

Trust law developed strict fiduciary rules to protect the interests of beneficiaries who have beneficial but not legal title.[39] When a fiduciary holds legal but not beneficial title to assets, the trustee may be tempted to try to benefit personally from the position of legal control.[40] 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

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[36] UNIF. TRUST CODE § 802(b). A self-dealing transaction is not 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.
[37] RMNCA § 8.30.
[38] RMNCA § 8.31.
[39] *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 640 (1995) (stating: "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.").
[40] *See also,* GEORGE T. BOGERT, TRUSTS 342 (6th ed. 1987) (including in a discussion of the duty of loyalty the following statement: "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.").

been on self-dealing by the trustee. A comment to the Restatement explains that the duty of loyalty also treats as improper a trustee's decision to invest in a manner that benefits a third party or a non-trust objective, even if the trustee does not benefit.[41]

2. Application to investment decision making

Clearly, a fiduciary cannot make an investment decision for the charity based on private benefit to the fiduciary, unless the transaction fits one of the provisions in trust law or nonprofit corporate law designed to protect the beneficiaries.[42] Beyond the fiduciary's own self-interest, a fiduciary cannot benefit a third party or a non-trust objective.[43] The beneficiaries' interests must come first, but the question becomes how one views the "sole interests" or the "best interests" of the beneficiaries. Traditionally, the view has been that the trustee's duty relates only to the beneficiaries' financial interests.[44] Yet nothing in the duty of loyalty requires the trustee to exclude consideration of a beneficiary's non-financial interests. The view of what constitutes the sole interests or best interests appears to be changing.[45]

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. Meir Statman comments that investment advice that ignores beneficiaries' nonmonetary interests is "fundamentally flawed." He notes that financial

[41] RESTATEMENT (THIRD) OF TRUSTS, § 78, cmt. f (2007).
[42] Beneficiaries can consent to transactions that would otherwise be self-dealing. *See supra*, text accompanying notes 35-38.
[43] RESTATEMENT (THIRD) OF TRUSTS § 78. cmt. f.
[44] Scholars writing about the duty of loyalty may assume that beneficiaries' interests in a trust are only financial interests. *See, e.g.*, Langbein & Posner, *supra* note 1 at 96 (stating that "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.").
[45] Joel Dobris has recently posited that the duty of loyalty may encompass non-monetary interests. He writes: "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." *See* Dobris, *supra* note 10, at n. 27.

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.[46] Mr. Statman views this kind of advice as irrational. Mr. Statman discusses private investors and not trust beneficiaries, but his focus on the interests of private individuals is instructive. At issue for a trustee is determining the interests of the beneficiaries, and Mr. Statman suggests that if one asks private individuals about preferences for investing assets, their interests may well include nonmonetary interests.

Turning to charities, the sole interests or best interests of a charitable purpose or even specific charitable entities becomes more complicated. 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 purposes. How does the duty of loyalty apply to mission investing or socially responsible investing by charities?

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 financially, no one is likely to complain, but the fiduciary has not acted in the sole interests of the charity.

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 nonmonetary interests. Thus, mission investing is consistent with the duty of loyalty. Although no court has adopted this analysis, revisions to comments to

[46] Meir Statman, *Why You're Not a Rational Investor*, FORTUNE MAGAZINE (Nov. 7, 2007).

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.[47]

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.[48] The broad approach to social investing taken at the time – the idea of investing in socially desirable projects that have a 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.[49] Langbein and Posner concluded that the duty of loyalty forbids social investing "in its current form."[50] The authors explained that the social principles embodied in the idea of social investing were "poorly specified"[51] and the criteria used to identify "socially irresponsible companies" were "dubious."[52] At that time, issues involved in deciding which investments were socially responsible may have been unrelated to the purpose of the charity. Langbein and Posner noted that social investing could confer a noneconomic value on the trust beneficiary, one that might compensate for any loss of economic value in the investment.[53] Given the type of social investing engaged in at the time, however, Langbein and Posner concluded that the noneconomic value did not directly benefit the beneficiaries of the trust.[54]

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[47] 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. RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

[48] *See* Langbein & Posner, *supra* note 1, at 96 (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.).

[49] *See id.*

[50] *See id.* at 76.

[51] *See id*. at 83.

[52] *See id.* at 84.

[53] *See id*. at 94. Langbein & Posner also argued that socially responsible investing may be "economically unsound" due to reduced diversification and higher administrative costs entailed by the screening process. *See id.* at 76, 93. This concern may be reduced by the growth of socially responsible funds and evidence that current returns are comparable to standard funds. *See infra* text accompanying notes 96-102

[54] *See* Langbein & Posner, *supra* note 1, at 95.

The comment to 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 of the interests of the persons supposedly benefitted by pursuing the particular social cause.[55]

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.[56]

In 2007 the Restatement (Third) of Trusts added the UPIA comment to a comment to its section on the duty of loyalty.[57] The Restatement comment notes that "[n]ot surprisingly considerable disagreement continues about what loyalty requires in this context."[58] The comment then cites articles addressing the issue in the context of pension plans and does not discuss investing by charities. [59]

Although the comment to the duty of loyalty does not address investing by charities, the comment includes a reference to the Restatement section on prudent investment.[60] 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.[61]

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[55] UPIA § 5, cmt. (1992). Prof. Langbein served as Reporter for UPIA.
[56] *See id.* (stating: "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.").
[57] RESTATEMENT (THIRD) OF TRUSTS § 78, cmt. f. (2007).
[58] *Id*.
[59] *Id*. The comment cites to two articles addressing the issue in the context of pension plans. Pension plans have identifiable beneficiaries and are beyond the scope of this paper.
[60] *Id.*
[61] RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. c. (2007).

The Restatement's section on prudent investment includes the requirement that the trustee must conform to the duty of loyalty.[62] 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.[63] The comment notes that the terms of the trust may permit investing based on social or political issues,[64] and beneficiaries may consent to such investing.[65] And then the comment turns to investing by charities:

> "social 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."[66]

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.

B. Prudent Investor Standard

1. Prudent Investor Act - Rules for Charitable Trusts

Another fiduciary duty, the duty of prudence, applies more directly to investment decision making by trustees.[67] In general, a trustee must manage a trust as a prudent

[62] *Id*. at 90(c)(1).
[63] *Id*. at 90, cmt. c.
[64] 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.
[65] A beneficiary can consent to a self-dealing transaction. *See* UNIF. TRUST CODE § 802(b).
[66] RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. c. (2007).
[67] *See* RESTATEMENT (THIRD) OF TRUSTS § 77 (2007) (stating, "(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)

person would, exercising reasonable care, skill, and caution.[68] The rules on investing trust assets lie within this duty of prudence. As early as 1830, the common law required a trustee to act in prudence when investing assets of a trust.[69] The prudence standard evolved over time, reflecting changes in the application of the standard and changes in investing practices.[70] As modern portfolio theory became more widely understood, the time came for a more significant revision of trust law. The result of that revision became the prudent investor rule.

The American Law Institute revised provisions in the Restatement of Trusts that applied to investment decision making by trustees, creating, in 1992, the prudent investor rule.[71] The Uniform Law Commission built on the Restatement project and in 1994 approved UPIA. This uniform act provides rules on investing by trustees,[72] and has been widely adopted.[73]

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,[74] to consider the entire portfolio in making investments and to allocate risk across the

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The duty of prudence requires the exercise of reasonable care, skill, and caution."). The prudent investor rule applies more directly to investments. *See infra* at n. 71.

[68] *See id.*

[69] Harvard v. Armory, 26 Mass. (9 Pick.) 446 (1830).

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

[71] RESTATEMENT (THIRD) OF TRUSTS § 90 (2007) (stating: "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."); *see also*, Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992).

[72] For a complete explanation of UPIA and a discussion of trust-investment law, see Langbein, *supra* note 13.

[73] 44 states have adopted UPIA. *See* Uniform Law Commissioners, A Few Facts About the Uniform Prudent Investor Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upria.asp (last visited April 11, 2008). Maryland is listed as "substantially similar" and is counted in this paper as one of the 44 states. The District of Columbia and the U.S. Virgin Islands have also adopted UPIA. For a discussion of the effect UPIA has had on investment decision making, see Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?,* 50 J. L. & ECON. (2007).

[74] UPIA § 2(a).

portfolio,[75] and to diversify trust assets unless the purposes of the trust are better served by not diversifying.[76] 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.[77]

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."[78] Thus, for a charitable trust, the charitable purposes of the trust become a factor 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 . . . ."[79] The comment 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.[80] For a charity, an asset may be related to the charitable purpose.[81]

2. UMIFA and UPMIFA – Rules for Nonprofit Corporations

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.[82] At the time the Uniform Law Commission developed the act, a great deal of uncertainty existed concerning the fiduciary duties of

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[75] *Id.* at § 2(b).
[76] *Id.* at § 3.
[77] *Id.* at § 9. *See* Langbein, *supra* note 70, at 650-52 (describing the traditional nondelegation rule and the importance for prudent investing of the changes wrought by UPIA). *See* RESTATEMENT (SECOND) OF TRUSTS § 171 at cmt. h (describing the pre-UPIA rule: "A trustee cannot properly delegate to another power to select investments.").
[78] UPIA § 2(a).
[79] *Id.* at § 2(c)(8).
[80] *Id.* at § 2, cmt.
[81] These two provisions allow a charity to acquire and hold program-related assets. See discussion of program-related assets, *supra* at II.A.
[82] *See* Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277 (2007) (describing the history and adoption of UPMIFA).

directors of nonprofit corporations with respect to investment decision making.[83] UMIFA adopted the rules that became the foundation for UPIA: prudent decision making that included diversification, a total return concept, and delegation. Forty-seven jurisdictions adopted UMIFA.[84]

The prudence standards of UMIFA provided useful guidance to directors of nonprofit corporations, but after 35 years, the act needed updating.[85] The development of UPIA provided a catalyst for the decision to revise UPMIFA.[86] In 2006 the Uniform Law Commission approved a revised act with a new name: the Uniform Prudent Management of Institutional Funds Act ("UPMIFA").[87] UPMIFA still applies to nonprofit corporations and not to trusts,[88] but now the rules on investing are the same whether UPIA or UPMIFA applies.

UPMIFA uses language from the Revised Model Nonprofit Corporation Act to state the overall duty of care for prudent investing.[89] 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."[90] UPMIFA then uses language from UPIA to provide more specific guidance for those managing and investing charitable funds.[91] UPMIFA directs the

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[83] *See id*. at 1284-87 (describing the report prepared by William L. Cary and Craig B. Bright that highlighted the uncertainty and called for statutory reform).
[84] *See* http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-umifa.asp (last checked April 21, 2008).
[85] *See* UPMIFA, Prefatory Note.
[86] *See id.*
[87] *See* press release, Jul. 13, 2006, posted at http://nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=163.
[88] UPMIFA like UMIFA applies to all charities but the acts do not apply to charitable funds managed in trust fund unless a charity is the trustee. The acts do not cover trusts managed by corporate or individual trustees.
[89] RMNCA § 8.30(a) 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."

[90] UPMIFA § 3(b).
[91] *Id.* at § 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." UPIA Pref. Note (1992). Thus, UPMIFA clarified the meaning of prudent investing for directors of charities.

persons responsible for managing and investing the funds of an institution to act as a prudent investor would, directly tracking the language from UPIA. UPMIFA includes the two factors noted above that direct the fiduciary to consider non-financial aspects of an investment. UPMIFA directs the decision maker to consider "the charitable purposes of the institution and the institutional fund"[92] in managing and investing assets for the charity. UPMIFA 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."[93]

3. The Prudent Investor Rule and Mission Investing

Whether UPIA or UPMIFA applies, the prudent investor rule directs a charity to consider its charitable purposes in making investment decisions. This direction permits consideration of a charity's mission. A charity should not invest for vague social benefits unrelated to the charity's mission, but an examination of investment options can include consideration of ways in which the investments can support the charity's mission.

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 appropriate. As the number of funds that engage in different types of socially responsible investing increases, the ability to diversity becomes less of a problem, costs have gone down, and performance may be comparable to other funds.[94] These economic issues are best considered by examining three types of socially responsible investment strategies: screens, shareholder advocacy, and community investment.[95] The use of any of

[92] UPMIFA § 3(a).
[93] *Id.* at § 3(e)(1)(H).
[94] *See* TRENDS, *supra* note 19.
[95] In 2005, assets involved in socially responsible investing were identified as 68% in social screening only, 26% in shareholder advocacy, 5% in screening and advocacy, and 1% in community investing. *See* TRENDS, *supra* note 19, at 1.

these strategies by a charity will depend on the charity's purposes and its abilities to monitor the strategies.

a. Screens

Screens evaluate investments based on social or environmental criteria as well as financial performance. Screens may be inclusionary, for example a fund might prefer companies that engage in sustainable environmental practices and do not pollute or companies that support employees through fair wages and benefits and nondiscriminatory policies. Screens may also be exclusionary, excluding, for example, companies that produce tobacco or alcohol, that pollute, or that practice discriminatory employment practices.[96] Seventy-five percent of screened funds use multiple screens, and a quarter of the funds screen on a single issue.[97]

Reports suggest that socially responsible portfolios using screens have been both competitive and not abnormally risky in recent years.[98] Some funds have outperformed their benchmarks. For example, returns for the Domini Social 400 Index between 1990 (inception) and September 2007 were 12 percent, compared with the S&P 500 Index return of 11.49 percent.[99] Another fund, the Winslow Green Growth Fund had an annualized total return over the past five years of 22.95 percent, nearly eight percent higher than a benchmark index, the Russell 2000 Growth Index.[100] Some SRI funds have

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[96] *See* Investment Policy posted on the Noyes Foundation website, (listing both inclusionary and exclusionary screens).
[97] *See* TRENDS, *supra* note 19.
[98] *See* Solomon & Coe, *supra* note 27 at 233-50 (discussing the performance record of socially responsible funds); Thompson, *supra* note 20.
[99] *See* Shauna Croome-Carther*, Funds with Values,* INVESTOPEDIA 11.14.07, 10:40 AM ET http://www.forbes.com/investoreducation/2007/11/14/sri-funds-domini-pf-education-in_sc_1114investopedia_inl.html (last visited April 21, 2008) (citing KLD Indexes).
[100] *Green Investing for a Solid Return,* 03.03.08, 1:00 PM ET, http://www.forbes.com/personalfinance/2008/03/03/green-solar-suntech-pf-ii-in_jl_0303adviserqa_inl.html (last visited April 21, 2008) (interviewing Jackson Robinson, the lead manager of the Winslow Green Growth Fund).

higher expenses and fees due to the additional research required,[101] but not all SRI funds have higher costs. For example, Vanguard's FTSE Social Index reports fees of 0.25 percent.[102]

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, with complete disregard for financial returns, but mission can be a factor to consider, along with the other factors related to economic conditions and performance.

The Jessie Smith Noyes Foundation ("the Noyes Foundation") has adopted an investment policy that stresses a combination of mission investing and generating returns to support the charitable mission.[103] The Noyes Foundation's investment goals include producing income and capital gains to support spending, maintaining "the real (inflation adjusted) value of its assets over the longterm," 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."[104] The investment policy provides detailed guidelines for the investment managers, including benchmarks tied to performance standards.[105] The Noyes Foundation has established market index benchmarks for each asset class and expects managers to meet or exceed

[101] *See* Croome-Carther, *supra* note 95 (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).
[102] Penelope Wang, *For Do-Good Funds, an Ethical Dilemma,* MONEY MAGAZINE, Mar. 22, 2007 1:48 PM EDT, http://money.cnn.com/magazines/moneymag/moneymag_archive/2007/04/01/8403607/index.htm (last visited April 21, 2008).
[103] *See* Noyes, *supra* note 31.
[104] *See id.*
[105] *See id.*

these benchmarks.[106] Of the indices listed, only one, Domini 400 Social Index, appears by name to be a social index. Others include typical indices: S&P 500 Index, Russell 2000 Index, and Lehman Bros. Aggregate Bond Index.[107] 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 the Foundation's mission.

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.[108] The policy notes that to "avail itself of a full spectrum of investment diversification" the foundation may invest in asset classes for which screening is unavailable.[109] 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.[110]

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 the if the Noyes Foundation follows the rigorous review process outlined in the investment policy, underperforming funds or managers are likely to be quickly replaced.

b. Shareholder Advocacy

[106] *See id.*
[107] *See id.*
[108] *See id.* (listing four broad categories for screens: toxic emissions, extractive industries, and environmental justice; sustainable agriculture and food systems; reproductive health and rights; a sustainable and socially just society).
[109] *See id.*
[110] *See 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.

Some charities use their position as shareholders to try to influence corporate behavior. Shareholder resolutions on social and environmental issues and on corporate governance issues have increased in number over the past few years.[111] Shareholders may also engage in ongoing dialog with management, sometimes as a lead-up to filing a shareholder resolution and sometimes as an alternative to filing shareholder resolutions.[112]

The Noyes Foundation's investment policy promotes shareholder advocacy as part of its mission investing and provides directions on how managers should use the foundation's "voice."[113] The Noyes Foundation's investment policy directs managers to vote proxies in a manner consistent with the foundation's programs and to evaluate the social, environmental, and economic performance of a company when voting.[114] 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.[115]

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[116] led a coalition of investors holding 500,000 shares of stock in Proctor & Gamble.[117] The shareholders urged Proctor & Gamble to offer Fair Trade Certfied coffee,[118] and eventually filed a related shareholder resolution.[119] In 2003 Proctor & Gamble announced that it would begin marketing Fair Trade Certified coffee

[111] *See* TRENDS, *supra* note 19, at 16-27.
[112] *See id.* at 18-19 (describing dialog as a shareholder tool and also describing dialog between fund managers and management as a means to promote corporate social responsibility).
[113] *See* Noyes, supra note 31.
[114] *See id.*
[115] *See id.*
[116] Domini Social Investments integrates social and investment criteria into investment decisions for the $1.5 billion assets it manages. Domini worked with the Center for Reflection, Education and Action (CREA), a research, education, and action organization *See id.*
[117] *See* Valerie Orth, *Advocacy Groups and Shareholders Persuade Procter and Gamble*, GLOBAL EXCHANGE, Sept. 15, 2003, http://www.globalexchange.org/update/press/1043.html (last visited April 20, 2008). Domini Social Investments integrates social and investment criteria into investment decisions for the $1.5 billion assets it manages. Domini worked with the Center for Reflection, Education and Action (CREA), a research, education, and action organization.
[118] Fair Trade certification requires a minimum level of compensation for small coffee farmers, a level designed to allow the farmers to support their families.
[119] *See* Orth, *supra* note 117.

products.[120] Other factors, including pressure from consumers and humanitarian organizations, influenced Proctor & Gamble, but the shareholder action played a role in the company's decision.[121]

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.[122] If the charity addresses issues related to its mission through shareholder advocacy, then investments in the companies targeted for the advocacy will constitute mission investing.

c. Community Investing

Community investing typically uses capital from investors and lends it to people or businesses in underserved communities.[123] 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 in community investment directly or may invest through a local organization that provides the financial services.

Trinity College, in Hartford, Connecticut, provides a good example of direct community investment. In the 1990s the area around Trinity College had become depressed and unsafe.[124] The College bought properties adjacent to the University and began to provide low-interest loans to businesses willing to develop the properties.[125] The University did not intend to use the properties directly for University purposes, but the University anticipated that revitalizing the area near the campus would result in benefits

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[120] *See id.*
[121] *See id.*
[122] *See* Dobris, *supra* note 10, at 277 (suggesting that proxy voting and shareholder motions may be more effective than screens in changing corporate behavior).
[123] *See* TRENDS, *supra* note 19, at 28-29.
[124] Eric Goldsheider, *College Initiates Program to Give Back to Its Neighbors*, N.Y. TIMES, November 1, 2000, at B15.
[125] Jane Gross, *Trinity College Leads Effort to Spark Hartford's Renewal*, N.Y. TIMES, April 14, 1997, at A1.

for the University community and would likely increase student applications.[126] Viewed entirely from an investment perspective, the acquisitions would likely not have been prudent.[127] In contrast, as assets that provided both a degree of investment potential and benefits for the purposes of the University, the purchases made sense.[128]

Many micro-finance organizations operate internationally. For example, the Grameen Foundation makes small loans, usually less than $200, to individuals to start a business.[129] The foundation uses several strategies to make repayments likely, and then, as loans are repaid, the foundation lends the money to new clients.[130] Other financial services organizations operate in the United States. Community Development Banks and Community Development Credit Unions lend money in under-served communities to individuals who might not have access to conventional financial services.[131] After Hurricane Katrina devastated parts of New Orleans, the Hope Community Credit Union automatically deferred loan payments of members living in affected areas, began offering business recovery loans, and also offered below-interest certificates of deposit so that other investors could assist with recovery efforts.[132]

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 charities' mission that the investments may properly be considered program-related assets.

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[126] Gitta Morris, *How Trinity Aims to Stay Competitive*, N.Y. TIMES, February 18, 1996, at Section 13CN, Page 1.; Stacey Stowe, *Raising the Neighborhood; A Few Years Into Its Ambitious Plan, Trinity College Sees Results*, N.Y. TIMES, October 29, 2000, at Section 14CN, Page 1 (indicating applications to Trinity have increased 77 percent).

[127] Eric Goldscheider, *College Initiates Program to Give Back to Its Neighbors*, N.Y. TIMES, November 1, 2000, at B15.

[128] *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.

[129] *See* http://www.grameenfoundation.org/what_we_do/microfinance_in_action/ (last visited April 20, 2008).

[130] *See id.*

[131] *See* TRENDS, *supra* note 19, at 29-30.

[132] *See* Hope Community Credit Union website, http://www.hopecu.org/Katrina.htm (last visited April 20, 2008).

The rules of prudence apply, but the concerns about financial return will differ from the analysis applied to other types of mission investing.

C. Jeopardizing Investments – IRC 4944

The Internal Revenue Code provides one other legal rule that applies to investment decision making by charities, although only to private foundations. Section 4944 prohibits private foundations from investing in "jeopardizing investments," investments that jeopardize a private foundation's charitable purposes.[133] Congress enacted Section 4944 as part of a group of code sections, termed the private foundation rules, added to the Internal Revenue Code in 1969.[134] Prior to 1969 Congress had become concerned that foundations created and managed by an individual or a family were at risk of possible abuse by the managers.[135] The private foundation rules represented an attempt to curtail these abuses, with particular focus on self-dealing and business holdings in donor-owned companies.[136] The rule on jeopardizing investments has been described as "[a] minor proposal to control trading and speculation, which Treasury found only among a small group of foundations . . . ."[137] Jeopardizing investments were not a big concern in 1969.

Section 4944 exempts from its coverage investments that qualify as program-related investments.[138] Thus, 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," the asset will not be subject to 4944.[139] Thus, Section 4944 applies to mission investing, because by definition a charity uses mission investing to generate investment returns as

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[133] IRC § 4944.
[134] IRC §§ 4940-4946.
[135] Wright Patman led a campaign against foundation abuse. *See* WALDEMAR A. NIELSEN, THE BIG FOUNDATIONS 7 (1972) (cited in JAMES J. FISHMAN & STEPHEN SCHWARTZ, NONPROFIT ORGANIZATIONS 762 (2006)); *see, also* Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52 (2000) (describing the 1965 Treasury Report that guided Congress as it developed the private foundation rules).
[136] *See* Troyer, *supra* note 129, at 57.
[137] *See id*. at 58.
[138] IRC § 4944; *see supra* text accompanying notes 17-18.
[139] IRC § 4944(c) (defining program-related investment).

well as to carry out charitable purposes. Section 4944 meshes with the prudent investor rules already discussed.[140] An investment decision maker must weigh economic factors when engaging in mission investing and if the decision maker does so, Section 4944 should not impose a penalty on the charity or the manager.

IV. Remaining Questions

Little caselaw addressing investments by managers of charities exists.[141] Thus, the statutes and the Restatements 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.[142]

One question that remains is the line between acceptable mission investing and investing that may further the public good (assuming that one could define the public good) but does not directly further a charity's mission. The difficult part of the question may not be the line between permissible mission investing and non-permissible socially responsible investing. Rather, the difficult part of the question may be how to determine a charity's "mission." Consider universities. Universities have engaged in socially responsible investing since the 1970s.[143] If a university's mission is limited to advancing knowledge and educating students, then socially responsible investing may not meet that

[140] The regulations under Section 4944 make clear that a foundation manager can avoid making jeopardizing investments by acting as a prudent investor. *See* 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."
[141] *See* Dobris, *supra* note 10, at 773 (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.").
[142] *See* RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. c. (2007).
[143] *See* TRENDS, *supra* note 19, at 26-27 (noting that SRI advisory committees at universities and colleges have become increasingly active over the past decade). The Responsible Endowments Coalition, created in 2004, has brought together students, alumni, and faculty from 35 universities and colleges. See id. The Coalition's website lists information about advisory committees at 11 schools. See http://www.endowmentethics.org/schools.html (last visited April 20, 2008).

mission. If instead, a university's mission is something broader, a more general responsibility to local, national, and global communities, then a university may appropriately engage in mission investing, related to that more broadly defined mission. If students, alumni and faculty are engaged in thinking about the university's mission, can they decide that the mission is the broader one and should encompass socially responsible investing?[144] To what extent does it matter that donors to the university think that socially responsible investing is a good idea?[145] And if socially responsible funds yield returns comparable to other funds, with comparable levels of risks, does a precise definition of mission matter?

A final thought, even further beyond the scope of this paper, is the role of donors in a charity's decision to engage in mission investing. Donors to a university may approve of investing in socially responsible funds, but those donors may not have an expectation that a university will invest donated funds based on socially responsible concepts. Donors to a different sort of charity, however, might assume that the charity will make investment decisions that further the charity's mission or at least do not undercut the mission. 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. And apart from using mission investing to attract new donors, perhaps a charity will owe a duty to donors to invest in a way that does not undercut the mission.

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[144] The Responsible Endowments Coalition, created in 2004, has brought together students, alumni, and faculty from 35 universities and colleges. *See id.* The Coalition's website lists information about advisory committees at 11 schools. See http://www.endowmentethics.org/schools.html (last visited April 20, 2008).
[145] *See* TRENDS, *supra* note 19, at 26 (reporting that "a recent university endowment poll by Goldman Sachs Global Market Institute found widespread support among donors for socially responsible investing by their college endowments.").