



MARTHA COAKLEY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL  
ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

(617) 727-2200  
(617) 727-4765 TTY  
[www.mass.gov/ago](http://www.mass.gov/ago)

**MODIFICATION OF INSTITUTIONAL FUNDS & M.G.L. Ch. 180A § 5(d)**  
*Frequently Asked Questions*

***Q.: How do I know if my organization is an “institution”?***

A.: “Institution” is defined by statute as “...(i) a person, other than an individual, organized and operated exclusively for charitable purposes; (ii) a government or governmental subdivision, agency or instrumentality to the extent that it holds funds exclusively for a charitable purpose; or (iii) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.” See M.G.L. ch. 180A § 1.

In general, a public charity will qualify as an institution. A public charitable trust will also qualify if (i) all non-charitable interests have terminated and (ii) the trustee is a public charity. A public charitable trust administered by and individual or corporate trustee does not qualify as and “institution” for purposes of Ch. 180A. Whether a governmental subdivision, agency or instrumentality qualifies as an institution depends upon whether or not it holds funds exclusively for charitable purposes.

Please note that the definition of “institution” under ch. 180A § 1 was revised, effective July 2, 2009.

***Q: How do I know if the funds qualify as an “institutional fund”?***

A.: Not all restricted funds are institutional funds. An institutional fund is defined by statute as “...a fund held by an institution exclusively for charitable purposes or a fund held by a trustee for a charitable community trust, but not including: (i) program-related assets; (ii) a fund held for an institution by a trustee that is not an institution, other than a fund which is held for a charitable community trust; or (iii) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purpose of the fund.” See M.G.L. ch. 180A § 1.

Generally speaking, institutional funds are funds held by an institution for charitable purposes *and* which the institution is holding primarily for investment purposes. Assets that are given to an institution to be used to accomplish its charitable purposes and not also held for investment purposes are not institutional funds.

For example, a donor-restricted endowment fund held by an institution for the purpose of investing these funds in order to provide a stream of income for the institution to expend on its charitable activities is an institutional fund.

***Q: Does the term “institutional fund” have the same meaning as “endowment fund”?***

A.: No, although the terms are quite similar. To qualify as an institutional fund, the endowment fund must be (i) donor-restricted (as opposed to board-restricted); and (ii) not wholly expendable by the institution on a current basis. See M.G.L. ch. 180A § 1.

For example, a gift to a library of \$10,000 to purchase children’s books is a restricted gift but is not an endowment fund since the funds can be expended immediately. However, if the donor further restricts the use of the funds to income only, then the restricted gift is an endowment fund and, if the library is an institution, also qualifies as an institutional fund.

***Q.: What is a gift instrument?***

A.: For purposes of ch. 180A, a gift instrument is defined as “...a record, including an institutional solicitation, under which property is granted to, transferred to or held by an institution as an institutional fund.”

The term “gift instrument” includes such writings as wills, trust instruments, agreements, deeds, cancelled checks, and other memoranda to the extent that such writings indicate the intent of the donor. A gift instrument may be made in the form of electronic communication.

A record of a gift instrument may consist of more than one document. For example, when a donor makes a gift to an institution as a result of a solicitation received from that institution, the record will generally consist of both the solicitation material, the cancelled check, and any other relevant writings such as email or other correspondence between the donor and the institution to the extent that such writings indicate the intent of the donor.

***Q.: What is the difference between “donor-restricted” and “board-restricted”?***

A.: Donor-restricted funds are funds that have been given by a donor subject to any restrictions. Board-restricted funds are funds held by an institution and upon which the board of directors have imposed certain restrictions on the use or purpose of those funds. Donor restrictions are generally binding upon the institution and cannot be removed without either the consent of the donor, the approval of the court, or, in certain instances, with the consent of the attorney general.

For example, a gift of \$10,000 to a university to be used for scholarships is a donor-restricted gift and the funds must be used for scholarships. However, a gift of \$10,000 to a university to be used for its general charitable purposes which, once received, the board of directors of the university later votes to restrict for the purpose of providing scholarships is board-restricted as to the restriction that the funds must be used for scholarships.

***Q.: My institution held a fundraising campaign and solicited donations for a specific charitable purpose. Does that mean that these funds are donor-restricted? Are these funds also “institutional funds”?***

A.: It depends. Donations made to an institution as a result of a fundraising campaign by which the institution solicited funds for a charitable purpose are restricted funds and must be used for that charitable purpose. If the solicitation material included language indicating that the funds

would be held as an endowment fund, then the funds donated pursuant to that solicitation material are generally considered to be an institutional fund. Subsequent donations to such an endowment fund will also be deemed to be institutional funds.

***Q: My institution has held certain funds in an institutional fund for over twenty years, but I do not know the date that the fund was first established. What can I do?***

A.: You must be able to demonstrate, through other forms of supporting documentation, that the institutional fund has been in existence for at least twenty years. Financial records, bank statements, or similar records may be sufficient to substantiate the age of the fund.

***Q.: How can I tell if a donor-restricted gift is held for a program-related purpose or if it's held for investment purposes?***

A.: A program-related asset is defined by the statute as “an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.” If the asset is used by the institution in furthering its charitable purposes or in carrying out its charitable activities, and not for investment purposes, then it is likely a program-related asset.

In some instances an institution may hold funds for both program-related purposes and for investment purposes. If the assets are held primarily for investment purposes, then the asset may qualify as an institutional fund.

For example, an animal rescue league acquires a piece of land and builds an animal shelter on it. While the land has value as an investment, it is primarily being used by the institution to further its charitable purposes, and so is primarily held as a program-related asset, and not for investment purposes.

***Q: I have an old fund that was given for a restricted purpose and the current fair market value is less than \$75,000. The gift instrument does not restrict the fund for income only, but it does state that the donor wishes the institution to expend only the income each year. Does this qualify as an institutional fund?***

A.: No. Ch. 180A applies only to funds held that the donor has restricted so that the funds cannot be wholly expended at any one time. A gift that is restricted as to purpose but permits the entire amount to be expended at one time may not be modified pursuant to either administrative cy pres or administrative equitable deviation.

***Q.: What is Administrative Cy Pres?***

A.: Cy pres means “as similarly as possible to” and the doctrine of cy pres is applicable when the purpose of a charitable gift has become impossible or impracticable to fulfill. Pursuant to ch. 180A § 5(d) and S.J.C. Rule 1:23, when the purpose of an institutional fund that has a fair market value of \$75,000 or less, has been in existence for at least 20 years, and has become impossible or impracticable to fulfill, an institution may apply to the Division for application of administrative cy pres.

The institution must provide evidence substantiating that the charitable purpose contained in the gift instrument has become:

- Unlawful; or
- Impracticable; or
- Impossible to achieve; or
- Wasteful; and
- That the proposed modification of the purpose of the fund or the restriction on the use of the fund will be made in a manner consistent with the charitable purposes expressed in the gift instrument.

The doctrine of cy pres is appropriate when the dominant, or primary, charitable purpose of a gift has become impossible or impracticable to fulfill. For modification of subordinate terms of a charitable gift, the doctrine of equitable deviation shall apply.

***Q.: What is Administrative Equitable Deviation?***

A.: The doctrine of equitable deviation is intended to permit reasonable deviation from any of the subordinate terms of a restricted charitable gift if doing so will further the dominant charitable purpose as intended by the donor. Reasonable deviation of a subordinate term may also be appropriate if adherence to a specific subordinate restriction has become impractical or wasteful, or impairs the management or investment of a restricted gift.

Pursuant to ch. 180A § 5(d) and S.J.C. Rule 1:23, an institution may apply to the Division for application of administrative equitable deviation in order to reasonably deviate from the subordinate terms of an institutional fund if the following criteria are met:

- The restriction contained in a gift instrument on the management, investment or duration of an institutional fund has become impracticable or wasteful; or
- The restriction contained in a gift instrument on the management, investment or duration of an institutional fund impairs the management or investment of the fund; or
- The modification of a subordinate restriction will further the purposes of the fund; and
- To the extent practicable, modification shall be made in accordance with the donor's probable intention.

***Q.: What does "duration" mean, as it is used in Ch. 180A §5?***

A.: The term "duration" refers to the length of time that a donor intended an institutional fund to exist. A donor might give a charitable gift for a restricted purpose with the intent that the funds be expended over a period of time, until a specific event has occurred, or indefinitely. Over time, such a restriction may no longer be beneficial to carrying out the intent of the donor.

For example, a charitable trust with a fair market value of \$10,000 and which restricts expenditures to income only will likely be unable to produce sufficient annual income to cover both the expenses of administering the trust and providing sufficient income to distribute to the institution. The income-only restriction has arguably become wasteful and it may be appropriate to seek to modify the restriction so as to permit the trustee to wholly expend the entire \$10,000 in furtherance of the charitable purposes for which the trust was established.