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ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
NON-PROFIT ORGANIZATIONS/PUBLIC CHARITIES DIVISION
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200 ext. 2101
www.mass.gov/ago/charities

December 2010

RE: INSTRUCTIONS FOR INSTITUTIONAL FUND FORM PC (FORM PC-IF)
(Modification of Institutional Funds of less than \$75,000 and more than 20 years old)

Dear Public Charity:

Massachusetts law has always permitted institutions, including charitable trusts, to petition the courts to modify donor-imposed restrictions on charitable funds if certain criteria are met. The Non-Profit Organizations/Public Charities Division of the Office of the Attorney General ("Division") reviews these requests to determine if the proposed modifications are appropriate under applicable laws. If the Attorney General approves of the proposed modifications, then the relief requested is assented to and, if the institution has not already filed the petition, it is submitted to the court for judicial approval. This procedure applied regardless of the size or age of the institutional fund.

Pursuant to the newly adopted Uniform Prudent Management of Institutional Funds Act (UPMIFA), M.G.L. ch. 180A § 5(d), the Supreme Judicial Court issued S.J.C. Rule 1:23. This Rule, which is effective as of January 1, 2011, permits an institution seeking to modify certain restrictions of an institutional fund (see definitions section) that has been in existence for twenty (20) years or longer *and* has a total value of seventy-five thousand dollars (\$75,000) or less as of the end of its last fiscal year to do so without petitioning the court for relief if the institution obtains the consent of the Attorney General. In such an event, the institution may apply to the Attorney General for consent to either: (i) modify a restriction contained in a gift instrument on the management, investment, or duration of the institutional fund (administrative equitable deviation), or (ii) modify the purpose of the institutional fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument if a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund has become unlawful, impracticable, impossible to achieve or wasteful (administrative cy pres).

In order to process an application for administrative equitable deviation or administrative cy pres, an institution must submit a completed Form PC-IF. In addition to the Form PC-IF, an institution must submit an officer's certificate of the authorization of the application by the institution's board of trustees or directors, a copy of the gift instrument, a financial statement of the institutional fund for the most recent fiscal year, and, if the funds will be transferred to another institution, an affidavit from the recipient institution consenting to the transfer and to the use of the funds subject to any restrictions. Additional documents may also need to be submitted.

Once the completed application has been submitted, it will be reviewed by the Division. If the Division determines that the proposed modifications are appropriate and consistent with applicable laws governing charitable funds, the institution will be notified in writing that the Attorney General consents to the relief requested. If there are any questions or concerns regarding the application, the institution's representative will be contacted.

If the Division determines that the proposed modifications are not appropriate, the Division will contact the institution and attempt to resolve any problems or concerns. If the Division is unable to consent to the proposed relief despite these efforts, the Division will notify the institution in writing that the Attorney General does not consent to the proposed modifications.

Any institution aggrieved by the decision of the Attorney General may proceed, de novo, under M.G.L. ch. 180A, §§ 5(b) or 5(c).

Please note that the Form PC-IF, including all attachments and submissions, become public records when filed with the Division and are open to public inspection.

Sincerely,

Non-Profit Organizations/Public Charities Division
(617) 727-2200, ext. 2101

ADDITIONAL FORMS AND INSTRUCTIONS CAN BE FOUND ON OUR WEBSITE AT:
WWW.MASS.GOV/AGO/CHARITIES
"MODIFICATION OF INSTITUTIONAL FUNDS"

WHAT MUST BE FILED?

The Form PC-IF requires copies of the following documents: an Officer's Certificate of Board Authorization of the administrative equitable deviation/cy pres and any transfer of assets, the gift instrument, a financial statement for the most recent fiscal year of the institutional fund, and, if the funds will be transferred to another institution, an affidavit from the recipient institution consenting to the transfer and to the use of the funds subject to the restrictions imposed upon their use. The Division reserves the right to require an institution to provide, on a case-by-case basis and as determined by the Division, additional documents or information prior to acting on an application for administrative equitable deviation or administrative cy pres.

WHO IS ELIGIBLE TO FILE A FORM PC-IF?

A public charity which is also an "Institution" as defined by M.G.L. ch. 180A §1(1) and holds an institutional fund as defined by M.G.L. ch. 180A §1(2) that is subject to the laws of the Commonwealth of Massachusetts may submit a Form PC-IF in order to request modification of an institutional fund that has been in existence for at least twenty (20) years and, as of the end of the institution's last fiscal year, has a fair market value of seventy-five thousand dollars (\$75,000) or less.

WHERE TO FILE?

The Form PC-IF, with all attachments and other documents, should be submitted by mail to:

Non-Profit Organizations/Public Charities Division
Office of the Attorney General
Administrative Deviation/Cy pres Processing
One Ashburton Place
Boston, MA 02108

SPECIFIC INSTRUCTIONS

Please type or print all responses very clearly.

Please answer all questions and provide attachments and/or explanations that are applicable to your institution.

For the Attorney General's Account #, indicate the number assigned to the institution by the Division. If it does not have or know its Attorney General Number, please call the Division. Please note that not all public charities are required to register and file with the Attorney General. For institutions not required to register with the Attorney General, please indicate "not applicable" on the line for the Attorney General's Account #. Institutions that are not in compliance with applicable registration and filing requirements will not have their applications reviewed until compliance is achieved.

I. INSTITUTIONAL FUND DATA

Provide contact information for the institution that will remain in effect for at least 16 weeks after submission to the Division. If an individual other than the institution is preparing the application, please provide that individual's contact information.

Please be sure to clearly label all responses that require additional information with the corresponding Question number.

Question 1

Indicate the date the institutional fund was established and whether the institutional fund has been in existence for twenty years or longer.

Please note that the age of the institutional fund is calculated based on the date its account was created and funded, and not as of the date of any gift or gifts subsequently made to the fund.

Question 2

Indicate the total value of the institutional fund as determined as of the end of the institution's last fiscal year.

Question 3

Indicate whether the institution is seeking application for administrative equitable deviation or administrative cy pres.

Question 4

Indicate the current restrictions imposed upon the institutional fund, a brief description as to why the institution believes these restrictions have become impracticable, impossible, or wasteful, a description of the proposed modifications to these restrictions, and the reasons why the institution believes the proposed changes conform to the intent of the donor and further the charitable purpose of the institutional fund.

Please see the definition section for further guidance. If an applicant is uncertain which type of relief to request or any other aspect of the application, please contact the Division at (617) 727-2200, ext. 2101.

II. SIGNATURE REQUIRED

Original signatures are required on this form. The contact information for the person signing on behalf of the institution should be provided here. If this form is completed by anyone other than the individual signing on the institution's behalf, please identify that individual and include their contact information. The date provided should be the date the PC-IF is signed.

III. DOCUMENT SUBMISSION DISCLOSURE

Indicate all other documents provided at the time the Form PC-IF is sent to the Division.

IV. DEFINITIONS

Administrative Cy Pres

The doctrine of cy pres is rooted in case law and statutory law. Under Massachusetts law, when the purpose of a charitable gift has become impossible or impracticable to fulfill, the court may, upon a petition presented to the court pursuant to M.G.L. Ch. 214 § 10B, modify the purpose of the gift to a similar charitable purpose. Courts seek to apply cy pres in a manner that is consistent with the presumed intent of the donor.

Administrative cy pres is modeled on the doctrine of cy pres, and the same analysis that would be performed by the court pursuant to a petition for cy pres will apply to the Division's review of an application for 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.

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

Administrative Equitable Deviation

The doctrine of equitable deviation is rooted in case law and statutory law. Under Massachusetts law, a fiduciary may, pursuant to M.G.L. ch. 214 § 10B, petition the court 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.

Administrative equitable deviation is modeled on the doctrine of equitable deviation, and the same analysis that would be performed by the court pursuant to a petition for equitable deviation will apply to the Division's review of an application for administrative equitable deviation. The institution must provide evidence substantiating:

- That a restriction contained in a gift instrument on the management, investment or duration of an institutional fund has become impractical or wasteful; or
- That a 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
- That a 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.

Gift Instrument

For purposes of M.G.L. ch. 180A, § 5(d), 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.”

Institution

For purposes of M.G.L. ch. 180A, § 5(d), an institution is defined 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.

Not all charitable organizations are institutions for purposes of M.G.L. ch. 180A. For example, a charitable trust managed by a charity is an institution, but a charitable trust managed by corporate or individual trustees is not an institution.

Institutional Fund

For purposes of M.G.L. ch. 180A, § 5(d), an “institutional fund” is defined as “a fund held by an institution exclusively for charitable purposes or a fund held by 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.” A “program-related asset” is defined as “an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.”