

Mission-Related Investments under Trust Law

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As explored in a previous article (June 2020), the IRS clarified that mission-related investments (MRIs) will not trigger the private foundation “jeopardy investment” rule (that is, a private foundation cannot make investments that would imperil its ability to conduct charitable activities). Although the definition of “mission-related investments” is somewhat vague, it refers to an investment approach where the primary goal of the investments is to generate income, but where investment choices are influenced by charitable or societal impact (in contrast, a program-related investment’s primary purpose is to advance a charitable purpose as opposed to the production of income). Depending on the exact circumstances, an example of a mission-related investment might be an investment in a small biotechnology start-up that is developing new scientific methods to address a wide-spread condition or disease. This may be highly risky, but the foundation wants to invest, not only for possible financial gain, but also to support scientific development. In Notice 2015-62, the IRS stated that private foundations may make mission-related investments without triggering the jeopardy investment rule as long as foundations exercise prudence and ordinary business care.

While the IRS has provided guidance related to the jeopardy investment rule, every private foundation is also subject to the law governing its existence as a legal entity. A private foundation is usually formed as a trust governed under the state trust statute or a non-stock corporation governed under the state non-stock corporation statute. If the foundation is a trust, trustees’ investment choices are generally governed by the state law. In many states, this is some version of the Uniform Prudent Investors Act (UPIA). Wisconsin adopted its version of UPIA in 2004 as Chapter 881. UPIA was written to address the typical situation where a trustee invests a trust fund that benefits one or more individual beneficiaries. Under UPIA, the trustee must invest and manage the funds as prudent investor would, considering the purposes, terms, distribution requirements, and other circumstances of the trust. The trustee must exercise reasonable care, skill and caution in doing so.

Where a charitable trust does not have a designated beneficiary (which is the case for most private foundations that allow the trustee discretion in making distributions for charitable purposes), mission-related investments are very likely acceptable as an investment alternative that accomplishes the private foundation’s charitable purpose (although every situation merits review). UPIA contains a provision allowing for the trustees to take into account the relationship or value of an investment asset as it relates to the purposes of the trust. Mission-related investments usually fit into this concept: mission-related investments are investments that may not otherwise be held by the private foundation if not for the societal benefit, but may nonetheless be important because they fulfill part of the charitable mission of the organization.

In a perfect world, the donor or creator of the private foundation has contemplated mission-related investing, and specifically allowed for this approach in the trust document (we anticipate that donors will want to do so). In making mission-related investments, some donors and trustees of private foundations are also making trust amendments or modifications to specifically address this issue.