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# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

**Version:** As Introduced

**Primary Sponsor:** Rep. Young

Logan Briggs, Attorney

### SUMMARY

- Defines, for purposes of the bill's regulatory regime, "non-private endowment fund" as a subcategory of an endowment fund regulated under continuing law and "non-private institution" as the private institution, college, or university holding such a subcategory fund.
- Permits the donor establishing a non-private endowment fund to appoint a representative to oversee the use, management, investment, and appropriation of the fund.
- Prohibits a non-private institution from making any transfer between a donor-restricted non-private endowment fund unless certain criteria are met.
- Clarifies that a non-private institution has discretion over the use of funds in a non-private endowment fund that are not donor-restricted, so long as certain accounting requirements are met.
- Requires non-private institutions to prepare and file annual reports regarding non-private endowment funds, and to conduct sustainability reviews at least once every five years for non-private endowment funds exceeding \$5 million.
- Permits an establishing donor or appointed representative to file a notice of concern with the Attorney General regarding prohibited transfers, compliance with charitable purposes, obligations and restrictions, and sustainability of a non-private endowment fund.
- Permits a court to modify a non-private endowment fund's obligations, restrictions, or charitable purpose when the fund is unsustainable.
- Creates a framework for enforcement by the Attorney General through investigations, corrective action plans, and civil actions.

- Permits the state to recover public money that has been provided to tax-exempt covered organizations that fail to comply with federal tax regulation and reporting laws.

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## DETAILED ANALYSIS

### Overview

The bill defines a “non-private endowment fund” as a subcategory of a current law “endowment fund,” and a “non-private institution” that holds a non-private endowment fund as an institution that is not a private institution, college, or university. The bill also provides for the oversight of such funds, and places restrictions on transfers from certain non-private endowment funds. The bill creates reporting requirements as well as requires sustainability reviews for certain funds. In the event that a non-private institution is noncompliant, or that a non-private endowment fund is unsustainable, the bill permits the Attorney General to enforce its provisions through investigations, corrective action plans, and civil actions when necessary. Additionally, the bill permits the state to recover public money that has been deposited in a fund or account of a tax-exempt covered organization that has failed to comply with federal tax regulation and reporting laws, and sets forth the process through which that money can be recovered.

### Non-private endowment funds

#### Definitions

The bill defines the following terms:

“Non-private endowment fund” means an endowment fund held by a non-private institution.

“Non-private institution” means an institution that is not a private institution, private college, or private university, including any institution incorporated under the educational corporation law.<sup>1</sup>

Under continuing law, unchanged by the bill, an “institutional fund” is a fund that is held by an institution exclusively for charitable purposes. Additionally, an “endowment fund” means an institutional fund or any part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. It does not include assets that an institution designates as an endowment fund for its own use. Any endowment fund can be donor-restricted to limit how it is used or expended. “Institution” means a (1) person, other than an individual, organized and operated exclusively for charitable purposes, (2) governmental organization to the extent that it holds funds exclusively for a charitable purpose, or (3) trust that had both charitable and noncharitable interests and the noncharitable interests have terminated.<sup>2</sup>

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<sup>1</sup> R.C. 1715.51(F) and (G).

<sup>2</sup> R.C. 1715.51(B), (C), and (D); R.C. 1715.53(A), not in the bill.

## Oversight of non-private endowment funds

The bill permits a donor who establishes a non-private endowment fund to appoint a representative to oversee the use, management, investment, and appropriation of that non-private endowment fund.<sup>3</sup>

### Transfer restrictions

The bill prohibits a non-private institution from making any transfer between a donor-restricted non-private endowment fund and any other fund, including an institutional fund, unless at least one of the following applies:

- The gift instrument expressly permits transfers between the non-private endowment fund and another fund;
- The establishing donor of the non-private endowment fund consents in a record;
- The gift instrument is modified pursuant to the Ohio law pertaining to releasing restrictions on the use or investment of institutional funds to permit transfers between the endowment fund and another fund.<sup>4</sup>

### Use of unrestricted endowment funds

The bill clarifies that a non-private institution has discretion over the use of any funds in a non-private endowment fund that are not donor-restricted, so long as the non-private institution makes publicly available a comprehensive accounting of the amount of funds expended, and the purpose for their expenditure. However, as stated in continuing law unchanged by the bill, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure unless otherwise stated in the gift instrument.<sup>5</sup>

### Annual reporting for endowment funds exceeding \$5 million

The bill requires a non-private institution that manages and invests a donor-restricted non-private endowment fund with a value exceeding \$5 million to prepare and file an annual report with the Office of the Attorney General and the non-private institution's governing board or equivalent body. The report must contain all of the following information:

- The market value of the non-private endowment fund;
- The non-private institution's investment asset allocation;
- The non-private institution's spending policy;
- The non-private institution's spending rate with respect to the non-private endowment fund;

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<sup>3</sup> R.C. 1715.60.

<sup>4</sup> R.C. 1715.61(A).

<sup>5</sup> R.C. 1715.62; R.C. 1715.53(A), not in the bill.

- Annual appropriations to the non-private endowment fund;
- Deficits for the non-private endowment fund;
- Material deviations from donor restrictions;
- Any suspension or override of investment or spending policies.

The report shall be annually filed beginning on the first day of January following the effective date of the bill.<sup>6</sup>

### **Five-year sustainability reviews**

The bill requires a non-private institution that manages and invests a non-private endowment fund to conduct a sustainability review beginning on the first day of January following the effective date of this bill, and at least once during each five-year period thereafter, and to produce a written report with its details, findings, and conclusions. Under the bill, the sustainability review shall contain all of the information required for an annual report for a non-private endowment fund exceeding \$5 million and evaluate all of the following:

- Compliance with the non-private institution's fiduciary duties;
- Compliance with the donor's intent;
- Compliance with prudence standards;
- The duration and preservation of the non-private endowment fund;
- The purposes of the institution and the non-private endowment fund;
- General economic conditions;
- The possible effect of inflation or deflation;
- The expected total return from income and the appreciation of investments;
- Other resources of the non-private institution;
- The investment policy of the non-private institution.

Any non-private institution conducting a sustainability review must retain and make the written report available to the public. The institution shall redact confidential or personal identifying information in this publicly available copy of the report. Additionally, the institution shall submit a written summary of each sustainability review to the Attorney General.<sup>7</sup>

### **Notice of concern**

The bill permits the establishing donor of a non-private endowment fund to a non-private institution, or a representative appointed under the bill, to submit a written notice of concern to

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<sup>6</sup> R.C. 1715.63(A).

<sup>7</sup> R.C. 1715.64(A) to (C).

the Charitable Law Section of the Office of the Attorney General if the donor or representative has a reasonable belief that any of the following are true:

- The non-private institution has violated the bill’s transfer restrictions;
- The non-private institution is not in compliance with the charitable purpose or endowment obligations of the non-private endowment fund, or a restriction contained in the gift instrument regarding the use, management, or investment of the fund;
- The non-private endowment fund is unsustainable based on a sustainability review produced by the institution under the bill.<sup>8</sup>

### **Court modification of unsustainable endowment obligations or purposes**

Under the bill, following the application of a non-private institution or the Attorney General, an appropriate court shall modify the endowment obligations of a non-private endowment fund, or a restriction contained in a gift instrument regarding the use, management, or investment of the fund, if the sustainability review conducted under the bill concludes that the endowment obligations or restrictions are, or will become, unsustainable under the charitable purpose of the fund. To the extent practicable, any modification made in this way shall be done in accordance with the donor’s probable intent.

Similarly, following the application of a non-private institution or the Attorney General, an appropriate court may modify the charitable purpose of a non-private endowment fund if the sustainability review conducted under the bill concludes that the specific charitable purpose is, or will become, unsustainable. Accordingly, any modification shall be made in a manner consistent with the charitable purposes expressed in the gift instrument.

Whenever a modification is made under the bill, the court shall only modify the obligations, charitable purpose, or restriction contained in a gift instrument to the least extent necessary to ensure a non-private endowment fund’s sustainability. However, the bill does not require modifications to a non-private endowment fund ensuring indefinite sustainability. If the fund expires upon a given date or upon the occurrence of a specified condition, any modification made under the bill must be made with the purpose of sustaining the fund only until the occurrence of that date or condition. Similarly, if a non-private endowment fund is not perpetual under the terms of the gift instrument, the bill does not require modifications.

Whenever an application is made to an appropriate court for the modification of a non-private endowment fund, the bill establishes that the Attorney General is a necessary party and must be served with process in a proceeding pertaining to that application.<sup>9</sup>

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<sup>8</sup> R.C. 1715.61(B), 1715.63(B), and 1715.64(D).

<sup>9</sup> R.C. 1715.65.

## **Enforcement**

### **Attorney General investigations**

The bill gives the Attorney General the sole authority to enforce the bill's provisions. The Attorney General must review any notice of concern submitted under the bill and may conduct an investigation to determine whether any of the following apply to a non-private institution or non-private endowment fund identified in the notice of concern:

- The non-private institution is not in compliance with the charitable purpose or endowment obligations of the non-private endowment fund or a restriction contained in the gift instrument regarding the use, management, or investment of the fund;
- The non-private institution has violated the bill's prohibitions on transfers involving donor-restricted non-private endowment funds;
- The non-private endowment fund is unsustainable.

In conducting an investigation under the bill, the bill permits the Attorney General to administer oaths, adduce evidence, and request the production of any book, document, record, or other relevant matter.<sup>10</sup>

### **Noncompliance corrective actions**

The bill requires the Attorney General to issue a notice of noncompliance to a non-private institution when the Attorney General determines that it is not in compliance with the charitable purpose or endowment obligations of the non-private endowment fund, or a restriction contained in the gift instrument regarding the use, management, or investment of the fund, or if the non-private institution has violated the bill's prohibitions on transfers involving donor-restricted non-private endowment funds. When issuing a notice under the bill, the Attorney General must clearly explain the manner in which the institution is noncompliant.

When a notice of noncompliance is issued under the bill, the Attorney General must require the non-private institution to submit a corrective action plan to the Attorney General. The notice must indicate the form and manner in which the corrective action plan must be submitted, and clearly state the date by which the institution is required to submit the plan. This date cannot be less than 30 days after the date on which the notice is sent. Additionally, if the institution has misused or improperly appropriated any portion of a non-private endowment fund, the Attorney General must require that the misused or misappropriated funds be repaid to the fund as part of the corrective action plan.

The bill requires a non-private institution receiving a notice of noncompliance to submit a corrective action plan to the Attorney General in accordance with the form, manner, and date specified in the notice. The plan must provide a detailed description of the corrective action the institution will take to address each instance of noncompliance identified by the Attorney

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<sup>10</sup> R.C. 1715.66 and 1715.67.

General. The institution is required to specify the date by which it will complete the corrective action, which cannot be more than 90 days after the date the plan is submitted.

The bill requires the Attorney General to review a corrective action plan, and to monitor and evaluate the non-private institution's compliance with the plan after the plan has been reviewed and approved. An institution that complies with and completes a corrective action plan in accordance with the bill is not subject to a civil enforcement action by the Attorney General.<sup>11</sup>

### **Unsustainability remedy**

The bill requires the Attorney General to issue a notice of unsustainability to a non-private institution when the Attorney General determines that a non-private endowment fund held by the institution is unsustainable. When issuing a notice under the bill, the Attorney General shall clearly explain the manner in which the non-private endowment fund is unsustainable.

A non-private institution that receives a notice of unsustainability must apply to a court of competent jurisdiction within 90 days for a modification of the obligations of the non-private endowment fund, its charitable purpose, or a restriction contained in the gift instrument regarding the use, management, or investment of the fund.<sup>12</sup>

### **Civil remedies**

A non-private institution has 120 days to complete a corrective action plan after the Attorney General sends a notice of noncompliance to the institution. If the institution has not completed the corrective action plan by that date, the bill requires the Attorney General to file a complaint in a court of competent jurisdiction. In this action, the Attorney General may seek any or all of the following types of relief:

- An order requiring the repayment of all misused or misappropriated funds to the non-private endowment fund;
- Injunctive relief ordering compliance with a non-private endowment fund's charitable purpose, endowment obligations, or restrictions contained in the gift instrument;
- Graduated corrective measures, as determined by the court, to supplement the corrective action plan;
- A temporary injunction limiting discretionary endowment spending;
- Enhanced reporting, as determined by the court;
- Other appropriate relief, as determined by the court.

However, the bill does not create or modify any criminal liability under Ohio law.<sup>13</sup>

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<sup>11</sup> R.C. 1715.68(A)(1) and (B) to (G).

<sup>12</sup> R.C. 1715.68(A)(2) and (H).

<sup>13</sup> R.C. 1715.69 and 1715.70.

## Applicability

The bill's provisions regarding non-private endowment funds only apply to such funds that are established on and after the effective date of the bill. Therefore, existing endowment funds, even if they meet the criteria of non-private endowment funds, are not subject to the bill's endowment fund provisions.<sup>14</sup>

## Recovery of public money deposited with noncompliant tax-exempt organizations

Under continuing law, the Auditor of State has the authority to audit the use of state dollars, even if they are deposited with a private institution. Additionally, continuing law also provides procedures governing audits of public offices, the recovery of public money that has been illegally expended, converted, misappropriated, or is unaccounted for, and legal actions to be taken in response to that kind of misuse of public funds.<sup>15</sup>

The bill expands on this framework, using the Auditor of State's existing authority to audit private institutions holding or utilizing public funds, to permit the state to recover public money that has been provided to tax-exempt "covered organizations" that fail to comply with federal tax regulation and reporting laws. Under the bill, a "covered organization" means any organization that is exempt from federal income tax under Section 501 of the Internal Revenue Code, which governs tax exemptions for certain nonprofit corporations, corporations, and trusts.

If an audit report, accounting, or other investigation indicates that a public office has deposited public money into a fund or account of a covered organization that has failed to adhere to any regulation or reporting required by the Internal Revenue Code, or related administrative regulation, the bill permits the officer that receives that report or accounting, the Auditor of State, or the Auditor's appointee to file and prosecute a civil action for the recovery of the public money. The action must be filed in the proper court and must be made in the name of the public office from which the public money was received.

The Auditor of State must notify the Attorney General in writing of every audit report, accounting, or investigation indicating that public money has been placed or deposited in a fund or account of a covered organization that is not in compliance with Internal Revenue Code regulations and requirements, and the date that the report was filed or that the accounting or investigation was completed. Within 120 days of receiving a certified copy of the report, accounting, or investigation, the bill requires the officer, Auditor of State, or Auditor's appointee to notify the Attorney General in writing whether legal action has been taken and, if not, the reason why legal action has not been taken.

The bill permits the Attorney General, or the Attorney General's assistant, to appear in any action on behalf of the office and may prosecute an action in conjunction with, or independent of, the officer, Auditor of State, or the Auditor's appointee. Furthermore, the bill

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<sup>14</sup> R.C. 1715.71.

<sup>15</sup> R.C. 117.10(A), 117.12, and 117.28, not in the bill.

permits the Attorney General to bring the action in a case where the officer, Auditor of State, or Auditor's appointee fails to do so within 120 days after the audit report has been filed.<sup>16</sup>

### **Applicability**

The bill's provisions regarding recovery of public money from covered organizations apply to public money deposited into a fund or account of a covered organization on or after the effective date of the bill.<sup>17</sup>

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## **HISTORY**

Action	Date
Introduced	02-25-26

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<sup>16</sup> R.C. 117.281(A) to (D); conforming changes in R.C. 117.30 and 117.36; R.C. 5747.01, not in the bill.

<sup>17</sup> R.C. 117.281(E).