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**STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION TO THE AMENDMENTS TO OHIO'S UPMIFA CONTAINED IN
SENATE BILL 135
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Before the Ohio House of Representatives Higher Education and Career Readiness Committee
Representative Laura Lanese, Chair
December 7, 2021

Chairwoman Lanese, Vice-Chair Young, Ranking Member Ingram and members of the House Higher Education and Career Readiness Committee: On behalf of the Ohio State Bar Association, I submit to you opposition testimony to the amendments to Ohio's Uniform Prudent Management of Institutional Funds Act (UPMIFA) contained in Substitute Senate Bill 135 (Sub. SB135).

I am the legislative counsel for the Ohio State Bar Association (OSBA). The OSBA is opposed to the amendments to Ohio's UPMIFA after a review by the OSBA's Estate Planning, Trust, and Probate Law Section. The Section consists of over 2,800 trust and estate attorneys throughout the State of Ohio and one of its purposes is "to improve the law of Ohio by proposing, sponsoring, opposing and reporting on Ohio legislation affecting estate planning, trusts and estates." For decades, the OSBA's Estate Planning, Trust and Probate Law Section has been at the forefront of trust and estate advancements in the State of Ohio. As a result of these efforts and the consistent support of the General Assembly, Ohio has earned a reputation for having some of the most thoughtful and well-developed laws in the United States.

One of the OSBA's more significant and impactful legislative proposals in the realm of estate planning law in recent memory is Ohio's version of the UPMIFA, now codified at Ohio Revised Code Sections 1715.51 through .59. Ohio's version of UPMIFA modernized Ohio law regarding the management and investment of charitable funds and endowments. Since it became effective in June 2009, Ohio's version of UPMIFA has impacted how Ohio's charitable organizations manage and invest assets, and its provisions are well known to, and relied upon, by donors and by directors, trustees and officers of charitable organizations throughout the state.

The proposed amendments to Ohio's version of UPMIFA in Sub. SB135 would make profound changes to Ohio's version of UPMIFA and may undermine the very purposes that Sub. SB135 seeks to achieve. If adopted, Sub. SB135 would fundamentally change how state institutions of higher education manage and invest their charitable assets and, ultimately, how they achieve their charitable missions.

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Sub. SB135 Would Eliminate the 5% Safe Harbor That Is Relied Upon by State Institutions of Higher Education.

First, Sub. SB135 would eliminate a safe harbor on spending that provides state institutions of higher education with certainty on the propriety of their spending decisions and predictability in their expenditures. Ohio's version of UPMIFA is unique in that it sets forth a safe harbor by which a certain level of annual expenditure from an endowment fund – up to 5% – will be considered prudent for all charitable organizations. Sub. SB135 would eliminate this safe harbor for state institutions of higher education and would replace that protection with a rebuttable presumption of imprudence if the annual expenditure is greater than 7% of the fund.

This safe harbor is relied upon by charitable organizations and their donors, and many state institutions of higher education incorporate this concept into their governing documents, investments and spending policies. Sub. SB135 will come as a surprise to state institutions of higher education and their donors and will eliminate the protection intended by the safe harbor. We question why such a change is considered necessary when, by all known accounts, the rule has been working so well for over a decade.

It is important to note, that this safe harbor does not mean that if a charitable organization's annual expenditure from an endowment fund is less than 5%, the spending is legally incontestable, as previously asserted by proponents of the bill. The safe harbor only says that the amount itself is considered prudent. It does not protect charitable organizations if the money is spent in violation of the terms of the endowment provisions.

By Creating a Private Right of Action, Sub. SB135 Would Mark a Significant Departure from the Law and Policy of Ohio and of Nearly Every Jurisdiction in the United States.

Second, Sub. SB135 would expand the class of persons who may challenge a state institution's stewardship of gifted assets. For centuries, Ohio law has viewed charitable gifts as benefiting the public, and, as such, the public – as represented by the Ohio Attorney General -- is the party to oversee and enforce the gift. This law is in keeping with the public nature of charitable gifts, and, as Ohio public policy, it helps ensure that charitable organizations are not subject to vexatious litigation that would divert charitable funds from their charitable purposes. This also follows the law of nearly every other U.S. jurisdiction.

Sub. SB135 would completely upend this policy by creating a private right of action in not only the donor, but also in the donor's "legal representative" in perpetuity. Thus, state institutions of higher education would be required, in perpetuity, to answer not just to the Attorney General, but to future generations of a donor's family who may have views very different than those of the donor.

Additional Vetting Is Needed.

The OSBA urges that a change of this magnitude should be carefully vetted before being adopted, as it will have a tremendous impact on all Ohio state institutions of higher education and the ways in which donor intent can be protected. Among our initial concerns and questions are the following:

1. Sub. SB135 could undermine the protection of donor intent by allowing unknown future generations of a family to affect and possibly frustrate the realization of the donor's intent.
2. This measure would undermine the rights of donors to establish the terms of their own charitable gifts. Under current law, donors may negotiate for enforcement rights, if they so choose and if the charitable organization consents. Sub. SB135 would impose additional provisions on a gift, regardless of whether a donor actually wants them.
3. This measure may put Ohio state institutions of higher education at a distinct disadvantage relative to organizations in other states that do not have these provisions. This could lead to actions that seek to (i) divert funds from Ohio state intuitions of higher education that the original donor wished to support, and instead (ii) transfer those Ohio charitable funds to different intuitions of higher education (perhaps even outside of Ohio) that the original donor's descendants wish to support.
4. This measure could lead to more entrenched special interests and harmful litigation, which could affect the goals of donors and the achievement of their charitable intent.
5. This measure could affect the ability of the Ohio Attorney General to appropriately handle complaints. It would seemingly eliminate the confidentiality of Attorney General investigations, which may make it harder to achieve resolutions timely.
6. Courts will have little guidance in how the expenses for litigating these issues would be satisfied. Would the expenses of the charitable organization be payable from the fund at issue? Would the expenses of the family members be payable from the fund? Would this measure promote costly suits that would provide more benefit to the lawyers than to the achievement of the donor's intent? Would the handling of expenses impact the entitlement of a donor to a charitable deduction?
7. The creation of new private causes of action would lead to (i) significant confusion, (ii) inconsistent positions and results, and (iii) substantial new economic burdens on Ohio state intuitions of higher education. It replaces a definite process with an indefinite one, and will burden both courts and state intuitions of higher education.
8. To the extent Sub. SB135 is intended to apply to existing endowment funds, it could defeat the intentions of the parties who established those funds.

To enact this legislative proposal without addressing these concerns could lead to significant disruption and could harm both donors and the state intuitions of higher education they support. We urge that this proposal undergo substantial additional vetting.

Our members are happy to assist with these efforts to ensure that any change to Ohio law does not create more problems than it purports to solve. The OSBA takes pride in its prior work on Ohio's version of UPMIFA and would welcome involvement in any effort that would change its provisions.

Thank you for your consideration of the OSBA's concerns on this proposal.