NORTHERN TRUST

RESPONSIBLE INVESTING FOR THE MODERN FIDUCIARY

ALIGNING GOALS, DUTIES, INVESTMENTS AND IMPACT

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Investors have various motivations for incorporating responsible investing considerations into their portfolios. Some desire to first and foremost "do good" with their financial resources (commonly referred to as "impact first" investment). Some are committed to aligning their investments with their values and, at a minimum, not supporting what they consider to be harmful through their investments. It is from this orientation that the phrase "sin stocks" has emerged. Others have mandated goals – environmental or social for example – arising from reputational or political considerations. And some act on a belief that "responsible" companies will outperform over a long time horizon.

Whatever the motivation, fiduciary investors face some unique considerations as they address responsible investment for the simple reason that they invest not for themselves, but for others, subject to strict fiduciary duties with a high bar. With an exclusively financial view of investment, the concern is the risk of under-performance. But that is not necessarily the end of the conversation. The next question is, in what circumstances are factors in addition to financial return appropriate to consider? If "sin stocks" historically out-perform, is it only prudent for a fiduciary to have a sin-tilted investment portfolio? (Asked rhetorically.) Do the interests of beneficiaries include non-financial elements?

Responsible investing is attracting the attention of investors and investment professionals, philanthropists and philanthropic organizations, and trustees and beneficiaries, particularly those identified as next generation "emerging wealth."

For investors with fiduciary obligations, we highlight current trends in responsible investing, provide an overview of general concepts and an analysis of issues and conclude with a discussion of the implementation of a responsible investment strategy in the fiduciary context.[1]

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Investment objectives can be established – and investment "success" defined – using a variety of criteria, including returns, risk management and societal impact. Responsible investing, i.e., taking societal impact into account, is a trend with growing momentum among investors across the globe. Its increasing prevalence compels those investing for others, including fiduciaries and their advisors, to pursue an understanding of the principles and implications of responsible investing.

Corporations have long integrated corporate social responsibility into their core business strategies, based on the premise that such practices are good for business. Private investors, with a wide range of motivations, increasingly incorporate responsible investment considerations into their portfolios. Trustees and other fiduciaries are being asked to do so as well. Fiduciary investors face some unique considerations as they address responsible investment for the simple reason that they invest not for themselves, but for others, subject to strict fiduciary duties with a high bar. Times change, and the modern fiduciary seeking to align goals, duties, investments and impact is doing so in a dynamic environment.

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TRENDS

Globally, environmental, social and governance (ESG) oriented investments increased from $32 trillion in 2012 to more than $59 trillion by 2015 – roughly 25% of all the world's financial holdings.[2] Europe leads with 75% of the measured ESG assets under management. Strategies and solutions include a range of passive or active management, negative or positive screening (excluding or including certain investments based upon alignment with investor values), best-of-class stock selection and shareholder advocacy.

Negative screening is the most consistently applied approach. The United States represents the greatest contribution to positive screening and impact investing (focusing on inclusion and impact aligned with investor objectives). Most thematic investments originate from Europe and Africa.[3]

EXHIBIT 1.

Country	Sustainable Investment Assets
Africa	$229 billion
Asia (Ex-Japan)	$44.9 billion
Australia/New Zealand	$180 billion
Canada	$945 billion
Europe	$13,608 billion
Japan	$8 billion
United States	$6,572 trillion
TOTAL	**$13.6 trillion**

Source: Global Sustainable Investment Review 2014

Domestic assets invested in accordance with responsible investment practices totaled approximately $8.72 trillion at the start of 2016, roughly 22% of all funds under management.[4] More than one out of every five dollars under professional management in the United States is invested according to strategies of responsible investing. From 1995 to 2016 the responsible investment universe increased nearly 14-fold, a compound annual growth rate of 13.25%.[5] The data clearly documents the upward trajectory of the trend in responsible investment.

EXHIBIT 2. RESPONSIBLE INVESTING IN THE UNITED STATES 1995 – 2016 (IN BILLIONS)

	1995	1997	1999	2001	2003	2005	2007	2010	2012	2014	2016
ESG Incorporation	$166	$533	$1,502	$2,018	$2,157	$1,704	$2,123	$2,554	$3,314	$6,200	$8,098
Shareholder Resolutions	$473	$736	$922	$897	$448	$703	$739	$1,497	$1,536	$1,720	$2,558
Overlapping Strategies	N/A	($84)	($265)	($592)	($441)	($117)	($151)	($981)	($1,106)	($1,350)	($1,933)
TOTAL	**$639**	**$1,185**	**$2,159**	**$2,323**	**$2,164**	**$2,290**	**$2,711**	**$3,069**	**$3,744**	**$6,572**	**$8,723**

Source: US SIF Foundation (2016)

The Vatican recently established Vatican Asset Management, which has placed a priority on establishing itself as a leader in ethical investing aligned with the values of the church. The Rockefeller Brothers Fund, a private charitable foundation the Rockefeller family built, in part on oil, has determined to divest itself of investment in fossil fuels due to concerns surrounding climate change. Times do change.

Responsible investing is of particular interest to the next generation of investors and philanthropists. The White House convened a group of 100 young philanthropists and next generation "emerging wealth" to find common ground between the public sector and the next generation of philanthropists. The summit was timely. It is estimated that more than $30 trillion in wealth will pass from the baby boomers to subsequent generations in the next 35 years (by 2050). And next generation inheritors are becoming involved in private family foundations at earlier ages. Why are these trends relevant in the context of responsible investing? Because the next generation of inheritors, investors and philanthropists is intensely interested in responsible investing.[6]

BACKGROUND

Socially responsible investing, sustainable and responsible investing, environmental, social and governance factors, mission investing and impact investing are familiar concepts to some and novel to others. What is meant by the various terms is not uniform and the terminology is evolving.

Socially Responsible Investment

Socially responsible investing historically focused on the avoidance of social injury through investments.[7] It dates back to the anti-slavery efforts of the Quakers in America in the 1700s, garnered renewed attention with divestiture of investments in South Africa in opposition to apartheid in the 1970s and 1980s, and more recently was the impetus to divest in Rwanda. Negative screens may be used to avoid undesired investment in a socially responsible portfolio.

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Sustainable and Responsible Investment – Environmental, Social, and Governance Factors

Sustainable and responsible investing is a somewhat broader concept than socially responsible investing. Whereas the origin of socially responsible investing was values-focused, sustainable and responsible investing is described as "an investment process that considers the social, environmental and ethical consequences of investments, both positive and negative."[8] The transition to sustainable and responsible investing places more emphasis on long-term investing with reduced risk and improved shareholder value – "long-term responsible investing."[9] Positive and negative screens are employed to take the identified priorities into account in the investment process.

Environment, social and governance considerations are trending toward the mainstream in the investment analysis process. The strong growth in environmental, social and governance (ESG) and industry debate regarding their return potential, has led to a proliferation of academic studies to analyze ESG-oriented strategies. The research results to date have been mixed, ranging all the way from positive, to neutral, to negative, and may be most accurately described as inconclusive at present.

Impact Investment

Impact investment is commonly understood as a more direct approach; making an investment for the primary purpose of achieving a particular impact. It is an investment strategy being used increasingly by philanthropists and philanthropic organizations to fulfill their mission, supplementing the traditional charitable contribution, invest-for-return and make-grants-for-mission approach.

- "Impact first investment" is simply investing with the principle purpose of making the impact determined by the investor – e.g., sustainable farming, immunization, affordable housing. The measure of "success" is achieving the identified impact.
- "Financial first investment" is the traditional fiduciary approach of achieving a risk adjusted return paired with the creation of an identified impact – impact without subsidy.

Philanthropic Program Related Investments and Mission-Investing

In the philanthropic context there are program-related investments and mission investing. These are discussed in greater detail below. In very brief summary, program-related investments are those investments made by a charitable organization in furtherance of its charitable activity – a dormitory for a homeless shelter, for example.

Mission investing is not to be confused with program-related investing. It is the investment of the "investable assets" of a charitable organization, the return on which is used to fund its philanthropic purpose, in a manner that is aligned with the organization's mission.

Principles for Responsible Investment

In April 2006, the United Nations set forth its Principles for Responsible Investment (PRI), which now has in excess of 1200 international investor signatories. Focused on the implementation of industry-devised responsible investment guidelines, key themes of the PRI are transparency, accountability and continuous improvement in responsible fiduciary investment.

Specifically, the Principles for Responsible Investment (PRI) commitment is stated as follows:

> *"We have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, and asset classes and through time). We also recognize that applying these Principles may better align investors with broader objectives of society...."*[10]

The PRI principles include the following, where consistent with fiduciary duty:

- "We will incorporate ESG issues into investment analysis and decision-making processes;
- We will be active owners and incorporate ESG issues into our ownership policies and practices;
- We will seek appropriate disclosure on ESG issues by the entities in which we invest;
- We will promote acceptance and implementation of the Principles within the investment industry;
- We will work together to enhance our effectiveness in implementing the Principles; and
- We will each report on our activities and progress towards implementing the Principles."[11]

The PRI signatories include the California Public Employees' Retirement System, the New York State Teachers' Retirement System, the Canada Pension Plan, the Norwegian Government Pension Fund and Northern Trust.

RESPONSIBLE INVESTORS

Conversations and analysis regarding responsible investment arise across the full spectrum of investors – from the individual investor who may establish her investment, philanthropic, family and wealth planning objectives based on her personal values and goals with very few external third-party limitations, to the corporate trustee of a private multi-generational trust subject to fiduciary duties to multiple beneficiaries operating in the context of modern financial services regulation. Who is investing, why they are investing and who they are investing for will have a bearing on the consideration and implementation of responsible investment by the investor.

Individuals

It is the goals and values of the individual that determine how she will allocate her resources and will shape her investment orientation and any investment policy statement. She may, with few exceptions, choose to do as she desires with her resources. She may choose to make gifts, charitable or otherwise, she may choose to make direct investments of assets primarily for the purpose of making a particular impact, and she may choose to incorporate sustainable and responsible investment considerations in her overall investing. But even for the individual investor there are some external considerations. Under the current tax laws, charitable contributions and investment in state and local bonds are tax-favored.[12] Investments in private equity funds are limited under the securities laws to "qualified purchasers" and "qualified investors" of a defined level of investment sophistication.

If the individual investor intends to have her wealth invested in accordance with values and for purposes she specifies beyond her lifetime, additional planning may be considered. Multi-generational wealth transfer is commonly structured through trusts and, as is discussed in greater detail below, trustees generally are subject to the guiding principles of the prudent investor rule. Nevertheless, the settlor of a trust is free to state in the trust agreement her intentions with respect to substantially all aspects of a trust, including investment, and may include guidance as to her priorities regarding investment, including responsible investment. However, at present, it would be premature to assume that fiduciary authority to make direct impact investments or to invest generally under a responsible investment paradigm will necessarily be inferred without a direct or implied expression of intent.

If you have a responsible investing orientation, consider incorporating your responsible investment goals and objectives in the investment policy statement for your individual investment management accounts to provide guidance to your investment professionals.

If you have a responsible investment orientation that you would like to have considered in the investment of assets you will either transfer to a trust during your lifetime or will be transferred to a trust at your demise, consider drafting the trust agreement to include a statement of your intentions regarding responsible investment in the trust agreement. This may be a particular responsible investment orientation that you prefer to be taken, or it may be a desire that the trustee determines the orientation of the trust taking into consideration the priorities of the beneficiaries. Be mindful, however, that the beneficiary view approach should be carefully considered as beneficiaries may have differing views that cannot easily be aligned.

Fiduciaries

Fiduciary investors are investing not for their own benefit, but for the benefit of another, e.g., a pension fund, a foundation, beneficiaries of a private trust. The standard for the fiduciary is high.

In the oft-quoted words of the famed Justice Cardozo:

> *"A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."*[13]

FIDUCIARY DUTIES

The three fiduciary duties that are of particular relevance to the trustee addressing responsible investment are the duty of loyalty, the duty of impartiality and, perhaps most significantly in the context of this subject, the duty of prudent investment of the trust estate. While fiduciary duties arise in various circumstances, a principal focus of this discussion is the trust context.

Duty of Loyalty

The duty of loyalty requires a trustee to act "solely in the interests of the beneficiaries." [14] Thus, a trustee may not act in her own self-interest. Self-dealing and conflicts of interest ordinarily constitute a breach of trust.

When non-financial considerations are introduced into the investment process for a trust, the duty of loyalty requires that the interests considered be those of the settlor, if expressed in the governing instrument – not those of the trustee.

If there is no statement of guiding principles delineated by the settlor, the views and priorities of the beneficiaries may potentially be brought to bear. However, where there are multiple beneficiaries and various classes of beneficiaries (current and future), the identification of common views and priorities becomes complex and may not be feasible. Here, the duty of impartiality, discussed below, is also influential.

The comments to the Uniform Prudent Investor Act states in no uncertain terms that:

> *"No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns – in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause."*[15]

The Restatement (Third) of Trusts acknowledges that there is "considerable disagreement" about what the duty of loyalty requires in responsible investing, but emphasizes that the trustee may not promote its personal views on social causes.[16] The Restatement affirms that the settlor may authorize such investment and that beneficiaries may consent to such investing.[17]

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UNIFORM PRUDENT INVESTMENT ACT

Duty of Impartiality

The duty of loyalty is a trustee-to-trust-and-beneficiary duty. The trust and the beneficiaries come first. The duty of impartiality is a little different – the beneficiaries come first, but they *all* come first. The trustee is not expected to treat all beneficiaries equally, but the trustee is expected to treat all beneficiaries equitably. The distinction between impartiality and equality is a consequence of the differences in the interests of the beneficiaries – current and remainder, income and principal, mandatory and discretionary. All beneficiaries do not have the same interest, so they are not necessarily required to be treated equally, but the trustee is required to act impartially.[18]

Individual beneficiaries of a private trust will commonly have vastly different non-financial values and priorities with no single unifying theme. This makes specifically defining the non-financial considerations the trustee is to take into account challenging to say the least. Financial return is a much simpler unifying common goal. It is the duty of impartiality that differentiates the analysis of fiduciary duty and responsible investing in the private trust context from either the institutional pension context or the charitable context. For institutional pension funds, there are more easily identifiable common themes. The fiduciaries of a firemen's pension fund would logically and rationally prefer not to invest in an accelerants manufacturer. Similarly, the fiduciaries of the retirement fund of an oncology practice would logically and rationally prefer not to invest in a tobacco company. For a charitable trust or foundation, investment aligned with the charitable mission ordinarily may be articulated without violation of the duty of impartiality.

Duty of Prudent Investment

Pension funds, charitable foundations and institutions, and private trusts are each subject to the duty of prudent investment in the investment of funds. Although the origin of the duty is the common law, current laws governing the

various types of fiduciary investors are not entirely uniform (although they are substantially aligned). Public pension funds are governed by state law. Private pension funds are governed by the Employee Retirement Income Security Act as enforced by the Department of Labor.

The laws governing charities come from a number of different sources. The Uniform Management of Institutional Funds Act (UMIFA) and the more recent Uniform Prudent Management of Institutional Funds Act (UPMIFA)[19] govern charitable "institutions." However, UPMIFA does not cover trusts managed by an individual or a corporation.[20] UPMIFA does not apply to split-interest trusts or to any fund with a non-charitable beneficiary.[21] Rather, such trusts are governed by state trust law, statutory law and common law.

The Prudent Investor Rule was first articulated in the Restatement (Third) of Trusts, and then codified in the Uniform Prudent Investor Act, now enacted in 45 states, including the District of Columbia and the U.S. Virgin Islands.[22]

General Prudent Investor Rule A trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust.[23]

Reasonable Care The Prudent Investor Rule requires the exercise of reasonable care, skill and caution and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.

Diversification In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

Loyalty, Impartiality, Delegation and Costs Under the Prudent Investor Rule the trustee is required to (i) conform to the duties of loyalty and impartiality, (ii) act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents, and (iii) incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship.[24]

The Prudent Investor Rule expressly authorizes the trustee to take the purpose and circumstances of the trust into consideration in making investment decisions. It is common for the settlor of a trust intended to hold a concentrated position in a closely held business to state her intention that the business interest be considered a proper trust investment notwithstanding the concentration. Similarly, as discussed above, the settlor with a sustainable and responsible investment perspective may express her intentions with respect to investments.

THE EVOLUTION OF PRUDENCE

The question at hand is whether responsible investment strategies can be employed under current concepts of fiduciary duty. However, the antecedent to that question is whether fiduciary duty in general, and prudent investment in particular, is static or dynamic. Do we answer the question solely on the basis of legal precedent, which admittedly is the basis of legal analysis, or do we also assess the current environment and anticipate, without predicting, future circumstances?

Recall that change in the legal and investment environment is the genesis of the evolution of the law and is itself reflected in the transition from the Restatement of Trusts, to the Restatement (Second) of Trusts, to the Restatement (Third) of Trusts. Under the Restatement (Second) of Trusts, particular investments were considered *per se* imprudent, including the purchase of securities for purposes of speculation: for example, purchase of shares of stock on margin or purchase of bonds selling at a great discount because of uncertainty whether they will be paid on maturity; purchase of securities in new and untried enterprises; employment of trust property in the carrying out of trade or business; and purchase of land or other things for resale.

The evolution of the introduction of alternative investments in fiduciary accounts began with institutional investors, pension funds and foundations, followed by private trusts. The Department of Labor initially provided guidance with respect to "riskier" investments such as venture capital in 1979.[25] By the time the Restatement (Third) of Trusts was introduced, real estate and venture capital investments were acknowledged as having a place in private trusts in appropriate circumstances. However, there was a clear recognition of the complexities of alternative investments that required special due diligence and monitoring.[26]

Restatement (Third) of Trusts

The Restatement (Third) of Trusts does not provide direct guidance regarding responsible investing. But it is not altogether silent and it does expressly incorporate principles of a changing and dynamic fiduciary investment environment. By way of example, under the prudent man rule of the Restatement (Second) of Trusts, delegation of investment authority was generally not considered appropriate, whereas the Restatement (Third) of Trusts expressly states the process for prudent delegation.[27]

Under the Restatement (Third) of Trusts and in the view of its principal contributors:

- Arbitrary restrictions on trust investments are unwarranted and often counterproductive. Trust investment law should reflect and accommodate current knowledge and concepts. Accordingly, no investment is *per se* prohibited.[28]
- Trust investment law should reflect and accommodate current knowledge and concepts. It should also avoid repeating the mistake of freezing its rules against future learning and developments.
- The rules are designed to be general and flexible enough to adapt to the changes that may occur over time in the financial world. They are also designed to be flexible enough to allow prudent use of any investments and techniques that are suitable to the different abilities of different trusts and to the varied purposes and circumstances of the diverse array of trusts to which the prudent investor rule will inevitably apply.[29]

A Commentator's View

Scott on Trusts[30] has long taken an expansive view of what the author titles "moral consideration as to making investments and retaining assets." In the 1988 Fourth Edition, Scott posed the question whether trustees are rigidly bound to attempt to secure the maximum return, whether as to income or principal, consistent with safety, or whether they may properly take into consideration those matters of morality or ethics or public welfare that ordinarily guide good citizens in the conduct of their affairs.

By way of analogy to directors of a business corporation who owe fiduciary duties to the shareholders to conduct the business of the corporation so as to attempt to secure a profit, Scott early on made the point that it is well settled that directors should recognize that they and the corporation are part of the community and that directors may properly consider the "social performance" of the corporation. In Scott's view, directors may, within proper limits, make gifts of a corporation for charitable purposes, although this may, at least in the near term, slightly diminish the profits of the corporation.

So also, in the case of private trusts, Scott opined:

> *"Trustees in deciding to invest, or to retain, the securities of a corporation may properly consider the social performance of the corporation. They may decline to invest in, or to retain, the securities of corporations whose activities or some of them are contrary to fundamental and generally accepted ethical principles. They may consider such matters as pollution, race discrimination, fair employment, and consumer responsibility.*

> *"To an increasing extent institutional fiduciaries, whether charitable, such as foundations, or educational and other charitable institutions, or noncharitable, such as trust companies and insurance companies, have become aware of this problem as to the choice of investments, and have come to realize that they have a concern in the social behavior of the corporation in whose securities they invest. Of course they may well believe that a corporation that has a proper sense of social obligation is more likely to be successful in the long run than those that are bent on obtaining the maximum amount of profits.* **But even if this were not so, the investor, though a trustee of funds for others, is entitled to consider the welfare of the community, and refrain from allowing the use of the funds in a manner detrimental to society"** *(emphasis added).*[31]

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SCOTT ON TRUSTS

The subsequent Fifth Edition of Scott on Trusts[32] takes a more constrained view of the topic of "Moral Considerations in Investing." Scott notes that the question of taking matters of morality, ethics and public welfare into account has generated massive literature, acknowledges the complexity of the issue and reframes the argument a bit:

> *"Just as corporations and the directors are part of the community, so are trusts and trustees. Thus, concludes the argument, in deciding whether to invest in or retain a corporation's securities, trustees may properly consider the corporation's social performance. Trustees may decline to invest in or retain the securities of corporations whose activities are contrary to fundamental and generally accepted ethical principles. Of course, fundamental and generally accepted ethical principles are sometimes hard to find, but favorite causes of those espousing social investing have been the environment, human rights, fair employment, and consumer rights. Indeed, statutes have sometimes expressly authorized or even directed trustees to engage in various forms of social investing.*

> *"The alternative position is that the social performance of corporations is at best, indirectly relevant to the duties a trustee owns to the beneficiaries of a trust. Instead of trying to encourage the implementation of various social agendas, this announcement suggests that, in the absence of statutory authority, the trustee should seek to secure for the beneficiaries the maximum overall return that is consistent with the level of risk that is appropriate under the circumstances. This is the position of both the Uniform Prudent Investor Act and the Restatement (Third) of Trusts."*[33]

Freshfield's Report

The question of whether fiduciary investors are legally permitted to engage in responsible investing is addressed in the United Nations Environmental Programmes' Finance Initiative (UNEP FI) "Freshfield's Report." The report provides an analysis of investment under a spectrum of international fiduciary paradigms, focused on institutional investment and public and private pension funds. The report makes the argument that in the fiduciary context, investors may be permitted to at least in some instances take sustainable, responsible investments, social and environmental, into consideration in making investments in fiduciary accounts. The report analyzes the institutional and fiduciary investment in the European Union, Australia, Canada, France, Germany, Italy, Spain, the United Kingdom and the United States.

The following excerpt from the foreword of the report contextualizes the findings:

> *"Institutional investors, pension fund trustees, asset managers, and investment advisors take their responsibilities seriously, generally putting their clients' or beneficiaries' interests before their own, as well they should. Fraud, self-dealing and illegal conduct do occur and when found out, as increasingly happens through internal control or watchful regulators, it deserves unflinching penalties. Ethical conduct by financial market participants is often thought of as being synonymous with not breaking the law. But ethical conduct is more than not being crooked. This is why ethics exists, to help us decide what is right and what is good.*
>
> *"In our business, the investment business, ethical conduct extends beyond not breaking the law to properly interpreting what is in the best interests of the savers who are the ultimate beneficiaries of the institutional pools of money we are engaged to oversee or manage. This is where the interesting questions concerning fiduciary responsibility come to the fore: are the best interests of savers only to be defined as their financial interest? If so, in respect to which horizon? Are not the social and environmental interests of savers also to be taken into account? Indeed, many people wonder what good an extra percent or three of patrimony are worth if the society in which they are to enjoy retirement and in which their descendants will live deteriorates. Quality of life and quality of the environment are worth something, even if not, or particularly because, they are not reducible to financial percentages.*

> *"While not pretending to answer in the abstract what is right and what is good, we have sought to get expert opinion on the question whether the law restricts us, as asset managers, from seeking to attend to broadly extra-financial interests of savers in conjunction with their financial interests. What we have in mind are certain social and environmental interests that find expression in diverse international treaties, norms, and declarations, particularly those emerging from the democratic deliberative processes of the United Nations. Furthermore, we have also asked whether fiduciary duty does not require us to take into account such considerations, in view of their materiality to equity pricing."*[34]

In analyzing the Prudent Investor Rule as stated in the Restatement (Third) of Trusts, the report states:

> *"The effect of the modern prudent investor rule is that institutional decision-makers are given latitude to follow a wide range of diversified investment strategies, provided their choice of investments is rational and economically defensible. The rule recognizes that different investments play different roles within a balanced portfolio. Because there is no duty to maximize the return of individual investment, the prudence of any specific investment will only be assessed within the context of the overall investment strategy.*

> *"There is accordingly no reason why investment strategies should not include investments with positive ESG characteristics. The important limiting requirement is that imposed by the duty of loyalty: all investment decisions must be motivated by the interests of the fund's beneficiaries and/or the purposes of the fund. No investment should be made purely to give effect to the personal views of the decision-maker. Instead, all considerations must be weighed and assessed in the context of their expected impact on the investment portfolio.*

> *"Moreover, as with all considerations, ESG consideration must be taken into account wherever they are relevant to any aspect of the investment strategy (including general economic or political context, expected tax consequences, the role that each investment plays within the overall portfolio, expected risk and return, and the need for liquidity or capital appreciation). In addition, where the beneficiaries have expressed investment preferences in the fund instrument or otherwise, these preferences should also be taken into account.*

> *"In short, there appears to be no bar to integrating ESG considerations into the day-to-day process of fund management, provided the focus is always on the beneficiaries/purposes of the fund and not on unrelated objectives."*[35]

...ESG consideration must be taken into account wherever they are relevant to any aspect of the investment strategy."

PRUDENT INVESTOR RULE

UNEP Finance Initiative "Fiduciary II" Report

The Asset Management Working Group of the United Nations Environmental Programme Finance Initiative issued its follow up to the Freshfield's Report in July 2009 – "Fiduciary Responsibility: Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues Into Institutional Investment." [36]

Contributors from the United Kingdom make the argument that there may in some circumstances be a fiduciary duty related to ESG and that ESG considerations are relevant factors in investment risk assessment. This argument was not made or expressly endorsed by contributors from the United States.

CHARITABLE FIDUCIARIES

Fiduciary investing for a charity is subject to duties of loyalty and prudent investment. However, a charity's common, non-financial mission distinguishes a charity from a non-charitable trust where there is no common, non-financial mission. As is discussed in greater detail below, while not without question, a compelling and informed argument may be made that the fiduciary investing for a charity may include the mission of the charity as a factor in the investment decision-making process.

UPMIFA Overview

The Uniform Prudent Management Institutional Funds Act, completed in 2006, is designed to replace the 1972 Uniform Management of Institutional Funds Act. Like UMIFA, UPMIFA regulates investment decisions and endowment expenditures for the charitable organizations within its scope. To date, UPMIFA has been enacted in a total of 49 states, the District of Columbia and the U.S. Virgin Islands.

Which organizations are subject to UPMIFA? UPMIFA articulates the prudence standards for the management of charitable funds by charities organized as not-for-profit corporations, and charities organized as charitable trusts managed by trustees that are charities. It applies the rules of the Prudent Investor Rule, with some refinements, to these charities. It does not apply to trusts managed by non-charitable corporate or other fiduciaries, even if they include charitable interests, such as split-interest charitable lead and charitable remainder trusts. Those trusts are subject to the Prudent Investor Rule discussed above.

Which assets are subject to UPMIFA? Assets that are held primarily for investment are covered by UPMIFA. In contrast, operating assets used directly to accomplish a charitable purpose are not covered by UPMIFA. A charity may hold assets related to its program to carry out its charitable purpose, e.g., hospitals, schools, homeless shelters. For purposes of UPMIFA a "program-related investment" is defined as "an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment." [37] UPMIFA expressly excludes program-related investments from the general requirement that a charity invest its funds in accordance with the principles of prudent investment. As is discussed in greater detail below, this specific exclusion provides a degree of flexibility with respect to investment in assets based primarily on purpose, rather than primarily on return, for the charity subject to UPMIFA.

What investment standards does UPMIFA impose? UPMIFA incorporates the language of the Uniform Prudent Investor Act, modified to fit the special needs of charities. It provides more detailed investment standards than its predecessor, bringing a degree of consistency to fiduciary investment, whatever the source of the fiduciary responsibility. UPMIFA requires a charity and its investment managers to:

- Give primary consideration to donor intent as expressed in a gift instrument;
- Act in good faith, with the care an ordinarily prudent person would exercise;
- Incur only reasonable costs in investing and managing charitable funds;
- Make every effort to verify reasonable facts;
- Make decisions about each asset in the context of the portfolio of investments, as part of an overall investment strategy;
- Diversify investments, unless due to special circumstances, the purposes of the fund are better served without diversification;
- Dispose of unsuitable assets; and
- In general, develop an investment strategy appropriate for the fund and the charity.[38]

How does Section 3 of UPMIFA differ from the Uniform Prudent Investor Act? While Section 3 of UPMIFA (Standard of Conduct in Managing and Investing Institutional Fund) is based upon the Uniform Prudent Investor Act, the rules are not identical. Importantly, the settlor of a private trust has complete control over the investment provisions of a trust agreement. The Uniform Prudent Investor Act is a "default rule." But because UPMIFA applies to charitable organizations, UPMIFA

makes the duty of care, the duty to minimize costs, and the duty to investigate mandatory. (The duty of loyalty is mandatory under applicable state organization law.) The other duties of Section 3 are default rules, meaning they can be modified.

How can responsible investing be incorporated? A gift instrument or the governing instruments of a charitable organization can modify non-mandatory duties, subject to the charitable purpose doctrine. Importantly, it is the intent of the donor, as expressed in the gift instrument, which will control decision-making.[39] Thus, with thoughtful drafting of governance documents and gift instruments, responsible investment goals of an institution and its donors may be documented to provide guidance to those with the fiduciary responsibility of prudent investment of charitable funds.

Mission Investing

Mission investing is the investment of non-programmatic investment resources in a manner aligned with the purpose of a charity. Professor Susan Gary provides a thorough and thoughtful analysis of the question of whether it is prudent for a charity to engage in what she refers to as socially responsible investing in "Is It Prudent to Be Responsible? The Legal Rules for Charities That Engage in Socially Responsible Investing and Mission Investing."[40] Gary concludes that:

- In the absence of case law that addresses investment decision-making by managers of charities, the statutes on prudent investment and the Restatement (Third) of Trusts are the best source of legal guidance.
- While neither the Uniform Prudent Investor Act nor the Uniform Prudent Management of Institutional Funds Act provides direct express guidance regarding mission investing, a reasoned analysis suggests that the law permits mission investing by charities.
- Fiduciaries of charities must act in the best interest of the charity, without letting personal views interfere.
- As long as a fiduciary acts as a prudent investor, the fiduciary of a charity may consider a charity's mission along with other factors as part of the charity's investment strategy.[41]

Presently, different types of non-profit organizations utilize various types of responsible investment strategies and vehicles with differing levels of frequency. The Commonfund Institute September 2013 whitepaper "From SRI to ESG: The Changing World of Responsible Investing" provides the following summary of usage:

EXHIBIT 3. CHARACTERISTICS OF ESG USAGE AMONG COLLEGES AND UNIVERSITIES, CULTURAL, RELIGIOUS AND SOCIAL SERVICE ORGANIZATIONS AND PRIVATE FOUNDATIONS*

Numbers in percent (%)	Colleges and Universities	Cultural Institutions	Religious Institutions	Social Service Organiza-tions	Private Founda-tions
Total Institutions	831	31	18	19	140
Use ESG criteria for portfolio	18	7	61	16	17
Environmental	5	3	6	11	5
Social	15	3	56	11	11
Governance	4	0	6	0	6
Other	3	0	6	0	4
None	71	87	33	84	79
No answer/ uncertain	11	6	6	0	4

* Multiple responses allowed.

Source: NACUBO-Commonfund Study of Endowments, Council on Foundations-Commonfund Study of Investments for Private Foundations and Commonfund Benchmarks Study of Operating Charities. For educational institutions the fiscal year end is June 30, 2012; for operating charities and foundations the fiscal year end is December 31, 2012.

EXHIBIT 4. ESG INVESTMENT PRACTICES USED AMONG COLLEGES AND UNIVERSITIES, OPERATING AND PRIVATE FOUNDATIONS

Numbers in percent (%)	Colleges and Universities	Operating Charities[1]	Private Foundations
Responding Institutions	149	16	23
Percentage of total portfolio dedicated to:			
Negative screening	60.1	78.6	5.9
Impact investing	*	*	25.9
Sustainability investing	*	*	17.8
Vote proxies consistent with ESG criteria	49	50	N/A
Portfolio managers integrate ESG criteria	56	63	N/A
Integration of ESG was essential in hiring manager	59	80	N/A
ESG is a formal institutional policy	72	74	N/A
ESG is at manager's discretion	18	13	N/A

(1) Cultural, religious and social service organizations. Sample size of responses by individual segment was too small to analyze.

* Sample size too small to analyze. N/A = not asked

Source: NACUBO-Commonfund Study of Endowments, Council on Foundations-Commonfund Study of Investments for Private Foundations and Commonfund Benchmarks Study of Operating Charities. For educational institutions the fiscal year end is June 30, 2012; for operating charities and foundations the fiscal year end is December 31, 2012.

PRIVATE FOUNDATIONS

Arguably, the earliest direct impact investors were a small number of private foundations that participated in program related investments in the early 1970s. The specialized treatment of qualifying program related investments under the private foundation excise taxes in the Internal Revenue Code (Code) is beneficial for the private foundation seeking to make its impact through direct program investments.

Private Foundation Excise Taxes

Private foundations are subject to excise taxes under the Code designed to at once protect the charitable purpose upon which the foundation's tax exempt status is premised and deter potential abuse of tax exempt status for private investment purposes. As a special investment, a program-related investment is not subject to the Section 4944 "jeopardizing investment"rules

that would otherwise apply to investments held by private foundations and possibly subject the private foundation and its managers to significant excise taxes. Complementing this exception to investment restrictions, Section 4942 permits a foundation to treat a program-related investment as a distribution in satisfaction of its minimum distribution requirement.

Section 4944 Jeopardizing Investments and Program Related Investment Exception

Code Section 4944(a) imposes an excise tax on a private foundation that makes an investment that jeopardizes the carrying out of any of the private foundation's exempt purposes. Section 4944(a) also imposes an excise tax on foundation managers who knowingly participate in the making of a jeopardizing investment. Section 4944(b) imposes additional excise taxes on private foundations and foundation managers when investments are not timely removed from jeopardy.

Generally, under Treas. Reg. § 53.4944-1(a)(2), a jeopardizing investment occurs when, based on the facts and circumstances at the time the investment is made, foundation managers fail to exercise ordinary business care and prudence in providing for the long- and short-term financial needs of the foundation. The determination of whether an investment is a jeopardizing investment is made on an investment-by-investment basis, taking into account the private foundation's entire portfolio. In exercising the requisite standard of care and prudence, foundation managers may take into account the expected investment return, price volatility and the need for portfolio diversification.

The regulations under Section 4944(c) define a program-related investment as an investment:

- The primary purpose of which is to accomplish one or more of the purposes described in Section 170(c)(2)(B) (i.e., religious, charitable, scientific, literary or educational purposes or to promote national or international amateur sports competition or toward the prevention of cruelty to children or animals, in short, for "charitable purposes");
- No significant purpose of which is the production of income or the appreciation of property; and
- No purpose of which is to accomplish one or more of the purposes described in Section 170(c)(2)(D) (i.e., attempting to influence legislation or participating in or intervening in any political campaign).

An investment is made primarily for charitable purposes if it significantly furthers the private foundation's exempt purposes and would not have been made but for the investment's capacity to further the private foundation's exempt purposes. In determining whether a significant purpose of an investment is the production of income or the appreciation of property, Treas. Reg. § 53.4944-3(a)(2)(iii) provides

that it shall be relevant whether investors who are engaged in the investment solely for the production of income would be likely to make the investment on the same terms as the private foundation.

Although program-related investments may generate profits – even significant ones – the regulations emphasize that profit may not be the primary objective. Rather, the Internal Revenue Service takes a "but for" approach, meaning that the investments would not have been made "but for" the fact that they are in furtherance of the private foundation's exempt purpose(s). However, changes in the structure of a program-related investment may reduce the exempt portion of the program-related investment.

Section 4942 Minimum Distribution

To maintain tax-exempt status, Section 4942 requires non-operating private foundations annually to distribute a minimum investment return (statutorily defined as 5%) to charity. Qualifying distributions can include program-related investments, treated in a similar fashion to an outright grant. In addition, program-related investments are among the assets excluded from the foundation's assets in the calculation of the 5% annual distribution requirement under Section 4942.

When the principal of a program-related investment is returned to the foundation, the value of that principal is added to the distribution requirement in the year received, mandating the recycling of these charitable funds either into other program-related investments or into outright grants. When a program-related investment becomes worthless, it has no effect on the foundation's distribution or reporting requirements, since the program-related investment is treated as an outright grant unless or until it is returned to the foundation.

RETROFITTING FOR RESPONSIBILITY

Trends and evolution of thinking are all well and good. But what can be done when existing documentation defining powers and duties does not give the trustee the flexibility it desires or needs to pursue a responsible investment orientation? Bylaws, committee mandates and investment policy statements may each be amended fairly easily. However, "modernizing" a long-term irrevocable trust may require more analysis and effort. Judicial trust construction, reformation or decanting to incorporate investment flexibility to embody responsible investment may all be possibilities to explore.

Construction and Reformation

In the case of an irrevocable trust, typical investment authority language in the trust agreement may not clearly and definitively answer the question as to whether the trustee may incorporate a responsible investment orientation in the investment process. Whether or not direct impact investment is authorized may also be subject to question. Where there is an ambiguity in the governing instrument the trustee may seek either a judicial construction or, where available,

a non-judicial settlement or virtual representation agreement. Where there are changed circumstances not anticipated by the settlor, reformation to allow for responsible investment may be an option.

Decanting

"Decanting" under state law is another possibility in some circumstances. For example, the Illinois "decanting" statute, Section 16.4 of the Trust and Trustees Act, 760 ILCS 5/16.4, went into effect on January 1, 2013. It confers statutory authority on a trustee who has discretion to make distributions of principal to a beneficiary of one trust (the "first trust") to exercise that discretion by decanting the first trust into another (the "second trust"), in furtherance of the purposes of the first trust, provided that the first trust is governed by Illinois law and does not expressly prohibit application of the statute. Decanting may provide a means of "modernizing" the investment provisions of a trust to provide clarity for the trustee and beneficiaries as to authority and limitations with respect to responsible investing.

Directed Trusts

The trustee of a directed trust may ordinarily invest as directed by the party with investment authority. However, the party with investment authority is customarily subject to fiduciary prudent investment limitations. Thus, in the case of a directed trust, it will be helpful to the party with the investment authority to have the settlor indicate her intentions with respect to sustainable and responsible investing, as in the case of a traditional trust. If decanting to a directed trust, such authority may be provided.

IMPLEMENTATION OF RESPONSIBLE INVESTMENT FOR FIDUCIARIES

If responsible investing is desired and permitted for the fiduciary investor, the next step is to address matters of implementation. Implementation may be for an entire trust estate or fiduciary account, or it may be for just a portion. Carving out a part of an investment portfolio for a responsible investment strategy is one approach that may be attractive to a fiduciary new to the concepts of responsible investment. Seeking the guidance of professionals with experience in responsible investment is another approach to consider.

Strategies and Approaches

There are various strategies and approaches to implement responsible investing, including active ownership strategies, use of negative or positive screens, best-of-sector stock selection, loans, guarantees and direct investment.

Active Ownership With active ownership, the investor in public securities uses proxy voting, shareholder resolutions and informal shareholder activism with the management of publicly traded companies held in the investment portfolio to influence the corporate citizenship of corporations. Shareholder advocacy has

successfully influenced corporations to report on hiring practices and to adopt environment codes of conduct.

Proxy guidelines for parties given voting discretion on accounts, including fiduciaries, commonly include:

- Advocating the elimination of workplace discrimination;
- Requesting increased disclosure regarding the environmental impact of a company's operations and products, and initiatives to curtail these risks;
- Requesting the issuance of corporate sustainability reports, as well as disclosure concerning the emission of greenhouse gases and the use of fracturing in connection with the extraction of natural gases; and
- Requesting the issuance of reports by a company detailing its energy efficiency plans.

Shareholder advocacy will have varying degrees of receptivity and success in different markets. Transparency and accountability is generally at a higher level in developed markets than in emerging markets.

Positive or Negative Screens Use of positive or negative screens is another approach. Investors, including fiduciary investors, typically invest within particular guidelines. How those guidelines are established may vary based on the type of investor, but the concept of guidelines is fundamental. Screening is the process of buying and selling securities based on their consistency with the priorities of the investor. Where the collective priorities of the investor can be identified, development of an investment screen is relatively straightforward and vendors provide monitoring services.

With a negative screen, identified factors are isolated and an investment may be eliminated based on the existence of the negative factor. Companies involved in industries or activities the investor chooses to restrict, such as poor environmental stewardship, questionable labor practices or controversial mining techniques can be excluded. Automated exceptions-based monitoring capabilities are available to investors for this purpose.

Positive or inclusionary screens, while not as broadly used as negative screens, are emerging. With a positive screen, for example, companies with high performance regarding identified environmental, social and governance issues are selected for inclusion in the investment portfolio. This may also be referred to as a "best-in-sector" approach, as discussed below.

A corporate governance ranking guideline (and related screen) may be used to monitor corporate governance at the individual asset or portfolio weighted-average level. Companies may be rated via what is referred to as a Corporate Governance Quotient (CGQ). CGQ is a rating system designed by Institutional Shareholder Services to assist institutional investors in evaluating the quality of corporate boards. Ratings are calculated based on the basis of eight core categories: boards of directors, audit, charter and bylaw provisions, anti-takeover

provisions, executive and director compensation, progressive practices, ownership and director education. Each company is scored individually and ranked relative to its index and industry peer group.[42]

Guidelines may also be established, measured and monitored in various social categories. Representative categories include adult entertainment, alcohol, animal welfare, child labor, cluster bomb component and system manufacturers, gambling and landmines, to name a few. The market value of assets in a fund or portfolio can be evaluated individually or in the aggregate and securities can be excluded for the test calculation.

Additionally screening capabilities exist for particular prohibited nations (Cuba, Iran, Myanmar (Burma), North Korea, Sudan and Syria). Examination may include both direct and indirect business ties with identified nations.[43]

In order to help owners and managers ensure that investment decisions comply with mandates, MSCI ESG Research and others provide research on publicly traded companies involved in specific business activities including for example tobacco, alcohol, animal welfare and weapons.[44]

Best-of-Sector Stock Selection An investor may build a portfolio using a best-of-sector approach by selecting companies with the highest ESG record relative to sector peers. This can create incentives for other companies in the industry to improve their social and environment impacts – positive peer pressure for a purposeful impact.

Loans, Guarantees and Green Bonds Loans may be made with a particular intended purpose – to support business development in a high unemployment area or to launch a sustainable farming enterprise. Similarly, with guarantees the investor enhances the credit of the work of an organization's impact efforts, creating leverage for the direct impact work of the organization.

Green bonds, debt instruments that tie the proceeds of the bond to specified environmental purposes, have emerged as investment generating significant investor interest. Issues of green bonds raise funds for investment in specified environmentally friendly investments. The cumulative value of green bonds is over $53 billion through year-end 2014.[45]

Direct Impact Investment Direct impact investment is another approach – investing in activities such as sustainable farming or water purification. For the fiduciary investor, any direct impact investment or impact focused private equity investment presents considerations that require evaluation: the liquidity of the investment and the cash flow requirements of the fiduciary account; the allocation of receipts between income and principal; and the associated impact on the relative interests of current income beneficiaries and future remainder beneficiaries.

Funds Responsible investment funds have become readily available. The investor may choose from among a broad range of sectors as well as geographic focuses. The opportunity to diversify sustainable responsible investments exists to a greater degree than in the recent past. Global Impact Investing Network provides a database of impact investment fund offerings.

Hybrid Entities There are a number of types of hybrid entities through which responsible investment strategies are implemented. These include benefit corporations, B-corporations, L3Cs (low-profit limited liability corporations and flexible benefit corporations).

Developing a Responsible Investing Policy and Process

Policy and process are the cornerstones of prudent fiduciary investment. Beyond the governing instrument requirements discussed above, development of the investment policy statement, due diligence, monitoring and evaluation are all important considerations for the fiduciary investor.

Responsible Investment Policy Statement[46] Just as traditional investors develop an investment policy, responsible investors develop a responsible investment policy. The familiar concepts of asset allocation, risk as related to return, and measurement of financial risk are all considerations in developing a responsible investment policy.

The process of writing and revising a responsible investment policy statement is ongoing and iterative as an investor fine-tunes its goals and philosophy toward responsible investing. The following general process can be adapted to developing responsible and prudent investment guidance and authorization language to include in a trust agreement.

It is often helpful to start at a high level to identify key beliefs. Assemble key stakeholders to provide input and to develop guidance that reflects their perspectives, priorities and insights.

When putting pen to paper so to speak, articulate the purpose for the investment policy statement, answering the question why you are developing the *policy*. Next, state your *objectives*. What are the expectations for returns – financial, environmental, social, etc.? What is the time horizon? Are there any specific cash flow requirements? Move on to the investment *guidelines*. What are the general parameters around diversification, “acceptable” types of assets in which to invest, asset allocation and any shareholder activism? An investment policy statement ordinarily includes maximum and minimum ranges and target percentage weightings. It is in the guidelines that more detail is typically included around specific responsible investment priorities. Will certain sub-sectors, such as fossil fuels, be minimized or even excluded? How stringent will any limitations be?

If there is to be a balancing between purely financial performance and ESG performance, how is this to be approached? Be mindful of how guidelines will (or will not) be applied to investments in mutual funds and to investment managers. Finally, consider the important element of *evaluation*. How will the “success” of investments be measured – quantitative measures, qualitative measures, tracking?

Once an investment policy is developed, with its responsible investment elements, obtain any necessary approvals and establish timelines for initial and periodic review and revision of the investment policy statement. For additional guidance in developing a responsible investment policy statement see the Principles for Responsible Investment at unpri.org.

When creating an investment policy statement:

- Answer why you are developing the policy
- State objectives
- Develop guidelines
- Consider how “success” will be evaluated

See sample format below.

PLANNING NOTE: FOLLOWING IS A SAMPLE FORMAT FOR DEVELOPING A RESPONSIBLE INVESTMENT POLICY STATEMENT

I. Purpose
- a. Why are you developing the policy?
- b. Include core principles
- c. Define policy scope – to what will investment policy statement apply?

II. Objectives
- a. Verbalize intent of policy
- b. Expectations for investment returns
- c. Specific cash flow goals
- d. Time horizon

III. Investment Guidelines
- a. Parameters around diversification
- b. Acceptable asset classes
- c. Asset allocation – ranges/targets
- d. Incorporation of responsible investing
  - i. Positive/negative screening
  - ii. Guidelines for shareholder activism

IV. Evaluation
- a. How will you measure success?
  - i. Quantitative: performance vs. specific benchmarks
  - ii. Qualitative: are investments in compliance with investment policy statement?
- b. Specify any reporting requirements

Portfolio Process

Process, again, is essential to prudent investment. The portfolio process necessarily will differ for the "financial first" investor seeking optimal financial return and acceptable SRI/ESG return and the "impact first" investor seeking optimal SRI/ESG return and acceptable financial return.[46] For the financial first investor, the portfolio construction process would proceed from investment due diligence, to SRI/ESG assessment, to compliance with the investment policy statement, to implementation, then to benchmarking and reporting. For the impact first investor, the SRI/ESG assessment would precede the investment due diligence.

Evaluating Investments

Due diligence in the selection of investments and the monitoring of performance are essential elements of risk management for the fiduciary investor; they are pillars of prudent fiduciary investment. Appendix B of the UNEP Fiduciary II Report includes "top ten" questions for trustees to consider when implementing various sustainable and responsible investment strategies such as negative screens, positive screens, integrations and engagement.

The Global Institutional Investors Network (GIIN) has established Impact Reporting and Investment and Reporting Standards (IRIS). IRIS is a framework for defining, tracking and reporting the social and environmental performance of impact investments. These standards can be found at iris.thegiin.org.

The GIIRS (which stands for Global Impact Investing Rating System) Report is a quarterly ratings and analytics report for assessing the social and environmental impact of companies and funds using a quantitative ratings and analytics approach. The GIIRS Index allows entrepreneurs and investors to benchmark their impact performance against a current index over time. The GIIRS Index may be found at giirs.org.

Other impact evaluation, monitoring and measuring services and resources continue to emerge as the momentum of responsible investing increases.

PUTTING IT ALL TOGETHER

Responsible investing is clearly an emerging consideration in the investment process, generally. For the fiduciary investor, the "doing good" of responsible investing, while admirable, must be considered in the context of the duties of loyalty, impartiality and prudent investing. Prudent investment generally provides that, when making investment decisions, consideration must be given to the purposes and circumstances of the trust. A statement of a settlor's intent in the trust agreement or the donor's purpose in the gift instrument will be of great benefit to the fiduciary presented with responsible investment requests and opportunities.

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In the civic community, Suzanne supports diversity and education initiatives. She has been involved with the executive committees and boards of directors of Gads Hill Center, and the Chicago Coalition of Women's Initiatives in Law. Suzanne is chairperson of the board of directors of Chicago Scholars, a college access program for high potential urban students, and a trustee of Hope College.

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ENDNOTES

1. The author would like to thank Marguerite Griffin, Northern Trust Director Philanthropic Advisory Services, for her contributions and authorship of “Impact Investing: A Guide for Philanthropists and Social Investors”.
2. Business for Social Responsibility, Trends in ESG Integration and Investment: Summary of the Latest Research and Recommendations to Attract Long Term Investors (2012) [hereinafter BSR White Paper], available at http://www.bsr.org/en/our-insights/report-view/trends-in-esg-integration-in-investments.
3. Global Sustainable Investment Alliance, Global Sustainable Investment Review (2012), available at http://gsiareview2012.gsi-alliance.org.
4. U.S. Social Investment Forum, Report on Sustainable and Responsible Investing Trends in the United States (2016) [hereinafter US SIF Foundation White Paper], available at http://www.ussif.org/trends.
5. Id.
6. Jamie Johnson, Including the Young and Rich, N.Y. Times, Apr. 18, 2014, http://www.nytimes.com/2014/04/20/fashion/white-house-hosts-next-generation-young-and-rich.html.
7. John H. Langbein and Richard A. Posner, Social Investing and the Law of Trusts, 79 MICH. L. REV. 72, 72 (1980).
8. B.J. Richardson, Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?, 22 BANKING & FIN. L. REV. 145, 147 (2007).
9. D. Hess, Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development, 2 VA. L. & BUS. REV. 221 (Fall 2007).
10. The Six Principles, About PRI, Principles for Responsible Investment, http://www.unpri.org/about-pri/the-six-principles/ (last visited Sep. 21, 2014).
11. Id.
12. I.R.C. §§ 103 and 170.
13. Meinhard v. Salmon, 164 N.E. 545, 546, (N.Y. 1928), citing Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926).
14. Restatement (Third) of Trusts, § 78(1) (2007); Unif. Trust Code § 802(a) (2005).
15. Unif. Prudent Investor Act § 5 (1994).
16. Restatement (Third) of Trusts § 90 cmt. c (2007).
17. Id.
18. Restatement (Third) of Trusts § 79 (2007); Unif. Trust Code § 803 (2005).
19. Unif. Management of Institutional Funds Act.
20. Id. at § 1(2).
21. Unif. Prudent Management of Institutional Funds Act § 2(5)(C).
22. Uniform Law Commission, Legislative Fact Sheet: Prudent Investor Act (2016), available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Prudent%20Investor%20Act.
23. Restatement (Third) of Trusts § 90 (2007).
24. Id.
25. Pension and Welfare Benefit Programs, 44 Fed. Reg. 37,221 (June 26, 1979) (to be codified at 29 C.F.R. pt. 2550).
26. Restatement (Third) of Trusts, § 90 cmt. o and cmt. p (2007).
27. See infra note xvi (discussing per se imprudent investments).
28. Id. (see Introductory Note)
29. Edward C. Halbach, Jr., Trust Investment Law in the Third Restatement, 77 IOWA L. REV. 1151, 1154-55 (1992).

30. Austin W. Scott, The Law of Trusts, § 227.14 (4th ed. 1988). Cited in Bd. of Trs. of Emps. Ret. Sys. of Balt. v. Mayor of Baltimore, 317 Md. 72, 562 A.2d 720 (1989).

31. Id.

32. Austin W. Scott, William F. Fratcher, and Mark L. Ascher, Scott and Ascher on Trusts, § 19.1.13 (5th ed. 2007).

33. Id.

34. United Nations Environment Programme Finance Initiative, A Legal Framework for the Integration of Environmental, Social and Governance Issues Into Institutional Investment, Forward (Oct. 2005) [hereinafter UNEP FI Forward], available at http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

35. Id. at 8.

36. The report, referred to as the "Fiduciary II Report," explores the legal perspective on how to operationalize the integration of ESG issues into the investment process. The report can be viewed at: http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf.

36. Id. §3.

37. Id. Prefatory Note and §3.

38. Id., § 3, cmt.

39. Susan N. Gary, Is It Prudent to Be Responsible? The Legal Rules for Charities That Engage in Socially Responsible Investing and Mission Investing, 6 NW. J. L. & SOC. POL'Y. 106 (2011).

40. Id. at 129.

41. Northern Trust Corporation, Investment Risk and Analytical Services, Compliance Analyst Guideline Types (2013).

42. Id.

43. Morgan Stanley Capital International, ESG Research, Business Involvement Screening Research (May 2012) available at http://www.msci.com/resources/factsheets/MSCI_ESG_BISR.pdf.

44. Thank you to Sally Giegerich, Senior Vice President at Northern Trust, for her contributions to the Investment Policy section of this piece.

45. Climate Bonds Initiative (2015). Year 2014 Green Bonds Final Report.

46. Rockefeller Philanthropy Advisors, Solutions for Impact Investors: From Strategy to Implementation (Aug. 2010), available at http://rockpa.org/document.doc?id=15.

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