



April 29, 2020

New Attorney General Guidance on Access to Endowment Funds

On March 27, 2020, we issued an alert on [Endowment Funds in the Time of Coronavirus](#), describing options for struggling nonprofits seeking to access their endowment funds. On April 28, 2020, the Charities Division of the Massachusetts Attorney General's office issued [new guidance](#) regarding nonprofit endowments, which addresses many of the same options discussed in our alert. In particular, the Attorney General recommends that nonprofits seeking to access their endowments because of the current emergency consider the following:

- Exploring other sources of funding (new donations or grants, CARES Act grants or loans, or commercial financing options)
- Asking donors to release spending restrictions
- Considering prudent adjustments to endowment spend rates, taking into account the various factors set forth in UPMIFA (the Uniform Prudent Management of Institutional Funds Act, found in Chapter 180A of the Massachusetts General Laws)
- Pursuing administrative modification of funds that are both small enough (\$75,000 or less) and old enough (in existence for more than 20 years) to qualify for that special non-judicial process

If none of these options are viable, the Attorney General's guidance makes clear that nonprofits must seek court approval before appropriating more from endowments, under the law of *cy pres* or deviation. In our March 27 alert, we noted that some nonprofits seek to borrow from their donor-restricted endowments, often treating such internal borrowing as a form of interest-bearing investment. We also noted, however, that often this sort of borrowing is really a *de facto* appropriation, without adequate interest or security or a credible plan for repayment, and that nonprofits should consult with the Charities Division before attempting to do so. In the new guidance, the Charities Division makes clear its position that any sort of borrowing from donor-restricted endowment is not permissible without court approval. It should be noted that there may be situations where a nonprofit can demonstrate that the ability to borrow from endowment in certain circumstances is in fact consistent with donor intent, based on donor communications at the time of the gift or subsequent consent by donors. To the extent that borrowing is not sanctioned by donors, however, and in light of the Attorney General's position, nonprofits should be wary of attempting to justify borrowing on a prudent investment theory without prior consultation with the Attorney General's office and, if necessary, court approval.





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If you do need to go to court, do not ask for more than you need to address your current situation and reasonable needs looking forward. Under *cy pres* and deviation legal principles, court approval for either borrowing or additional appropriation requires a recitation of why deviation from donor intent is necessary under the circumstances and why the specific relief requested addresses these circumstances, while hewing as closely as possible to donor intent.

A court-based solution is not amenable to speedy emergency relief, as it will inevitably take a certain amount of time and resources to prepare the necessary materials for the court petition and for Attorney General review, and to coordinate with the Charities Division on a petition that they will support. Accordingly, any nonprofit not able to find relief by way of one of the non-judicial options listed above should begin consulting with the Charities Division and preparing the court documents as soon as possible. The Charities Division requests that all documents be submitted electronically, and promises to cooperate as appropriate to help schedule emergency court hearings if needed.

Contact Us

If we can be of assistance in preparing any court materials or coordinating on your behalf with the Charities Division, please contact a member of our [Nonprofit Practice Group](#), or the author of this advisory:

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