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BEYOND PRIs: HOW UPMIFA ANCHORS IMPACT-FIRST INVESTING FOR DONOR ADVISED FUNDS AND CHARITIES

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Impact-first investing deploys capital with societal benefit as the dominant rationale and financial returns as secondary. Despite its growing importance, public charities, including donor advised fund (DAF) sponsoring organizations, lack a clear legal framework for this practice, leaving substantial philanthropic assets either idle or invested primarily for financial gain. Private foundations have long relied on the Program-Related Investment regime under the Internal Revenue Code for charitable purpose investments, but other charities often assume they must satisfy the Uniform Prudent Management of Institutional Funds Act (UPMIFA) financial prudence standard, discouraging mission-driven investment. However, UPMIFA already provides a separate foundation for this type of impact-first investing through its underexamined category of Program-Related Assets (PRAs), defined as assets held primarily to accomplish a charitable purpose and not primarily for investment. The implications are particularly meaningful for DAFs, which hold significant assets and face persistent criticism for warehousing charitable capital. PRAs offer DAFs and other charities a doctrinal pathway to deploy those assets for impact. Clarifying this framework can unlock significant

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philanthropic capital for flexible, high-impact use and restore prudence to its original philanthropic meaning of careful, reasoned decision-making in pursuit of charitable purpose.

Introduction

Impact-first investing has emerged as an important development in modern impact finance, marking a quiet shift in the logic of philanthropy and transforming charitable capital from static endowment to active instrument.[1] Impact investments are defined broadly as those "made with the intention to generate positive, measurable social and environmental impact alongside a financial return."[2] Distinct from *finance*-first impact investing, which focuses on generating market-rate returns with secondary social benefits, *impact*-first investing places the pursuit of social or environmental outcomes above the pursuit of financial gain, even where that requires tolerance of concessionary returns, higher transaction costs, or longer time horizons.[3] Importantly, impact-first does not mean impact-only.[4] Unlike grants, impact-first investments retain financial characteristics: they are structured as loans, equity stakes, or other financial instruments. What distinguishes them is that the investment decision is made on the basis of advancing mission.[5]

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1. *See* Michael Etzel, Matt Bannick, Mariah Collins, Jordana Fremed & Roger Thompson, *Back to the Frontier: Investing That Puts Impact First*, The Bridgespan Group (Apr. 2, 2021), https://www.bridgespan.org/insights/investing-that-puts-impact-first ("Only a decade ago, impact investing struck most people in the finance community as a novel, even improbable concept. Today, it has achieved mainstream status by demonstrating that an impact mandate can successfully deliver against traditional financial benchmarks. That's the finance-first approach to impact investing. Advocates for the impact-first approach to impact investing hope to chart a similarly successful trajectory by demonstrating that impact need not be constrained by financial performance. This is the new frontier for impact investing.").

2. Global Impact Investing Network, Impact Investing: A Guide to This Dynamic Market 3 (Jan. 24, 2025).

3. *See* Zia Khan, *The Untapped Potential of "Impact-First" Investing*, Social Finance, Inc. (Aug. 15, 2023), https://socialfinance.org/insight/the-untapped-potential-of-impact-first-investing/; *Impact-First Investing*, Ceniarth, https://ceniarthllc.com/impact-first-investing/ (last visited Nov. 14, 2025) (this continuum identifies a distinction between impact-first investing and catalytic investing on the investing continuum but both options are within the purview of impact-first by the legal distinction being articulated in this Article and therefore, this paper will not seek to distinguish between the two types of investment opportunity).

4. *Id.*

5. *Catalytic Capital Consortium*, MacArthur Foundation, https://www.macfound.org/press/evaluation/interim-evaluation-of-catalytic-capital-consortium-c3-initiative (last visited Nov. 16, 2025) (defining catalytic capital as "debt, equity, or guarantees that accept disproportionate risk and/or concessionary returns" compared to conventional investments "to generate positive impacts or enable third-party investment that would not otherwise be possible").

No statute, regulation, or case law defines impact-first investing.[6] This Article focuses on the subset of impact-first investments that function as programmatic charitable assets under existing law. Private foundations benefit from a well-developed model for programmatic investing, namely Program-Related Investments (PRIs).[7] Codified in the Internal Revenue Code (IRC), PRIs explicitly recognize that some investments can be made primarily for charitable purpose, but the PRI doctrine statutorily extends only to private foundations.[8] Public charities including community foundations and donor advised fund (DAF) sponsoring organizations have lacked an equivalent framework, or so conventional wisdom holds.[9] In fact, the Uniform Prudent Management of Institutional Funds Act (UPMIFA) already contains the necessary foundation through its underexamined category of Program-Related Assets (PRAs).[10] UPMIFA governs the investment of charitable assets in 49 states and applies directly to public charities, including community foundations and DAFs.[11] Most charities looking to make impact investments under UPMIFA refer to the eight-factor prudent investor test and attempt to balance

6. As used in this Article, "impact-first investing" refers to an investment approach in which advancing social or environmental impact is prioritized over financial return. That intention-based concept is broader than, and analytically distinct from, investments that qualify as charitable activities under federal tax or state fiduciary law. Some mission-related investments may be impact-first without satisfying the legal requirements for treatment as PRIs or PRAs. By contrast, all PRIs and PRAs, as defined here, are impact-first in character because they are held primarily to accomplish charitable purposes.

7. I.R.C. § 4944(c); Treas. Reg. § 53.4944–3; Zoey F. Orol, *The Failures and Future of Private Foundation Governance,* 46 AM. COLL. OF TRUST AND EST. COUNS. 185, 208 (2021).

8. I.R.C. § 4944(c).

9. Throughout this Article, "DAF" refers to the sponsoring organization which is the public charity that maintains donor advised funds rather than the individual donor-advised fund accounts or the donors who advise them. *See* I.R.C. § 4966(d)(2).

10. Uniform Prudent Management of Institutional Funds Act § 2(7) (Unif. L. Comm'n 2006) [hereinafter UPMIFA].

11. UPMIFA has been adopted, with minor variations, in every U.S. jurisdiction except Pennsylvania. Forty-nine states, the District of Columbia, and the U.S. Virgin Islands have enacted versions of the statute, often with state-specific tweaks to reflect local trust law or nonprofit governance provisions. Pennsylvania continues to operate under its pre-existing nonprofit corporation law and trust law regime. PNC Bank, *Good Nonprofit Governance Starts with the Board*, PNC BANK (last visited Apr. 2, 2026), https://www.pnc.com/insights/corporate-institutional/manage-nonprofit-enterprises/good-nonprofit-governance-starts-with-the-board.html.

financial considerations against mission alignment.[12] Too often, this framing treats impact as one factor among many, and the investment fails to clear the bar. But this approach misses a key avenue: PRAs are not subject to the eight-factor financial prudence test at all.[13] Yet this category has received little practical or scholarly attention.[14] Fiduciaries rarely invoke PRAs when structuring impact-first transactions, and many practitioners overlook the extent to which the statutory language parallels the PRI definition under federal law. That oversight leaves significant philanthropic capital on the sidelines.

The urgency of clarifying the legal status of impact-first investing is heightened by the rapid growth of the broader impact investing market. The Global Impact Investing Network estimates that the global impact investing market now totals in the trillions of dollars with approximately 35% of investors and assets under management originating from within the U.S.[15] Much of this capital is finance-first and deployed by institutional investors seeking market-rate, risk-adjusted returns—impact is at most a secondary consideration.[16] Yet practitioners increasingly acknowledge that finance-first strategies leave critical gaps.[17] Market-based investments tend to flow toward sectors and geographies that can support competitive returns, such as renewable energy projects with strong subsidies, health care ventures with scalable revenue models, or

12. *See generally* 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. of L. & Soc. Policy 106 (2011).

13. UPMIFA § 2(5) cmt.

14. *See infra* note 166.

15. Dean Hand, Maddie Ulanow, Hongyu Pan & Kelly Xiao, Sizing the Impact Investing Market 3 (Global Impact Investing Network 2024), https://thegiin.org/publication/research/sizing-the-impact-investing-market-2024/ (in this report, the GIIN estimates that over 3,907 organizations manage $1.571 trillion in impact investing assets under management worldwide).

16. Grand View Research, Impact Investing Market Size, Share Trends Analysis Report by Asset Class, By Offerings, By Investment Style, By Investor Type, By Region, and Segment Forecasts, 2023–2030, https://www.grandviewresearch.com/industry-analysis/impact-investing-market-report# (last visited Feb. 18, 2026) ("Institutional investors segment dominated the market in 2024. The segment has experienced significant growth due to the increasing interest from institutional investors, such as pension funds and endowments. . . . They view impact investments as an opportunity to generate both financial returns and positive societal and environmental outcomes.").

17. *See* Khan, *supra* note 3; Dana Brakman Reiser, *Foundation Regulation in Our Age of Impact*, 17 Pitt. Tax Rev. 357, 357 (2020).

microfinance institutions with proven repayment histories.[18] By contrast, many pressing social and environmental challenges do not present commercially competitive opportunities. Community development, early-stage social enterprises, workforce training programs, and services for marginalized populations often cannot generate market-rate returns.[19]

Impact-first investing responds to this gap. By tolerating lower or uncertain returns, impact-first capital can reach undercapitalized sectors and communities and it can outsize impact per-philanthropic-dollar.[20] It can accelerate new solutions by financing riskier, earlier-stage innovations or supporting business models that do not fit into traditional investment frameworks.[21] Impact-first capital can play a catalytic role by absorbing first-loss risk or accepting concessionary returns in order to unlock larger volumes of commercial capital.[22] Doing so promotes flexibility and resiliency in the philanthropic sector at a time when both are urgently needed.

Despite the opportunity, legal ambiguity with respect to how to deploy impact-first capital creates over-caution, stranding mission-aligned capital in traditional investments.[23] Impact-first investing provides a way to align investable assets with mission, but fiduciaries hesitate, uncertain whether they may lawfully sacrifice return.[24] But, financial prudence is meant to protect charitable capital, not to constrain its ability to be used for

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18. Baoxin Le, *Social Impact Investing: Balancing Financial Returns with Societal Benefits*, 5 J. OF LIFESTYLE & SDGS R. 3 (2025), https://www.sdgsreview.org/LifestyleJournal/article/view/6599.

19. Etzel et al., *supra* note 1, at 3; *see also* Matt Bannick & Paula Goldman, *Gaps in the Impact Investing Capital Curve*, STAN. SOCIAL INNOVATION REV. (Sept. 27, 2012), https://ssir.org/articles/entry/gaps_in_the_impact_investing_capital_curve.

20. Khan, *supra* note 3; *see also* Rachel Wimpee, *The Economics of Empowerment: The Civil Rights Origins of Program-Related Investments*, 8 (2019), https://cppp.usc.edu/wp-content/uploads/2019/03/Wimpee-Rachel-Wimpee_Civil-Rights-Origins-of-PRIs.pdf ("financial aids other than outright grants . . . meant that 'the philanthropic dollar could be stretched further to do double, triple, or even higher multiple duty.'").

21. Khan, *supra* note 3.

22. *Id.*

23. *See* Mike Silvestri, *Debunking the Myths of Impact Investing from DAFs,* MISSION INVS. EXCH. (Feb. 2025), https://missioninvestors.org/resources/debunking-myths-impact-investing-dafs.

24. *Id.*

charitable purpose.[25] Understood correctly, PRAs function less like traditional investments than like grants in investment form, they are recoverable capital deployed for charitable purpose. As such, impact-first investments require a different mode of prudence, what this Article terms *purpose prudence* which is focused on likelihood of impact and recovery, and proportionate safeguards, rather than the *financial prudence* of risk-adjusted return optimization.

Nowhere is clarity more needed, or the potential impact greater, than with DAFs. With more than $325 billion in assets, DAFs represent one of the fastest-growing vehicles in philanthropy.[26] Yet criticism persists that these funds are "warehoused" rather than deployed for charitable impact.[27] Public charities, high net worth individuals, and family offices can push momentum into investable and impactful opportunities utilizing DAFs.[28] Because a DAF's charitable purpose is inherently to maximize philanthropic impact, they are especially well-suited to utilize an impact-first approach under the PRA framework.[29] Clarifying this framework can unlock significant philanthropic

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25. *See generally* UPMIFA, *supra* note 10; Model Prot. of Charitable Assets Act § prefatory note (Unif. L. Comm'n 2011) [hereinafter Protection of Charitable Assets Act]. The Protection of Charitable Assets Act has only been enacted in Maryland as of 2025, but it is a model (versus a uniform act) because some states have substantial statutes in this area of law.

26. Robin A. Rothman, *The Future Is #DAF: Donor-Advised Fund Growth and How Nonprofits Can Benefit*, CCS Fundraising (Oct. 15, 2025), https://www.ccsfundraising.com/insights/the-future-is-daf-donor-advised-fund-growth/ ("Early in 2025, several major studies—including the 2025 DAFgiving360 Giving Report, the 2025 FreeWill Donor-Advised Fund Report, and the Independent Report on DAFs (IPS, 2025)—confirmed that DAFs remain one of the fastest-growing and most debated tools in philanthropy."); *see also* Dan Heist et al., The Annual DAF Report 2025 13 tbl. 3 (Donor Advised Fund Research Collaborative 2025) [hereinafter DAF Report], https://www.dafresearchcollaborative.org/annual-daf-report/2025.

27. Nicholas Kulish, *How Long Should It Take to Give Away Millions?* N.Y. Times (June 9, 2021), https://www.nytimes.com/2021/06/09/business/donor-advised-funds-philanthropy.html.

28. Amit Bouri, *Legacy with Purpose: Why Families are Aligning Capital with Conviction,* Crain Currency (June 18, 2025), https://www.craincurrency.com/philanthropy/legacy-purpose-why-families-are-aligning-capital-conviction; *see* Etzel et al., *supra* note 1 ("That leaves HNWIs and family offices in a unique position to champion impact-first investing. Their investable assets dwarf that of foundations, and they have the discretionary power to declare impact a priority.").

29. *See infra* Part IV.

capital for flexible, high-impact use. By grounding the practice in law, fiduciaries gain both defensibility and confidence to act.

This Article proceeds in five parts. Part I explores the broader evolution of fiduciary standards for charitable assets, tracing how the goals of prudence and purpose have manifested across federal and state law. Part II turns to understanding and defining PRAs under UPMIFA. Part III utilizes the PRI framework and its relevance as a doctrinal model to demonstrate the guardrails fiduciaries need to adhere to when contemplating impact-first PRAs. Part IV includes a direct application of this analysis to the unique parameters that govern DAFs. Part V briefly identifies the operational elements and considerations fiduciaries must review when making PRAs.

I.
Historical Context: Fiduciary Standards for Tax-Exempts

Understanding how PRAs authorize impact-first investing requires understanding why prudence rules exist for philanthropic capital and why Congress and the UPMIFA drafters created exceptions for charitable-purpose assets. It has always been true that philanthropic leaders are wary of investing with a focus on anything other than maximizing return. In her paper, *The Economics of Empowerment: The Civil Rights Origins of Program-Related Investments*, Rachel Wimpee recounts a conversation between Lou Winnick and John McCloy of the Ford Foundation in some of the earliest discussions of the concept of impact-first investing, (before PRIs or PRAs were ever codified):

> I said, 'Mr. [John] McCloy among the ideas that I think you ought to take seriously is the use of the investment portfolio for social purposes.' And he snapped back right away, 'No!' He said that this wouldn't survive the prudent investor, you know, the responsibility kind of thing, and he said, 'It's a nice idea, but it ain't going anywhere.'[30]

Fast forward to today and philanthropic leaders and their legal practitioners continue to be overly wary of impact-first investments.[31] There are precious few hard law sources

30. Wimpee, *supra* note 20, at 6.
31. Silvestri, *supra* note 23.

demonstrating the use and acceptance of impact-first investment programs, and cautious attorneys may confuse this with a belief that they're not well tolerated.[32] In order to understand why and encourage more confidence to make impact-first investments, this Article will briefly explore the historical underpinnings of both PRIs and PRAs.

Before Congress and the UPMIFA drafters created nonprofit-specific rules, fiduciary standards for charities were governed by the same financial prudence doctrines that applied to private trusts.[33] Rooted in the common law "prudent man rule" and later the Uniform Prudent Investor Act (UPIA), these standards emphasized loyalty to beneficiaries.[34] For charitable organizations, that framework raised ambiguity as to who is the beneficiary, and what it means to maximize benefit. The Tax Reform Act of 1969 and UPMIFA represent attempts to adapt the prudence doctrine to the unique needs of charitable organizations.[35]

A. *Statutory and Regulatory Framework for Private Foundations*

In the 1950s, the general public was skeptical of the contributions private foundations made to the charitable sector.[36] In response, several high-profile commission inquiries led to

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32. Richard Schmalbeck, *Reconsidering the Private Foundation Investment Limitations*, 58 TAX L. REV. 59, 67–68 (2004) ("In light of the amorphous texture of their central concept – what constitutes a jeopardizing investment – one might expect that these rules would have produced a significant number of disputes, at least some of which would have been litigated. But that would be wrong. A search of the literature reveals a substantial number of private letter rulings and a few revenue rulings. But while there are a few cases involving the periphery of § 4944, there do not appear to be any cases interpreting the 'jeopardizing investments' concept that is at its core.").

33. Rachel M. Williams, *Transitioning From UMIFA to UPMIFA: How the Promulgation of the Uniform Prudent Management of Institutional Funds Act Will Affect Donor-Initiated Lawsuits Brought Against Colleges and Universities*, 37 J. COLL. & U. L. 201, 206 (2010).

34. Johnny Rex Buckles, *Probing UPMIFA: The Mysteries of the Uniform Act in Light of Federal Tax and State Charity Laws and Concepts*, 46 REAL PROP. TR. & EST. L. J. 281, 299 (2011).

35. *Id.*

36. DANA BRAKMAN REISER & STEVEN A. DEAN, FOR-PROFIT PHILANTHROPY: ELITE POWER AND THE THREAT OF LIMITED LIABILITY COMPANIES, DONOR-ADVISED FUNDS, AND STRATEGIC CORPORATE GIVING 115–17 (Oxford Univ. Press 2023) [hereinafter FOR-PROFIT PHILANTHROPY] (noting that public concern was likely driven by skepticism of the gilded-age industrialists like

the Tax Reform Act of 1969 (1969 Act).[37] The 1969 Act reforms have been described as a "grand bargain" between Congress and the philanthropic sector.[38] In exchange for retaining favorable tax treatment and perpetual existence, private foundations accepted strict rules including prohibitions on self-dealing, penalties for excess business holdings, new reporting requirements, and excise taxes on jeopardizing investments.[39]

The 1969 Act created a sharp division between private foundations and public charities. Legally, a tax-exempt charitable organization must be one or the other.[40] Congress drew this distinction out of concern that private foundations, typically controlled by a single donor or family, lacked the built-in accountability mechanisms of public charities, which naturally encounter public scrutiny when seeking public support.[41] Private foundations required stricter rules to prevent abuse of their concentrated wealth and perpetual life.[42] Therefore, when examining what is allowable by a charitable organization, the

John D. Rockefeller and Andrew Carnegie who created the first private foundations).

37. *Id.* Reiser and Dean trace how growing public skepticism toward foundations set the stage for the 1969 Tax Reform Act. Early controversies beginning with the backlash to Rockefeller's proposed national charter in 1910, criticized as a vehicle for extending Standard Oil's influence, cast large foundations as instruments of elite power. Mid-century congressional investigations reinforced these concerns: the Cox Committee (1953) called for greater transparency, the Reece Commission (1954) alleged subversive activities and urged stricter controls, and Congressman Wright Patman's 1960s reports accused foundations of advancing private interests at public expense. High-profile Ford Foundation grants in civil rights and labor further intensified scrutiny. Together, these episodes created a narrative of foundations as powerful, insufficiently accountable institutions, paving the way for the sweeping restrictions adopted in the 1969 Act.

38. *Id.* at 120 ("Although not the product of formal negotiations, the contours of the Act indicate clear victories and concessions for both elite donors and the public at large. Foundations secured their perpetual existence. Funders ensured their ability to retain control of their foundations. Efforts by congressional committees and the Treasury department to limit foundation lifetimes and require board independence failed. In return, foundations made significant concessions on tax and yielded to extensive regulatory intervention.").

39. *Id.* at 121–23, 134–35.

40. I.R.C. §§ 509(a)(1), 170(b)(1)(A)(vi). Such tax-exempt charitable organization is presumed to be private foundation subject to stricter rules until it can demonstrate that it is sufficiently supported by the public. I.R.C. §§ 509(a)(2)–(d).

41. *See supra* notes 37 and 38.

42. *See supra* notes 37 and 38.

legislative history suggests that public charities are inherently granted more legal leeway than private foundations. Specific codified rules for private foundations were outlined by Congress *not* to grant special authority to private foundations but to *constrain* them.[43]

Specifically, Congress created a constraint prohibiting private foundations from making jeopardizing investments, essentially applying financial prudence requirements to private foundation investing.[44] Congress sought to ensure private foundations could not make speculative, unreasonable investments with dollars already set aside for charitable use before they're able to be used for charity.[45] The entire rationale for imposing a

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43. Such tailored rules included two broad categories of restrictions on foundation investments: (i) protecting the assets of the foundation from misuse and loss, which would prevent it from achieving its charitable purpose, and (ii) avoid functioning as vehicles that directly benefit donors or managers. I.R.C. §§ 4941–4944(a)(1).

44. A jeopardizing investment is defined as one in which "the foundation managers, in making such investment, have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment, in providing for the long- and short-term financial needs of the foundation to carry out its exempt purposes." Treas. Reg. § 53.4944–1 (as amended in 1973). Jeopardizing investments as a concept existed as of the 1950s legislation applicable to all tax-exempts as a possible rationale to strip tax exempt-status. It wasn't until the 1969 Act that jeopardizing investments were identified for purposes of applying excise taxes and that was applied only for private foundations. David A. Levitt & Robert A. Wexler, *Proposed Regulations Would Bring Program-Related Investments Into the 21st Century*, 17 J. TAX'N 100, 101 (2012) [hereinafter Levitt, *Proposed Regulations*].

45. U.S. TREAS. DEP'T, REPORT ON PRIVATE FOUNDATIONS 53–54 (1965) [hereinafter TREASURY REPORT]. This Report included a section on the "trading and speculation by foundations" with the specific note that "the problem is of sufficient importance to require legislative attention." The Treasury Report warns that speculative investing exposes charitable assets to undue risk, threatening losses that prudent, long-term stewardship is meant to avoid. Even when speculation succeeds, it can encourage financial empire-building. More subtly, speculation diverts trustees' time and attention toward market timing, exotic instruments, and untested ventures, activities fundamentally incompatible with the careful analysis, planning, and sustained focus required for genuine charitable work. In short, the Treasury Report emphasized speculative behavior undermines both the protection of charitable assets and the proper management of a foundation's mission; *See also* Schmalbeck, *supra* note 32, at 93–96. Schmalbeck goes on in this section to question the rationale for the jeopardizing investments prohibition by noting that risky investments typically include a risk premium or higher expected return, which, when taken across population of foundations could in fact raise the average, and total, rate of return for all foundations and thus the total amount of assets available to deploy for charitable purpose.

prudent investor standard was to ensure money would be available to be spent on charitable purpose activities.[46]

As soon as regulators identified this need for financial prudence, they identified the need for an exception for charitable purpose investments.[47] In an informational paper circulated by the Ford Foundation's Board of Trustees in 1968, before the adoption of the Tax Reform Act, the authors argued for implementation of a "program-related-investment account" so that "the philanthropic dollar could be stretched further to do double, triple, or even higher multiple duty."[48] The concept of impact-first investing has always been about multiplying efforts for purpose and impact.[49] Congress recognized that certain financial transactions could be made in support of charitable purposes, and that when made in that context, it did not serve the purpose to capture and restrict those under jeopardizing investment rules.[50] To preserve charitable flexibility, § 4944(c) identifies an exception to the jeopardizing investments prohibition for PRIs.[51]

As we approach the analysis of PRAs, this understanding is an important element. PRIs, as codified, are a safe harbor from the jeopardizing investments rule. This is a legislative acknowledgement that when deployed for charitable use, the constraint of financial prudence no longer has any purpose.

B. *Statutory and Regulatory Framework for Public Charities*

Prior to 1972, public charities lacked a distinct legal framework for managing and investing donated funds and relied on

46. *See generally* Treasury Report, *supra* note 45, at 52–54. Reflecting aspects of modern portfolio theory, the determination whether the investment of a particular amount jeopardizes the carrying out of the exempt purposes of a foundation shall be made on an investment-by-investment basis, considering the foundation's portfolio as a whole. No category of investments shall be treated as a per se violation of § 4944. Treas. Reg. § 53.4944–1(a)(2) (as amended in 1973).

47. *See generally* Wimpee, *supra* note 20.

48. *Id.* at 6.

49. *Id.*

50. I.R.C. § 4944(c).

51. *Id.* An investment qualifies as a PRI if it satisfies three requirements: (i) the primary purpose of the investment is charitable; (ii) no significant purpose of the investment is the production of income or the appreciation of property; and (iii) it was not made for the purpose of lobbying or political activity. I.R.C. § 170(c)(2)(D).

traditional trust, corporate, and contract law whose rigid rules often proved ill-suited to charitable finance. This led first to the adoption of the Uniform Management of Institutional Funds Act (UMIFA)[52] and later its modernization through the Uniform Prudent Management of Institutional Funds Act (UPMIFA).[53]

UPMIFA was recommended to the states in 2006[54] and has been adopted in nearly every U.S. jurisdiction.[55] UPMIFA revised the financial prudence standard that applies to the management and investment of charitable funds by effectively merging the laws applicable to private trusts and business corporations.[56] UPMIFA explicitly applied the prudent man rule to investments of charitable organizations under § 3(b):

> In addition to complying with the duty of loyalty imposed by law other than this [Act], each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.[57]

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52. UMIFA established uniform and fundamental rules for the investment of funds held by charitable institutions. The intent of UMIFA was to create a distinct set of uniform laws tailored to the unique issues of charitable donations, including the concept of financial prudence. Unif. Mgmt. of Institutional Funds Act (Nat'l Conference of Comm'rs on Unif. State Laws 1972); *see also* Williams, *supra* note 33, at 204 (quoting Uniform Law Commission, History of UPMIFA and UMIFA).

53. Williams, *supra* note 33, at 204–206.

54. Harvey P. Dale et al., *Evolution, Not Revolution: A Legislative History of The New York Prudent Management Of Institutional Funds Act*, 17 N.Y.U. Legis. & Pub. Pol'y 377, 381 (2014). In 2002, the Uniform Law Commission determined that the existing UMIFA should be updated to reflect modern portfolio theory and eliminate the concept of an historic-dollar-value floor, replacing it with a procedure by which institutions may prudently appropriate from the historic dollar value of their endowment funds.

55. *See supra* note 11.

56. Williams, *supra* note 33, at 204–206.

57. UPMIFA, *supra* note 10, § 3(b). Further guidance as to the factors that a prudent person would consider were mandated under UPMIFA, like UPIA, such that individuals who manage and invest institutional funds are required to consider the following, if relevant: (1) general economic conditions; (2) the possible effect of inflation and deflation; (3) tax consequences; (4) the role of each investment in the overall portfolio; (5) expected total return from income and appreciation; (6) the nonprofit organization's other resources; and (7) an asset's special relationship or value to the charitable purpose of the nonprofit. *Id.* § (3)(a)(A)–(H). UPMIFA further provides that, in addition to

Once again, to understand the crux of this rule, one must understand why it exists. UPMIFA set a standard of financial prudence for the same reason Congress imposed a jeopardizing investments rule on private foundations—to protect assets from the risk that managers will make speculative, unreasonable investments with dollars already set aside for charitable use.

Just as with PRIs, an exception is needed for charitable purpose investments and an analogous safe harbor is codified in UPMIFA.[58] Section 2(7) defines a PRA as "an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment."[59] This "primary" purpose language clearly mirrors the language of the PRI and exists for the same reason as the PRI, it is an acknowledgement that some assets may be held for a purpose that is aligned with mission and charitable use. The comments to UPMIFA recognize and validate the concept that assets used "primarily" for charitable purpose may also serve an investment purpose.[60] A PRA then, is the clear analogy to a PRI, but applicable to a broader population of charitable organizations.

complying with the duty of loyalty and prudence, a manager will (i) consider the charitable purposes of the institution and the institutional fund, (ii) give primary consideration to donor intent as expressed in a gift instrument, (iii) incur only reasonable costs in investing and managing charitable funds, (iv) make a reasonable effort to verify relevant facts, (v) make decisions about each asset in the context of the portfolio of investments as part of an overall investment strategy, (vi) diversify investments unless, due to special circumstances, the purposes of the fund are better served without diversification, (vii) dispose of unsuitable assets, and, in general, (viii) develop an investment strategy appropriate for the fund and the institution. *Id.* § 3(c)(2).

58. UPMIFA, *supra* note 10, § 2(7); *see also* Memorandum from Susan Gary, Reporter, UMIFA Drafting Comm. to UMIFA Drafting Comm. (Oct. 20, 2003) [hereinafter UMIFA Drafting Comm. Memo], https://www.yumpu.com/en/document/read/27577622/memo-for-november-2002-meeting-uniform-law-commission (where the Reporter identifies that the language for the new definition of "program-related investment" comes directly from § 4944 drawing a direct parallel to PRIs); Restatement of Charitable Nonprofit Orgs. § 2.04 cmt. c (Am. L. Inst. 2016) ("Accordingly, it is important to identify assets held for investment purposes and distinguish them from other assets. . . . UPMIFA excludes from the prudent investor rules those assets that a charity uses to conduct its charitable activities.").

59. UPMIFA, *supra* note 10, § 2(7).

60. *Id.* § 2(7) cmt.

PRAs are doctrinally aligned with PRIs because they each formalize a category of charitable assets,[61] but both are largely misunderstood in today's impact finance landscape. Investment professionals dominate the PRI/PRA practitioner population and apply the frameworks and prudence they know and understand best where an investment is a financial tool even when deployed for impact.[62] The legislative history enacting PRIs tells a different story. PRIs and PRAs are structured as investments precisely because investments can offer a superior device for achieving charitable objectives.[63] Taken collectively, PRAs offer a legal framework for charitable organization managers to explore and engage in impact-first investments. The next section of this Article dives deeper into the PRA framework and the prudence doctrine that underpins it.

II.
Demystifying Program-Related Assets

Part II advances this Article's core claim: UPMIFA's PRA category provides the doctrinal basis for programmatic impact-first investing by public charities, including community foundations and DAFs. A PRA is expressly *excluded* from UPMIFA's eight-factor financial prudence balancing standard.[64] Once an asset is determined to be held *primarily* for a charitable purpose, fidu-

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61. Protection of Charitable Assets Act, *supra* note 25. Under the Protection of Charitable Assets Act, property qualifies as a "charitable asset" only when held for a charitable purpose, regardless of whether the underlying activity could be characterized as socially beneficial if conducted for profit. UPMIFA and Charitable Assets Act commentary make clear that not all property held by a charity is a "charitable asset." Property held primarily for investment or profit-seeking purposes, even when owned by a nonprofit organization, falls outside the charitable-asset category. A PRA therefore occupies a distinct legal position: it is an investment instrument that qualifies as a charitable asset because its primary purpose is to advance the organization's exempt mission, not to generate income.

62. *See* Etzel et al., *supra* note 1, at 15–16 (articulating the mindset of investors to do well in the marketplace despite the purpose of the investment).

63. Reiser, *supra* note 17, at 366.

64. Modern portfolio theory underlies the contemporary prudent-investor standard codified in UPMIFA's § 3(b) factors, which emphasize diversification, risk–return analysis, and portfolio-level optimization. *See* Restatement (Third) of Trusts § 90 cmt. f (A.L.I. 2007). UPMIFA incorporates these principles into its governance of "institutional funds," but PRAs fall outside that regime and therefore are not evaluated under modern portfolio theory-based prudence.

ciaries should evaluate it through a *purpose* prudence lens and adopt reasonable, mission-proportionate safeguards.

A. *Looking to UPMIFA and its Commentary*

Section 2(7) of UPMIFA defines a PRA as "an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment."[65] Further, § 2(5) explicitly excludes PRAs from the definition of an "Institutional Fund," the type of fund governed by UPMIFA.[66] The official comments confirm that assets held by an institution primarily for program-related purposes are not subject to UPMIFA and are excluded "from prudent investor norms" meaning the eight-part financial prudence standard set forth in § 3(b).[67]

Only a few examples of these types of excluded assets are included in the comments,[68] but one example in the official comment to § 2(7) is central to understanding PRAs in the impact-first investing context:

> For example, a program providing below-market loans to inner-city businesses may be "primarily to accomplish a charitable purpose of the institution" but also can be considered, in part, an investment. The institution should create reasonable credit standards and other guidelines for the program to increase the likelihood that the loans will be repaid.[69]

65. UPMIFA, *supra* note 10, § 2(7). The New York Prudent Management of Institutional Funds Act (NYPMIFA) defines "program-related asset" as "an asset held by an institution not for investment under the terms of the gift instrument, but primarily to accomplish a *programmatic purpose* of the institution" (emphasis added). NYPMIFA refers to "programmatic purpose" rather than a "charitable purpose" because it was believed that it could be argued that all funds held by a charity are held for charitable purposes and thus that all funds might be inappropriately excepted from the definition of an "institutional fund." Dale et al., *supra* note 54, at 401.

66. UPMIFA, *supra* note 10, § 2(5).

67. *Id.* § 2(5) cmt.

68. *Id.* (providing an example where a university's purchase of land adjacent to its campus might not meet the prudent investor standards for commercial real estate but is still appropriate because the university will use the land to build a needed dormitory).

69. *Id.* § 2(7) cmt. Further evidence for this use of PRA appears in official Uniform Law Commission guidance on UPMIFA program related assets which states: "The exclusion for program-related assets applies to . . . a charity engaged in micro-finance as its charitable purpose, to a fund used to make

This example is striking for several reasons. First, it directly contemplates dual-purpose assets. The loans described are both investments (with repayment expectations) and programmatic (designed to revitalize inner-city businesses). Second, it confirms that a dual-purpose asset that is primarily program-related relieves the institution of financial prudence review requirements. Finally, it introduces a separate governance expectation. Instead of adhering to the financial prudence expectations, the institution is expected to establish *other* investment criteria that are reasonably related to achieving the charitable purpose. The example references adopting "reasonable credit standards." In this context, reasonable credit standards can be understood as program integrity safeguards to (i) ensure capital is deployed for the actual charitable purpose, (ii) understand and mitigate impact risks, and (iii) increase the likelihood of recovering funds so they can be redeployed for future charitable purpose.

This last point is critical because it demonstrates why some level of finance-related prudence, reasonably calibrated to the ultimate purpose, should still be applied when deploying a PRA. In effect, UPMIFA drafters anticipated the practice now described as impact-first investing where capital deployed for mission is structured in financial form. Understanding the prudence requirements of different types of mission-aligned investments is, therefore, critical to appropriately categorizing and utilizing these impact tools.

B. *Distinguishing Mission-Related Investments and Prudence Frameworks*

While the comment to § 2(5) excludes assets used to conduct charitable activities under UPMIFA, it "does not exclude assets that have a tangential tie to the charitable purpose of the institution but are held primarily for investment purposes."[70] In other words, UPMIFA comments confirm a legal difference between investments made for the sake of investment and investments made for a charitable purpose.[71]

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loans. . . . A fund used by a micro-finance charity to make low-interest loans might also be used 'primarily to accomplish a charitable purpose."

70. *Id.* § 2(5).

71. There are significant other considerations that attach when an investment is made as part of charitable activities, such as the application (or not) of unrelated trade or business income (UBIT). *See infra* note 185.

The term mission-related investment (MRIs) is used practically to describe investments that seek to align with an institution's mission while also explicitly seeking financial returns, often at or near risk-adjusted market rates.[72] MRIs are not creatures of statute[73] and they do not appear in the I.R.C. or Treasury Regulations.[74] The terminology of MRI is most often used opposite PRIs in the private foundation context and while it might be tempting to describe MRIs as the *finance-first* distinguishable alternative to *impact-first* PRIs, this definition confuses the outcome of the investment with its intention.[75] A fiduciary might *intend* to prioritize impact, but the legally distinguishing feature of an MRI is that it remains tethered to financial prudence and *is not* considered a charitable activity.[76] PRIs and PRAs, in contrast, are governed by purpose prudence and treated as extensions of the organization's charitable work.[77] As clarified above, *impact-first investing* refers to an *intention* to

72. Darren Walker, *Unleashing the Power of Endowments: The Next Great Challenge for Philanthropy*, FORD FOUND. (Apr. 5, 2017), https://www.fordfoundation.org/news-and-stories/stories/unleashing-the-power-of-endowments-the-next-great-challenge-for-philanthropy/; Joshua Mintz & Chelsey Zeigler, *Mission-Related Investing: Legal and Policy Issues to Consider Before Investing*, MACARTHUR FOUND., 4–5 (Mar. 2013), https://www.macfound.org/media/article_pdfs/mission-related-investing-legal-and-policy-issues-to-consider-before-investing.pdf.

73. David A. Levitt, *Investing for the Future: MRIs and PRIs for Private Foundations*, 25 PRAC. TAX L. 33, 34 (2011) [hereinafter Levitt, *Investing*]; *see* Gary, *supra* note 12, at 111 (distinguishing "mission investing" from program-related assets).

74. MRIs have been conceptually blessed by the issuance of a notice from the Treasury where IRS states explicitly that an investment's relationship to the charitable purpose of the entity is allowed as a consideration when making an investment and that investments by foundations are not required to seek the highest rates of return, lowest risk or greatest liquidity. This notice thus follows the logic of, and specifically references, UPMIFA § 3(e)(1)(H). I.R.S. Notice 2015-62, 2015-39 I.R.B. 411.

75. *Cf. Recent IRS Ruling Raises Questions Among Impact Investors: What It Really Means*, ADLER & COLVIN (Dec. 9, 2020), https://www.adlercolvin.com/blog/2020/12/09/recent-irs-ruling-raises-questions-among-impact-investors-what-it-really-means/.

76. Levitt, *Investing*, *supra* note 73, at 33 ("An MRI is not a charitable activity. MRIs are made from investment assets rather than program assets, sometimes referred to as 'the other 95 percent' of a private foundation's assets that are not designated for making charitable qualifying distributions.").

77. In practice, this distinction is often shown based on the origin of the capital. PRIs are programmatic assets drawn from programmatic budgets, whereas MRIs are typically drawn from corpus assets, the pool that would otherwise be deployed to maximize returns. *See* Mintz & Zeigler, *supra* note 72, at 5.

prioritize social or environmental outcomes over financial return; accordingly, some MRIs may be impact-first, but they remain investment-character assets and do not constitute programmatic charitable activity.

Some commenters may argue that distinguishing a PRA is unnecessary because the final factor of the eight-part test under UPMIFA is a requirement to consider "an asset's special relationship or value to the charitable purpose" of the organization.[78] The contention is that this allows fiduciaries a berth to appropriately weigh financial factors and programmatic factors and make impactful, mission-aligned investments.[79] However, this does not appropriately capture the nature of true charitable activity investments or align with the legislative history distinguishing programmatic investing.

Ultimately, weighing seven financial factors against a single impact element frames the mission as one factor to be balanced among many rather than the governing purpose, meaning it is wholly unsuitable for programmatic activity.[80] The resulting compromises, which could include smaller loan sizes, stricter terms, or narrower eligibility, preserve capital but blunt the reach of charitable outcomes. In practice, this balancing exercise often results in no investment at all. DAFs evaluating impact-first opportunities under the eight-factor test frequently

78. UPMIFA, *supra* note 10, § 3(e)(1)(H).

79. I.R.S. Notice 2015-62, 2015-39 I.R.B. 411. This guidance is quite clear that it is speaking specifically about investments that are made for a significant investment purpose and therefore does not speak directly to the primarily-impact product discussed in this Article ("Questions have arisen about whether an investment made by a private foundation that furthers its charitable purposes, but is not a PRI because a significant purpose of the investment is the production of income or the appreciation of property, is subject to tax under section 4944.").

80. Whether UPMIFA's eighth factor provides sufficient authority for all MRI activity is not universally acknowledged. UPMIFA does not require fiduciaries to weigh each of the eight prudence factors equally, and nothing in the statute precludes fiduciaries from according substantial weight to charitable purpose. In theory, this flexibility could permit impact-first MRIs within the investment-prudence framework. In practice, however, investment committees and advisors operating within conventional financial prudence norms may be reluctant to rely heavily on purpose-based weighting. This divergence between statutory text and fiduciary practice has led some commentators to suggest that additional statutory clarification or a dedicated safe harbor could provide greater confidence for fiduciaries seeking to prioritize mission through institutional investments.

cannot document sufficient financial prudence to proceed.[81] In such cases, programmatic capital remains undeployed, not because the investment lacks charitable merit, but because the wrong evaluative framework was applied.[82]

Once an asset is properly identified as an extension of charitable purpose, subjecting it to UPMIFA's investment-prudence balancing test is not merely unnecessary, it is inconsistent with the statutory structure, which treats programmatic assets as categorically distinct from institutional investment funds.[83]

III.
Comparative Analysis of PRAs to PRIs

Having established what a PRA is and why it is needed, the PRA framework can be used to actually deploy impact-first capital. However, UPMIFA offers little interpretive guidance on what qualifies as a PRA. This Part looks to the more developed

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81. This observation reflects the author's professional experience advising on impact investments at Social Finance, Inc. An impact-first investment's below-market terms, higher risk profile, or illiquidity can make it difficult to satisfy a framework designed for traditional portfolio management.

82. While it is outside the scope of this Article, there is an argument that that MRIs are the only other available type of investment that a charitable organization may engage in under UPMIFA. As detailed above, UPMIFA includes a specific requirement to consider an asset's special relationship or value to the charitable purpose of the nonprofit as a factor in its determination of prudence. UPMIFA, *supra* note 10, § 3(e)(1)(H). Other commentators have already articulated how the final factor provides support for the proposition that an MRI can be made consistent with UPMIFA as long as the investment is made in adherence to the prudent investor standard i.e., with the remaining factors in mind. *See* Mintz & Zeigler, *supra* note 72, at 10. Others articulate that this factor provides support for the proposition that in order to be consistent with UPMIFA, an investment must be made in adherence to the final factor, i.e., an asset's relationship to the specific charitable purpose of the nonprofit organization. *Complaint Regarding Harvard Fossil Fuel Investments*, Climate Def. Project (Mar. 2021), https://climatedefenseproject.org/wp-content/uploads/2021/03/Harvard-Fossil-Fuel-Investment-Complaint.pdf (arguing that an investment in fossil fuel by public charity violates the requirement to consider an asset's special relationship or special value to the charitable purpose of the institution because by financially supporting the degradation of climate, damage to ecological and human health, it has not considered such charity's commitment to "strive toward a more just, fair, and promising world").

83. *See* Restatement of the L., Charitable Nonprofit Orgs. § 2.04 cmt. c (A.L.I. 2016) ("Accordingly, it is important to identify assets held for investment purposes and distinguish them from other assets . . . UPMIFA excludes from the prudent investor rules those assets that a charity uses to conduct its charitable activities.").

body of law surrounding PRIs for analytic traction.[84] The PRI rules codified in § 4944, elaborated in Treasury Regulations, and tested through IRS rulings, provide a relatively robust and durable set of criteria for determining when an investment's primary purpose is charitable.[85] Although these standards apply formally only to private foundations, they are conceptually instructive for PRAs.

Application of the PRI statutory framework to PRAs is natural and offers fiduciaries a practical starting point. Further, as set forth below, PRAs are ultimately a somewhat broader tool because they are governed by a "primarily charitable" test rather than the stricter "no significant income purpose" requirement.[86] As such, the PRI framework provides a conservative benchmark for interpreting PRAs. If an investment would satisfy the PRI tests, its classification as a PRA should be legally sound and defensible.

A. *Applying the PRI Statutory Safe Harbor to PRAs*

A foundation's investment is a PRI if (i) its primary purpose is to accomplish one or more charitable purposes; (ii) no significant purpose is the production of income or appreciation of property; and (iii) it was not made for the purpose of lobbying or political activity."[87]

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84. Dale et al., *supra* note 54, at 399 n.104 (supporting the assertion that analogous authority for determining what qualifies as a PRA can be found in the PRI statutes); *see also* UMIFA Drafting Comm. Memo, *supra* note 58.

85. Per IRS guidance, once an investment is determined to be program-related, it will continue to qualify as a PRI if changes in the form or terms of the investment are made primarily for exempt purposes. A change made in the form or terms of a PRI for the prudent protection of the foundation's investment will not ordinarily cause the investment to cease to qualify as program-related. The IRS clarifies that under certain conditions a PRI may cease to be program-related because of a critical change in circumstances, such as serving an illegal purpose or serving the private purpose of the foundation or its managers. However, if a foundation changes the form or terms of an investment, and if the investment no longer qualifies as program-related, it then must be determined whether or not the investment jeopardizes carrying out its exempt purposes. *Program-Related Investments*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments (last visited Nov. 20, 2025).

86. *See infra* Part III.A.1–2.

87. Treas. Reg. § 53.4944–3; I.R.C. § 170(c)(2)(B)–(D).

1. *Primary Exempt Purpose Test*

The standard two-part test that is used to determine primary purpose requires that (i) the investment significantly furthers the accomplishment of the private foundation's exempt activities; and (ii) the investment would not have been made *but for* the relationship between the investment and the accomplishment of the foundation's exempt activities.[88] Therefore, the PRI must be consistent with one or more charitable purposes *and* must be consistent with the actual documented specific exempt purpose of the private foundation.[89] For example, a foundation whose purpose is to protect endangered animals might have difficulty in claiming an investment in low-income housing as a PRI. To satisfy the but-for test, a conclusion must be found that an investment would not have been made unless it contributed to the accomplishment of the exempt purpose.[90]

Applying this primary purpose test to PRAs is straightforward. The language of the Treasury Regulations describing PRIs and that is used in most UPMIFA state laws is substantially similar such that this primary purpose test can be applied very directly. A PRA is defined as an asset held by an institution *primarily to accomplish a charitable purpose of the institution*.[91] Therefore, a PRA must be consistent with one or more purposes described as charitable under UPMIFA *and* must be consistent with the specific actual documented exempt purpose of the charitable organization. Unlike PRIs, there is no legislative guidance requiring PRAs to satisfy a strict *but-for* test. Nevertheless, elements of the PRI but-for analysis can provide a useful, though non-binding, framework for assessing whether charitable purpose predominates in a dual-purpose asset. Applying the "but-for" test, a conclusion should be drawn that a PRA would not have been made *but-for* its ability to potentially enact the charitable purpose.

2. *No Significant Income Purpose Test*

The second prong of the PRI test under § 4944 requires that that no significant purpose of the investment is the production

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88. Treas. Reg. § 53.4944–3(a)(2)(i).
89. Levitt, *Proposed Regulations*, *supra* note 44, at 102.
90. *Id.*
91. UPMIFA, *supra* note 10, § 2(7).

of income or the appreciation of property.[92] Treasury Regulations provide that the IRS will consider whether commercial investors solely seeking profit would likely make the investment on the same terms.[93] Importantly, earning significant income or appreciation does not, by itself, disqualify an investment.[94] While the inquiry is focused on purpose and not outcome, in practice foundation lawyers typically deem that this test is satisfied if a PRI is made at below-market terms because, by definition, such terms would not be palatable to market investors.[95]

Comparing the "no significant income purpose" text of § 4944 to UPMIFA highlights where the textual differences actually favor PRAs. A PRA is defined as an asset held by an institution primarily to accomplish a charitable purpose of the institution *and not primarily for investment*.[96] Two distinctions merit attention.

First, the PRA definition may be satisfied more readily than the PRI definition. Under UPMIFA, if the "primary exempt purpose" is established per the two-part test described in Part III.A.2 above, the second clause test is also definitionally met as there cannot be more than one primary purpose. The PRI framework, by contrast, requires an independent showing that income production is not a "significant" purpose which is a separate inquiry from the primary purpose determination.

Second, UPMIFA's language may permit a broader range of dual-purpose investments. The PRI test prohibits any "significant" income purpose. UPMIFA prohibits only a "primary" investment purpose. Under UPMIFA, an asset held primarily for charitable purpose can have a secondary financial purpose that is more than insignificant, so long as that financial purpose is not dominant.

The drafting history, however, reveals a countervailing concern. Records indicate the UPMIFA drafting committee changed "significant purpose" to "primarily for investment" to

92. Levitt, *Proposed Regulations*, *supra* note 44, at 102.

93. *Id.*

94. *Id.*

95. *See*, e.g., *id.* While this is, to some, too narrow a constriction to apply to PRI investments based on the technical language of the statute and regulations because a "financially sensible" investment may still qualify as a PRI if it is fundamentally program-motivated, this is practically more difficult to document and clearly demonstrate which is likely why some legal guidance suggests use of a below-market threshold.

96. UPMIFA, *supra* note 10, § 2(7).

prevent abuse.[97] The committee sought to ensure that PRAs are a real-time, purpose-based classification rather than a fallback label for failed investments.[98] "Primarily" was chosen to require charities to demonstrate that charitable purpose was dominant before the deal closed, preventing opportunistic recharacterization after an investment underperforms.[99]

Whether or not the drafters intended this result, the net effect of the plain language of the test is flexibility in scope. PRAs can cover a broader range of dual-purpose deals because the profit purpose can be real and potentially more than insubstantial so long as it is not primary. However, considering the drafting history, practitioners should use strict governance discipline. PRAs require clear, contemporaneous evidence that mission was the intent. Fiduciaries cannot wait to see how an investment performs before classifying it. Establishing PRAs is therefore a matter of documenting a current intent for a primary charitable purpose at the time an investment is made.

3. *No Political Activity Test*

The final PRI regime test imposes an additional restriction not found in UPMIFA. A PRI may not be used to attempt to influence legislation or to participate in political campaigns.[100] UPMIFA contains no analogous limitation for PRAs. Instead, any lobbying or political activity associated with a PRA remains constrained solely by the generally applicable rules governing § 501(c)(3) organizations, including the prohibition on political campaign intervention and the restriction on substantial lobbying.[101]

B. *Risk and Enforcement in Practice*

Whether one believes that tax-advantaged nonprofit entities require strict oversight to preserve public trust,[102] or that

97. Gary, *supra* note 12, at 109 nn.14, 23 (identifying the somewhat different language between § 4944 and UPMIFA).
98. *Id.*
99. *Id.*
100. Treas. Reg. § 53.4944–3; I.R.C. § 170(c)(2)(D).
101. I.R.C. § 501(c)(3).
102. *See* Ray D. Madoff, *The Five Percent Fig Leaf: Private Foundation Payout Rules at Fifty*, 17 PITT. TAX REV. 341, 343 n.7 (2020).

the sector must be allowed broad freedom to operate,[103] the enforcement landscape provides ample room for impact-first investing.

The federal and state[104] frameworks governing charitable investments both aim to protect assets from misuse, but neither is designed to deter mission-aligned risk-taking. At the federal level, the IRS monitors PRIs under § 4944, though enforcement has been limited and public guidance tends to clarify rather than restrict.[105] Few IRS actions have focused on monitoring the purpose or integrity of exempt organization investments. The jeopardizing investments context is illustrative, despite decades of regulatory authority, there appear to be no cases interpreting the concept at its core.[106] Far from constraining innovation, Treasury has repeatedly interpreted the PRI exception expansively, amending its regulations in 2012 to broaden the official list of qualifying examples to include microfinance, environmental protection, and post-disaster recovery investments.[107] The preamble reaffirmed that the list was illustrative, not exhaustive, signaling continuing openness to new forms of charitable investment.[108]

103. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 2 (2008).

104. Private actors, including donors, cannot directly enforce nonprofit laws federally, or in most states. Phaguni Nangia, *Revisiting Oversight Challenges in the Nonprofit Sector: Allowing Private Parties Legal Standing*, 15 NOTRE DAME J. INT'L & COMPAR. L. 246, 258 (2025).

105. I.R.C. § 4944; Treas. Reg. § 53.4944–3(b); Schmalbeck, *supra* note 32, at 67–68.

106. Schmalbeck, *supra* note 32, at 93–96.

107. Treas. Reg. § 53.4944–3(b) (examples 12–14).

108. *See* Prop. Treas. Reg. § 53.4944-3(b), 77 Fed. Reg. 23429 (Apr. 19, 2012) ("The new examples demonstrate that a PRI may accomplish a variety of charitable purposes, such as advancing science, combating environmental deterioration, and promoting the arts. Several examples also demonstrate that an investment that funds activities in one or more foreign countries, including investments that alleviate the impact of a natural disaster or that fund educational programs for poor individuals, may further the accomplishment of charitable purposes and qualify as a PRI. One example illustrates that the existence of a high potential rate of return on an investment does not, by itself, prevent the investment from qualifying as a PRI. Another example illustrates that a private foundation's acceptance of an equity position in conjunction with making a loan does not necessarily prevent the investment from qualifying as a PRI, and two examples illustrate that a private foundation's provision of credit enhancement can qualify as a PRI. The last example demonstrates that a guarantee arrangement may qualify as a PRI.").

At the state level, attorneys general have responsibility for UPMIFA compliance, but oversight varies widely and is often resource-constrained.[109] More than 50% of jurisdictions report less than three full-time equivalent staff dedicated to charitable oversight at state attorneys general offices, a figure that has not meaningfully improved even as the nonprofit sector has grown.[110] Generally, charitable fiduciaries are expected to self-police.[111]

PRAs, by nature, should face less regulatory scrutiny than PRIs. PRIs create a dual incentive structure because they count toward the five percent payout requirement (see Part III.B.4 infra) while preserving capital that may be recycled. By contrast, public charities do not have a payout requirement. PRAs confer no special tax benefit, trigger no excise tax exposure, and are overseen by state regulators with little incentive to

109. Lloyd Hitoshi Mayer, *Fragmented Oversight of Nonprofits in the United States: Does it Work? Can it Work?*, 91 CHI.-KENT L. REV. 937, 939 (2016) (stating violations of UPMIFA can be pursued by the attorney general); *see also* National Association of Attorneys General, *Chapter 12 – Protection of Nonprofits and Charitable Assets* 223–24 (4th ed. 2018) [hereinafter NAAG], https://www.naag.org/wp-content/uploads/2021/02/Powers-and-Duties-4th-Edition-Chapter-12.0-Prot-and-Regs-of-Nonprofits-and-Charitable-Assets-Courtesy-Chapter.pdf (describing state attorney general authority to investigate fiduciary breaches of charitable trusts); Nangia, *supra* note 104, at 249 ("[S]ome attorney general offices choose not to allocate any resources towards oversight of nonprofits or their assets. . . . With respect to states that choose to exercise some or all authority over charities, some commentators point out that such states have offices with sparse resources.").

110. CINDY M. LOTT ET AL., STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR 8 (Urb. Inst. 2016), https://www.urban.org/sites/default/files/publication/84161/2000925-State-Regulation-and-Enforcement-in-the-Charitable-Sector.pdf; *see also* Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1117, 1128 (2007).

111. *See* LOTT, *supra* note 110, at 33 ("[C]harities oversight continues to rely heavily on stakeholder and public oversight, a system built on trust and maintained through outreach and partnerships."); FREMONT-SMITH, *supra* note 103, at 1 ("A distinguishing feature of the nonprofit sector is the freedom within which its component entities are allowed to operate. The vast number of organizations that comprise the sector, including almost all churches and organizations with receipts of $25,000 or less, are under no duty to account to any governmental agency on a regular basis. The rest operate largely without supervision by any state official and with minimal oversight by the federal government, oversight, moreover, that is generally limited to assuring that they meet the conditions for exemption from federal taxes. Governments require no accountings of the methods by which nonprofit organizations pursue their missions nor make any attempt to assure that charitable assets are used effectively or efficiently."); *see also* Nangia, *supra* note 104.

scrutinize good-faith charitable deployment. While fiduciary responsibilities are an area of enforcement interest for state attorneys general, validating investment decisions is not a common area of regulatory action.[112] If PRIs are rarely challenged despite their abuse potential, PRAs are even less likely to attract enforcement attention.[113]

To be clear, the absence of enforcement actions does not constitute affirmative approval. No court or regulator has expressly validated the PRA framework as a vehicle for impact-first investing. But the enforcement landscape does suggest that fiduciaries acting in good faith, with documented charitable purpose, face minimal practical risk of sanction. The greater risk may be inaction, allowing legal uncertainty to strand capital that could otherwise advance charitable missions.

IV.
Applying the PRA Framework to Donor Advised Funds

The PRA framework applies broadly to public charities, but DAFs warrant particular attention. DAFs hold over $325 billion in assets and face persistent criticism for warehousing charitable capital rather than deploying it for impact.[114] At the same time, DAFs operate under statutory constraints that may appear to complicate impact-first investing. The Pension Protection Act of 2006 (2006 Act) extended several private foundation rules to DAFs, including excess business holdings, expenditure responsibility, and excess benefit transaction provisions.[115] Cautious fiduciaries may assume these constraints foreclose the use of PRAs. They do not.

This Part demonstrates that DAFs are not merely permitted to use PRAs, they may be uniquely well-suited to do so. DAFs' exempt purposes typically center on maximizing philanthropic impact, which aligns directly with the thesis of impact-first

112. *See* Lott, *supra* note 110, at 19–20.

113. Because state-law PRA classifications have not been the subject of broad enforcement, available evidence suggests that the consequences of misclassifying an investment as a PRA are likely to be corrective rather than punitive. *See* Weil, Gotshal & Manges LLP, Guide to Not-For-Profit Governance 13–47 (2024) (listing restitution, removal, voiding as typical remedies for state-level fiduciary enforcement).

114. *See* DAF Report, *supra* note 26; Kulish, *supra* note 27.

115. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).

investing. Unlike private foundations, DAFs face no payout requirement, eliminating the abuse incentive that invites regulatory scrutiny of PRIs. Finally, the 2006 Act constraints, properly understood, either do not apply to investments held primarily for charitable purpose or impose requirements that standard investment practice already satisfies.

A. *Distinctions to Note for DAFs*

1. *DAF Exempt Purposes*

Before turning to the specific statutory constraints, it is worth examining how the PRA's "primary exempt purpose" requirement applies to DAF sponsors. The analysis reveals not merely compatibility but close alignment. The threshold inquiry for any PRA is whether the asset is held primarily to accomplish the charitable purpose of the institution.[116] For many public charities, this requires demonstrating a connection between the investment and a specific programmatic mission. For example, an affordable housing charity making housing loans would likely satisfy the required nexus. Many DAFs, however, have stated exempt purposes that are not limited to a particular cause but rather to increasing philanthropy broadly. Several of the largest DAF sponsoring organizations illustrate this pattern:

- **Vanguard Charitable:** "To increase philanthropy and maximize its impact over time."[117]
- **Fidelity Charitable:** "Fidelity Charitable seeks to facilitate, support and increase charitable activities . . . Fidelity Charitable's goal is to increase the dollars to charitable organizations through fundraising and outreach."[118]

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116. UPMIFA, *supra* note 10, § 2(7).

117. Vanguard Charitable, Form 990: Return of Organization Exempt from Income Tax (tax year ending June 30, 2024) (IRS filed 2025), available at https://app.candid.org/profile/7136262/vanguard-charitable-23-2888152?activeTab=7.

118. Fidelity Investments Charitable Gift Fund, Form 990: Return of Organization Exempt from Income Tax (tax year ending June 30, 2023) (IRS filed 2024), available at https://app.candid.org/profile/6882194/fidelity-investments-charitable-gift-fund-11-0303001?activeTab=7.

- **DAFgiving360 (Charles Schwab):** "Increase charitable giving in the United States of America."[119]
- **National Philanthropic Trust:** ". . . a public charity dedicated to increasing philanthropy in society."[120]

In each case, the explicit stated purpose is to increase philanthropy or maximize value of the assets available for charitable deployment. This aligns directly with the thesis of impact-first investing which is to stretch philanthropic dollars further, recycle capital for future use and catalyze additional investment toward charitable ends.[121] For these DAFs, impact-first investments are not merely consistent with their exempt purpose but may be the best expression of maximizing the assets available for charitable use.[122]

2. *Absence of Payout Requirement Reduces Regulatory Scrutiny*

As briefly touched on when discussing enforcement above, DAFs benefit from a structural advantage that private foundations lack because there is no payout requirement. In order to ensure that foundations actively fulfill a charitable purpose rather than accumulating assets indefinitely, § 4942 applies a requirement for private foundations to distribute a minimum of five percent of the average fair market value of their non-charitable assets from the preceding tax year.[123] One feature of the PRI regime unique to private foundations is that a

119. Donor Advised Charitable Giving Inc, Form 990: Return of Organization Exempt from Income Tax (tax year ending June 30, 2024) (IRS filed 2025), available at https://app.candid.org/profile/7399183/donor-advised-charitable-giving-inc-dba-dafgiving360-31-1640316?activeTab=7.

120. National Philanthropic Trust, Form 990: Return of Organization Exempt from Income Tax (tax year ending June 30, 2024) (IRS filed 2025), available at https://app.candid.org/profile/7270691/national-philanthropic-trust-23-7825575?activeTab=7.

121. Khan, *supra* note 3.

122. Regarding the charitable purpose of increasing total capital deployed toward charitable projects, it is worth noting that the Treasury has concurred with the idea that program-related investing can catalyze entry of private capital. In the Summary of Comments and Explanation of Revisions to the 2016 Treasury Regulation, the Treasury states that they chose not to adopt an additional example of a foundation assuming certain risks to catalyze the entry of private investment capital because the regulations already included two examples of a foundation assuming certain risks (specifically, in the form of a deposit agreement and a guarantee) to catalyze the entry of private investment capital. Examples of Program-Related Investments, T.D. 9762, 81 Fed. Reg. 24016 (Apr. 25, 2016).

123. I.R.C. § 4942(e), (g)(1).

PRI qualifies as a charitable distribution for purposes of this rule and counts toward the five percent payout requirement.[124] In the eyes of regulators, this treatment gives PRIs both a dual benefit and a dual incentive for abuse. A tool that is more subject to abuse is a tool that is subject to more regulatory scrutiny.[125] IRS rulings and practitioner commentary reflect persistent caution, precisely because PRIs let foundations count dollars as both investment and charitable expenditure. This is a common reason PRIs are thought to require more rigorous documentation such as opinions of legal counsel.[126] PRAs, by contrast, confer no such special tax benefit and DAFs face no pressure related to payout requirements.[127] The absence of the payout requirement removes both the temptation that invites abuse and the scrutiny that follows it.

3. *Legal Obligations Sit with Sponsoring Obligations*

Throughout this Article, "DAF" refers to the sponsoring organization, the public charity that maintains donor-advised funds, holds legal title to the assets, and bears fiduciary responsibility for investment decisions rather than the individual donor-advised fund accounts or the donors who advise them.[128] This distinction is legally significant. Donor-advisors may recommend grants and, in some cases, investment approaches,[129] but the decision to classify an investment as a PRA and the fiduciary

124. Treas. Reg. § 53.4942(a)–3(a)(2)(i) includes "program-related investments . . . paid to accomplish one or more purposes described in section 170(c)(1)" as "qualifying distributions" under § 4942; FOR-PROFIT PHILANTHROPY, *supra* note 36, at 134.

125. Madoff, *supra* note 102, at 342 n. 3 (citing I.R.C. § 170); *see also supra* notes 38–48 (describing how Congress imposed stringent restrictions on private foundations in 1969 to curb abuse, ensure accountability, and preserve public trust in tax-advantaged charitable entities).

126. *See* Treas. Reg. § 53.4944–1(b)(2)(v) (detailing the advice of counsel safe harbor where manager reliance on a reasoned written legal opinion avoids "knowing" or "willful" for § 4944(a)(2)).

127. While it is outside the scope of this analysis, it is worth noting that advocates of DAF reforms have consistently called for distribution or payout requirements applicable to DAFs.

128. I.R.C. § 4966(d)(1).

129. UPMIFA requires fiduciaries to give primary consideration to donor intent as expressed in a gift instrument. A donor who contributes to a DAF with the expressed intent that funds support impact-first investing creates a mandate the DAF should attempt to honor. UPMIFA's prudent investment standard will not apply if a donor expresses in the gift instrument to the DAF that it is to be used for specific investment classes. David A. Levitt, *Impact*

responsibility that accompanies that classification legally rests with the sponsoring organization.[130] A donor may recommend that funds from their account be deployed into an impact-first opportunity, but the sponsor must document an independent determination that charitable purpose is primary and that the investment satisfies the PRA framework.

B. *Navigating the Pension Protection Act Framework*

Even DAFs that understand they may not be bound by UPMIFA financial prudence standards may be risk-averse given the "taxable distribution" penalties that were statutorily extended to DAFs under the 2006 Act.[131] Section 4966 adopted several 1969 Act rules, namely excess business holdings rules under § 4943,[132] expenditure responsibility compliance under § 4945,[133] and excess benefit rules (as related to the sponsor under § 4958,[134] and as related to the donor under § 4967).[135] While these constraints have legitimate implications, careful analysis demonstrates that many of these restrictions are not applicable to DAFs wishing to make PRA investments, or impose requirements that standard investment practices already satisfy.

1. *Investments in Non-Exempt Businesses*

DAFs and other public charities may make all types of investments into non-exempt entities when the primary purpose is charitable. Under the PRI regime, Treasury has long recognized that for-profit entities can be "instruments" by which charitable purposes are accomplished.[136] Treasury has

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Investing Through a Donor-Advised Fund, 25 TAX'N OF EXEMPTS 3, 7 (2014) [hereinafter Levitt, *DAFs*].

130. I.R.C. § 4966(d)(2).

131. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006); I.R.C. § 4966.

132. I.R.C. § 4943.

133. *Id.* § 4945(h).

134. *Id.* § 4958.

135. *Id.* § 4967.

136. Treas. Reg. § 53.4944–3(a)(2)(i) ("For purposes of section 4944 and §§ 53.4944–1 through 53.4944–6, the term purposes described in section 170(c)(2)(B) shall be treated as including purposes described in section 170(c)(2)(B) whether or not carried out by organizations described in section 170(c)"). Treasury Regulations contain 14 examples of investments involving noncharitable recipients which qualify as PRIs. Treas. Reg. § 53.4944–3(b), Examples 1–6, 8–9, 11–16 (as amended in 2016).

blessed multiple forms of investments including debt, equity[137] and credit enhancement such as guarantees.[138]

2. *Excess Business Holdings*

The excess business holdings (EBH) rules do not apply to programmatic investments made by DAFs. The excess business holdings rules under § 4943 limit the amount of an active business that a private foundation or a DAF may own.[139] These rules were enacted in the 1969 Act to prevent founders and donors from using charitable entities to retain control of operating businesses due to a concern that business holdings would distract foundation managers from their proper charitable focus.[140] Generally, a private foundation and its "disqualified persons" may not collectively own more than twenty percent of the voting power or profit interest in a "business enterprise," subject to a two percent "safe harbor" for de minimis holdings.[141] Holdings above these thresholds may give rise to excise

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137. While Treasury declined to include an example of an equity PRI into an LLC in the examples due to complexity of the context, it is not prohibited. *See* Treas. Reg. § 53.4944–3(b), Examples 18–19 (illustrating that PRIs may take the form of credit-enhancement tools, such as loan guarantees (Example 19)); *see also* Examples of Program-Related Investments, 81 Fed. Reg. 24014, 24016 (Apr. 25, 2016) (to be codified at 26 C.F.R. pt. 53) (explaining that the regulations intentionally include examples of a foundation "assuming certain risks (specifically, in the form of a deposit agreement and a guarantee) to catalyze the entry of private investment capital"). In a private letter ruling, the IRS found explicitly that an equity investment in a for-profit corporation qualified as a PRI because it was designed to create jobs and spur economic development in depressed areas, meeting the primary purpose test of a charitable investment. *See* I.R.S. Priv. Ltr. Rul. 199943044 (Jul. 26, 1999); Levitt, *Investing*, *supra* note 73, at 35.

138. *See* Examples of Program-Related Investments, 81 Fed. Reg. 24014, 24016 (Apr. 25, 2016) (to be codified at 26 C.F.R. pt. 53) (explaining that the issue of investments in partnership interests by 501(c)(3)'s raises a host of issues that necessitate consideration and analysis of a variety of facts difficult to summarize and therefore are addressed primarily through revenue rulings).

139. I.R.C. § 4943(a).

140. *See* Reiser, *supra* note 17, at 360.

141. I.R.C. § 4943(c). For purposes of § 4943, a "disqualified person" includes substantial contributors to the foundation, foundation managers, owners of more than 20 percent of a substantial contributor, and family members of any of the foregoing. *Id.* § 4946(a)(1). A "business enterprise" generally means the active conduct of a trade or business, including any activity regularly carried on for the production of income from the sale of goods or the performance of services. *Id.* § 4943(d)(3).

taxes and require ongoing monitoring of ownership, attribution, and control to ensure compliance.[142]

DAFs were explicitly subject to the EBH rules per the same statutory language as private foundations.[143] However, the statute expressly excludes from the definition of a "business enterprise" any activity that is functionally related to the organization's exempt purposes.[144] Further, business holdings explicitly exclude investments that qualify as a PRI.[145] In other words, there are two possible avenues to discount an extension of DAF charitable activity from the EBH regime which applies to *business holdings* in a *business enterprise*.[146] First, a functionally related business that is substantially related to the charitable purpose of the DAF is not a "business enterprise."[147] Second, a PRI made to advance a charitable objective rather than to operate a business for profit is not a "business holding."[148] Both are outside the scope of the EBH regime.[149] Utilizing this logic, the business holdings of DAFs which are subject to EBH rules do not include functionally related businesses or PRIs.[150] In other words, if the asset is owned for a charitable purpose, a DAF should be able to own more than twenty percent so long as it does not confer more than an incidental benefit on any donor or donor-advisor.

Consider the following example: a DAF invests funds from a donor account into an impact-first fund organized and managed for charitable purposes. The fund's mission is to achieve outcomes that are social, environmental, or a combination of the two. The DAFs' investment is made not to generate

142. I.R.C. § 4943(a).
143. *Id.* § 4943(e).
144. *Id.* § 4943(a)(3)(A).
145. Treas. Reg. § 53.4943–10(b) ("[B]usiness holdings do not include program-related investments (such as investments in small businesses in central cities or in corporations to assist in neighborhood renovation) as defined in section 4944(c) and the regulations thereunder."). Treasury Regulations that except PRIs from EBH regime specifically cross-reference I.R.C. § 4943(d)(3) which section is explicitly applicable to donor advised funds per § 4943(e)(1).
146. I.R.C. § 4943(c)(1).
147. *Id.* § 513(a).
148. *Id.*; *see also* Levitt, *DAFs*, *supra* note 129, at 6; Reiser, *supra* note 17, at 376.
149. I.R.C. § 513(a).
150. Because the EBH rules of § 4943 were explicitly applied to DAFs by § 4943(e), a DAF relying on the programmatic investment safe harbor may wish to apply the more conservative PRI language of § 4944 rather than the more permissive language of UPMIFA § 3(7).

market-rate returns but to advance these charitable outcomes, and the investment documentation reflects programmatic intent, prioritizing impact over financial returns and reporting on impact metrics. The fund is not managed by the donor or a related party and is therefore compliant with § 4967 and § 4958. If the fund were *not* impact-first, even though EBH is only applicable to active business enterprises and not passive investment funds, the IRS can look-through a fund to active businesses in the fund portfolio. Hence, a DAF would need to ensure that the DAF and the original donors together do not own directly or indirectly more than twenty percent of the voting stock of any portfolio businesses in the fund. However, because this investment's primary purpose is charitable and it could meet a PRI standard, it can be excluded from the "business holdings" of the DAF for purposes of § 4943. The DAF is therefore relieved of the twenty-percent ownership ceiling and aggregation monitoring obligations that EBH would otherwise impose on underlying portfolio businesses.[151]

3. *Expenditure Responsibility*

DAFs making PRAs directly to non-exempt entities should expect to comply with expenditure responsibility (ER) requirements.[152] Under the ER rules, a taxable distribution occurs when a private foundation or DAF makes a disbursement to a non-charity *unless* the foundation/sponsor exercises ER.[153] Although the regulations do not explicitly address PRAs, the logic of this Article suggests that PRAs (like PRIs) have a donative character that triggers ER.[154] In traditional investments or

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151. Conceptually, a DAF could choose to manage the EBH rules when investing into a fund by adhering to the safe harbor ownership limit of 2% which likely would need to be managed at the fund level by capping each individual donor account allocation to 2% of the fund. For a charitable purpose investment where EBH does not apply, the safe harbor also does not need to be a constraint.

152. I.R.C. § 4945(h).

153. *Id.* § 4945.

154. Prop. Treas. Reg. § 4966, 88 Fed. Reg. 77922, 77931 (Nov. 14, 2023). The proposed regulations, though not finalized, reflect an evolution in Treasury's thinking about DAF investments. By distinguishing between ordinary investments and those with donative elements, Treasury acknowledged what this Article argues: not all capital deployed by a DAF is purely financial in character. Some deployments are charitable in nature even when structured as investments. While the proposed regulations do not use the term "PRA", the conceptual distinction they draw supports the thesis that impact-first

MRIs, ER would not apply because unlike a grant to a non-charity, an investment is not treated as a distribution.[155] However, under Treasury Regulations, PRIs are included in the definition of grants for which ER specifically attaches, reflecting recognition that some investments are charitable in character.[156] The same proposed regulations that stated explicitly that an investment is not a distribution excepted investments with "donative" elements.[157]

However, the requirements of ER align naturally with an investment-making process. The purpose of ER is to ensure the distribution funds are used for charitable purposes, so ER requires detailed reporting to the IRS on how the funds are spent. In practice, this includes pre-investment diligence inquiry and a written agreement.[158] Additionally, in either separate materials or the investment agreement, the written documentation should include agreement that such organization will provide financial reports, recordkeeping and other requirements of the type ordinarily required by commercial investors under similar circumstances.[159] In most cases, standard diligence, standard investment documentation and standard investment reporting will generally meet the ER requirements.[160] ER responsibilities are met by reasonable efforts and establishment of adequate procedures.[161]

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investments from DAFs warrant different treatment than traditional investment activity. The fact that Treasury felt the need to articulate this distinction suggests growing recognition that the binary categories of "grant" and "investment" fail to capture the full range of charitable capital deployment.

155. *Id.* ("Investments generally would not be treated as distributions . . . because they typically merely reflect a change from one form of property to another."); David A. Levitt, *Proposed Regulations on Donor Advised Funds: Take-Aways for Impact Investing*, ADLER & COLVIN BLOG (Jan. 22, 2024), https://www.adlercolvin.com/blog/2024/01/22/proposed-regulations-on-donor-advised-funds-take-aways-for-impact-investing/.

156. Treas. Reg. § 53.4945-5(b)(4); Levitt, *DAFs, supra* note 129, at 9.

157. Prop. Treas. Reg. § 4966, 88 Fed. Reg. 77922, 77931 (Nov. 14, 2023). ("Investments generally would not be treated as distributions . . . because they typically merely reflect a change from one form of property to another."); Levitt, *supra* note 155.

158. Levitt, *Proposed Regulations*, *supra* note 44, at 103–04.

159. Treas. Reg. § 53.4945–5(b)(4).

160. In practice, DAFs may wish to be explicit with charitable expectations in supplementary provisions or agreements.

161. Treas. Reg. § 53.4945-5(f)(2)(iii).

4. *Excess Benefit Transactions*

Impact-first investments that advance charitable purpose and provide only incidental private benefit will not trigger excess benefit rules. "Excess benefit transactions" occur under § 4958 when a disqualified person receives a benefit from a charity that exceeds the value provided in return.[162] For DAFs, the rules are even stricter. Under § 4967, any grant, loan, guarantee, compensation, or similar payment from a DAF that provides more than incidental benefit to a donor, donor-advisor, or related party is treated as a taxable distribution regardless of whether the transaction reflects fair market value.[163] This framework functions as a guardrail for impact-first investing. A PRA that advances a charitable purpose and provides only incidental, proportionate private benefit will not implicate § 4958 or § 4967, but an investment structured to confer special economic advantage on a donor or related party will. Accordingly, DAFs must ensure that impact-first investments neither favor donor interests nor resemble opportunities made available only to insiders. When applied correctly, the excess-benefit rules reinforce rather than constrain the PRA framework by focusing fiduciaries on preserving charitable primacy and preventing insider enrichment.

These distinctions underscore the conceptual coherence between the I.R.C.'s treatment of PRIs and UPMIFA's treatment of PRAs. In both regimes, when an investment is primarily charitable in nature, regulatory frameworks designed to limit private control or speculative risk give way to standards focused on advancing the organization's exempt purposes.

V.
Fiduciary Principles for PRA Classification

Despite the availability of these tools, PRIs and PRAs are chronically underutilized.[164] As one researcher recently

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162. I.R.C. § 4958(c)(1); *see also* Cong. Rsch. Serv., R48873, The Prohibitions on Private Inurement & Benefit by Tax-Exempt Organizations and Intermediate Sanctions (Mar. 5, 2026).

163. I.R.C. § 4967.

164. Only a small percentage of foundations regularly engage in program-related investing. According to a comprehensive study of PRIs by the Lilly Family School of Philanthropy, from 2000 to 2010, about one percent of U.S. foundations made PRIs each year. Lilly Family School of Philanthropy, Leveraging the Power of Foundations: An Analysis of Program-Related Investing 33 (2013).

observed, there has been a persistent gap "between the vision of PRIs as innovations expanding grantmaking's reach and the reality of their limited use."[165] While PRIs receive scholarly attention,[166] programmatic investments by public charities and DAFs are largely absent from the impact finance dialogue.[167] PRAs remain unrecognized as a legal framework with clear rules and guidelines, and charitable organizations that engage in impact-first investing default incorrectly to UPMIFA's financial prudence requirements.[168]

The preceding Parts established that PRAs provide a pathway away from UPMIFA's financial prudence regime, but classification as a PRA does not exempt an institution from fiduciary responsibilities altogether. Rather, it triggers a different mode of fiduciary reasoning focused on charitable purpose, programmatic coherence, and proportional safeguards (collectively, purpose prudence). *Prudence is still required.* The argument advanced here is not that prudence, even in its financial dimension, should be set aside. The fiduciary duties of care, loyalty, and obedience to mission still apply.[169] As with grantmaking, charitable assets should be deployed with considered and thoughtful due diligence about the best mechanism, avenue and likelihood for impact. In the investment context, this will often require consideration of the terms of the investment against the anticipated outcomes.[170]

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165. Peter C. Weber, *Philanthropic innovations: A historical analysis of Foundations' adoption, implementation, and diffusion of program-related investment (PRI) strategies*, 35 Nonprofit Mgmt. & Leadership 61, 64 (2024).

166. *See* Levitt, *Investing*, *supra* note 73; Reiser, *supra* note 17; Wimpee, *supra* note 20.

167. The lack of uptake of impact investing by nonprofit organizations is reflected in the scholarship. According to a literature review, most social enterprise and impact investing articles focus on for-profit or blended organizations (160 articles or 90% compared to 87% in 2017) instead of nonprofit organizations. Anne M. Tucker & Deborah Burand, *Charting New Frontiers: A Legal Literature Review of Social Entrepreneurship and Impact Investing 2018–2023*, 21 N.Y.U. J. L. & Bus. 183, 205 (2025).

168. *See* Gary, *supra* note 12.

169. *See* Restatement of the L., Charitable Nonprofit Orgs. § 2.02 (A.L.I. 2021) (a fiduciary has a duty to act in good faith and in a manner the fiduciary reasonably believes to be in the best interests of the charity in light of its purposes); *id.* § 2.03 (a fiduciary of a charity has a duty to act in good faith with the care a person of ordinary prudence in a like position would exercise under similar circumstances).

170. *See* UPMIFA, *supra* note 10, § 2(7) cmt. (suggesting institutions adopt "reasonable credit standards and other guidelines").

The operational details of PRA implementation merit fuller treatment in practice-oriented guidance including templates and advice related to institutional policies, investment committee protocols, disclosures, and documentation. However, the following principles broadly synthesize UPMIFA's statutory text, official commentary, and the federal PRI framework to identify the core considerations fiduciaries must address within a legally grounded structure when implementing PRAs.

A. *Establishing a Primarily Exempt Purpose*

The threshold inquiry for any PRA is whether the asset is held primarily to accomplish a charitable purpose of the institution.[171] It is common for impact investment practitioners to describe opportunities as being *both* good investments and having a positive impact, but the law forces us to choose between impact-first charitable activity and finance-first investment activity.[172] Under UPMIFA, "charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.[173] Contemporaneous documentation of a primarily charitable purpose should include: (i) what the statutory related charitable purpose of the investment is, (ii) who the charitable beneficiary population reached will be, and (iii) how the investment activity will enact the identified purpose for the identified population. There is no legal standard requiring that charitable impact be immediately or ultimately realized in order for an investment to qualify as programmatic. Instead, fiduciaries are assessed based on the purpose and intent underlying the investment at the time it is made, as well as the reasonableness of the opportunity to advance charitable goals.[174]

171. *Id.* § 2(7).
172. Adler & Colvin, *supra* note 75.
173. UPMIFA, *supra* note 10, § 2(1).
174. *Charitable purposes*, Internal Revenue Serv. (last visited Nov. 23, 2025), https://www.irs.gov/charities-non-profits/charitable-purposes. The scope of this Article isn't to delve into the boundaries of charitable purpose, but note the exempt purposes set forth in IRC § 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals. The term charitable is used in its generally accepted

Further, the charitable purpose must be *related*. UPMIFA comments emphasize that PRAs are exempt from financial prudence standard only if they are held primarily to accomplish the charitable purpose *of the institution*.[175] This is not a generic public-benefit standard, it is tethered to the organization's mission. A need to comply with the specific exempt purpose may restrict some PRA activity for exempt organizations with a limited scope. It is therefore unlikely that an animal welfare charity can classify affordable housing loans as PRAs, or that a university can justify speculative investments in start-up ventures unrelated to education as PRAs. The investment must advance the purposes stated in the organization's governing documents.

Although UPMIFA does not require PRAs to satisfy a strict but-for test, fiduciaries may nonetheless use a modified version of that inquiry as a practical aid in assessing programmatic intent.[176] An appropriate way to think about PRAs is as grant equivalents in investment form, making the programmatic narrative the central inquiry.[177] Applied as a heuristic rather than a requirement, the *but-for* analysis helps fiduciaries articulate why holding the asset in investment form is an appropriate means of carrying out the organization's charitable work.

B. *Reasonable Credit Standards and Mission-Proportionate Safeguards*

Neither PRIs nor PRAs have mandatory statutory credit standards. However, UPMIFA comments explicitly provide that when a charitable organization makes programmatic investments, it should "create reasonable credit standards and other guidelines for the program to increase the likelihood that the loans will be repaid."[178] This clause replaces a strict financial prudence standard with a lighter governance expectation tailored to impact-first investing. Its purpose is not to ensure

legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.

175. UPMIFA, *supra* note 10, § 2(7).

176. Levitt, *Proposed Regulations*, *supra* note 44, at 102.

177. Reiser, *supra* note 17, at 366–67.

178. UPMIFA, *supra* note 10, § 2(7) cmt.

market-rate returns but to ensure that fiduciaries act thoughtfully, proportionately, and with reasonable expectations of sustainability.

Under the purpose prudence standard, fiduciaries are encouraged to consider both the cost of the asset and the possibility of return, even when the return is secondary.[179] In short, this suggestion in the UPMIFA comments indicates that decision-makers' fiduciary obligation shifts from balancing risk, return, diversification, or liquidity to balancing the likelihood that charitable capital will achieve its intended purpose and, where possible, recycle for future use. Therefore, "reasonable credit standards" under UPMIFA should be understood as mission-proportionate diligence or a good-faith evaluation that the investment structure and counterparties are appropriate for achieving the charitable goal and preserving program integrity. It does not require the tools of conventional underwriting, but it does require that decision-makers can demonstrate why the investment terms are sensible in context. Such analysis may include exit or disposition of the asset, and valuation considerations.

C. *Guarding Against Improper Private Benefit*

Any investment should comply with donor intent, restrictions, or applicable agreements.[180] However, PRAs remain subject to federal tax law boundaries governing private benefit and, for DAFs, excess-benefit restrictions.[181] A PRA that advances charitable purpose and confers only incidental, proportionate private benefit will be permissible under both § 4958 and § 4967. Whether a private benefit is "incidental" is measured both qualitatively (as a natural byproduct of the charitable activity) and quantitatively (as not disproportionate compared to the charitable benefit).[182] This boundary reinforces that PRAs must be designed to serve the public interests rather than those of donors. Proper fiduciary inquiry, therefore, asks whether the charitable benefit meaningfully outweighs any private return and whether the structure avoids conferring special advantage on insiders.

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179. *Id.*; *see also* Gary, *supra* note 12, at 109.
180. UPMIFA, *supra* note 10, § 3(a).
181. I.R.C. §§ 4958, 4967.
182. I.R.S. Gen. Couns. Mem. 37,789 (Dec. 18, 1978).

D. *Documentation and Governance Considerations*

PRAs require clear contemporaneous evidence that the charitable purpose is primary. Because PRAs fall outside UPMIFA's investment regime, documentation assumes heightened importance. Documentation is the primary mechanism by which fiduciaries demonstrate compliance and protect against later challenges. The most robust PRA decisions are those in which fiduciaries can point to board or committee approval of an investment held primarily for charitable purpose, with contemporaneous articulation of the charitable objective being advanced, the rationale for selecting an investment mechanism rather than a grant or conventional portfolio investment, and the programmatic expectations, including risks to impact and safeguards adopted.[183] This form of governance, purpose-centered rather than portfolio-centered, is consistent with both the statutory text and the historical rationale for program-related investing.

Governance practices can further reinforce this determination. Explicit recognition of PRAs within an institution's investment policy statement can help situate such assets within the organization's fiduciary framework and clarify the rationale for deploying capital in programmatic form. Similarly, where PRAs are funded from corpus or other discretionary institutional assets, approval by the governing board or highest level of organizational authority provides additional assurance that the use of capital reflects institutional intent.

UPMIFA's delegation provisions also permit reliance on external investment managers or advisors, provided that fiduciaries exercise reasonable care in selecting and monitoring agents with appropriate expertise.[184] In the PRA context, this means that an investment manager charged with diligence and decision-making should be competent to evaluate not only financial characteristics, but also impact considerations and the primacy of charitable purpose.

Entities making PRAs should also ensure reporting of such program-related investments on the annual Form 990.

183. I.R.S. Priv. Ltr. Rul. 202041009 (July 14, 2020) (wherein the IRS expressed skepticism toward an impact fund that evaluated financial targets before considering charitable outcomes, finding the commercial aspects of the fund's activities insufficiently subordinate to charitable purpose).

184. UPMIFA, *supra* note 10, § 5.

Additionally, fiduciaries should consider potential UBIT implications,[185] and, where applicable, comply with ER requirements for investments made to non-exempt entities.[186]

Taken together, the principles outlined in this Part operationalize purpose prudence for impact-first investments including establishing primarily exempt purpose, adopting mission-proportionate safeguards, guarding against private benefit, and documenting contemporaneous intent. They provide fiduciaries with a framework that is both legally grounded and practically actionable.

VI.
Conclusion

Philanthropic capital is under pressure. Economic volatility, political uncertainty, and growing demand for social services require charitable assets to work harder and more flexibly. Impact-first investing offers a response, but only if fiduciaries have confidence to act. By stretching scarce charitable dollars, enabling recycling of capital, and creating opportunities to crowd in additional investors, impact-first approaches can extend the reach of philanthropy beyond traditional grantmaking.

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185. Although the IRS has not issued guidance specifically addressing unrelated business income tax as it relates to PRAs, the treatment of PRIs provides a useful analogue. Income from a PRI is generally not treated as UBIT because the investment is made primarily to accomplish an exempt purpose rather than to participate in an unrelated trade or business. Levitt, *Investing*, *supra* note 73, at 39. The same reasoning suggests that even where a PRA produces income that might resemble business income, such as interest or pass-through returns, the programmatic purpose of the investment indicates that the income is related to the organization's exempt activities. Accordingly, analysis in the context of established PRI treatment suggests that properly documented PRAs are unlikely to accrue UBIT. This analysis does not address debt-financed income under IRC § 514, which may be subject to UBIT even where the underlying investment serves an exempt purpose. Practitioners structuring leveraged PRAs should evaluate this issue separately.

186. I.R.S. Form 990, Pt. X, l. 13 (2025). The 2025 Instructions for Form 990 Return of Organization Exempt From Income Tax instructions state "Report here the total book value of all investments made primarily to accomplish the organization's exempt purposes rather than to produce income. Examples of program-related investments include student loans and notes receivable from other exempt organizations that obtained the funds to pursue the filing organization's exempt function." Internal Revenue Serv., Instructions for Form 990 Return of Organization Exempt From Income Tax, Pt. X, l. 13 (2025), https://www.irs.gov/pub/irs-pdf/i990.pdf.

While PRIs remain an important and conservative safe harbor for private foundations, PRAs apply broadly to public charities, including community foundations and DAFs. Both tools recognize that some assets, structured as investments, should be treated as programmatic when their primary purpose is charitable. PRAs are not subject to UPMIFA's eight-factor financial prudence test. Instead, they are governed by purpose prudence, an inquiry focused on whether the investment is reasonably designed to accomplish charitable purpose. PRAs do not eliminate prudence, they redirect it toward mission. Re-centering PRAs in the conversation about impact-first investing provides fiduciaries with the clarity they need to act confidently. By distinguishing programmatic assets from financial ones, and by requiring explicit documentation of purpose, PRAs reduce unnecessary caution without eroding fiduciary responsibility. More importantly, they create a pathway for philanthropy to deploy capital creatively and sustainably in times of uncertainty. If impact-first investing is to move from rhetoric to resilient practice, PRAs supply a legal framework to make the transition both possible and prudent.

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COMMENTARY ON *BEYOND PRIs*: MISSION RELATED

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Leslie Cornell's paper addresses an important and timely issue: namely, the mechanisms available for "impact-first" deployment of charitable assets of public charities and the ambiguity surrounding the legal framework that permits impact-first deployment. As Ms. Cornell argues, impact-first investing for public charities, including donor advised fund (DAF) sponsoring organizations (SPORGs), to deploy charitable assets to further charitable mission should be encouraged through clear and precise law and regulations, both at the state level and at the federal level, but the program related assets (PRA) mechanism suggested by Ms. Cornell does not provide a useful path for impact-first investing.

This comment will explore the options available to public charities for prioritizing charitable impact over bottom line in investment decisions and will conclude that current law does permit impact-first investing for SPORGs and other public

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charities through the somewhat fuzzy but widely accepted mission-related investments (MRI) regime. Because MRIs can be utilized to achieve Ms. Cornell's laudable goal, recalibrating the PRA concept to serve this purpose is unnecessary and unjustified under the PRA concept contemplated by the Uniform Prudent Management of Institutional Funds Act (UPMIFA). Part I of this comment will focus on the importance of Ms. Cornell's suggestion and the arguments she posits that seem accurate and appropriate for increasing impact-first investing for public charities. Part II will argue that PRAs, as envisioned by the drafters of UPMIFA, are not a relevant mechanism for achieving Ms. Cornell's objective, but that the objective is attainable through MRIs made by public charities, including SPORGs. Part III of the comment will conclude with a suggestion for a mechanism that will enable SPORGs holding DAFs to deploy assets on an impact-first basis, which seems to be Ms. Cornell's primary goal.

I. THE IMPORTANCE OF IMPACT-FIRST INVESTING BY PUBLIC CHARITIES

Permitting public charities, including SPORGs, to engage in impact-first investing easily and without fear of violating prudent investment standards makes sense as an avenue to increase charitable impact. SPORGs hold billions of dollars in DAFs that are invested primarily in traditional vehicles.[1] As a policy matter, a connection between investment and mission should be encouraged, not discouraged, for public charities since it is so explicitly encouraged through program related investments (PRIs)[2] and MRIs in the private foundation arena where there is far less accountability and significantly more

1. NAT'L PHILANTHROPIC TR., 2024 DONOR-ADVISED FUND REPORT 11–16 (2024) https://www.nptrust.org/wp-content/uploads/2024/11/2024-DAF-Report-NPT.pdf [https://perma.cc/3ZZK-7TFW] (reporting that donor-advised funds held approximately $251.5 billion in assets as of 2023 and documenting continued growth in DAF contributions and balances); DAF RSCH. COLLABORATIVE, *THE ANNUAL DAF REPORT 2025* 10–17 (2025), https://static1.squarespace.com/static/6011def87418a462fcb03978/t/6941a4c-c17e484296f44b45d/1765909728393/Annual+DAF+Report+2025+-+DAF+Research+Collaborative.pdf [https://perma.cc/2PS8-R4HM] (reporting over $320 billion in donor-advised fund assets in 2024 and continued growth in balances and grantmaking).

2. Leslie Cornell, *Beyond PRIs: How UPMIFA Anchors Impact-First Investing for Donor-Advised Funds and Charities*, 22 N.Y.U. J. L. & BUS. 2, 255 (2026).

risk of private interests being served than in the public charity realm where SPORGs reside. The prudent investor standard should be sufficiently flexible to allow charities to pursue their missions through perhaps more risky or lower returns but more socially responsive investments, presuming that the entire portfolio is not at risk. But that flexibility for public charities to engage in impact-first or double bottom line investing already exists in states and territories that have adopted some version of UPMIFA, which, as mentioned by Ms. Cornell, is everywhere except Pennsylvania and Puerto Rico.[3] UPMIFA explicitly permits charities to take charitable purposes into consideration over return in investment decisions through both MRIs and PRIs, although it may not permit the charity to completely ignore prudence throughout its portfolio. The escape hatch here is UPMIFA's provision that a well-diversified portfolio does permit some riskier investments and that the prudence of a charity's portfolio is viewed in light of its entirety rather than on an investment-by-investment basis.[4]

Federal tax law, even in the private foundation realm where regulation is more stringent, supports the UPMIFA emphasis on flexibility for well-diversified portfolios in the provision that prohibits and penalizes "jeopardy investments"[5] for private foundations. Putting aside special provisions for PRIs and MRIs, the law under Internal Revenue Code (Code) section 4944 is quite clear that no individual investment is per se prohibited and that risky investments are permitted if part of a well-diversified portfolio. The Internal Revenue Service (IRS) supports this flexible standard by rarely, if ever, attacking a private foundation investment as a jeopardy investment. Accordingly, as Ms. Cornell concludes, neither federal tax law nor IRS behavior supports the concern of cautious attorneys that impact-first investments are "not well tolerated."[6]

Ms. Cornell's discussion of PRIs is insightful and accurate. The PRI rules are more restrictive[7] than the rules that apply to public charities for all of the historical and policy reasons

3. *Id.* at 258 n.11.
4. UPMIFA § 3(b).
5. I.R.C. § 4944; Treas. Reg. §§ 53.4944-1(a)(2)(i), 53.4944-3(a) (as amended in 2016).
6. Cornell, *supra* note 2, at 259–61 (describing how legal uncertainty leads fiduciaries to adopt overly cautious compliance practices).
7. *Id.* at 271–78.

so adeptly discussed in the paper. This all makes sense. Private foundations should be subject to more stringent rules than public charities because private foundations are not dependent on the public for funding or purchases of goods or services, so they are not accountable to the public and the government in the manner that public charities are accountable, and, accordingly, they are more likely to behave in ways that promote the private interests of their founders. While the public, in a sense, polices public charities, private foundations are not constrained by the public, and, appropriately, are more stringently regulated by the IRS through the Code and Treasury Regulations.

Given the policy reasons for the enactment of Code section 4944 and the more stringent regulation of private foundations under the 1969 Tax Act,[8] the prudent investment standards for public charities, including SPORGs, certainly cannot be more stringent than the 4944 standard imposed on private foundations. Focusing on SPORGs, the billions of dollars that they hold and invest inevitably are invested in well-diversified portfolios, leaving plenty of room for some impact-first investing.

Nevertheless, Ms. Cornell's conclusion that many SPORGs and other public charities are reluctant to engage in impact-first investing is well founded, but the mechanisms for providing comfort to these entities to engage in impact-first investing already exist and have been blessed by the Internal Revenue Service[9] and by the states that have adopted UPMIFA. As a practical matter, it is unlikely that any state Attorney General will question impact-first investing by public charities unless the risk to the entire portfolio becomes too extreme, but that past behavior at the state level might not provide sufficient comfort to the public charities she seeks to convince to practice impact-first investing. But the law, both at the state fiduciary level and at the federal tax level, is on the side of permitting impact-first investing, so educating public charities about their options rather than enacting more explicit laws is the solution to encouraging and increasing impact-first investing. Publishing Ms. Cornell's important paper is a significant step in the educational process.

8. *Id.* at 263–66.
9. I.R.S. Notice 2015-62, 2015-39 I.R.B. 411.

II.
Rethinking the Solution

Ms. Cornell's vision for increasing impact-first investing by public charities is entirely achievable, but a different and much simpler path to arriving at her goal is available. Ms. Cornell states, "Impact-first investing provides a way to align investable assets with mission, but fiduciaries hesitate, uncertain whether they may lawfully sacrifice return."[10] Ms. Cornell's article aligns PRIs and PRAs within a single interpretive framework: PRIs offer the analytical model, and PRAs extend that rationale to nearly all charitable entities, creating a responsible foundation for impact-first investing.[11] But the real answer is neither PRIs nor PRAs. The solution is MRIs. Neither PRIs nor PRAs are relevant to the goal at hand.

Regarding PRAs, what Ms. Cornell refers to as a PRA is not what is referred to or intended as a PRA in UPMIFA, so it is necessary to find another basis for her argument that impact-investing by public charities is permissible.[12] Ms. Cornell quotes language from UPMIFA[13] to suggest that UPMIFA created the PRA carve out for PRAs with investment assets in mind, but that suggestion is unsupported by the examples in the provision she cites. Based on the examples and commentary in UPMIFA, it seems clear that the UPMIFA drafters, in constructing the PRA carve out, were not thinking about funds of money (institutional funds) that might be invested in alignment with the charity's mission. The drafters were concerned that a charity might buy an asset with investment value that might not be the best risk-return investment but would serve other, more brick and mortar purposes, and they did not want those assets to be trapped in a standard that charities could not meet. The examples refer to PRAs such as university buildings or real estate bought by a college to provide for future expansion. In the real estate example, until the expansion of the college occurs, the college rents the houses on the real estate and generates some income,[14] but the goal is to use the land for future expansion,

10. Cornell, *supra* note 2, at 260.
11. *Id.* at 274–75.
12. *Id.* at 268.
13. *Id.* at 270.
14. Unif. Prudent Mgmt. of Institutional Funds Act § 2(5) cmt. (Unif. L. Comm'n 2006), https://mn.gov/school-trust-lands/assets/2006-UPMIFA_tcm1107-317033.pdf [https://perma.cc/SN9L-F4L2] [hereinafter UPMIFA];

not investment. PRAs are aimed at unintended consequences rather than at impact-first investing and, accordingly, do not provide a viable justification for impact-first investing by public charities. PRAs are not intended to refer to impact-first investments of charitable funds. That role is adequately filled by both PRIs and MRIs.

Similarly, PRIs do not provide a particularly helpful analogy for impact-first investing by public charities. MRIs, on the other hand, are the vehicle that would provide the most useful rubric for accomplishing Ms. Cornell's goal. In order to understand this distinction, it is important to understand the distinction between PRIs and MRIs for federal income tax purposes. In short, a PRI is viewed and treated for most purposes as a charitable grant while an MRI is an investment that considers more than return in the investment decision. In other words, as Ms. Cornell confirms,[15] MRIs permit impact-first considerations in investment decisions, with a focus on both charitable impact and return, but along the continuum between charitable impact and financial return, MRIs may be charitable impact first. Avoiding Code section 4944 penalties was never the goal for PRI investments by private foundations, because the IRS so rarely penalizes jeopardy investments by private foundations.[16] The major benefit of PRIs over MRIs for private foundations is that PRIs count toward minimum payout requirements under Code section 4942 and MRIs, because they are not viewed as grants, are not included in minimum payout. But there is no minimum payout requirement for public charities, so there is no advantage to public charities to meeting the PRI standard Ms. Cornell suggests in her analysis. Public charities do not need to satisfy the IRS in the impact-first investing area because the IRS has no skin in the game for public charities in the investment realm. Public charities answer only to the state attorneys general, much less fussy line judges than the IRS in overseeing charities in general. There is no advantage to public charities in

Susan N. Gray, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 Ga. L. Rev. 1277, 1293–94 (2007) (providing context for this provision by describing an example involving Trinity College in Hartford, Connecticut).

15. Cornell, *supra* note 2, at 272–73.

16. There is little evidence that the IRS sanctioned or even questioned any private foundation that invested 100 percent of their assets with Bernie Madoff, which may have been the most infamous jeopardy investment of all time.

jumping through the PRI hoop because there is no advantage for public charities without minimum payout requirements to have an investment classified as a grant.

Since neither PRAs nor PRIs are relevant or helpful in providing comfort to public charities investing for a double bottom line, the focus should be on the MRI standard. First, MRIs are closer to the concept of what Ms. Cornell refers to as PRAs (if not the UPMIFA PRA concept) than either PRIs or what she refers to as PRAs. Second, MRIs are subject to less conservative, rigid rules than PRIs, so it would be more advantageous from the public charity perspective to focus on MRIs as a template for impact-first investments because that would result in more flexibility and less rigidity in a public charity's ability to pursue mission through investments without vetting each investment through the prudent investment standard.

Although Ms. Cornell correctly notes that MRIs are not defined in a tax statute or Treasury Regulation, it is important to note that MRIs explicitly have been blessed by both the IRS and the UPMIFA drafters. MRIs have been blessed by the IRS in IRS Notice 2015-62.[17] The goal of that notice was to create a regime for private foundations to engage in mission-related investing even if the investment did not meet the requirements of a PRI. In that notice, the IRS clarifies that an investment will not be considered a jeopardizing investment under Code section 4944 if a private foundation's managers choose the investment based on its relationship to the foundation's charitable mission, even if the investment has a lower expected rate of return than the foundation might obtain from another investment unrelated to its charitable purposes, as long as the managers exercise ordinary business care and prudence in making that investment decision. Specifically, the notice states, "a private foundation will not be subject to tax under section 4944 if foundation managers who have exercised ordinary business care and prudence make an investment that furthers the foundation's charitable purposes at an expected rate of return that is less than what the foundation might obtain from an investment that is unrelated to its charitable purposes."[18] This Notice was intended to provide greater comfort to private foundations engaged in impact-first investing, accepting lower returns to

17. I.R.S. Notice 2015-62, 2015-39 I.R.B. 411.
18. *Id.*

advance a charitable mission. If this is acceptable for private foundations, it is difficult to argue that public charities, not subject to Code section 4944 or any similar provision, would be subject to a stricter standard in impact-first investing. The IRS Notice blesses MRIs that are impact-first and relies on UPMIFA to support its conclusion.

Impact-first investing also explicitly is blessed in UPMIFA. Section 3 of UPMIFA, entitled, Standard of Conduct in Managing and Investing Institutional Funds, provides, in part, "an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund."[19] The provision, in a list of factors that must be considered if relevant, states, "an asset's special relationship or special value, if any, to the charitable purposes of the institution."[20] This subsection may not have been drafted with the thought of impact-first investing, but it certainly provides support, and it is being used by more adventurous public charities to provide support for impact-first investing. Section 3 of UPMIFA, which applies the prudent investor rule to all charities, includes consideration of purpose as a valid basis for investments. Accordingly, there is no need to explicitly state that the prudent investor rule does not apply to impact-first investments, because these investments are authorized by Section 3 of UPMIFA and the state statutes that adopt the provision. This explains the IRS's statement in the 2015 IRS Notice that its conclusion is based on state law—a clear reference to section 3 of UPMIFA.

In sum, the law to support Ms. Cornell's goal of increasing impact investing by public charities exists without contorting the PRA concept to accommodate investment activities it was not intended to accommodate. The 2015 IRS Notice explicitly blesses concessionary investments (lower than market return) for private foundations, and UPMIFA explicitly blesses the same investments for public charities. So, impact-first investing that is concessionary through MRIs is permissible for public charities. That takes Ms. Cornell to exactly where she aims to arrive in a simple and straightforward way. Her paper will provide excellent support to make charities more comfortable to move forward with impact-first investing.

19. UPMIFA, *supra* note 13, § 3(a).
20. *Id.* § 3(e)(1)(H).

III.
A Blueprint for SPORG Impact-First Investing

Returning to Ms. Cornell's ultimate goal of increasing impact-first investing by SPORGs to "increase philanthropy," it is important to consider the practical effects of this analysis on SPORGs. SPORGs have an interest in keeping fees low and avoiding labor-intensive individualized investment strategies that might raise administrative costs. Permitting individual DAFs to recommend PRIs or PRAs (as defined by Ms. Cornell) would be both cost and labor prohibitive, and unworkable as a solution to the problem of increasing bottom line investing by SPORGs. It is also important to consider the incentives for financial institutions, like Fidelity and Vanguard, to form and operate enormous SPORGs. Certainly these institutions seek to foster philanthropy on some level, but the SPORGs provide a windfall for those for-profit entities—they are in the business of investing money for profit and the SPORGs provide the financial institutions with billions of additional dollars to invest. SPORGs face significant public criticism for the private benefit their affiliated financial institutions may derive from investment of charitable assets. As a result, it is likely that SPORGs are so concerned about both the limelight and the high labor costs of individualized investments that they will shy away from permitting these types of investments, but they could be much more comfortable with less regulated MRIs if a low-labor mechanism could be imagined and implemented.

There may be a simple, low-labor option for impact-first investment by SPORGs that would further Ms. Cornell's important goal to "increase philanthropy." Taking into account both practical and legal constraints on a SPORG administering thousands of DAFs, a SPORG could form and operate various funds aimed at achieving specific charitable purposes, such as a "climate fund" or an "education fund" or an "improve food distribution fund" or a "cure a disease fund," that a donor-advisor could advise the SPORG to select for investment of the donor-advisor's DAF. These could be impact-first funds, but investment in the funds, if properly structured, would qualify as MRIs and should not create a risk for the SPORG. This would accomplish Ms. Cornell's goals, increase philanthropy through impact-first investments by public charities, and provide comfort to the queasy SPORGs.