

## **Memorandum**

To: UMIFA Drafting Committee

From: Susan Gary

Re: New UMIFA Draft

Date: June 3, 2005

I am sending the revised draft, dated June 3, 2005, with changes in the Comments as well as in the Act itself. We are close to the deadline for the Annual Meeting draft, but if we can resolve any issues by email in the next week, I can make changes and still get the Annual Meeting draft ready by next Friday. The deadline is June 10 for UMIFA. We will be able to discuss the issues raised below at the Saturday, July 23 meeting, but I would like to get the draft as close as possible to final before then.

I will explain the issues we still need to discuss. Some of these issues were raised in the May 27 memo that went only to the Drafting Committee. I am copying those issues into this memo so that they will all be in one place. In making the revisions I have tried to work through all the input we have received from various sources. I may have missed something or decided not to address it, so you may want to add something to the list of issues still to be discussed.

### **Section 2. Definitions.**

**Gift Instrument.** An observer raised a question about what gift instrument governs multiple gifts to an endowment fund. The question concerns who can release a restriction and whether the consent of all donors is necessary. The scenario raised is an endowment fund created by a large initial gift and then supplemented with many small gifts. If the donor who made the large initial gift wants to release the restriction that the fund be held as an endowment (or some other restriction), can that individual donor do so or will the consent of all donors be necessary? Part of the question is what gift instrument binds the subsequent donors – a solicitation, the original gift document entered into between the first donor and the charity, or something else. My own interpretation is that the consent of all subsequent donors would be necessary to release a restriction on the fund, but I recognize the frustration for charities stuck with a fund for which a release of restriction is a practical impossibility. I raise the question to ask whether we should attempt to address the problem in UMIFA or the comments.

Going forward, a charity soliciting donations to a fund could indicate in the solicitation that the terms of the fund will be subject to change by an agreement between the original donor and the charity. I think that would be sufficient to bind subsequent donors to any changes. However, a charity that simply solicits for an endowment fund is telling subsequent donors that the fund will be held as endowment.

**Institution.** The part of the definition that refers to split-interest trusts continues to be confusing. I got an email from one of observers saying that she and a number of others who reviewed it found it confusing. The confusion may stem in part from the Style changes, but we have never been able to find language that everyone thinks is good. I wonder whether the better approach is to delete “organized” in (4)(1) and then delete (4)(3). The definition of institution would then read:

(4) “Institution” means:

(A) a person, other than an individual, operated exclusively for charitable purposes; and

(B) a government, or governmental subdivision, agency, or instrumentality to the extent that it holds funds exclusively for a charitable purpose.

I do not see a problem with deleting “organized.” The language comes from the tax rules for exempt organizations. For our purposes, we are concerned whether the charity is currently operating exclusively for charitable purposes and not whether it was organized for mixed purposes. I have made this change in the Act and in the Comments, and I left an explanation about split-interest trusts in the Comments.

**Institutional fund and endowment fund.** Jack raised the question of whether we should delete the sentence: “The term includes two or more funds collectively managed.” from both definitions. I concluded that we could delete the sentence from the definition of endowment fund but that we needed it for the definition of institutional fund. Please refer to Jack’s memo (titled Preliminary Draft of Revisions to Parts of Proposed New UMIFA) and my May 21 memo for further discussion of this question. I have not changed the draft, but I have tried to add clarification in the Comments. We need to decide whether to delete the language in the Act.

#### **Section 4. Expenditure of Endowment Fund; Rules of Construction.**

I have made two changes to this section that have not yet been approved and need to be discussed. In subsection (a), I added the language from the Florida statute: “consistent with the goal of conserving the purchasing power of the endowment fund.” This language appeared in our December 2002 draft and was deleted in the April 2003 draft. I have been in contact with a Florida lawyer who was involved in the enactment of their new UMIFA. He says he has heard no concern there about the demise of historic dollar value or about the language quoted above. It should be noted that the Florida statute only applies to educational institutions and those institutions typically use a spending rate for endowment spending.

The second change is in subsection (c). I think we should change the word “indefinite” to something that better reflects the idea that the fund should be around for a

long time. I have used “long-term” in the draft, but there may be a better word. Someone else suggested “enduring.”

### **Section 6. Release or Modification of Restrictions on Management, Investment, or Purpose.**

Jack Burton raised the question (in a May 10, 2005 email) of whether we should include a statement that a modification cannot change an endowment fund to a fund that is not an endowment fund. This provision comes from Section 7 of UMIFA (1972). I think with respect to cy pres and deviation, adding the language could result in different rules for trusts and nonprofit corporations, which we do not want. I wonder, though, if it might be useful in Section 6(e), the provision for modifying funds that are old and small.

### **Comments**

I have substantially revised the comments to Section 4, providing more of an explanation of the restrictions imposed on a charity’s decision-making authority when the charity holds a fund as an endowment. We continue to receive comments that new UMIFA permits a charity to spend whatever it wants from an endowment, which is clearly not the intent of the Act. One of the things I realized after lots of emails on the accounting issue is that we could be clearer about that intent, both in the Act and in the Comments. In addition to the additions to the Comments, I have moved some sections around.

In connection with the presumption, I have added a brief paragraph about the fact that the presumption creates a burden of production and not a burden of persuasion. I am still working on how to formulate the Comment on this issue, but given the uncertainty that will result without an indication of which burden applies, I think we should include a Comment on this issue. I still need to work on the paragraph, but I did not want to delay sending the draft until I was in better shape on the Comment.

Thanks to everyone for their continued input on the project. As always, I can be reached by email at [sgary@law.uoregon.edu](mailto:sgary@law.uoregon.edu).