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BY U.S. Mail

August 19, 2003

Dwight Hamilton, Esq.
Acting Chair
NCCUSL UMIFA Drafting Committee
Suite 500
1600 Broadway
Denver, CO 80202

Dear Mr. Hamilton:

I am writing to comment on your committee's August 2003 draft revision of the Uniform Management of Institutional Funds Act ("UMIFA"). The New York State Attorney General's Charities Bureau is responsible for overseeing the administration of charitable assets in New York State, which has adopted UMIFA in significant part. As a state charity regulator, the Charities Bureau has a unique perspective on the practical issues of enforcing UMIFA, which I hope your committee will find useful. I note that no charity regulator appears to be participating in the UMIFA revision.

As you are well aware, Section 5 of the draft revision is a radical departure from UMIFA's, and New York State's, provisions on expenditure of endowment funds. Although the concept of historic dollar value is not perfect, particularly during a down market, it has the advantage of providing a reasonably objective rule for non-profit fiduciaries to follow. The Charities Bureau is not necessarily opposed to scrapping historic dollar value. However, the proposed approach – to apply a general prudence standard to expenditure of endowment funds – which purports to provide non-profit fiduciaries with flexibility, may have unintended adverse consequences. The "good" fiduciaries may be paralyzed by the lack of a clear rule. Alternatively, they may turn to expensive experts to opine on the prudence of their spending. Meanwhile, the "bad" fiduciaries may be emboldened to act imprudently by a standard that lacks any objectivity. Such a standard will also no doubt make it more difficult for government regulators to determine what is a violation and how to prove it. For these reasons, you may wish to retain historic dollar value or consider a safe harbor provision, perhaps one tied to a spending rate calculation.

Please also consider the following specific comments and questions on the draft revision:

Section 2. Definitions.

1. The Charities Bureau has received numerous inquiries from the public about whether board-designated endowment or other restricted funds can be made subject to the same rules as donor-created endowment funds. You may wish to consider clarifying this issue, perhaps through the definition of "endowment fund."
2. The draft revision's comment on the definition of "endowment fund," which provides that a solicitation may be integrated with other writings and considered part of the gift instrument, may create significant parole evidence and dead person's issues, especially if the intent of the parties is to have one document, if and when negotiations are finally completed.
3. If a governing instrument provides that a fund will revert to the donor if, and only if, the institution fails to comply with the terms of the instrument, would the fund be considered an "institutional fund"?

Section 6. Investment Authority.

4. Paragraph (4) of section 6 should be revised to clarify that institutional funds may only be pooled or combined for investment purposes (an institution "may include all or any part of an institutional fund in any pooled or common investment fund maintained by the institution . . .").

Section 7. Prudent Investing and Managing of Institutional Funds.

5. The Charities Bureau has experienced several instances of non-profit fiduciaries attempting to justify imprudent investments or a failure to diversify by claiming, after the fact, a donor's affinity for a particular investment without any evidence in the gift instrument of any such affinity. In this light, subparagraph (a)(13) of section 7, which authorizes fiduciaries to consider an asset's relationship to the purposes of the gift instrument or to the institution, appears far too broad. The Charities Bureau has also had unfortunate experience with even, but not only, institutional fiduciaries too tied in with a particular issuer. Section 7 should require fiduciaries to consider the investment intent of the donor only as evidenced by the gift instrument. Moreover, because programmatic investments are already excluded, there is no need in

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section 7 to require fiduciaries to consider an asset's relationship to the institution.

Section 9. Release or Modification of Restrictions on Use or Investment.

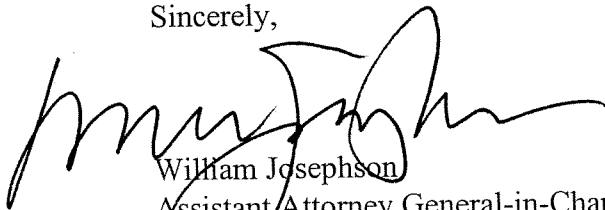
6. Paragraph (b) of section 9 would authorize the release or modification of a restriction on a charitable gift below a set dollar amount without the requirement of court approval or notice to the Attorney General or the donor. Although the Charities Bureau supports the idea that a non-profit should be allowed to release or modify a restriction on a small gift without the expense of a judicial proceeding, notice to the donor, if living, competent and available, and the Attorney General should still be required in order to safeguard the intent of the donor and the interests of the public as the ultimate beneficiary of the gift. In addition, paragraph (b) should be revised to clarify that the exemption of small gifts from the requirement of court and/or donor approval is determined based on the aggregate value of the fund. Otherwise, the restriction on a multi-million dollar building fund made up of thousands of solicited \$1,000 contributions, for example, could be released or modified without a court proceeding.

7. Paragraph (c) of section 9 should not allow an institution to apply to a court for the release or modification of a restriction if the donor is living, competent and available. At the very least, notice to such a donor should be required. Removing an available donor from the process of releasing or modifying a gift restriction may have a chilling effect on charitable giving.

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If you have any questions or would like to discuss these comments, please contact Assistant Attorney General James Siegal or me at the number above or by email at James.Siegal@oag.state.ny.us or William.Josephson@oag.state.ny.us.

Sincerely,



William Josephson
Assistant Attorney General-in-Charge
Charities Bureau

cc: Prof. Susan N. Gary, Reporter