Memorandum

To: UMIFA Observers

From: Susan Gary

Re: Draft Dated March 2, 2005

Date: March 7, 2005

I am sending a new draft of UMIFA, dated March 2, 2005. This draft will be posted on the NCCUSL website and the RPPT website, and the draft can be circulated to anyone who is interested. The draft is in strike-and-score format, showing changes from the January 5, 2005 draft.

At the January meeting someone suggested that each committee member, observer, and other interested person, request comments from any universities in his or her state and from the attorney general's office in the state. I urge each of you to do so and then to let me know what you learn so that I can compile the information for distribution to the committee.

Here is a short explanation of the changes from the prior draft. The Comments have been revised and provide more detailed explanations of the changes.

Section 2 - Definitions and Taking Trusts out of UMIFA

In terms of coverage, the Drafting Committee agreed to return to the approach taken under old UMIFA. If a charity is a trustee of a trust, the trust will be subject to UMIFA. If a non-charity (a bank or an individual) is the trustee, then the trust is excluded from UMIFA. Although there was discussion at the meeting about taking the word "trust" out of the definitions of institution and person, I think that we do not want to do that because we will then exclude a trust of which a charity is the trustee. I have left trusts in those definitions, and I have excluded trusts managed by non-charities from the definition of institutional fund in two ways. An institutional fund is defined as a fund held by an institution (a person organized and operated exclusively for charitable purposes). A bank is not an institution, so this sentence excludes bank trustees. In addition, the definition specifically excludes a fund held by a trustee that is not an institution. I believe this additional language is necessary to clarify that bank trustees are not included. UMIFA (1972) contains both exclusions – first saying that an institutional fund is one held by an institution and then saying specifically that if a non-charity is the trustee, UMIFA does not apply. I think we should do both in new UMIFA.

Section 4 – Expenditure of Endowment Fund; Rules of Construction

I have moved the presumption of imprudence to the comments, and I have redrafted the comments to explain the advantages and disadvantages of including the presumption in the statute. The intention of the Drafting Committee is to have the statutory language available for states that want to include the presumption when enacting UMIFA (200-). I have made some changes to the language of the presumption from the prior draft, but because the presumption itself has been moved, the changes do not show in the strike-and-score.

Section 5 - Delegation of Management and Investment Functions

This section is now in brackets. The power to delegate is essential to prudent investment, so a state should enact Section 5 as part of UMIFA (200-) unless other state laws already provide this authority. The Drafting Committee put the section in brackets because the Committee assumes that the power to delegate is now provided by other statutes (which was not the case in 1972).

Section 6 – Release or Modification of Restrictions on Use or Administration

This section has been substantially rewritten to bring the language closer in line with Sections 412 and 413 of the Uniform Trust Code and to clarify the difference between deviation and cy pres.

The UTC subsections on deviation, 412(a) and (b), are now UMIFA 6(c). The UTC subsections both say that modification must be made "in accordance with the settlor's probable intention." I have kept that approach in the UMIFA version of deviation (substituting donor for settlor). The cy pres provision, UTC 413, says that the modification must be made "in a manner consistent with the settlor's charitable purposes." I have kept this approach in UMIFA 6(d) and (e), the two subsections that apply cy pres. Deviation focuses on changes to restrictions on management or investment (the means to the end) and cy pres focuses on changes to restrictions on purposes (the end).