

Memorandum

To: UMIFA Drafting Committee

From: Susan Gary

Re: UMIFA – Annual Meeting Draft

Date: June 15, 2005

Based on comments I received last week, I made a few changes to the June 3 draft. The Annual Meeting draft will be dated June 14. We will still need to talk about a number of issues at our July 23 meeting. If we decide to make any changes at that July 23 meeting, I have worked out arrangements with NCCUSL to prepare a handout titled “Drafting Committee Changes” to be distributed to Commissioners before we go to the floor on Monday, July 25. They can also prepare a replacement draft, but I think (hope) that will not be necessary.

This memo outlines the issues to be discussed at our July 23 meeting. In addition, I am attaching a document that provides feedback from James LoPrete, an attorney from Michigan who has followed our progress and has provided comments in the past. He makes a number of recommendations you should review. I will note in brackets the steps I have already taken to address some of his concerns, and I have included my email response to his first message.

Issues for the July 23 Meeting

Section 1. Short Title.

Barry raised the question of what we call the Act. My understanding from John is that the Conference frowns on Revised, and we cannot add that on our own. They also frown on “2005” because by the time the Act gets to a legislature it may be 2006 or 2007. If this is a continuing concern, perhaps Barry could raise it with John McCabe.

I agree with Barry and Jack Burton, who first raised this issue, that it is confusing to have two UMIFAs, but I will refer to them by year in the Comments, so maybe that will help.

Section 2. Definitions.

Institution. Based on comments from Carol Kroch, I will leave the words “organized and” in the definition of institution. The only reason for taking the words out was to deal with the problem created by the language of subsection (c), and I am persuaded by Carol that we need to leave the words in. That leaves us with the problem of unclear language in Section 2(4)(C). That subsection now reads:

[Institution means:]

(C) a trust that has both charitable and noncharitable interests after all noncharitable interests have terminated.

This language is confusing, as we have noted throughout this process. Style changed it to this format, and I think we were close to giving up on fixing it, but I got this comment from a banker who has been following our progress:

I note also that definition "Institution" includes "a trust that has both charitable and noncharitable interests after all noncharitable interest have terminated." I think this was meant to cover a situation where individual established a qualified charitable split interest trust for which a charity served as trustee and the individual is now dead? For example some arrangement with a church, etc? A number of us looked at this and concluded it needed to be refined. If you read this literally, it actually, in my mind, says that there are both charitable and noncharitable interests and the noncharitable interests have terminated...which I don't believe is what you are trying to accomplish.

I agree with this comment. Could we change "has" to "had" and add a comma, to read:

(C) "a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated."

I have not changed it on the draft, but I would like to try to fix this subsection.

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.

We received the following comment about the definition of endowment fund:

You have a sentence in the comments to Section 4 that I think would be good to have in the definition of an endowment fund (preferred by me) or the comments to the section that contains the definition. It reads, "The term "endowment fund" includes funds that may last in perpetuity but also funds that are created to last for a fixed term of years or until the institution achieves a specified objective."

I will add this to the comments, but I thought I should check to see whether we could add this to the definition itself. Because some lawyers and advisors will not read the comments, clarifications in the statute can be helpful.

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

Subsection (c) – Rule of Construction. I changed “fund of indefinite duration” to “fund of long-term duration” in this subsection. Sandy Wilcox prefers “indefinite,” finding it more definite than long-term. My concern with indefinite is that it is being read (I have received comments to this effect) as meaning whenever the charity feels like rather than indefinitely long or to mean simply that the duration has not yet been determined. I think those of us drafting this provision were thinking of this as meaning indefinitely into the future, with a long-term connotation. Unfortunately, I think it can be read to mean undecided or undetermined, which could mean next year.

Subsection (d) – Rebuttable Presumption of Imprudence. At our series of May telephone meetings we voted to put the presumption into the Act and then voted to remove the brackets. Not all Commissioners were present at those meetings, so we may need to revisit the question of brackets. I think the general sense is that politically the presumption needs to be in the Act rather than in the comments, but the question of whether to use brackets seemed less settled.

I have modified the language in subsection (d) to address concerns that a charity could choose any three years as the measuring period. The comments indicated a preference that a charity be required to use the three-year period immediately preceding the year in question. I suspect that the Massachusetts statute intends that result, but the language is not clear.

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 wondered in a prior memo whether it might be useful to add the sentence to Section 6(e), the provision for modifying funds that are old and small. Shelly Kurtz notes his uncertainty about the right approach in 6(e). Under some circumstances the flexibility to change the fund into a non-endowment fund may be appropriate.