

**NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON NON-PROFIT ORGANIZATIONS**

DAVID G. SAMUELS
chair

300 EAST 42ND STREET
NEW YORK, NY 10017
Phone: (212) 692-5981
Fax: (212) 883-8883
dsamuels@dsllp.com

August 10, 2007

Drafting Committee on UPMIFA
National Conference of Commissioners
on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
Attention: Barry C. Hawkins, Chair

Re: Uniform Prudent Management of Institutional Funds Act

Dear Mr. Hawkins:

The Committee on Non-Profit Organizations (the "NPO Committee") of the New York City Bar Association (the "Association") submits this letter to communicate the NPO Committee's limited endorsement of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), subject to the inclusion in UPMIFA of the changes suggested herein.

The NPO Committee: The members of the Association's NPO Committee are lawyers in the New York City area with an interest in legal issues affecting non-profit organizations. NPO Committee members include attorneys in private practice, attorneys who serve as "in-house" counsel to non-profit organizations, current and former regulators, and prominent academics. A list of committee members is attached to this letter. The NPO Committee believes the collective professional experience of its members provides a perspective that is pertinent to consideration of UPMIFA in New York State. However, the views expressed in this letter reflect the views only of the NPO Committee, not necessarily the views of any law firms, governmental agencies or non-profit organizations with which members of the NPO Committee are affiliated or whom they represent.

Background: As you know, UPMIFA was approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in July 2006. Where enacted, it would replace the Uniform Management of Institutional Funds Act ("UMIFA") in states where UMIFA is current law. UMIFA was approved by NCCUSL in 1972 and has been enacted in 48 jurisdictions. New York enacted UMIFA in 1978, and it is codified

in sections 102, 512, 513, 514, 522 and 717 of the New York Not-for-Profit Corporation Law (the “N-PCL”).

UMIFA was novel in that, as enacted in New York, it, among other things: (i) permits charitable corporations to use modern investment techniques such as total-return investing when managing/investing their funds; (ii) provides endowment spending rules that do not depend on trust accounting principles of income and principal; and (iii) permits the release of restrictions on the use/management of funds under certain circumstances.

Many, including the NPO Committee, see certain portions of UMIFA as out-of-date. Per the prefatory note to UPMIFA, UPMIFA is an attempt to: (i) provide modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending; and (ii) incorporate certain recent revisions with respect to charitable trusts, as set forth in the Uniform Prudent Investor Act (“UPIA”), promulgated in 1994 and already enacted in 46 jurisdictions, into the law governing charitable corporations, such that standards for managing and investing institutional funds are the same regardless of whether a charitable organization is organized as a trust, corporation or some other entity. [*Prefatory Note, p. 1*]

As of the date hereof, nine states, the District of Columbia and the US Virgin Islands have introduced UPMIFA, either in whole or in part, for consideration, and ten additional states (Connecticut, Idaho, Indiana, Montana, Nebraska, Nevada, Oklahoma, South Dakota, Tennessee, and Utah) have already enacted UPMIFA, again, either in whole or in part.

On December 14, 2006, representatives of the NPO Committee attended a meeting of New York academics, government officials and practitioners to discuss UPMIFA’s merits. The NPO Committee subsequently reviewed UPMIFA internally and has identified a number of provisions (discussed below) requiring revision before the NPO Committee would recommend enactment of UPMIFA in New York.

Reason to Change Law: The NPO Committee thinks that UMIFA (as codified in the N-PCL) warrants revision due to the fact that certain provisions are out-of-date.

NPO Committee’s Recommendations:

UPMIFA is comprised of twelve sections. The NPO Committee’s specific comments to certain sections of UPMIFA are set forth immediately below. Unless specifically discussed below, the NPO Committee recommends adoption of a section without comment.

1. Short Title (UPMIFA Section 1).

Section 1 states that the act may be cited as the Uniform Prudent Management of Institutional Funds Act.

If it is decided to move forward with enactment of UPMIFA in New York, the NPO Committee recommends that careful consideration be given to how to integrate UPMIFA into the law it affects. That is, the NPO Committee recommends careful consideration of whether UPMIFA should be fully integrated into either the N-PCL or the Estates, Powers, & Trusts Law

("EPTL") with a cross-reference to the other statute, or enacted as a stand-alone act cross-referenced in both the N-PCL and the EPTL. The NPO Committee notes that, as drafted, UPMIFA (unlike UMIFA, which, as currently codified in the N-PCL, applies only to charitable corporations) would apply to all charitable "institutions," including all charitable corporations, as well as, generally, those charitable trusts of which a charitable "institution" or a governmental agency is the trustee. (Charitable trusts with exclusively individual, corporate and other fiduciaries that are not charitable "institutions" are excluded from both UPMIFA and UMIFA, as currently codified in the N-PCL).

2. Appropriation for Expenditure or Accumulation of Endowment Fund; Rules of Construction (UPMIFA Section 4).

General Provisions.

Under UMIFA, as enacted in New York, a charitable corporation can only spend amounts above "historic dollar value" that it determines to be prudent, where historic dollar value is defined as all contributions to an endowment fund valued at the time of contribution. UPMIFA eliminates the historic dollar value limitation on endowment fund spending. Under UPMIFA, subject to the intent of a donor expressed in a gift instrument, a charitable organization may spend any amount that is prudent, consistent with the purposes of the fund, relevant economic factors and the donor's intent that the fund continue in perpetuity (or for a period specified in the gift instrument). The proposed elimination of the historic dollar value limitation is motivated by the view that a donor's intent to create a fund of long duration that preserves its value is not always best served by a strict adherence to maintaining historic dollar value and, under certain circumstances, dipping below historic dollar value can, in the long run, better serve such donor intent.

Subsection (c) of Section 4 provides rules of construction to assist charitable organizations in interpreting donor intent. It states that terms in a gift instrument designating a gift as an endowment, or a direction/authorization in the gift instrument to use only "income," "interest," "dividends" or "rents, issues or profits," or "to preserve the principal intact," or similar words create an endowment fund of permanent duration (unless there is additional language limiting duration) but do not otherwise limit spending authority. Under UPMIFA, these rules of construction will be applied retroactively to funds already in existence.

While the NPO Committee supports elimination of the historic dollar value limitation on a prospective basis where donors are given advance notice of the opportunity to provide alternative specific restrictions, the NPO Committee recommends modification of the rules of construction as they apply to retroactive elimination of the historic dollar value limitation.

In the NPO Committee's view, the proposed rules of construction are so sweeping that they could serve to eliminate the historic dollar value limitation in certain situations where donors, relying on the statute at the time of their gift (see N-PCL sections 102(13), 102(16) and 513(c)), undoubtedly intended that the limitation apply. To protect the intentions of these donors, the NPO Committee recommends revision of UPMIFA's proposed rules of construction such that retroactive invasion of historic dollar value is prohibited with respect to all pre-UPMIFA charitable gifts which are under UPMIFA (and the N-PCL provisions cited) found to

be “endowment funds.” Otherwise, and in addition to violating the intentions of pre-UPMIFA donors, retroactive elimination of the historic dollar value limitation, presumably relied upon by donors, could be seen as a threat to the general credibility of charitable organizations and their fundraisers, and could, consequently, have a chilling effect on the current level of charitable giving.

In addition to the modifications noted immediately above, consideration might be given to deferring the effective date of this provision for some months after enactment in order to allow time for word of the law change (and need for a different drafting approach for endowment-minded donors who wish to have a historic dollar value limitation or other comparable fixed spending limitation) to become sufficiently widely known in the legal and charitable communities.

Optional Presumption of Imprudence.

UPMIFA includes as an optional provision (to be included at the enacting jurisdiction’s option) a presumption of imprudence if a charitable organization spends more than 7% of an endowment fund in any one year. The presumption is meant to protect against spending an endowment too quickly.

While the NPO Committee does not have a recommendation as to whether or not New York State’s version of UPMIFA should include the optional provision, if such a provision is included, the NPO Committee strongly recommends that the provision be made more flexible in some manner (e.g., that the percentage be adjusted for fluctuations in current market interest rates and the rate of inflation/deflation and that the presumption discriminate based on type of spending, such as permitting exceptions for multi-year capital campaigns).

Optional Provision regarding Small Funds Invading Historic Dollar Value.

The comments to Section 4 of UPMIFA include as an optional provision (to be included at the enacting jurisdiction’s option) a provision requiring notice to the Attorney General (the “AG”) for small charitable organizations invading historic dollar value. The provision is meant to curb imprudent spending by small, unsophisticated charitable organizations. In particular, the provision would:

- apply only to charitable organizations with endowment funds valued, in the aggregate, at less than [\$2 million] (or another amount established by the enacting jurisdiction); and
- require such organizations to notify the AG (but not obtain its consent) before spending below historic dollar value. The AG would then have the opportunity to review the organization and its spending decision, educate the organization on prudent decision-making for endowment funds, and intervene if the AG determines the spending would be imprudent.

The NPO Committee recommends consideration of adoption of this section, both as a regulatory matter and as a possible source of comfort to donors.

Accounting Issues.

Under UMIFA, a fund's historic dollar value is shown as permanently restricted from an accounting perspective. The comments to Section 4 of UPMIFA maintain that endowment funds, notwithstanding the repeal of the historic dollar value limitation, will still be considered legally restricted because there are some limitations on current spending (albeit flexible). The comments assert this to be true regardless of the treatment from an accounting perspective. [Comments to UPMIFA Section 4, p. 23] The NPO Committee understands that discussions are ongoing within the accounting profession regarding the effects of the elimination of the historic dollar value limitation on the accounting treatment of endowment funds. The NPO Committee thinks that consideration of this issue is extremely important, not only with respect to charitable organizations understanding how to present their financial statements accurately, but also in terms of current and prospective donors digesting those statements.

3. Release or Modification of Restrictions on Management, Investment, or Purpose (UPMIFA Section 6).

Generally, the provisions set forth in Section 6 are the same as, or clarify, UMIFA's provisions relating to release/modification of institutional fund restrictions with donor or court consent. In particular, UPMIFA clarifies that the doctrines of *cy pres* and deviation apply to funds held by charitable corporations as well as to funds held by charitable trusts.

However, Section 6 also contains a new provision, not included in UMIFA, that would permit a charitable organization to modify a restriction on its own (i.e. without court approval) for small funds [less than \$25,000] (or another amount as determined by the enacting jurisdiction) that have existed for a substantial period of time [20 years] (or another time period as determined by the enacting jurisdiction), after giving notice [60 days] (or another notice period as determined by the enacting jurisdiction) to the AG. The AG may then take action if the proposed modification appears inappropriate. The provision is meant to permit a charitable organization to lift a restriction that may no longer make sense where the cost of a judicial *cy pres* proceeding would be so great as to be prohibitive.

The NPO Committee generally recommends inclusion of such a provision, but proposes that the provision be revised to permit a charitable organization to modify a restriction without court approval only so long as it notifies the AG and obtains AG consent to such modification (either as originally proposed in the notice or with the AG's suggested changes). If, however, the AG does not provide its consent, if the charitable organization desires to pursue the modification, it must then proceed with a typical court proceeding.

*Conclusion:

The NPO Committee recommends enactment of UPMIFA in New York, subject to the modifications set forth above. The NPO Committee stands ready to work with NCCUSL, members of the accounting profession or any other interested parties to advance adoption of UPMIFA.

Respectfully submitted,



David G. Samuels
Chair

Committee Members

David G. Samuels - Chair
Kevin T. Matz
Allison N. Abbott
Kathleen M. Boozang
Allen R. Bromberger
Vaughn J. Buffalo
Cynthia Carlson
Julia M. Chu
Patricia Diaz
Beth R. Essig
Douglas Hayward Evans
Prof. James J. Fishman
Linda R. Franciscovich
Stephanie C. Gevirtz-Guberman
Morton J. Goldfein
Rachel J. Harris
Miree Kim
Michael S. Kutzin

Michael A. Lehmann
Audra M. Lewton
JoAnn Luehring
Edward A. Morgan
Barbara Nagel
Sandra B. Otero
Robert Pigott
Marion Ringel
Betty B. Robbins
Michael A. Salberg
Nuno M. Santos
Pietrina Scaraglino
Estee Shor
James Sligar
Sunita Subramanian
Philip T. Temple
Jean L. Tom
James A. Woehlke
Ivan Zimmerman