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TO: The 2009-2010 NYSSCPA Board of Directors
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RE: NYSSCPA Board Directors' Responsibilities

Introduction

This memorandum summarizes the responsibilities of members of the NYSSCPA Board of Directors. We have provided copies of BoardSource's *How to Help Your Board Govern More and Manage Less* by Richard P. Chait and *The Board Team Handbook* published by Cain Consulting Group for new members of the Board. These excellent resources address the balance between the responsibilities of a nonprofit organization's volunteer leadership and its staff. In addition, we have a number of excellent governance resources available for loan to any Board member interested in further study of the field of nonprofit governance.

Individuals who serve on nonprofit organizations' boards, although not compelled to serve and not compensated for their service, nevertheless have certain legal obligations to their organizations. In general, a member of a non-profit's governing body has a fiduciary duty to the organization. This fiduciary duty has three aspects:

1. duty of care,
2. duty of loyalty, and
3. duty of obedience.

Duty of Care

To meet the duty of care, a Board member should

- Attend Board meetings, at least by phone
- Participate in Board deliberations and votes
- Show independent judgment when voting
- Be informed about organizational activities
- Rely on trustworthy sources of information (staff included)

- Delegate only to responsible persons
- Follow up regularly
- Fulfill these obligations honestly, in good faith, and with the care of an ordinarily prudent person in similar circumstances.

Attendance. In addition to a legal obligation to regularly attend meetings, the NYSSCPA bylaws also impose an attendance requirement. A Board member who misses three consecutive Board meetings is automatically removed from the Board, unless a majority of the Board acts to find that the absences were for cause. See NYSSCPA Bylaws, Article VI, paragraph 3.

Being Informed; Reliance on Trustworthy Sources. In the ordinary course of business, a Board member may rely on information received from sources that the director reasonably regards as trustworthy. Generally, Board members may rely on information from the staff, but if a Board member thinks such information is in any way inadequate, he or she should request additional information.

Balance of Board and Staff Responsibilities. The Board does not manage the NYSSCPA's affairs on a day-to-day basis and must, therefore, delegate managerial functions to the Executive Director and the staff. This does not relieve the Board from its responsibility to monitor NYSSCPA affairs; but Board members have no personal responsibility for errors and omissions of management, employees or agents of the NYSSCPA, so long as those persons were prudently selected and the Board members' reliance on them is reasonable. Put in other words, the Board of Directors is expected to properly delegate its authority to the officers and staff; but it may not abdicate its responsibilities to monitor and evaluate the performance of its officers and staff.

Duty of Loyalty

The duty of loyalty requires that Board members give undivided allegiance to the organization. In other words, they must exercise their powers in the interest of the NYSSCPA and not in their own interest or the interest of another entity or person. This duty primarily relates to

- Conflicts of Interest,
- Corporate Opportunity, and
- Confidentiality

The most common breach of duty of loyalty occurs when nonprofit board members use an organization's property, including intangible property such as the organization's good name or confidential information, for purposes not related to the organization.

Conflicts of Interest. A major responsibility of nonprofit organization directors is the obligation to avoid conflicts of interest. On October 2, 2003, the NYSSCPA Board of Directors adopted the NYSSCPA/FAE Conflict of Interest Policy, which is available on the web at http://www.nysscpa.org/governance/conflict_policy.htm. Under that policy, the Board of Directors is a “Group II” assembly and each director is expected annually to complete the “Group II Disclosure Statement” and to notify the Society President if a conflict arises between disclosure statement filings.

Members of a nonprofit board of directors must provide undivided allegiance to the nonprofit and its mission. The existence of occasional conflicts of interest is unavoidable; but when they arise, they need to be properly handled.

- Directors should be sensitive to all the various interests they have in any decision to be made by the Board.
- When a director has an interest in a transaction, he or she should disclose it in advance of any Board action.
- If the President deems the matter to be of sufficient concern, the President may ask the director to either completely recuse him- or herself, to abstain from discussion of the matter, or to refrain from participating in any vote related to the matter.
- If the director disagrees with the President’s decision as to the proper handling of the conflict, the matter may be appealed to the entire Board, the decision of which is final.

Occasionally, a conflict of interest will be of such a nature that the director cannot disclose details to the Society President. In those instances, the director should simply disclose that a conflict exists and then leave the meeting. If even this lower level of disclosure is impossible under the circumstances, the director may need to resign.

Corporate Opportunities. Your fiduciary duty also subjects you to the “corporate opportunities” doctrine. This precludes a director who learns of a business opportunity through the director’s service to the nonprofit organization from pursuing the opportunity outside the organization.

Confidential Information. Another important responsibility of nonprofit organization directors relates to confidential information. A director must maintain in confidence whatever information the nonprofit desires to keep confidential and that it treats as confidential. A Board member should not disclose information about the NYSSCPA’s legitimate activities unless the information is already known to the public or is part of the public record. Similarly, from time-to-time Board members receive information that is protectable under the attorney-client privilege. The protections available to preserve these confidential communications are waived if a Board member discloses them outside a proper venue.

Duty of Obedience

Boards have a duty to ensure that their organization remains obedient to its stated purposes and does not act without authority granted in its governing documents or law. The Society's stated purpose is:

1. to cultivate, promote and disseminate knowledge and information concerning accountancy and subjects related thereto;
2. to establish and maintain high standards of integrity, honor and character among certified public accountants;
3. to furnish information regarding accountancy and the practice and methods thereof to its members, and to other persons interested therein, and to the general public; to protect the interests of its members and of the general public with respect to the practice of accountancy;
4. to promote reforms in the law;
5. to provide lectures and to cause the publication of articles, relating to accountancy and the practice and methods thereof;
6. to correspond and hold relations with other organizations of accountants, both within and without the United States of America;
7. to establish and maintain a library, and reading rooms, meeting rooms and social rooms for the use of its members;
8. to promote social intercourse among its own members and between its own members and the members of other organizations of accountants and other persons interested in accountancy or related subjects; and
9. to do any and all things which shall be lawful and appropriate in furtherance of any of the purposes hereinbefore expressed.

Other salient points in the Society's Certificate of Incorporation as amended include that the Society's operations are to be principally conducted in New York State and the Society's offices are to be located in the Borough of Manhattan.

Illegal Activities. Board members cannot ignore potentially illegal activities. If a Board member believes some activity of the NYSSCPA may not be legal, he or she should bring the matter to the attention of the President and the Executive Director with a demand for an investigation. If ignored, the matter should be brought to the full Board. If not satisfied with the handling of the matter, the Board member should consult his or her attorney to determine if disclosure outside the organization is required or if resignation is in order.

Rights of Board Members

To fulfill your responsibilities as Board members, you have certain rights, including

- Reasonable access to management,

- Access to the NYSSCPA's books and records at reasonable intervals and during business hours,
- Notice of meetings, and
- Minutes of meetings.

Liability of Directors

Board members of a nonprofit organization, even though they serve voluntarily and without pay, may be exposed to personal liability for acts they perform on behalf of the nonprofit. In general, as long as a director exercises ordinary diligence and care, no personal liability will arise, even when actions and decisions are made in poor judgment, or cause damage or injury. Reasonableness and good faith are key aspects of ordinary diligence and care. Ordinarily, board members are not liable for actions taken by predecessors, but can be found liable for the consequences of those actions if continued into their terms and they do not disassociate themselves from the actions.

The Business Judgment Rule. Even where a corporate action has proven to be unwise or unsuccessful, a director will not be liable if he or she acted in good faith, in a manner reasonably believed to be in the corporation's best interest, and with independent and informed judgment.

In general, directors may be held liable if they

- Perform or approve organization activities that are beyond the corporate power and authority of the organization (*ultra vires*)
- Intentionally cause injury or damage to others
- Are fraudulent, act in bad faith or are grossly negligent
- Commit or facilitate acts while representing the organization that violate anti-trust or other laws

NY N-PCL § 719. In addition, the New York Not-For-Profit Corporation Law (Section 719) provides for director liability in certain situations, including

- Distributions of cash or property to members, directors or officers (other than reasonable compensation for services rendered and distributions in liquidation); and
- Making loans to officers, directors or firms, in which any officer or director has a substantial financial interest.

Board members are presumed to concur in these transactions unless their dissent is noted in the organization's minutes.

Directors' and Officers' Liability Insurance. One can never be immune from lawsuit; and nonprofit directors are exposed to suit from members and employees of their organization and government officials charged with regulation of nonprofit organizations. But directors can insulate themselves from liability by exercising ordinary diligence and

care, and by purchasing directors' and officers' (D&O) insurance coverage. The Society has purchased \$10 million of D&O coverage: a \$5 million primary layer with Chubb and a \$5 million excess layer with Illinois National Insurance Company (AIG). This D&O coverage includes the Society's employment practices liability insurance (EPLI) coverage (unlike for-profit organizations where EPLI is generally carved out of the D&O coverage). Descriptions of the coverage was sent to the full Board in June.

Resources

Jerald A. Jacobs, "Fiduciary Duty—Conflicts, Confidentiality, Opportunities" and "Personal Liability of Officers and Directors," Chapters 10 and 11, *Association Law Handbook: A Practical Guide for Associations, Societies, and Charities (4th Ed.)*, ASAE (2007).

The Board Team Handbook: The Board Member's Guide to Visionary Leadership, Cain Consulting Group Inc. (2007).

Jacqueline C. Leifer and Michael B. Glomb, *The Legal Obligations of Nonprofit Boards: A Guidebook for Board Members*, BoardSource (1997).

Corporate Director's Guidebook (3rd Ed.), ABA Section of Business Law (2001).

Gregory V. Varallo and Daniel A Dreisbach, *Fundamentals of Corporate Governance*, ABA Section of Business Law (1996).

Guidebook for Directors of Nonprofit Corporations (2nd Ed.), ABA Section of Business Law (2002).

George Webster and Hugh K. Webster, "Responsibilities and Liabilities of Association Directors and Officers," Chapter 2A, *The Law of Associations*, Matthew Bender (1999).

Victor Futter, Editor-in-Chief, *Nonprofit Governance and Management*, ABA Section of Business Law (2002).

BoardSource, www.boardsource.org.

American Society of Association Executives, www.asaenet.org.