new york state society of
NYSSCPA
certified public accountants
530 fifth avenue, new york, ny 10036-5101
www.nysscpa.org

January 7, 2003

Mr. Daniel J. Dustin, CPA
State Board for Public Accountancy
89 Washington Avenue
Albany, NY 12234

Dear Dan:

The New York State Society of Certified Public Accountants (NYSSCPA) shares your desire to clarify the rules in New York State regarding the acceptance of commissions by CPAs and to discipline accountants and firms that violate federal laws, rules, and regulations. We have the following suggestions regarding the draft that you sent in December, 2002, and have included language to replace the entire draft text you provided.

Commissions

Commissions and contingent fees should be treated separately in distinct enumerated paragraphs rather than together in the current paragraph (a)(6) of Section 29.10, which now covers only contingent fee arrangements. Treating them together creates unnecessary confusion and complexity about when they are permitted. Moreover, the draft proposal endeavors to introduce new terms and their definitions, such as related parties, affiliates, investment company complex, professional accountancy services, among others, which would cause numerous interpretational problems and other difficulties.

Our preference has been to deal with commissions through legislation rather than by rule, and we have language in our draft bill (available in its entirety at www.nysscpa.org/legislative/draftbills.htm) that reflects our position on how reasonably to authorize commissions. The NYSSCPA draft language accomplishes the essence of what is appropriate: To allow commissions for services to clients where independence is not required; and to disallow commissions for services to clients where independence is required. Our suggested language on commissions reads as follows:

> Notwithstanding any provisions of law to the contrary, a certified public accountant or public accountant licensed or otherwise authorized to practice under this article or such certified public accountant's or public accountant's firm may accept or be paid a commission or referral fee from or for any client for whom the certified public accountant, public accountant, or firm is not engaged to perform the attest services or a compilation of a financial statement in which the compilation report does not disclose a lack of independence.
>
> Any certified public accountant, public accountant or firm that is paid or expects to be paid a commission, or accepts a referral fee, shall provide written disclosure to the client of such payment or acceptance.

You can also reference the draft bill at www.nysscpa.org/legislative/draftbills.htm for our preferred language related to contingent fees.

In addition, the draft proposal (and the current rule on contingent fee arrangements) includes under unprofessional conduct "…offering or rendering services under a contingency fee arrangement … an original or amended tax return or claim for a tax refund…" This and other references to tax practice in the rules and regulations go beyond the statutory definition of the practice of public accountancy and should be removed.

Sarbanes-Oxley Act Implementation in New York State

The draft proposal paraphrases certain provisions of the Sarbanes-Oxley Act of 2002. Such an approach inevitably leads to inconsistencies between the exact language of the Act, subsequent implementation by the SEC and PCAOB, and implementation within New York State. Moreover, the intent should be to discipline those in New York that violate the Sarbanes-Oxley Act and the federal rules and regulations that devolve from it rather than adopting state level rules that paraphrase the federal law.

Section 29.1(b)(1) of the Regents rules applicable to all professions already provides that "Unprofessional conduct in the practice of any profession licensed or certified pursuant to title VIII of the Education Law shall include: willful or grossly negligent failure to comply with substantial provisions of Federal, State or Local laws, rules or regulations governing the practice of the profession."

Therefore, SED has the authority to pursue violations of the Sarbanes-Oxley Act of 2002 that meet the "willful or grossly negligent" standard. Nonetheless, there are other violations of the Sarbanes-Oxley Act of 2002 that should be addressed in Part 29.10 for the practice of public accountancy. Such an outcome could be achieved by replacing

proposed Subdivision 29.10(a)(12) in the draft by the following, which would constitute a new subdivision, 29.10(d):

> (d) Unprofessional conduct shall also include failure to comply with substantial provisions of the Sarbanes-Oxley Act of 2002 (Public Law 107-204) and the federal rules and regulations thereunder, as evidenced by an imposition of a disciplinary sanction imposed upon a registered accounting firm or accountant by the Public Company Accounting Oversight Board or the Securities and Exchange Commission pursuant to Sections 105 or 107 of such Act.

The issues of commissions and the implementation of the Sarbanes-Oxley Act of 2002 in New York are extremely important for the future practices of CPAs. New York State needs to move forward in these two areas quickly and responsibly. We would be pleased to discuss our reactions and proposals with you.

Sincerely,

Jo Ann Golden
President