

Summary Note Regarding Indemnification Requirement

From: Doug Church, USMS Legal Counsel

The recently adopted LMSC Minimum Standards contains a provision under the heading “Bylaws & Administration” in the “Suggested” column that refers to “Indemnification.” Questions have been raised about this inclusion and this memo is intended to provide some brief background on the topic as well as some suggested language for review by an attorney in the LMSC before adoption. Also attached are relevant excerpts from the USMS Bylaws and the Ohio Revised Code.

What is indemnification? The essential concept of “indemnification” is that the organization accepts a financial responsibility to reimburse or pay directly the costs of defense or damages that result from a claim made against an officer, director, employee or agent of the organization for acts or failures to act while in the course of their duties on behalf of the organization.

Is there a duty for the LMSC to indemnify? Article 510.1 of the USMS Bylaws specifically provides that “Each person who is or was a director, officer or employee of USMS...**shall** be indemnified by USMS. Article 502 makes clear that each LMSC is a division of the corporation. Article 502.2 requires that each LMSC **shall** be governed by bylaws that are consistent with USMS objectives. Taken together, it is my opinion that each LMSC must include a provision in their bylaws reflecting the mandated indemnification provided for the USMS bylaws.

Why would an LMSC choose to accept this responsibility? Omitting for the moment the fact that an LMSC is covered by the provisions of 510.1 noted above, **Volunteer** leaders of not-for-profits are exposed to liability as a result of holding office in a variety of ways. Many organizations believe that it is simply not reasonable to expect a volunteer leader to accept the financial risk associated with this exposure and, therefore, they will accept the obligation to indemnify the officer for acts undertaken on behalf of the organization. Usually, this obligation once assumed is accompanied with the purchase of insurance to cover the risk. Many states have adopted laws that provide for the indemnification of officers, directors, employees and agents of not-for-profits that contain very specific requirements and limitations. USMS, and by virtue of the status of each LMSC as a division of USMS, has taken the responsible position of providing indemnity for its officers, which includes all LMSC officers, to protect them from the potential exposure that would otherwise result in personal cost and expense.

Do the LMSC Minimum Standards *require* an LMSC to provide indemnification for its officers? Even though the language implies discretion (“...suggested...”), as noted above, it is my opinion that the LMSC bylaws must be consistent with the USMS requirements and, therefore, an indemnification provision should be included.

Is there insurance to cover this obligation? Yes. USMS provides Director and Officer liability coverage which explicitly applies to officers of the LMSC. The LMSC does not

need to obtain separate coverage in order to have the benefit of the current coverage supplied to each LMSC and its officers as a division of USMS.

The carrier for the USMS “Director & Officer Liability” policy has the following language in their application for such coverage:

You must be a non-profit organization and your bylaws must include an Indemnification Provision for your Officers and Board members.

This language, taken together with the language of the USMS Bylaws, makes it reasonably clear that to protect LMSC officers and to insure that the D & O coverage is maintained, an indemnification clause should be included in the LMSC Bylaws.

The draft paragraph that follows is a modification of Article 510.1 of the USMS Bylaws which merely substitutes “LMSC” for “USMS” in the applicable locations.

Suggested LMSC Bylaw Provision: Indemnification

Indemnification

Each person who is or was a director, officer or employee of the LMSC (including the heirs, executors, administrators or estate of such person) shall be indemnified by the LMSC as a division of USMS to the full extent permitted by the Nonprofit Corporation Law of the State of Ohio against any liability, cost or expense incurred in the capacity as director, officer or employee, or arising out of the status as a director, officer or employee (including serving at the request of the LMSC as a director, trustee, officer, employee or agent of another not-for-profit organization).

Selected Excerpts of Applicable References

Article 502 of USMS Bylaws: Local Masters Swimming Committee (LMSC)
The Local Masters Swimming Committee is a division of the corporation with supervisory responsibilities within a specified geographical territory.

Article 502.2 of USMS Bylaws: Bylaws
Each LMSC shall be governed by bylaws that are consistent with USMS objectives and goals.

Article 510 of USMS Bylaws: Indemnification

510.1 Coverage

Each person who is or was a director, officer or employee of USMS (including the heirs, executors, administrators or estate of such person) shall be indemnified by USMS to the full extent permitted by the Non profit Corporation Law of the State of Ohio against any liability, cost or expense incurred in the capacity as director, officer or employee, or arising out of the status as a director, officer or employee (including serving at the request of USMS as a director, trustee, officer, employee or agent of another not-for-profit organization).

510.2 Insurance

USMS may maintain insurance, at its expense, to protect itself and any such person against any such liability, cost or expense. For the purpose of article 510, references to "USMS" shall include all constituents absorbed in a consolidation or merger as well as the resulting or surviving corporation.

Ohio Revised Code, Not for Profit Law: **1702.12 Authority of nonprofit corporation.**

(A) A corporation may sue and be sued.

(B) A corporation may adopt and alter a corporate seal and use it or a facsimile of it, but failure to affix the corporate seal shall not affect the validity of any instrument.

(C) Unless otherwise provided in the articles, a corporation may take property of any description, or any interest in property, by gift, devise, or bequest.

(D) Subject to limitations prescribed by law or in its articles, a corporation may make donations for the public welfare, for religious, charitable, scientific, literary, or educational purposes, or in furtherance of any of its purposes.

(E)(1) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed civil, criminal, administrative, or investigative action, suit, or proceeding, other than an action by or in the right of the corporation, by reason of the fact that the person is or was a director, officer, employee, or agent of or a volunteer of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, member, manager, or agent of or a volunteer of another domestic or foreign nonprofit corporation or business corporation, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit, or proceeding, if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, if the person had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, or conviction, or upon a plea of *nolo contendere* or its equivalent, shall not create, of itself, a presumption that the person did not act in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, a presumption that the person had reasonable cause to believe that the person's conduct was unlawful.

(2) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that the person is or was a director, officer, employee, or agent of or a volunteer of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, member, manager, or agent of or a volunteer of another domestic or foreign nonprofit corporation or business corporation, a limited liability company, or a partnership, joint venture, trust, or other enterprise against expenses, including attorney's fees, actually and reasonably

incurred by the person in connection with the defense or settlement of such action or suit, if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any of the following:

(a) Any claim, issue, or matter as to which the person is adjudged to be liable for negligence or misconduct in the performance of the person's duty to the corporation unless, and only to the extent that, the court of common pleas or the court in which the action or suit was brought determines, upon application, that, despite the adjudication of liability but in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court considers proper;

(b) Any action or suit in which liability is asserted against a director and that liability is asserted only pursuant to section 1702.55 of the Revised Code.

(3) To the extent that a director, officer, employee, member, manager, agent, or volunteer has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim, issue, or matter in such an action, suit, or proceeding, the person shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by the person in connection with that action, suit, or proceeding.

(4) Unless ordered by a court and subject to division (E)(3) of this section, any indemnification under division (E)(1) or (2) of this section shall be made by the corporation only as authorized in the specific case, upon a determination that indemnification of the director, officer, employee, member, manager, agent, or volunteer is proper in the circumstances because the person has met the applicable standard of conduct set forth in division (E)(1) or (2) of this section. Such determination shall be made in any of the following manners:

(a) By a majority vote of a quorum consisting of directors of the indemnifying corporation who were not and are not parties to or threatened with the action, suit, or proceeding referred to in division (E)(1) or (2) of this section;

(b) Whether or not a quorum as described in division (E)(4)(a) of this section is obtainable, and if a majority of a quorum of disinterested directors so directs, in a written opinion by independent legal counsel other than an attorney, or a firm having associated with it an attorney, who has been retained by or who has performed services for the corporation or any person to be indemnified within the past five years;

(c) By the members;

(d) By the court of common pleas or the court in which the action, suit, or proceeding referred to in division (E)(1) or (2) of this section was brought.

If an action or suit by or in the right of the corporation is involved, any determination made by the disinterested directors under division (E)(4)(a) of this section or by independent legal counsel under division (E)(4)(b) of this section shall be communicated promptly to the person who threatened or brought the action or suit under division (E)(2) of this section, and, within ten days after receipt of such notification, such person shall have the right to petition the court of common pleas or the court in which such action or suit was brought to review the reasonableness of such determination.

(5)(a)(i) Unless, at the time of a director's or volunteer's act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or regulations of the corporation state, by specific reference to this division, that its provisions do not apply to the corporation, or unless the only liability asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1702.55 of the Revised Code, or unless division (E)(5)(a)(ii) of this section applies, the expenses incurred by the director or volunteer in defending the action, suit, or proceeding, including attorney's fees, shall be paid by the corporation. Upon the request of the director or volunteer and in accordance with division (E)(5)(b) of this section, those expenses shall be paid as they are incurred, in advance of the final disposition of the action, suit, or proceeding.

(ii) Notwithstanding division (E)(5)(a)(i) of this section, the expenses incurred by a director or volunteer in defending an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, including attorney's fees, shall not be paid by the corporation upon the final disposition of the action, suit, or proceeding, or, if paid in advance of the final disposition of the action, suit, or proceeding, shall be repaid to the corporation by the director or volunteer, if it is proved, by clear and convincing evidence, in a court with jurisdiction that the act or omission of the director or volunteer was one undertaken with a deliberate intent to cause injury to the corporation or was one undertaken with a reckless disregard for the best interests of the corporation.

(b) Expenses, including attorney's fees, incurred by a director, officer, employee, member, manager, agent, or volunteer in defending any action, suit, or proceeding referred to in division (E)(1) or (2) of this section may be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, as authorized by the directors in the specific case, upon receipt of an undertaking by or on behalf of the director, officer, employee, member, manager, agent, or volunteer to repay the amount if it ultimately is determined that the person is not entitled to be indemnified by the corporation.

(6) The indemnification authorized by this section is not exclusive of, and shall be in addition to, any other rights granted to those seeking indemnification, pursuant to the articles, the regulations, any agreement, a vote of members or disinterested directors, or otherwise, both as to action in their official capacities and as to action in another capacity while holding their offices or positions, and shall continue as to a person who has ceased to be a director, officer, employee, member, manager, agent, or volunteer and shall inure to the benefit of the heirs, executors, and administrators of such a person.

(7) A corporation may purchase and maintain insurance, or furnish similar protection, including, but not limited to, trust funds, letters of credit, or self-insurance, for or on behalf of any person who is or was a director, officer, employee, agent, or volunteer of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, member, manager, agent, or volunteer of another domestic or foreign nonprofit corporation or business corporation, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against any liability asserted against the person and incurred by the person in any such capacity, or arising out of the person's status as such, whether or not the corporation would have the power to indemnify the person against that liability under this section. Insurance may be so purchased from or so maintained with a person in which the corporation has a financial interest.

(8) The authority of a corporation to indemnify persons pursuant to division (E)(1) or (2) of this section does not limit the payment of expenses as they are incurred, in advance of the final disposition of an action, suit, or proceeding, pursuant to division (E)(5) of this section or the payment of indemnification, insurance, or other protection that may be provided pursuant to division (E)(6) or (7) of this section. Divisions (E)(1) and (2) of this section do not create any obligation to repay or return payments made by a corporation pursuant to division (E)(5), (6), or (7) of this section.

(9) As used in division (E) of this section, "corporation" includes all constituent corporations in a consolidation or merger, and the new or surviving corporation, so that any person who is or was a director, officer, employee, agent, or volunteer of a constituent corporation or is or was serving at the request of a constituent corporation as a director, officer, employee, member, manager, agent, or volunteer of another domestic or foreign nonprofit corporation or business corporation, a limited liability company, or a partnership, joint venture, trust, or other enterprise, shall stand in the same position under this section with respect to the new or surviving corporation as the person would if the person had served the new or surviving corporation in the same capacity.

(F) In carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may do the following:

(1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as lessor, encumber, sell, exchange, transfer, and dispose of property of any description or any interest in property of any description;

(2) Make contracts;

(3) Form or acquire the control of other domestic or foreign nonprofit corporations or business corporations;

(4) Be a partner, member, associate, or participant in other enterprises or ventures, whether profit or nonprofit;

(5) Borrow money, and issue, sell, and pledge its notes, bonds, and other evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed of trust, of all or any of its property, and guarantee or secure obligations of any person;

(6) Become a member of another corporation;

(7) Conduct its affairs in this state and elsewhere;

(8) Resist a change or potential change in control of the corporation, if the directors, by a majority vote of a quorum, determine that the change or potential change is opposed to or not in the best interests of the corporation, upon consideration of any of the matters set forth in division (E) of section 1702.30 of the Revised Code;

(9) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental to those purposes.

(G) Irrespective of the purposes stated in its articles, but subject to limitations or prohibitions stated in its articles, a corporation, in addition to the authority conferred by division (F) of this section, may invest its funds not currently needed in carrying out its purposes in any shares or other securities of another nonprofit corporation or business corporation, or another business or undertaking.

(H)(1) Notwithstanding any other provision of this section to the contrary, no corporation that is a “private foundation,” as defined in section 509 of the Internal Revenue Code, shall do the following:

(a) Engage in any act of “self-dealing,” as defined in section 4941(d) of the Internal Revenue Code, that would give rise to any liability for any tax imposed by section 4941 of the Internal Revenue Code;

(b) Retain any “excess business holdings,” as defined in section 4943(c) of the Internal Revenue Code, that would give rise to any liability for any tax imposed by section 4943 of the Internal Revenue Code;

(c) Make any investment that would jeopardize the carrying out of any of its exempt purposes, within the meaning of section 4944 of the Internal Revenue Code, so as to give rise to any liability for any tax imposed by that section;

(d) Make any “taxable expenditures,” as defined in section 4945(d) of the Internal Revenue Code, that would give rise to any liability for any tax imposed by section 4945 of the Internal Revenue Code.

(2) Each corporation that is a “private foundation,” as defined in section 509 of the Internal Revenue Code, shall, for the purposes specified in its articles, distribute at such time and in such manner, for each taxable year, amounts at least sufficient to avoid liability for any tax imposed by section 4942 of the Internal Revenue Code.

(3) Divisions (H)(1) and (2) of this section apply to all corporations described in them, whether or not contrary to the provisions of the articles or regulations of such a corporation, except that divisions (H)(1) and (2) of this section do not apply to a corporation in existence on September 17, 1971, to the extent that such corporation provides to the contrary by amendment to its articles adopted after that date.

(4) Violation of a provision of division (H)(1) or (2) of this section by a corporation to which the provisions of those divisions are applicable is not cause for cancellation of its articles. No director or officer of a corporation to which the provisions of division (H)(1) or (2) of this section are applicable is personally liable for a violation of a prohibition or requirement of those provisions, unless the director or officer participated in such violation knowing that it was a violation, and no director or officer is personally liable if such violation was not willful and was due to reasonable cause, except that this division does not exonerate a director or officer from any responsibility or liability to which the director or officer is subject under any other rule of law, whether or not duplicated in division (H)(1) or (2) of this section.

(5) Except as provided in division (H)(4) of this section, nothing in division (H) of this section impairs the rights and powers of the courts or the attorney general of this state with respect to any corporation.

(6) As used in division (H) of this section, "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

(I)(1) No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except as follows:

- (a) By the state in an action by it against the corporation;
- (b) By or on behalf of the corporation against a director, an officer, or a member as such;
- (c) By a member as such or by or on behalf of the members against the corporation, a director, an officer, or a member as such.

(2) Division (I)(1) of this section shall apply to any action brought in this state upon any contract made in this state by a foreign corporation.

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