**Duties, Potential Liabilities and Protections for Nonprofit Board Members**

This memo provides a general outline of the duties, potential liabilities and protections for NAIFA-[Insert Chapter] Board members as trustees of a nonprofit corporation.

1. **Role of the Board**

* The NAIFA-[Insert Chapter] Board defines the policies and has full administrative authority in all NAIFA-[Insert Chapter] matters.
* The Board’s focus in managing NAIFA-[Insert Chapter]’s affairs should be on planning and oversight for the association’s long-term success, including (a) establishing major policies; (b) reviewing association finances and (c) ensuring NAIFA-[Insert Chapter] is operated in a manner consistent with its mission.
* The Board should not micro-manage the day-to-day affairs of the association. Implementation of Board policy is the role of staff.

1. **Fiduciary Duties of Nonprofit Board Members**

Board members owe three primary fiduciary duties to NAIFA-[Insert Chapter] and its members: (a) the duty of care; (b) the duty of loyalty and (c) the duty of obedience. A fiduciary is one in a position of trust and confidence for another, such as a Board member’s position of trust and confidence for the association and its members.

1. **The Duty of Care**

* The duty of care is an obligation to act in good faith with the same diligence and skill that an ordinarily prudent person would use in similar circumstances.
* Generally speaking, the duty of care is met by (1) attendance at and participation in Board meetings; (2) monitoring those who exercise delegated authority (e.g., staff, committees) to ensure they are acting properly; (3) being informed of association activities (e.g., by reviewing materials) and (4) making reasoned decisions.
* In order to meet the duty of care, Board members have a general right of equal access to information regarding the operations of the association, including access to the association’s books and records.
* In satisfying the duty of care, Board members are permitted to rely on reports and information provided by others, including officers, other Board members, staff and outside consultants. Such reliance must be reasonable. Reliance is not reasonable if the information has obvious deficiencies or the Board has reason to doubt the source of the information.
* Board functions include oversight of NAIFA-[Insert Chapter]’s financial affairs and approval of the association budget.

1. **The Duty of Loyalty**

* The duty of loyalty is an obligation to act solely in the best interest of the association.
* Board members should exercise their powers to advance the interests of the association, not their own personal interests or the interests of others.
* The duty of loyalty is violated if a Board member uses their position to promote a transaction between NAIFA-[Insert Chapter] and the Board member, or someone with whom the Board member has an interest, and the transaction is not fair to NAIFA-[Insert Chapter].
* In the event of an apparent conflict of interest: (1) the conflict should be disclosed to the Board; (2) the conflicted Board member should not participate in decisions on the matter and (3) the resulting transaction must be fair to the association.
* The duty of loyalty is also violated if a Board member does not maintain the confidentiality of non-public, proprietary and sensitive information about the association or Board deliberations, which the Board member obtained in his or her capacity as a Board member.

1. **The Duty of Obedience**

* The duty of obedience refers to the obligation to comply with NAIFA-[Insert Chapter]’s governing documents (e.g., bylaws), mission and applicable law.
* Board actions are invalid if they violate the bylaws, articles of incorporation or applicable law.

1. **Potential Liability for Nonprofit Board Members**
2. **Potential Claims Against Nonprofit Board Members**

Claims against nonprofit Board members can potentially arise in many areas, including:

* negligence in association management
* defamation
* violation of association bylaws or articles of incorporation
* unfair treatment of association members
* negligent oversight of association investments
* wrongful discharge of staff (where Board is involved in dismissal)
* breach of duty in oversight of an employee pension plan
* antitrust violations
* unfair insider transactions
* improper use of corporate opportunities
* waste of corporate assets

In addition to personal liability, a Board member’s conduct may result in liability for the association where the Board member acts, or is perceived as acting, on behalf of the association.

1. **The Business Judgment Rule**

* Board members are not strictly liable for every fault of the association. Generally, there is no liability without fault on the part of a Board member in the form of a breach of duty.
* The “business judgment rule” provides that courts will not second-guess a Board’s decision that is taken in conformity with the Board’s fiduciary duties, even if the decision is later found to be wrong. The protection of the business judgment rule depends on the Board acting in good faith and with reasonable diligence.

1. **Director and Officer (D&O) Liability Insurance and Indemnification**

* NAIFA-[Insert Chapter] maintains insurance coverage for its Board members’ potential liability in connection with their service on the Board. This includes D&O coverage, commercial general liability coverage and employment practices liability coverage.
* D&O coverage will not apply in the event of willful dishonest, fraudulent, criminal or unlawful acts, or acts resulting in improper personal profit.
* It is critical that any potential claim be brought to the attention of NAIFA-[Insert Chapter]’s Executive Director at the earliest possible time so that carriers may be notified; otherwise, coverage may be waived.
* NAIFA-[Insert Chapter] has an official stated policy that it will indemnify Board members, committee members and staff, to the extent there is no protection from an applicable NAIFA-[Insert Chapter] insurance policy, for expenses and liabilities in connection with any proceeding the person is involved in by virtue of their position with NAIFA-[Insert Chapter].
* NAIFA-[Insert Chapter] will not indemnify a Board member, committee member or employee who engages in willful misconduct. An indemnification policy is only as good as the nonprofit’s ability to fund it.

1. **Volunteer Protection Statutes**

* NAIFA is a D.C. nonprofit corporation and D.C. law grants immunity from civil liability to nonprofit volunteers under certain circumstances. The law does not exempt a nonprofit from liability for a volunteer’s conduct; however, it limits a nonprofit’s liability to the amount of its insurance coverage.
* The D.C. law only gives immunity from liability, not from defending against lawsuits. The law only applies to nonprofits that maintain D&O insurance.
* The D.C. law does not apply to willful misconduct, crimes, improper conflict transactions or bad faith acts beyond the scope of a nonprofit’s authority. Application of the D.C. law in all other states is unclear. There is also a federal volunteer protection law, but it is unclear if it applies to nonprofits other than charities.