No. 5P15 TWENTY-FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

COMMSCOPE CREDIT UNION, Plaintiff-Respondent, v. BUTLER & BURKE, LLP, a North Carolina Limited Liability Partnership, Defendant-Petitioner, v. BARRY D. GRAHAM, JAMES L. WRIGHT, ED DUTTON, FRANK GENTRY, GERAL HOLLAR, JOE CRESIMORE, MARK HONNEYCUTT, ROSE SIPE, TODD POPE, JASON CUSHING, and SCOTT SAUNDERS, Third-Party Defendants.	)	From Catawba County No. COA 14-273

****

MOTION BY THE NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The National Association of State Boards of Accountancy ("NASBA") hereby moves the Court, pursuant to Rule 28(i) and Rule 2 of the North Carolina Rules of Appellate Procedure, for leave to file an *amicus curiae* brief and conditionally submits the attached *amicus curiae* brief with this Motion.

In support of this motion, NASBA shows unto the Court the following:

Nature of NASBA's Interest

NASBA is a nonprofit corporation with its headquarters in Nashville, Tennessee. Its members are all of the state boards of accountancy of the fifty states, as well as the District of Columbia and the territories of Puerto Rico, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. Each NASBA member board is a state agency created by law for the purpose of public protection. For over one hundred years, NASBA has served to enhance the effectiveness of these state boards of accountancy. On behalf of its state board members, NASBA participates in the administration of the Uniform Certified Public Accountant ("CPA") Examination. It also supports state boards through the submission of *amicus* briefs on important public protection issues in various state and federal cases.[1]

NASBA has also developed and published the Uniform Accountancy Act Model Rules ("Model Rules") and, in conjunction with the American Institute of Certified Public Accountants ("AICPA"), has developed and promoted the

[1] For example, NASBA has filed amicus briefs advocating for public protection in the following cases: Walsh v. State ex rel. State Bd. of Pub. Accountancy of the State of Neb., 276 Neb. 1034, 759 N.W.2d 100 (2009); Stuart v. Am. Express Tax & Bus. Servs., Inc., 117 F.3d 1376 (11th Cir. 1997), cert. denied, 522 U.S. 1076 (1998); Colo. State Bd. of Accountancy v. Raisch, 931 P.2d 498 (Colo. App. 1996), aff'd, 960 P.2d 102 (Colo. 1998); and Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

Uniform Accountancy Act ("UAA"). A key component of the UAA and Model Rules is the requirement that a CPA must maintain independence throughout audit engagements like those at issue in the instant case. As such, NASBA and its member boards have a common interest in ensuring that laws such as North Carolina's remain unambiguous on this point, as well as consistent with the long-standing requirement that auditor independence never be impaired during an audit engagement.

The North Carolina State Board of Certified Public Accountant Examiners ("NC Board") has requested that NASBA submit an *amicus curiae* brief in this matter because the opinion of the Court of Appeals could adversely impact the NC Board's ability to fulfill its public protection mandate. As worded, the Court of Appeals' decision appears to hold that an auditor may owe a fiduciary duty to an audit client. Such a holding would be inconsistent with the accountancy laws and rules of all U.S. jurisdictions, court decisions interpreting these regulations, the UAA, the Model Rules, and the NC Board's rules. Therefore, in its mission to assist its member boards in protecting the public, NASBA submits this *amicus curiae* brief to support and protect this long-standing legal practice. Specifically, NASBA urges this Court to clarify or correct the Court of Appeals' opinion, to the extent that the opinion holds that an independent auditor could owe a fiduciary duty to an audit client.

Why an *Amicus Curiae* Brief Is Desirable

NASBA is a key advocate in the field of accountancy regulation and its member boards are the primary entities overseeing the work of licensed CPAs in all U.S. jurisdictions. The Court of Appeals' holding on an auditor-client fiduciary duty is untenable when analyzed in light of the UAA and Model Rules, as well as the jurisprudence of other jurisdictions on this issue. NASBA is concerned that the public may be harmed if that holding is allowed to stand, because the holding creates uncertainty and may impair auditor independence, which is required throughout an audit engagement.

Issue of Law to Be Addressed

NASBA does not take a position on the factual or legal merits of CommScope's claim for professional malpractice. NASBA's proposed *amicus* brief narrowly argues that this Court should clarify or correct the Court of Appeals' opinion, to the extent that the opinion holds that an independent auditor could owe a fiduciary duty to an audit client. The imposition of a fiduciary duty in an audit engagement is incompatible with the independence requirement.

WHEREFORE, NASBA respectfully moves this Honorable Court for leave to file this *amicus curiae* brief in support of clarifying or correcting the decision below.

This the 6th day of April, 2015.

ALLEN, PINNIX & NICHOLS, P.A.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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I hereby certify that the foregoing motion was served upon the parties to this action by mailing a copy thereof by first class mail to the following:

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY IN SUPPORT OF NEITHER PARTY

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No. 5P15 TWENTY-FIFTH JUDICIAL DISTRICT

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COMMSCOPE CREDIT UNION, Plaintiff-Respondent, v. BUTLER & BURKE, LLP, a North Carolina Limited Liability Partnership, Defendant-Petitioner, v. BARRY D. GRAHAM, JAMES L. WRIGHT, ED DUTTON, FRANK GENTRY, GERAL HOLLAR, JOE CRESIMORE, MARK HONNEYCUTT, ROSE SIPE, TODD POPE, JASON CUSHING, and SCOTT SAUNDERS, Third-Party Defendants.	)	From Catawba County No. COA 14-273

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY IN SUPPORT OF NEITHER PARTY

****

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of State Boards of Accountancy ("NASBA") is a nonprofit corporation with its headquarters in Nashville, Tennessee. Its members are all of the state boards of accountancy of the fifty states, as well as the District of Columbia and the territories of Puerto Rico, Guam, the Northern Mariana

Islands, and the U.S. Virgin Islands. Each NASBA member board is a state agency created by law for the purpose of public protection.[1] For over one hundred years, NASBA has served to enhance the effectiveness of these state boards of accountancy. On behalf of its state board members, NASBA participates in the administration of the Uniform Certified Public Accountant ("CPA") Examination. It has also supported state boards by the submission of *amicus* briefs on important public protection issues in various state and federal cases.

NASBA has also developed and published the Uniform Accountancy Act Model Rules ("Model Rules") and, in conjunction with the American Institute of Certified Public Accountants ("AICPA"), has developed and promoted the Uniform Accountancy Act ("UAA"). A key component of the UAA and Model Rules is the requirement that a CPA must maintain independence throughout audit engagements like those at issue in the instant case. As such, NASBA and its member boards have a common interest in ensuring that laws such as North Carolina's remain unambiguous on this point, as well as consistent with the long-

[1] The preface to 1925 legislation for the North Carolina State Board of Certified Public Accountant Examiners stated that it was established "so as to afford protection to the public." 1925 N.C. Sess. Laws Ch. 261. See also, e.g., Ariz. Rev. Stat. Ann. § 32-703(A) ("The primary duty of the [Arizona accountancy] board is to protect the public . . . ."); Cal. Bus. & Prof. Code § 5096.21(a) (It is the "board's duty to protect the public…."); Neb. Rev. Stat. § 1-105.01 (Nebraska board's purpose is to "protect the welfare of the citizens of the state . . .").

standing requirement that auditor independence never be impaired during an audit engagement.

The North Carolina State Board of Certified Public Accountant Examiners ("NC Board") has requested that NASBA submit an *amicus curiae* brief in this matter because the opinion of the Court of Appeals could adversely impact the NC Board's ability to fulfill its public protection mandate. As worded, the Court of Appeals' decision appears to hold that an auditor may owe a fiduciary duty to an audit client. Such a holding would be inconsistent with the accountancy laws and rules of all U.S. jurisdictions, court decisions interpreting these regulations, the UAA, the Model Rules, and the NC Board's rules. Therefore, in its mission to assist its member boards in protecting the public, NASBA submits this *amicus curiae* brief to support and protect this long-standing legal practice. Specifically, NASBA urges this Court to clarify or correct the Court of Appeals' opinion, to the extent that the opinion holds that an independent auditor could owe a fiduciary duty to an audit client.

ARGUMENT

I. INDEPENDENCE IS FUNDAMENTAL TO AUDIT ENGAGEMENTS.

Federal and state-chartered credit unions, such as CommScope, are required to undergo annual audits by an independent auditor. For CommScope, a North Carolina chartered credit union, state law mandates that "[t]he supervisory

committee [of the credit union] shall make or cause to be made an annual audit, in accordance with rules and regulations promulgated by the Administrator of Credit Unions . . . ." N.C. Gen. Stat. § 54-109.49. North Carolina Administrator of Credit Unions rules provide that "[a] credit union shall obtain an outside independent audit by a certified public accountant for any fiscal year . . . ." 04 NCAC 06C.0305(d) (emphasis added). Applicable state laws, therefore, require that CommScope's auditor must be independent. Federal laws impose similar requirements. See 12 U.S.C. § 1782(6)(A) ("[National Credit Union Administration] Board shall prescribe, by regulation, audit standards which require an outside, independent audit of any insured credit union by a certified public accountant for any fiscal year . . . ") (emphasis added); see also 12 C.F.R. § 715 et seq. (detailing the audit requirements of federally-chartered credit unions and federally-insured, state-chartered credit unions).

Thus, the requirement that annual audits be performed by independent auditors is imposed on both the credit union, pursuant to state law, and the auditor, pursuant to state law and applicable professional standards. In contrast, there is no statute or rule imposing a fiduciary duty upon CPAs in audit engagements. State law explicitly imposes a general fiduciary duty upon some other professions,[2] but

[2] See, e.g., N.C. Gen. Stat. § 83A-1(5) regarding architects: '"Good moral character' means such character as tends to assure the faithful discharge of the

does not have such a requirement regarding CPAs serving as auditors. An "independent audit" is not necessarily a condition preferred by clients, but is statutorily required not only for credit unions such as CommScope, but in many other matters.[3]

These independent audit requirements under North Carolina law are reinforced by the UAA, the model act for accountancy regulation. The UAA is intended to promote efficient, effective public protection by providing a template or reference point for state accountancy acts. Under the UAA, state boards of accountancy are required to adopt rules of professional conduct including, in particular, rules on independence, as well as "integrity, and objectivity; competence and technical standards; responsibilities to the public; and responsibilities to clients." Unif. Accountancy Act § 4(h)(4) (2014) (App. 31).[4]

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fiduciary duties of an architect to his client." See also N.C. Gen. Stat. § 89E-3 regarding geologists.

[3] See, e.g., N.C. Gen. Stat. § 18B-702(s) (local boards must submit annual "independent audit"); § 159-34 (each unit of a local government is required to obtain annual independent audit provided by "independent auditors"); § 115C-447 (local school administrative units are subject to annual independent audits); § 58-91-60(f) (Interstate Insurance Product Regulation Commission shall be "audited annually by an independent certified public accountant"). Indeed, audit services provided by "independent certified public accountants" are authorized or required by at least 36 North Carolina statutes.

[4] Other UAA provisions emphasize the importance of independence by expressly limiting which types of non-audit services CPAs may render, or forms of compensation that CPAs may receive, from audit clients. See, e.g., UAA 14(n)(1)(B) (regarding commission fees, "a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use

The Model Rules provide guidance and reflect the consensus of states' independence requirements. The NASBA Model Code of Conduct Preamble provides that:

> [I]ndependence . . . applies only to those professional services where it is required by professional standards. This Model Code of Conduct defines the conduct that the public has a right to expect of the licensee, as well as all persons or entities the licensee has the authority or capacity to control. . . . With the exception of independence, these principles are universal and apply to all services and activities performed by the licensee in all aspects of his or her professional conduct. Independence, however, is a unique principle that applies only to those professional services where it is required in accordance with professional standards.

Unif. Accountancy Act Model Rules 10-4 (2014) (App. 36-37). Moreover, the independence principle of the Code of Conduct requires independence in fact and appearance.

> Independence, where required by professional standards, is essential to establishing and maintaining the public's faith and confidence in, and reliance on, the information reported on by the licensee.
>
> A licensee in the practice of public accounting should be independent in fact and appearance when engaged to provide services where independence is required by professional standards. Independence in fact is the state of mind that permits a licensee to perform an attest service without being affected by influences that compromise professional judgment, thereby allowing the licensee to act with

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the financial statement and the licensee's compilation report does not disclose a lack of independence") (App. 33); see also UAA 14(o)(1)(A)(ii) (regarding contingent fees, "a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence") (App. 33).

> integrity and exercise objectivity and professional skepticism. Independence in appearance is the avoidance of circumstances that would cause a reasonable and informed third party, having knowledge of all relevant information, to reasonably conclude that the integrity, objectivity or professional skepticism of a licensee had been compromised.

Id. (App. 39). Thus, under the UAA and Model Rules, the auditor's obligation of independence and disclosure to the public preempts the types of client expectations that would be imposed on an auditor with a fiduciary duty.

In addition, the applicable professional standards impose the independence requirement for audit engagements. Model Rule 10-3(b) provides that "[a] licensee shall not render auditing services unless the licensee has complied with the applicable generally accepted auditing standards." Unif. Accountancy Act Model Rules 10-3(b) (2014) (App. 35). Those auditing standards are found, in pertinent part, in the AICPA's Statements on Auditing Standards. These prescribe that "[t]he auditor must maintain independence in mental attitude in all matters relating to the audit" and "[t]his standard requires that the auditor be independent." Statement on Auditing Standards No. 1, §§ 220.01, .02 (Am. Inst. of Certified Pub. Accountants 2006) (App. 40). The foregoing professional standards apply to state board licensees rendering auditing services, and such standards require independence throughout an audit. The essence of those requirements is reflected

in the NC Board's applicable rule on independence, 21 NCAC 08N.0402(a).[5] That rule, the UAA and Model Rules, and applicable professional standards make clear that independence is the foundation of the audit engagement and an auditor cannot be independent if the auditor owes a fiduciary duty to that audit client.

II. A FIDUCIARY DUTY CANNOT COEXIST AS A MATTER OF LAW OR FACT WITH AN AUDITOR'S DUTY OF INDEPENDENCE.

The Court of Appeals decision did not explain how or when an independent auditor could owe a fiduciary duty to an audit client. While the Court of Appeals' decision concluded that there is no fiduciary duty owed by the CPA as a matter of law, it then cited the language of the independent audit engagement letter to suggest that despite the auditor's obligation of independence under the law, board rules, applicable standards, and the contract, an auditor could contract for a fiduciary relationship. Per the Court:

> More importantly, even if the relationship between an accounting firm and its audit clients is not a fiduciary one as a matter of law, Plaintiff's complaint alleges that Defendant pledged to "plan and perform []audit[s] to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether from errors, fraudulent financial reporting, misappropriation of assets, or violations of laws or government regulations that are attributable to [Plaintiff] or to acts by management or employees acting on behalf of [Plaintiff]." In assuring Plaintiff that it had the expertise to review

[5] 21 NCAC 08N.0402(a) states (and throughout the relevant period of time stated): "A CPA, or the CPA's firm, who is performing an engagement in which the CPA, or the CPA's firm, will issue a report on financial statements of any client (other than a report in which lack of independence is disclosed) must be independent with respect to the client in fact and appearance."

> financial statements to identify "errors [and] fraud[,]" even by Plaintiff's own management and employees, Defendant sought and received "special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence."

Slip. op. at 9.

CommScope alleged that it retained Petitioner "to provide independent audit services" (Compl. ¶ 6), but apparently did not allege any lack of independence or assert that the independent auditor violated statutes, rules, or standards that expressly require independence. Thus, the Court of Appeals' language imposing a "special confidence" could be construed so as to impose a fiduciary duty on audit firms when only performing independent audit services. Unless the auditor lacked independence (which was apparently not alleged), the Court of Appeals language imposes a fiduciary duty that as a matter of law or fact simply cannot coexist with the duty of independence that an auditor owes to the public.

A fiduciary duty would require an auditor to foremost serve "in a representative capacity for another in dealing with the property of the other." Resolution Trust Corp. v. KPMG Peat Marwick, 844 F. Supp. 431, 436 (N.D. Ill. 1994). Whereas independence "is essential to establishing and maintaining the public's faith and confidence in, and reliance on, the information reported on by the licensee." Unif. Accountancy Act Model Rules 10-4 (2014) (App. 39).

None of the accountancy acts enforced by NASBA's member boards impose a fiduciary relationship between a client and the CPA acting as the client's auditor. When other laws require a fiduciary duty in certain non-audit relationships, state boards of accountancy may treat violations of that duty as potential violations under the CPA's obligation of competency and ethics. Thus, state accountancy acts typically contemplate a breach of fiduciary duty to a CPA's service as a trustee, conservator, or financial advisor.

Consistent with the approach of state accountancy acts, courts have rejected any imposition of a fiduciary duty or have tended to impose a fiduciary duty on CPAs sparingly, and they have consistently confined the expectation of a fiduciary duty to non-audit engagement relationships only. See, e.g., Tech. in P'ship, Inc. v. Rudin, No. 10 Civ. 8076 (RPP), 2011 U.S. Dist. LEXIS 114127, at *17 (S.D.N.Y. Oct. 4, 2011) (finding no fiduciary relationship created by a CPA providing tax services to a client); Caprer v. Nussbaum, 825 N.Y.S.2d 55, 71 (App. Div. 2d Dep't 2006), abrogated on other grounds, Bd. of Managers of the Chelsea 19 Condo. v. Chelsea 19 Assocs., 934 N.Y.S.2d 32 (App. Div. 2d Dep't 2009) (concluding that accountants providing financial services for building managers did not owe a fiduciary duty to the building's owners).

Numerous state and federal courts have articulated the inherent contradiction between the requirement of auditor independence and the expectations imposed by

a fiduciary duty. See, e.g., FDIC v. Schoenberger, 781 F. Supp. 1155, 1157-58 (E.D. La. 1992) ("Although an auditor may be charged with duties, they are not duties as a fiduciary."). Indeed, contrary to a fiduciary duty, "an accountant hired to audit the financial statements of a client has a distinct duty to remain independent of the client. . . . As the United States Supreme Court has observed, an accountant's responsibilities extend beyond its duty to the audit client." Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 133-34, 670 S.E.2d 818, 823 (2008) (citing United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984)).

The Court of Appeals decision also could be disruptive to the regulatory public protection framework that state boards of accountancy have adopted. It is an enforceable principle that the role of the independent auditor is to protect, and act in the best interests of, entities other than the client. One such entity, the investing public, "demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust." Arthur Young & Co., 465 U.S. at 818.

Thus, it is clear from long-standing legal precedent throughout the U.S. that an auditor cannot be independent of an audit client with whom the auditor could also have a fiduciary duty. The potential fiduciary duty "as a matter of fact" would be particularly inappropriate in the absence of claims that the auditor lacked independence. Instead, an auditor-client relationship entails total independence,

and such independence would be incompatible with an auditor's service as a fiduciary to a client.

CONCLUSION

For the foregoing reasons, this Court should correct the opinion of the court below and clarify that the independent auditor-client relationship is incompatible with the imposition of a fiduciary duty.

This the 6th day of April, 2015.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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This the 6th day of April, 2015.

/s/ Noel L. Allen
Noel L. Allen

CONTENTS OF APPENDIX

App. 1

§1782. Administration of insurance fund

(a) Reports of condition

(1) Each insured credit union shall make reports of condition to the Board upon dates which shall be selected by it. Such reports of condition shall be in such form and shall contain such information as the Board may require. The reporting dates selected for reports of condition shall be the same for all insured credit unions except that when any of said reporting dates is a nonbusiness day for any credit union the preceding business day shall be its reporting date. The total amount of the member accounts of each insured credit union as of each reporting date shall be reported in such reports of condition in accordance with regulations prescribed by the Board. Each report of condition shall contain a declaration by the president, by a vice president, by the treasurer, or by any other officer designated by the board of directors of the reporting credit union to make such declaration, that the report is true and correct to the best of such officer's knowledge and belief. Unless such requirement is waived by the Board, the correctness of each report of condition shall be attested by the signatures of three of the officers of the reporting credit union with the declaration that the report has been examined by them and to the best of their knowledge and belief is true and correct.

(2) The Board may call for such other reports as it may from time to time require.

(3) The Board may require reports of condition to be published in such manner, not inconsistent with any applicable law, as it may direct. Any insured credit union which maintains procedures reasonably adapted to avoid any inadvertent error and, unintentionally and as a result of such an error, fails to submit or publish any report required under this subsection or section 1756 of this title, within the period of time specified by the Board, or submits or publishes any false or misleading report or information, or inadvertently transmits or publishes any report which is minimally late, shall be subject to a penalty of not more than $2,000 for each day during which such failure continues or such false or misleading information is not corrected. The insured credit union shall have the burden of proving that an error was inadvertent and that a report was inadvertently transmitted or published late. Any insured credit union which fails to submit or publish any report required under this subsection or section 1756 of this title, within the period of time specified by the Board, or submits or publishes any false or misleading report or information, in a manner not described in the 2nd preceding sentence shall be subject to a penalty of not more than $20,000 for each day during which such failure continues or such false or misleading information is not corrected. Notwithstanding the preceding sentence, if any insured credit union knowingly or with reckless disregard for the accuracy of any information or report described in such sentence submits or publishes any false or misleading report or information, the Board may assess a penalty of not more than $1,000,000 or 1 percent of total assets of such credit union, whichever is less, per day for each day during which such failure continues or such false or misleading information is not corrected. Any penalty imposed under any of the 4 preceding sentences shall be assessed and collected by the Board in the manner provided in section 1786(k)(2) of this title (for penalties imposed under such section) and any such assessment (including the determination of the amount of the penalty) shall be subject to the provisions of such section. Any insured credit union against which any penalty is assessed under this subsection shall be afforded an agency hearing if such insured credit union submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 1786(j) of this title shall apply to any proceeding under this subsection.

(4) The Board may accept any report of condition made to any commission, board, or authority having supervision of a State-chartered credit union and may furnish to any such commission, board, or authority reports of condition made to the Board.

(5) Reports required under subchapter I of this chapter shall be so prepared that they can be used for share insurance purposes. To the maximum extent feasible, the Board shall use for insurance purposes reports submitted to State regulatory agencies by State-chartered credit unions.

(6) Audit requirement.-

(A) In general.-Before the end of the 120-day period beginning on August 9, 1989, and notwithstanding any other provision of Federal or State law, the Board shall prescribe, by regulation, audit standards which require an outside, independent audit of any insured credit union by a certified public accountant for any fiscal year (of such credit union)-

(i) for which such credit union has not conducted an annual supervisory committee audit;

(ii) for which such credit union has not received a complete and satisfactory supervisory committee audit; or

(iii) during which such credit union has experienced persistent and serious recordkeeping deficiencies, as determined by the Board.

(B) Unsafe or unsound practice.-The Board may treat the failure of any insured credit union to obtain an outside, independent audit for any fiscal year for which such audit is required under subparagraph (A) or (D) as an unsafe or unsound practice within the meaning of section 1786(b) of this title.

*** Current through all 2014 legislation, 51st Legislature, 2nd Regular Session and 2nd Special Session, and results of November 4, 2014 election. ***

TITLE 32. PROFESSIONS AND OCCUPATIONS
CHAPTER 6. CERTIFIED PUBLIC ACCOUNTANTS
ARTICLE 1. BOARD OF ACCOUNTANCY

Go to the Arizona Code Archive Directory

A.R.S. § 32-703 (2014)

§ 32-703. Powers and duties; rules; executive director; advisory committees and individuals

A. The primary duty of the board is to protect the public from unlawful, incompetent, unqualified or unprofessional certified public accountants or public accountants through certification, regulation and rehabilitation.

B. The board may:

1. Investigate complaints filed with the board or on its own motion to determine whether a certified public accountant or public accountant has engaged in conduct in violation of this chapter or rules adopted pursuant to this chapter.

2. Establish and maintain high standards of competence, independence and integrity in the practice of accounting by a certified public accountant or by a public accountant as required by generally accepted auditing standards and generally accepted accounting principles and, in the case of publicly held corporations or enterprises offering securities for sale, in accordance with state or federal securities agency accounting requirements.

3. Establish reporting requirements that require registrants to report:

(a) The imposition of any discipline on the right to practice before the federal securities and exchange commission, the internal revenue service, any state board of accountancy, other government agencies or the public company accounting oversight board.

(b) Any criminal conviction, any civil judgment involving negligence in the practice of accounting by a certified public accountant or by a public accountant and any judgment or order as described in *section 32-741*, subsection A, paragraphs 7 and 8.

4. Establish basic requirements for continuing professional education of certified public accountants and public accountants, except that the requirements shall not exceed eighty hours in any registration renewal period.

5. Adopt procedures concerning disciplinary actions, administrative hearings and consent decisions.

6. Issue to qualified applicants certificates executed for and on behalf of the board by the signatures of the president and secretary of the board.

7. Adopt procedures and rules to administer this chapter.

8. Require peer review pursuant to rules adopted by the board on a general and random basis of the professional work of a registrant engaged in the practice of accounting.

9. Subject to title 41, chapter 4, article 4, employ an executive director and other personnel that it considers necessary to administer and enforce this chapter.

10. Appoint accounting and auditing, tax, peer review, law, certification, continuing professional education or other committees or individuals as it considers necessary to advise or assist the board in administering and enforcing this chapter. These committees and individuals serve at the pleasure of the board.

11. Take all action that is necessary and proper to effectuate the purposes of this chapter.

12. Sue and be sued in its official name as an agency of this state.

13. Adopt and amend rules concerning the definition of terms, the orderly conduct of the board's affairs and the effective administration of this chapter.

C. The board or an authorized agent of the board may:

1. Issue subpoenas to compel the attendance of witnesses or the production of documents. If a subpoena is disobeyed, the board may invoke the aid of any court in requiring the attendance and testimony of witnesses and the production of documents.

2. Administer oaths and take testimony.

3. Cooperate with the appropriate authorities in other jurisdictions in investigation and enforcement concerning violations of this chapter and comparable statutes of other jurisdictions.

4. Receive evidence concerning all matters within the scope of this chapter.

HISTORY: Laws 2003, Ch. 82, § 4; Laws 2008, Ch. 295, § 2; Laws 2009, 3rd Sp. Sess., Ch. 7, § 12; Laws 2012, 2nd Reg. Sess., Ch. 321, § 45; Laws 2013, 1st Reg. Sess., Ch. 136, § 2.

NOTES:
EDITOR'S NOTE.

Laws 2013, 1st Reg. Sess., Ch. 136, § 21 provides, "A. Notwithstanding any other law, a certificate of a certified public accountant or public accountant that was suspended for nonregistration by the Arizona state board of accountancy before July 21, 1997, and that remains suspended on the effective date of this act [September 13, 2013] is expired. B. Notwithstanding any other law, a firm registration to practice public accounting that was suspended for nonregistration by the Arizona board of accountancy before September 26, 2008, and that remains suspended on the effective date of this act is expired."

Laws 2012, 2nd Reg. Sess., Ch. 321, § 169 provides, "In order to promote public confidence in government, governmental integrity, increased accountability and the efficient delivery of services to its citizens, this act intends to reform this state's outdated personnel system. The current system consists of rules and regulations adopted many years ago that served a valuable purpose at the time, but now actually makes it difficult to manage the workforce effectively. The current emphasis on job security rewards longevity over performance that often results in the retention of lower performers and the separation of our best talent. The new personnel system pursuant to this act is intended to support this state's ability to attract, hire and retain high-performing employees."

Laws 2012, 2nd Reg. Sess., Ch. 321, § 171 provides, "If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

By Laws 2012, 2nd Reg. Sess., Ch. 321, § 172, this section was effective September 29, 2012.

Repealed effective January 1, 2016, pursuant to *§ 41-3015.02*.

LexisNexis 50 State Surveys, Legislation & Regulations

50 State Surveys - Accountancy

USER NOTE: For more generally applicable notes, see notes under the first section of this article, chapter or title.

*** This document is current through the 2015 Supplement ***
(All 2014 legislation)

BUSINESS & PROFESSIONS CODE
Division 3. Professions and Vocations Generally
Chapter 1. Accountants
Article 5.1. Practice Privileges

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Bus & Prof Code § 5096.21 (2015)

§ 5096.21. (Repealed January 1, 2019) Determinations regarding out-of-state practitioners; Board's duty to protect the public; Requirements; Considerations; Reports; Stakeholders group to convene

(a) On and after January 1, 2016, if the board determines, through a majority vote of the board at a regularly scheduled meeting, that allowing individuals from a particular state to practice in this state pursuant to a practice privilege as described in Section 5096, violates the board's duty to protect the public, pursuant to Section 5000.1, the board shall require, by regulation, out-of-state individuals licensed from that state, as a condition to exercising a practice privilege in this state, to file the notification form and pay the applicable fees as required by former Section 5096, as added by Chapter 921 of the Statutes of 2004, and regulations adopted thereunder.

(b) The board shall, at minimum, consider the following factors in making the determination required by subdivision (a):

(1) Whether the state timely and adequately addresses enforcement referrals made by the board to the accountancy regulatory board of that state, or otherwise fails to respond to requests the board deems necessary to meet its obligations under this article.

(2) Whether the state makes the disciplinary history of its licensees publicly available through the Internet in a manner that allows the board to adequately link consumers to an Internet Web site to obtain information that was previously made available to consumers about individuals from the state prior to January 1, 2013, through the notification form.

(3) Whether the state imposes discipline against licensees that is appropriate in light of the nature of the alleged misconduct.

(c) Notwithstanding subdivision (a), if (1) the National Association of State Boards of Accountancy (NASBA) adopts enforcement best practices guidelines, (2) the board, upon a majority vote at a regularly scheduled board meeting, issues a finding after a public hearing that those practices meet or exceed the board's own enforcement practices, (3) a state has in place and is operating pursuant to enforcement practices substantially equivalent to the best practices guidelines, and (4) disciplinary history of a state's licensees is publicly available through the Internet in a manner that allows the board to link consumers to an Internet Web site to obtain information at least equal to the information that was previously available to consumers through the practice privilege form filed by out-of-state licensees pursuant to former Section 5096, as added by Chapter 921 of the Statutes of 2004, no practice privilege form shall be required to be

filed by any licensee of that state as required by subdivision (a), nor shall the board be required to report on that state to the Legislature as required by subdivision (d).

(d)

(1) The board shall report to the relevant policy committees of the Legislature, the director, and the public, upon request, preliminary determinations made pursuant to this section no later than July 1, 2015. The board shall, prior to January 1, 2016, and thereafter as it deems appropriate, review its determinations made pursuant to subdivision (b) to ensure that it is in compliance with this section.

(2) This subdivision shall become inoperative on July 1, 2017, pursuant to *Section 10231.5 of the Government Code*.

(e) On or before July 1, 2014, the board shall convene a stakeholder group consisting of members of the board, board enforcement staff, and representatives of the accounting profession and consumer representatives to consider whether the provisions of this article are consistent with the board's duty to protect the public consistent with Section 5000.1, and whether the provisions of this article satisfy the objectives of stakeholders of the accounting profession in this state, including consumers. The group, at its first meeting, shall adopt policies and procedures relative to how it will conduct its business, including, but not limited to, policies and procedures addressing periodic reporting of its findings to the board.

(f) On or before January 1, 2018, the board shall prepare a report to be provided to the relevant policy committees of the Legislature, the director, and the public, upon request, that, at minimum, explains in detail all of the following:

(1) How the board has implemented this article and whether implementation is complete.

(2) Whether this article is, in the opinion of the board, more, less, or equivalent in the protection it affords the public than its predecessor article.

(3) Describes how other state boards of accountancy have addressed referrals to those boards from the board, the timeframe in which those referrals were addressed, and the outcome of investigations conducted by those boards.

(g) This section shall remain in effect only until January 1, 2019, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2019, deletes or extends that date.

HISTORY:

Added Stats 2012 ch 411 § 44 (SB 1405), effective January 1, 2013, repealed January 1, 2019.

NOTES:

Hierarchy Notes:

Div. 3 Note

Div. 3, Ch. 1 Note

Div. 3, Ch. 1, Art. 5.1 Note

LexisNexis 50 State Surveys, Legislation & Regulations

50 State Surveys - Accountancy

R.R.S. Neb. § 1-105.01

*** Current through the 2014 103rd Second Session ***

CHAPTER 1. ACCOUNTANTS

Go to the Nebraska Code Archive Directory

R.R.S. Neb. § 1-105.01 (2014)

§ 1-105.01. Nebraska State Board of Public Accountancy; purpose

It is the purpose of the Nebraska State Board of Public Accountancy to protect the welfare of the citizens of the state by assuring the competency of persons regulated under the Public Accountancy Act through (1) administration of certified public accountant examinations, (2) issuance of certificates and permits to qualified persons and firms, (3) monitoring the requirements for continued issuance of certificates and permits, and (4) disciplining certificate and permit holders who fail to comply with the technical or ethical standards of the public accountancy profession.

HISTORY: Laws 1984, LB 473, § 1; Laws 1997, LB 114, § 2.

§ 18B-702. Financial operations of local boards.

(a) Generally. - A local board may transact business as a corporate body, except as limited by this section. A local board shall not be considered a public authority under G.S. 159-7(b)(10).

(b) Budget Officer. - The general manager of the local board shall be the budget officer for the local board. In the absence of a general manager, a local board may impose the duties of budget officer on the chairman or any member of the local board or any other employee of the board.

(c) Annual Balanced Budget. - Each local board shall operate under an annual balanced budget administered in accordance with this section. A budget is balanced when the sum of estimated gross revenues and both restricted and unrestricted funds are equal to appropriations. Expenditures shall not exceed the amount of funds received or in reserve for the purpose to which the funds are appropriated. It is the intent of this section that all monies received and expended by a local board should be included in the budget. Therefore, notwithstanding any other provision of law, no local board may expend any monies, regardless of their source, except in accordance with a budget adopted under this section. The budget of a local board shall cover a fiscal year beginning July 1 and ending June 30.

(d) Preparation and Submission of Budget and Budget Message. - Upon receipt of the budget requests and revenue estimates and the financial information supplied by the finance officer, the budget officer shall prepare a budget for consideration by the local board in such form and detail as may have been prescribed by the budget officer or the local board. The budget, together with a budget message, shall be submitted to the local board, the appointing authority, and the Commission not later than June 1. The budget and budget message should, but need not, be submitted at a formal meeting of the board. The budget message should contain a concise explanation of the goals fixed by the budget for the budget year, explain important features of the activities anticipated in the budget, set forth the reasons for stated changes from the previous year in appropriation levels, and explain any major changes in fiscal policy.

(e) Filing and Publication of the Budget. - On the same day the budget officer submits the budget to the local board, the budget officer shall make a copy for public inspection, and it shall remain available for public inspection until the budget is adopted. The budget officer shall make a copy of the budget available to all news media in the county. The budget officer shall also publish a statement that the budget has been submitted to the local board and is available for public inspection in the office of the general manager of the local board. The statement shall also give notice of the time and place of the budget hearing required by subsection (f) of this section.

(f) Budget Hearings. - Before adopting the budget, the board shall hold a public hearing at which time any persons who wish to be heard on the budget may appear.

(g) Adoption of Budget. - Not earlier than 10 days after the day the budget is presented to the board and not later than July 1, the local board shall adopt a budget making appropriations for the budget year in such sums as the board may consider sufficient and proper, whether greater or less than the sums recommended in the budget. The budget shall authorize all financial transactions of the local board. The budget may be in any form that the board considers most efficient in enabling it to make the fiscal policy decisions embodied therein, but it shall make appropriations by department, function, or project and show revenues by major source. The following directions and limitations shall bind the local board in adopting the budget:

(1) The full amount estimated by the finance officer to be required for debt service during the budget year shall be appropriated.

(2) The full amount of any deficit in each fund shall be appropriated.

(3) Working capital funds set aside pursuant to G.S. 18B-805 shall be established by rule of the Commission. "Working capital" means the total of cash, investments, and inventory less all unsecured liabilities. Gross sales means gross receipts from the sale of alcoholic beverages less distributions as defined in G.S. 18B-805(b)(2),

(3), (4), and (5). Any expenditure to be charged against working capital funds shall be authorized by resolution of the local board, which resolution shall be deemed an amendment to the budget setting up an appropriation for the object of expenditure authorized. The local board may authorize the budget officer to authorize expenditures from working capital funds subject to such limitations and procedures as it may prescribe. Any such expenditure shall be deemed an amendment and reported to the board at its next regular meeting and recorded in the minutes.

(4) Estimated revenues shall include only those revenues reasonably expected to be realized in the budget year.

(5) Sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into shall be appropriated unless such contract reserves to the local board the right to limit or not to make such appropriation.

(6) The sum of estimated net revenues and appropriated fund balance in each fund shall be equal to appropriations in that fund. Appropriated fund balance in a fund shall not exceed the sum of cash and investments minus the sum of liabilities, encumbrances, and deferred revenues arising from cash receipts, as those figures stand at the close of the fiscal year next preceding the budget year.

The budget shall be entered in the minutes of the local board and within five days after adoption, and copies thereof shall be filed with the finance officer, the budget officer, the appointing authority, and the Commission.

(h) Amendments to the Budget. - Except as otherwise restricted by law, the local board may amend the budget at any time after adoption, in any manner, so long as the budget, as amended, continues to satisfy the requirements of this section. The local board by appropriate resolution may authorize the budget officer to transfer monies from one appropriation to another within the same fund subject to such limitations and procedures as it may prescribe. Any such transfers shall be reported to the local board at its next regular meeting and shall be entered in the minutes. Amendments to the adopted budget shall also be provided to the appointing authority and the Commission.

(i) Interim Budget. - In case the adoption of the budget is delayed until after July 1, the local board shall make interim appropriations for the purpose of paying salaries, debt service payments, and the usual ordinary expenses of the local board for the interval between the beginning of the budget year and the adoption of the budget. Interim appropriations so made shall be charged to the proper appropriations in the adopted budget.

(j) Finance Officer. - Except as otherwise provided, the local board shall designate (i) a part-time or full-time employee of the board other than the general manager or (ii) the finance officer of the appointing authority with consent of the appointing authority to be the finance officer for the local board. The Commission, for good cause shown, may grant a waiver to allow the general manager of a board also to be the finance officer. Good cause includes, but is not limited to, the fact that the board operates no more than two stores, and any approval for the general manager also to be the finance officer shall apply until the board operates more than two stores; in any event, the approval shall be effective for 36 months. The Commission may grant one or more waivers to a board.

(k) Duties and Powers of the Finance Officer. - The finance officer for a local board shall:

(1) Keep the accounts of the local board in accordance with generally accepted principles of governmental accounting and the rules and regulations of the Commission.

(2) Disburse all funds of the local board in strict compliance with this Chapter, the budget, preaudit obligations, and disbursements as required by this section.

(3) As often as may be requested by the local board or the general manager, prepare and file with the board a statement of the financial condition of the local board.

(4) Receive and deposit all monies accruing to the local board, or supervise the receipt and deposit of money by other duly authorized employees.

(5) Maintain all records concerning the debt and other obligations of the local board, determine the amount of money that will be required for debt service or the payment of other obligations during each fiscal year, and maintain all funds.

(6) Supervise the investment of idle funds of the local board pursuant to subsection (t) of this section.

The finance officer shall perform such other duties as may be assigned by law, by the general manager, budget officer, or local board, or by rules and regulations of the Commission.

(l) Accounting System. - Each local board shall establish and maintain an accounting system designed to show in detail its assets, liabilities, equities, revenues, and expenditures. The system shall also be designed to show appropriations and estimated revenues as established in the budget originally adopted and subsequently amended.

(m) Incurring Obligations. - No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget unless the budget includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year. No obligation may be incurred for a capital project unless the budget authorizes the obligation and an unencumbered balance remains in the appropriation sufficient to pay the sums obligated by the transaction. If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the local board, shall take substantially the following form:

"This instrument has been preaudited in the manner required by G.S. 18B-702.

_____

(Signature of finance officer)."

An obligation incurred in violation of this subsection is invalid and may not be enforced. The finance officer shall establish procedures to assure compliance with this subsection.

(n) Disbursements. - When a bill, invoice, or other claim against a local board is presented, the finance officer shall either approve or disapprove the necessary disbursement. If the claim involves a program, function, or activity accounted for in a fund included in the budget or a capital project or a grant project authorized by the budget, the finance officer may approve the claim only if:

(1) The finance officer determines the amount to be payable; and

(2) The budget includes an appropriation authorizing the expenditure and either (i) an encumbrance has been previously created for the transaction or (ii) an unencumbered balance remains in the appropriation sufficient to pay the amount to be disbursed.

A bill, invoice, or other claim may not be paid unless it has been approved by the finance officer or, under subsection (o) of this section, by the local board. The finance officer shall establish procedures to assure compliance with this subsection.

(o) Local Board Approval of Bills, Invoices, or Claims. - The local board may, as permitted by this subsection, approve a bill, invoice, or other claim against the local board that has been disapproved by the finance officer. It may not approve a claim for which no appropriation appears in the budget, or for which the appropriation contains no encumbrance and the unencumbered balance is less than the amount to be paid. The local board shall approve payment by formal resolution stating the board's reasons for allowing the bill, invoice, or other claim. The resolution shall be entered in the

minutes together with the names of those voting in the affirmative. The chairman of the board or some other member designated for this purpose shall sign the certificate on the check or draft given in payment of the bill, invoice, or other claim. If payment results in a violation of law, each member of the board voting to allow payment is jointly and severally liable for the full amount of the check or draft given in payment.

(p) Checks or Drafts Signed by Finance Officer. - Except as otherwise provided by law, all checks or drafts on an official depository shall be signed by the finance officer or a properly designated deputy finance officer. The chairman of the local board or general manager of the local board shall countersign these checks and drafts. The Commission may waive the requirements of this subsection if the board determines that the internal control procedures of the unit or authority will be satisfactory in the absence of dual signatures.

(q) Payment of a Bill, Invoice, Salary, or Claim. - A local board may not pay a bill, invoice, salary, or other claim except by a check or draft on an official depository or by a bank wire transfer from an official depository. Except as provided in this subsection, each check or draft on an official depository shall bear on its face a certificate signed by the finance officer or a deputy finance officer approved for this purpose by the local board (or signed by the chairman or some other member of the board pursuant to subsection (o) of this section). The certificate shall take substantially the following form

"This disbursement has been approved in the manner required by G.S. 18B-702.

_____

(Signature of finance officer)."

No certificate is required on payroll checks or drafts on an imprest account in an official depository if the check or draft depositing the funds in the imprest account carried a signed certificate. No certificate is required for expenditures of fifty dollars ($50.00) or less from a petty cash fund, provided the expenditure is accounted for by a receipt for the expended item.

(r) Borrowing Money. - A local board may borrow money only for the purchase of land, buildings, equipment and stock needed for the operation of its ABC system. A local board may pledge a security interest in any real or personal property it owns other than alcoholic beverages. A city or county whose governing body appoints a local board shall not in any way be held responsible for the debts of that board.

(s) Audits. - A local board shall submit to the appointing authority and Commission an annual independent audit of its operations, performed in accordance with generally accepted accounting standards and in compliance with a chart of accounts prescribed by the Commission. The audit report shall contain a summary of the requirements of this Chapter, or of any local act applicable to that local board, concerning the distribution of profits of that board and a description of how those distributions have been made, including the names of recipients of the profits and the activities for which the funds were distributed. A local board shall also submit to any other audits and submit any reports demanded by the appointing authority or the Commission.

(t) Deposits and Investments. - A local board may deposit monies at interest in any bank or trust company in this State in the form of savings accounts or certificates of deposit. Investment deposits shall be secured as provided in G.S. 159-31(b) and the reports required by G.S. 159-33 shall be submitted. A local board may invest all or part of the cash balance of any fund as provided in G.S. 159-30(c) and (d), and may deposit any portion of those funds for investment with the State Treasurer in the same manner as State boards and commissions under G.S. 147-69.3.

(u) Compliance with Commission Rules. - The Commission shall adopt, and each local board shall comply with, fiscal control rules concerning the borrowing of money, maintenance of working capital, investments, appointment of a budget officer, appointment of a financial officer, daily deposit of funds, bonding of employees, auditing of operations, and the schedule, manner and other procedures for distribution of profits. The Commission may also adopt any other rules concerning the

financial operations of local boards which are needed to assure the proper accountability of public funds. The Commission may vary these rules and regulations according to any other criteria reasonably related to the purpose or complexity of the financial operations involved. The Commission has the authority to inquire into and investigate the internal control procedures of a local board and may require any modifications in internal control procedures which, in the opinion of the Commission, are necessary or desirable to prevent embezzlements or mishandling of public monies.

(v) Penalties. - If a board member or employee of a local board incurs an obligation or pays out or causes to be paid out any funds in violation of this section, the member or employee and the sureties on the official bond are liable for any sums so committed or disbursed. If the finance officer or any properly designated deputy finance officer gives a false certificate to any contract, agreement, purchase order, check, draft, or other document, the finance officer and the sureties on the official bond are liable for any sums illegally committed or disbursed thereby.

(w) Applicability of Criminal Statutes. - The provisions of G.S. 14-90 and G.S. 14-254 shall apply to any person appointed to or employed by a local board, and any person convicted of a violation of G.S. 14-90 or G.S. 14-254 shall be punished as a Class H felon.

(x) Local Acts. - Notwithstanding the provisions of any local act, this section applies to all local boards. (1937, c. 49, ss. 10, 12; cc. 411, 431; 1939, c. 98; 1957, cc. 1006, 1335; 1963, c. 1119, s. 2; 1967, c. 1178; 1969, cc. 118, 902; 1971, c. 872, s. 1; 1973, cc. 85, 185; c. 1000, ss. 1, 2; 1977, c. 618; 1979, c. 467, s. 20; c. 617; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 11; 1991, c. 459, s. 2; 2010-122, s. 18; 2012-4, s. 2.)

§ 54-109.49. Duties of supervisory committee.

The supervisory committee shall make or cause to be made an annual audit, in accordance with rules and regulations promulgated by the Administrator of Credit Unions, and shall submit a report of that audit to the board of directors and a summary of the report to the members at the next annual meeting of the credit union. The supervisory committee shall make or cause to be made such supplemental audits as deemed necessary by it or as may be ordered by the Administrator of Credit Unions. Any violation of this Article or of the bylaws or of any practice of the corporation which in the opinion of the supervisory committee is unsafe, unsound, or unauthorized, shall be reported to the board of directors and the Administrator of Credit Unions within seven days after its discovery. (1915, c. 115, s. 12; C.S., s. 5236; 1965, c. 956, s. 21; 1973, c. 199, s. 11; 1975, c. 538, s. 1.)

§ 58-91-60. Finance.

(a) The Commission shall pay or provide for the payment of the reasonable expenses of its establishment and organization. To fund the cost of its initial operations, the Commission may accept contributions and other forms of funding from the National Association of Insurance Commissioners, compacting states, and other sources. Contributions and other forms of funding from other sources shall be of such a nature that the independence of the Commission concerning the performance of its duties shall not be compromised.

(b) The Commission shall collect a filing fee from each insurer and third-party filer filing a product with the Commission to cover the cost of the operations and activities of the Commission and its staff in a total amount sufficient to cover the Commission's annual budget.

(c) The Commission's budget for a fiscal year shall not be approved until it has been subject to notice and comment as set forth in G.S. 58-91-35.

(d) The Commission shall be exempt from all taxation in and by the compacting states.

(e) The Commission shall not pledge the credit of any compacting state, except by and with the appropriate legal authority of that compacting state.

(f) The Commission shall keep complete and accurate accounts of all its internal receipts, including grants and donations, and disbursements of all funds under its control. The internal financial accounts of the Commission shall be subject to the accounting procedures established under its bylaws. The financial accounts and reports, including the system of internal controls and procedures of the Commission, shall be audited annually by an independent certified public accountant. Upon the determination of the Commission, but no less frequently than every three years, the review of the independent auditor shall include a management and performance audit of the Commission. The Commission shall make an annual report to the Governor and legislature of the compacting states, which shall include a report of the independent audit. The Commission's internal accounts shall not be confidential, and those materials may be shared with the commissioner of any compacting state upon request except that any work papers related to any internal or independent audit and any information regarding the privacy of individuals and insurers' proprietary information, including trade secrets, shall remain confidential.

(g) No compacting state shall have any claim to or ownership of any property held by or vested in the Commission or to any Commission funds held pursuant to the provisions of this Compact. (2005-183, s. 1; 2009-382, s. 35.)

Chapter 83A.

Architects.

§ 83A-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Architect" means a person who is duly licensed to practice architecture.

(2) "Board" means the North Carolina Board of Architecture.

(3) "Corporate certificate" means a certificate of corporate registration issued by the Board recognizing the corporation named in the certificate as meeting the requirements for the corporate practice of architecture.

(4) "Corporate practice of architecture" means "practice" as defined in G.S. 83A-1(7) by a corporation which is organized or domesticated in this State, and which holds a current "corporate certificate" from this Board.

(5) "Good moral character" means such character as tends to assure the faithful discharge of the fiduciary duties of an architect to his client. Evidence of lack of such character shall include the willful commission of an offense justifying discipline under this Chapter, the practice of architecture in violation of this Chapter, or of the laws of another jurisdiction, or the conviction of a felony.

(6) "License" means a certificate of registration issued by the Board recognizing the individual named in the certificate as meeting the requirements for registration under this Chapter.

(7) "Practice of architecture" means performing or offering to perform or holding oneself out as legally qualified to perform professional services in connection with the design, construction, enlargement or alteration of buildings, including consultations, investigations, evaluations, preliminary studies, the preparation of plans, specifications and contract documents, administration of construction contracts and related services or combination of services in connection with the design and construction of buildings, regardless of whether these services are performed in person or as the directing head of an office or organization. (1915, c. 270, s. 9; C.S., s. 4985; 1941, c. 369, s. 3; 1951, c. 1130, s. 1; 1957, c. 794, ss. 1, 2; 1979, c. 871, s. 1.)

§ 89E-3. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Board" means the North Carolina Board for Licensing of Geologists.

(2) "Geologist". The term "geologist", within the intent of this Chapter, shall mean a person who is trained and educated in the science of geology.

(3) The term "geologist-in-training" means a person who has taken and successfully passed the portion of professional examination covering fundamental or academic geologic subjects, prior to his completion of the requisite years of experience in geologic work as provided for in this Chapter.

(4) "Geology" means the science dealing with the earth and its history; investigation, prediction and location of the materials and structures which compose it; the natural processes that cause change in the earth; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases and other materials for the benefit of mankind. This definition shall not include any of the following:

a. Service or creative works, the adequate performance of which requires engineering education, training, and experience.

b. The assessment of an underground storage tank required by applicable rules at closure or change in service unless there has been a discharge or release of the product from the tank.

(5) The term "good moral character" means such character as tends to ensure the faithful discharge of the fiduciary duties of the licensed geologist to his client.

(6) "License" means a certificate issued by the Board recognizing the individual named in this certificate as meeting the requirements for licensing under this Chapter.

(7) "Licensed geologist" means a person who is licensed as a geologist under the provisions of this Chapter.

(8) "Public practice of geology" means the performance for others of geological service or work in the nature of work or consultation, investigation, surveys, evaluations, planning, mapping and inspection of geological work, in which the performance is related to the public welfare of safeguarding of life, health, property and the environment, except as specifically exempted by this Chapter. The definition shall not include or allow the practice of engineering as defined in Chapter 89C of the North Carolina General Statutes.

(9) The term "qualified geologist" means a person who possesses all of the qualifications specified in this Chapter for licensing except that he or she is not licensed.

(10) The term "responsible charge of work" means the independent control and direction by the use of initiative, skill and independent judgment of geological work or the supervision of such work.

(11) The term "subordinate" means any person who assists a licensed geologist in the practice of geology without assuming the responsible charge of work. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(j).)

§ 115C-447. Annual independent audit.

(a) Each local school administrative unit shall have its accounts and the accounts of individual schools therein audited as soon as possible after the close of each fiscal year by a certified public accountant or by an accountant certified by the Local Government Commission as qualified to audit local government accounts. The auditor who audits the accounts of a local school administrative unit shall also audit the accounts of its individual schools. The auditor shall be selected by and shall report directly to the board of education. The audit contract shall be in writing, shall include all its terms and conditions, and shall be submitted to the Secretary of the Local Government Commission for his approval as to form, terms and conditions. The terms and conditions of the audit contract shall include the scope of the audit, and the requirement that upon completion of the examination the auditor shall prepare a typewritten or printed report embodying financial statements and his opinion and comments relating thereto. The financial statements accompanying the auditor's report shall be prepared in conformity with generally accepted accounting principles. The auditor shall file a copy of the audit report with the Secretary of the Local Government Commission, the State Board of Education, the board of education and the board of county commissioners, and shall submit all bills or claims for audit fees and costs to the Secretary of the Local Government Commission for his approval. It shall be unlawful for any local school administrative unit to pay or permit the payment of such bills or claims without this approval. Each officer, employee and agent of the local school administrative unit having custody of public money or responsibility for keeping records of public financial or fiscal affairs shall produce all books and records requested by the auditor and shall divulge such information relating to fiscal affairs as he may request. If any member of a board of education or any other public officer, employee or agent shall conceal, falsify, or refuse to deliver or divulge any books, records, or information, with an intent thereby to mislead the auditor or impede or interfere with the audit, he is guilty of a Class 1 misdemeanor.

The State Auditor shall have authority to prescribe the manner in which funds disbursed by administrative units by warrants on the State Treasurer shall be audited.

(b) When the State Board of Education finds that incidents of fraud, embezzlement, theft, or management failures in a local school administrative unit make it appropriate to review the internal control procedures of the unit, the State Board of Education shall so notify the unit. If the incidents were discovered by the firm performing the audit under subsection (a) of this section, the board of the local school administrative unit shall submit the audit together with a plan for any corrective actions relative to its internal control procedures to the State Board of Education and the Local Government Commission for approval and shall implement the approved changes prior to the next annual audit. Where the firm preparing the audit under subsection (a) of this section identifies significant problems with internal control procedures the local school administrative unit shall submit the audit together with a plan for any corrective actions relative to its internal control procedures to the State Board of Education and the Local Government Commission for approval and shall implement the approved changes prior to the next annual audit.

If the incidents were not discovered by the firm performing the audit under subsection (a) of this section, the State Board of Education and the Local Government Commission shall employ an audit firm to review the internal control procedures of that local school administrative unit. Upon completion of this review, the audit firm shall report publicly to the State Board of Education, the Local Government Commission, and the board of the local school administrative unit. If the State Board of Education determines that significant changes are needed in the internal control procedures of the local school administrative unit, the local board shall submit a plan of corrective actions to the State Board of Education and the Local Government Commission for approval and shall implement the approved changes prior to the next annual audit. The local school administrative unit shall pay the cost of this audit. (1975, c. 437, s. 1; 1981, c. 423, s. 1; 1983, c. 913, s. 17; 1987 (Reg. Sess., 1988), c. 1025, s. 14; 1993, c. 539, s. 891; 1994, Ex. Sess., c. 24, s. 14(c); 2005-276, s. 7.58.)

§ 159-34. Annual independent audit; rules and regulations.

(a) Each unit of local government and public authority shall have its accounts audited as soon as possible after the close of each fiscal year by a certified public accountant or by an accountant certified by the Commission as qualified to audit local government accounts. When specified by the secretary, the audit shall evaluate the performance of a unit of local government or public authority with regard to compliance with all applicable federal and State agency regulations. This audit, combined with the audit of financial accounts, shall be deemed to be the single audit described by the "Federal Single Audit Act of 1984". The auditor shall be selected by and shall report directly to the governing board. The audit contract or agreement shall (i) be in writing, (ii) include the entire entity in the scope of the audit, except that an audit for purposes other than the annual audit required by this section should include an accurate description of the scope of the audit, (iii) require that a typewritten or printed report on the audit be prepared as set forth herein, (iv) include all of its terms and conditions, and (v) be submitted to the secretary for his approval as to form, terms, conditions, and compliance with the rules of the Commission. As a minimum, the required report shall include the financial statements prepared in accordance with generally accepted accounting principles, all disclosures in the public interest required by law, and the auditor's opinion and comments relating to financial statements. The audit shall be performed in conformity with generally accepted auditing standards. The finance officer shall file a copy of the audit report with the secretary, and shall submit all bills or claims for audit fees and costs to the secretary for his approval. Before giving his approval the secretary shall determine that the audit and audit report substantially conform to the requirements of this section. It shall be unlawful for any unit of local government or public authority to pay or permit the payment of such bills or claims without this approval. Each officer and employee of the local government or local public authority having custody of public money or responsibility for keeping records of public financial or fiscal affairs shall produce all books and records requested by the auditor and shall divulge such information relating to fiscal affairs as he may request. If any member of a governing board or any other public officer or employee shall conceal, falsify, or refuse to deliver or divulge any books, records, or information, with an attempt thereby to mislead the auditor or impede or interfere with the audit, he is guilty of a Class 1 misdemeanor.

(b) The Local Government Commission has authority to issue rules and regulations for the purpose of improving the quality of auditing and the quality and comparability of reporting pursuant to this section or any similar section of the General Statutes. The rules and regulations may consider the needs of the public for adequate information and the performance that the auditor has demonstrated in the past, and may be varied according to the size, purpose or function of the unit, or any other criteria reasonably related to the purpose or substance of the rules or regulation.

(c) Notwithstanding any other provision of law, except for Article 5A of Chapter 147 of the General Statutes pertaining to the State Auditor, all State departments and agencies shall rely upon the single audit accepted by the secretary as the basis for compliance with applicable federal and State regulations. All State departments and agencies which provide funds to local governments and public authorities shall provide the Commission with documents that the Commission finds are in the prescribed format describing standards of compliance and suggested audit procedures sufficient to give adequate direction to independent auditors retained by local governments and public authorities to conduct a single audit as required by this section. The secretary shall be responsible for the annual distribution of all such standards of compliance and suggested audit procedures proposed by State departments and agencies and any amendments thereto. Further, the Commission with the cooperation of all affected State departments and agencies shall be responsible for the following:

(1) Procedures for the timely distribution of compliance standards developed by State departments and agencies, reviewed and approved by the Commission to auditors retained by local governments and public authorities.

(2) Procedures for the distribution of single audits for local governments and public authorities such that they are available to all State departments and agencies which provide funds to local units.

(3) The acceptance of single audits on behalf of all State departments and agencies; provided that, the secretary may subsequently revoke such acceptance for cause, whereupon affected State departments and agencies shall no longer rely upon such audit as the basis for compliance with applicable federal and State regulations. (1971, c. 780, s. 1; 1975, c. 514, s. 15; 1979, c. 402, s. 9; 1981, c. 685, ss. 8, 9; 1987, c. 287; 1993, c. 257, s. 20; c. 539, s. 1081; 1994, Ex. Sess., c. 24, s. 14(c); 2001-160, s. 1.)

CHAPTER 261

AN ACT TO REGULATE THE PROFESSION OF PUBLIC ACCOUNTING IN THE STATE OF NORTH CAROLINA, AND TO PRESCRIBE ITS PRACTICE SO AS TO AFFORD PROTECTION TO THE PUBLIC; AND TO REPEAL CHAPTER 157 OF THE PUBLIC LAWS OF NORTH CAROLINA, SESSION OF 1913, ENTITLED "AN ACT TO CREATE A STATE BOARD OF ACCOUNTING AND PRESCRIBE ITS DUTIES AND POWERS; TO PROVIDE FOR THE EXAMINATION AND ISSUANCE OF CERTIFICATES TO QUALIFIED APPLICANTS, WITH DESIGNATION OF CERTIFIED PUBLIC ACCOUNTANTS, AND TO PROVIDE THE GRADE OF PENALTY FOR VIOLATION OF THE PROVISIONS HEREOF."

§ 714.6 Are you required to retain salvage powers over the leased property?

You must retain salvage powers over the leased property. Salvage powers protect you from a loss and provide you with the power to take action if there is an unanticipated change in conditions that threatens your financial position by significantly increasing your exposure to risk. Salvage powers allow you:

(a) As the owner and lessor, to take reasonable and appropriate action to salvage or protect the value of the property or your interests arising under the lease; or

(b) As the assignee of a lease, to become the owner and lessor of the leased property pursuant to your contractual rights, or take any reasonable and appropriate action to salvage or protect the value of the property or your interests arising under the lease.

§ 714.7 What are the insurance requirements applicable to leasing?

(a) You must maintain a contingent liability insurance policy with an endorsement for leasing or be named as the co-insured if you do not own the leased property. Contingent liability insurance protects you should you be sued as the owner of the leased property. You must use an insurance company with a nationally recognized industry rating of at least a B+.

(b) Your member must carry the normal liability and property insurance on the leased property. You must be named as an additional insured on the liability insurance policy and as the loss payee on the property insurance policy.

§ 714.8 Are the early payment provisions, or interest rate provisions, applicable in leasing arrangements?

You are not subject to the early payment provisions set forth in § 701.21(c)(6) of this chapter. You are also not subject to the interest rate provisions in § 701.21(c)(7).

§ 714.9 Are indirect leasing arrangements subject to the purchase of eligible obligation limit set forth in § 701.23 of this chapter?

Your indirect leasing arrangements are not subject to the eligible obligation limit if they satisfy the provisions of § 701.23(b)(3)(iv) that require that you make the final underwriting decision and that the lease contract is assigned to you very soon after it is signed by the member and the dealer or leasing company.

§ 714.10 What other laws must you comply with when engaged in leasing?

You must comply with the Consumer Leasing Act, 15 U.S.C. 1667–67f, and its implementing regulation, Regulation M, 12 CFR part 1013. You must comply with state laws on consumer leasing, but only to the extent that the state leasing laws are consistent with the Consumer Leasing Act, 15 U.S.C. 1667e, or provide the member with greater protections or benefits than the Consumer Leasing Act. You are also subject to the lending rules set forth in § 701.21 of this chapter, except as provided in § 714.8 and § 714.9 of this part. The lending rules in § 701.21 address the preemption of other state and federal laws that impact on credit transactions.

[65 FR 34585, May 31, 2000, as amended at 77 FR 71085, Nov. 29, 2012]

PART 715—SUPERVISORY COMMITTEE AUDITS AND VERIFICATIONS

Sec.

AUTHORITY: 12 U.S.C. 1761(b), 1761d, 1782(a)(6).

SOURCE: 64 FR 41035, July 29, 1999, unless otherwise noted.

§715.1 Scope of this part.

This part implements section 202(a)(6)(D) of the Federal Credit Union Act, 12 U.S.C. 1782(a)(6)(D), as added by section 201(a) of the Credit Union Membership Access Act, Pub. L. No. 105–219, 112 Stat. 918 (1998). This part prescribes the responsibilities of the Supervisory Committee to obtain an annual audit of the credit union according to its charter type and asset size, and to conduct a verification of members' accounts.

§715.2 Definitions used in this part.

As used in this part:

(a) *Balance sheet audit* refers to the examination of a credit union's assets, liabilities, and equity under generally accepted auditing standards (GAAS) by an independent public accountant for the purpose of opining on the fairness of the presentation on the balance sheet. Credit unions required to file call reports consistent with GAAP should ensure the audited balance sheet is likewise prepared on a GAAP basis. The opinion under this type of engagement would not address the fairness of the presentation of the credit union's income statement, statement of changes in equity (including comprehensive income), or statement of cash flows.

(b) *Compensated person* refers to any accounting/auditing professional, excluding a credit union employee, who is compensated for performing more than one supervisory committee audit and/or verification of members' accounts per calendar year.

(c) *Financial statements* refers to a presentation of financial data, including accompanying notes, derived from accounting records of the credit union, and intended to disclose a credit union's economic resources or obligations at a point in time, or the changes therein for a period of time, in conformity with GAAP, as defined herein, or regulatory accounting procedures. Each of the following is considered to be a financial statement: a balance sheet or statement of financial condition; statement of income or statement of operations; statement of undivided earnings; statement of cash flows; statement of changes in members' equity; statement of revenue and expenses; and statement of cash receipts and disbursements.

(d) *Financial statement audit* (also known as an "opinion audit") refers to an audit of the financial statements of a credit union performed in accordance with GAAS by an independent person who is licensed by the appropriate State or jurisdiction. The objective of a financial statement audit is to express an opinion as to whether those financial statements of the credit union present fairly, in all material respects, the financial position and the results of its operations and its cash flows in conformity with GAAP, as defined herein, or regulatory accounting practices.

(e) *GAAP* is an acronym for "generally accepted accounting principles" which refers to the conventions, rules, and procedures which define accepted accounting practice. GAAP includes both broad general guidelines and detailed practices and procedures, provides a standard by which to measure financial statement presentations, and encompasses not only accounting principles and practices but also the methods of applying them.

(f) *GAAS* is an acronym for "generally accepted auditing standards" which refers to the standards approved and adopted by the American Institute of Certified Public Accountants which apply when an "independent, licensed certified public accountant" audits financial statements. Auditing standards differ from auditing procedures in that "procedures" address acts to be performed, whereas "standards" measure the quality of the performance of those acts and the objectives to be achieved by use of the procedures undertaken. In addition, auditing standards address the auditor's professional qualifications as well as the judgment exercised in performing the audit and in preparing the report of the audit.

(g) *Independent* means the impartiality necessary for the dependability

of the compensated auditor's findings. Independence requires the exercise of fairness toward credit union officials, members, creditors and others who may rely upon the report of a supervisory committee audit report.

(h) *Internal control* refers to the process, established by the credit union's board of directors, officers and employees, designed to provide reasonable assurance of reliable financial reporting and safeguarding of assets against unauthorized acquisition, use, or disposition. A credit union's internal control structure consists of five components: control environment; risk assessment; control activities; information and communication; and monitoring. Reliable financial reporting refers to preparation of Call Reports (NCUA Forms 5300 and 5310) that meet management's financial reporting objectives. Internal control over safeguarding of assets against unauthorized acquisition, use, or disposition refers to prevention or timely detection of transactions involving such unauthorized access, use, or disposition of assets which could result in a loss that is material to the financial statements.

(i) *Reportable conditions* refers to a matter coming to the attention of the independent, compensated auditor which, in his or her judgment, represents a significant deficiency in the design or operation of the internal control structure of the credit union, which could adversely affect its ability to record, process, summarize, and report financial data consistent with the representations of management in the financial statements.

(j) *Report on Examination of Internal Control over Call Reporting* refers to an engagement in which an independent, licensed, certified public accountant or public accountant, consistent with attestation standards, examines and reports on management's written assertions concerning the effectiveness of its internal control over financial reporting in its most recently filed semiannual or year-end Call Report, with a concentration in high risk areas. For credit unions, such high risk areas most often include: lending activity; investing activity; and cash handling and deposit-taking activity.

(k) *State-licensed person* refers to a certified public accountant or public accountant who is licensed by the State or jurisdiction where the credit union is principally located to perform accounting or auditing services for that credit union.

(l) *Supervisory committee* refers to a supervisory committee as defined in Section 111(b) of the Federal Credit Union Act, 12 U.S.C. 1761(b). For some federally-insured state chartered credit unions, the "audit committee" designated by state statute or regulation is the equivalent of a supervisory committee.

(m) *Supervisory committee audit* refers to an engagement under either § 715.5 or § 715.6 of this part.

(n) *Working papers* refers to the principal record, in any form, of the work performed by the auditor and/or supervisory committee to support its findings and/or conclusions concerning significant matters. Examples include the written record of procedures applied, tests performed, information obtained, and pertinent conclusions reached in the engagement, proprietary audit programs, analyses, memoranda, letters of confirmation and representation, abstracts of credit union documents, reviewer's notes, if retained, and schedules or commentaries prepared or obtained in the course of the engagement.

[64 FR 41035, July 29, 1999, as amended at 66 FR 65624, Dec. 20, 2001]

§ 715.3 General responsibilities of the Supervisory Committee.

(a) *Basic.* The supervisory committee is responsible for ensuring that the board of directors and management of the credit union—

(1) Meet required financial reporting objectives and

(2) Establish practices and procedures sufficient to safeguard members' assets.

(b) *Specific.* To carry out the responsibilities set forth in paragraph (a) of this section, the supervisory committee must determine whether:

(1) Internal controls are established and effectively maintained to achieve the credit union's financial reporting objectives which must be sufficient to satisfy the requirements of the supervisory committee audit, verification of

members' accounts and its additional responsibilities;

(2) The credit union's accounting records and financial reports are promptly prepared and accurately reflect operations and results;

(3) The relevant plans, policies, and control procedures established by the board of directors are properly administered; and

(4) Policies and control procedures are sufficient to safeguard against error, conflict of interest, self-dealing and fraud.

(c) *Mandates.* In carrying out the responsibilities set forth in paragraphs (a) and (b) of this section, the Supervisory Committee must:

(1) Ensure that the credit union adheres to the measurement and filing requirements for reports filed with the NCUA Board under § 741.6 of this chapter;

(2) Perform or obtain a supervisory committee audit, as prescribed in § 715.4 of this part;

(3) Verify or cause the verification of members' passbooks and accounts against the records of the credit union, as prescribed in § 715.8 of this part;

(4) Act to avoid imposition of sanctions for failure to comply with the requirements of this part, as prescribed in §§ 715.11 and 715.12 of this part.

[64 FR 41035, July 29, 1999, as amended at 69 FR 27828, May 17, 2004]

§ 715.4 Audit responsibility of the Supervisory Committee.

(a) *Annual audit requirement.* A federally-insured credit union is required to obtain an annual supervisory committee audit which occurs at least once every calendar year (period of performance) and must cover the period elapsed since the last audit period (period effectively covered).

(b) *Financial statement audit option.* Any federally-insured credit union, whether Federally- or State-chartered and regardless of asset size, may choose to fulfill its Supervisory Committee audit responsibility by obtaining an annual audit of its financial statements performed in accordance with GAAS by an independent person who is licensed to do so by the State or jurisdiction in which the credit union is principally located. (A "financial statement audit" is distinct from a "supervisory committee audit," although a financial statement audit is included among the options for fulfilling the supervisory committee audit requirement. *Compare* § 715.2(c) and (j).)

(c) *Other audit options.* A federally insured credit union which does not choose to obtain a financial statement audit as permitted by subsection (b) must fulfill its supervisory audit responsibility under either of § 715.5 or § 715.6 of this part, whichever is applicable. *See* Table 1. For purposes of this part, a credit union's asset size is the amount of total assets reported in the year-end Call Report (NCUA form 5300) filed for the calendar year-end immediately preceding the period under audit.

Type of Charter	*Asset Size*	*Minimum Audit Required to Fulfill Supervisory Committee Audit Responsibility*[1]	*Part 715 section*
Federal charter	$500 Million or more	Financial statement audit per GAAS by independent, State-licensed person	§ 715.5
	Less than $500 Million but greater than $10 Million	Either financial statement audit or other supervisory committee audit options	
	$10 Million or less	Either of three supervisory committee audit options	
State charter	$500 Million or more	Financial statement audit per GAAS by independent, State-licensed person	§ 715.6
	Less than $500 Million	Either of three supervisory committee audit options unless audit prescribed by State law is more stringent.	

[1]The Supervisory Committee audit responsibility under Part 715 can always be fulfilled by obtaining a financial statement audit. §715.4(b).

§ 715.5 Audit of Federal Credit Unions.

(a) *Total assets of $500 million or greater.* To fulfill its Supervisory Committee audit responsibility, a federal credit union having total assets of $500 million or greater must obtain an annual audit of its financial statements performed in accordance with GAAS by an independent person who is licensed to do so by the State or jurisdiction in which the credit union is principally located.

(b) *Total assets of less than $500 million but more than $10 million.* To fulfill its Supervisory Committee audit responsibility, a Federally-chartered credit union having total assets of less than $500 million but more than $10 million which does not choose to obtain an audit under §715.5(a), must obtain an annual supervisory committee audit as prescribed in §715.7.

(c) *Total assets of $10 million or less.* To fulfill its Supervisory Committee audit responsibility, a Federally-chartered credit union having total assets of $10 million or less must obtain an annual Supervisory Committee audit as prescribed in §715.7.

(d) *Other requirements.* A federally chartered credit union, regardless of which audit it is required to obtain under this section, must meet other applicable requirements of this part.

[64 FR 41035, July 29, 1999, as amended at 75 FR 34621, June 18, 2010]

§ 715.6 Audit of Federally-insured State-chartered credit unions.

(a) *Total assets of $500 million or greater.* To fulfill its Supervisory Committee audit responsibility, a federally-insured State-chartered credit union having total assets of $500 million or greater must obtain an annual audit of its financial statements performed in accordance with GAAS by an independent person who is licensed to do so by the State or jurisdiction in which the credit union is principally located.

(b) *Total assets of less than $500 million.* To fulfill its Supervisory Committee audit responsibility, a federally-insured State-chartered credit union having total assets of less than $500 million must obtain either an annual supervisory committee audit as prescribed under either §715.6(a) or §715.7, or an audit as prescribed by the State

or jurisdiction in which the credit union is principally located, whichever audit is more stringent.

(c) *Other requirements.* A federally-insured, state-chartered credit union, regardless of which audit it is required to obtain under this section, must meet other applicable requirements of this part except §§715.5 and 715.12.

§715.7 Supervisory Committee audit alternatives to a financial statement audit.

A credit union which is not required to obtain a financial statement audit may fulfill its supervisory committee responsibility by any one of the following engagements:

(a) *Balance sheet audit.* A balance sheet audit, as defined in §715.2(a), performed by a person who is licensed to do so by the State or jurisdiction in which the credit union is principally located; or

(b) *Report on Examination of Internal Control over Call Reporting.* An engagement and report on management's written assertions concerning the effectiveness of internal control over financial reporting in the credit union's most recently filed semiannual or year-end call report (NCUA Form 5300), as defined in §715.2(j), performed by a person who is licensed to do so by the State or jurisdiction in which the credit union is principally located, and in which management specifies the criteria on which it based its evaluation of internal control; or

(c) *Audit per Supervisory Committee Guide.* An audit performed by the supervisory committee, its internal auditor, or any other qualified person (such as a certified public accountant, public accountant, league auditor, credit union auditor consultant, retired financial institutions examiner, etc.) in accordance with the procedures prescribed in NCUA's *Supervisory Committee Guide.* Qualified persons who are not State-licensed cannot provide assurance services under this subsection.

§715.8 Requirements for verification of accounts and passbooks.

(a) *Verification obligation.* The Supervisory Committee shall, at least once every two years, cause the passbooks (including any book, statements of account, or other record approved by the NCUA Board) and accounts of the members to be verified against the records of the treasurer of the credit union.

(b) *Methods.* Any of the following methods may be used to verify members' passbooks and accounts, as appropriate:

(1) *Controlled verification.* A controlled verification of 100 percent of members' share and loan accounts;

(2) *Statistical method.* A sampling method which provides for:

(i) Random selection:

(ii) A sample which is representative of the population from which it was selected;

(iii) An equal chance of selecting each dollar in the population;

(iv) Sufficient accounts in both number and scope on which to base conclusions concerning management's financial reporting objectives; and

(v) Additional procedures to be performed if evidence provided by confirmations alone is not sufficient.

(3) *Non-statistical method.* When the verification is performed by an Independent person licensed by the State or jurisdiction in which the credit union is principally located, the auditor may choose among the sampling methods set forth in paragraphs (b)(1) and (2) of this section and non-statistical sampling methods consistent with GAAS if such methods provide for:

(i) Sufficient accounts in both number and scope on which to base conclusions concerning management's financial reporting objectives to provide assurance that the General Ledger accounts are fairly stated in relation to the financial statements taken as a whole;

(ii) Additional procedures to be performed by the auditor if evidence provided by confirmations alone is not sufficient; and

(iii) Documentation of the sampling procedures used and of their consistency with GAAS (to be provided to the NCUA Board upon request).

(c) *Retention of records.* The supervisory committee must retain the records of each verification of members' passbooks and accounts until it completes the next verification of members' passbooks and accounts.

§ 715.9 Assistance from outside, compensated person.

(a) *Unrelated to officials.* A compensated auditor who performs a Supervisory Committee audit on behalf of a credit union shall not be related by blood or marriage to any management employee, member of either the board of directors, the Supervisory Committee or the credit committee, or loan officer of that credit union.

(b) *Engagement letter.* The engagement of a compensated auditor to perform all or a portion of the scope of a financial statement audit or supervisory committee audit shall be evidenced by an engagement letter. In all cases, the engagement must be contracted directly with the Supervisory Committee. The engagement letter must be signed by the compensated auditor and acknowledged therein by the Supervisory Committee prior to commencement of the engagement.

(c) *Contents of letter.* The engagement letter shall:

(1) Specify the terms, conditions, and objectives of the engagement;

(2) Identify the basis of accounting to be used;

(3) If a Supervisory Committee Guide audit, include an appendix setting forth the procedures to be performed;

(4) Specify the rate of, or total, compensation to be paid for the audit;

(5) Provide that the auditor shall, upon completion of the engagement, deliver to the Supervisory Committee a written report of the audit and notice in writing, either within the report or communicated separately, of any internal control reportable conditions and/or irregularities or illegal acts, if any, which come to the auditor's attention during the normal course of the audit (i.e., no notice required if none noted);

(6) Specify a target date of delivery of the written reports, such target date not to exceed 120 days from date of calendar or fiscal year-end under audit (period covered), unless the supervisory committee obtains a waiver from the supervising NCUA Regional Director;

(7) Certify that NCUA staff and/or the State credit union supervisor, or designated representatives of each, will be provided unconditional access to the complete set of original working papers, either at the offices of the credit union or at a mutually agreed upon location, for purposes of inspection; and

(8) Acknowledge that working papers shall be retained for a minimum of three years from the date of the written audit report.

(d) *Complete scope.* If the engagement is to perform a *Supervisory Committee Guide* audit intended to fully meet the requirements of §715.7(c), the engagement letter shall certify that the audit will address the complete scope of that engagement;

(e) *Exclusions from scope.* If the engagement is to perform a *Supervisory Committee Guide* audit which will exclude any item required by the applicable section, the engagement letter shall:

(1) Identify the excluded items;

(2) State that, because of the exclusion(s), the resulting audit will not, by itself, fulfill the scope of a supervisory committee audit; and

(3) Caution that the supervisory committee will remain responsible for fulfilling the scope of a supervisory committee audit with respect to the excluded items.

§ 715.10 Audit report and working paper maintenance and access.

(a) *Audit report.* Upon completion and/or receipt of the written report of a financial statement audit or a supervisory committee audit, the Supervisory Committee must verify that the audit was performed and reported in accordance with the terms of the engagement letter prescribed herein. The Supervisory Committee must submit the report(s) to the board of directors, and provide a summary of the results of the audit to the members of the credit union orally or in writing at the next annual meeting of the credit union. If a member so requests, the Supervisory Committee shall provide the member access to the full audit report. If the National Credit Union Administration ("NCUA") so requests, the Supervisory Committee shall provide NCUA a copy of each of the audit reports it receives or produces.

(b) *Working papers.* The supervisory committee shall be responsible for preparing and maintaining, or making available, a complete set of original

working papers supporting each supervisory committee audit. The supervisory committee shall, upon request, provide NCUA staff unconditional access to such working papers, either at the offices of the credit union or at a mutually agreeable location, for purposes of inspecting such working papers.

§ 715.11 Sanctions for failure to comply with this part.

(a) *Sanctions.* Failure of a supervisory committee and/or its independent compensated auditor or other person to comply with the requirements of this section, or the terms of an engagement letter required by this section, is grounds for:

(1) The regional director to reject the supervisory committee audit and provide a reasonable opportunity to correct deficiencies;

(2) The regional director to impose the remedies available in §715.12, provided any of the conditions specified therein is present; and

(3) The NCUA Board to seek formal administrative sanctions against the supervisory committee and/or its independent, compensated auditor pursuant to section 206(r) of the Federal Credit Union Act, 12 U.S.C. 1786(r).

(b) *State Charters.* In the case of a federally-insured state chartered credit union, NCUA shall provide the state regulator an opportunity to timely impose a remedy satisfactory to NCUA before exercising it authority under §741.202 of this chapter to impose a sanction permitted under paragraph (a) of this section.

§ 715.12 Statutory audit remedies for Federal credit unions.

(a) *Audit by alternative licensed person.* The NCUA Board may compel a federal credit union to obtain a supervisory committee audit which meets the minimum requirements of §715.5 or §715.7, and which is performed by an independent person who is licensed by the State or jurisdiction in which the credit union is principally located, for any fiscal year in which any of the following three conditions is present:

(1) The Supervisory Committee has not obtained an annual financial statement audit or performed a supervisory committee audit; or

(2) The Supervisory Committee has obtained a financial statement audit or performed a supervisory committee audit which does not meet the requirements of part 715 including those in §715.8.

(3) The credit union has experienced serious and persistent recordkeeping deficiencies as defined in paragraph (c) of this section.

(b) *Financial statement audit required.* The NCUA Board may compel a federal credit union to obtain a financial statement audit performed in accordance with GAAS by an independent person who is licensed by the State or jurisdiction in which the credit union is principally located (even if such audit is not required by §715.5), for any fiscal year in which the credit union has experienced serious and persistent recordkeeping deficiencies as defined in paragraph (c) of this section. The objective of a financial statement audit performed under this paragraph is to reconstruct the records of the credit union sufficient to allow an unqualified or, if necessary, a qualified opinion on the credit union's financial statements. An adverse opinion or disclaimer of opinion should be the exception rather than the norm.

(c) "*Serious and persistent recordkeeping deficiencies.*" A record-keeping deficiency is "serious" if the NCUA Board reasonably believes that the board of directors and management of the credit union have not timely met financial reporting objectives and established practices and procedures sufficient to safeguard members' assets. A serious recordkeeping deficiency is "persistent" when it continues beyond a usual, expected or reasonable period of time.

PART 716—PRIVACY OF CONSUMER FINANCIAL INFORMATION

AUTHORITY: 15 U.S.C. 6801 *et seq.*, 12 U.S.C. 1751 *et seq.*

SOURCE: 78 FR 32545, May 31, 2013, unless otherwise noted.

04 NCAC 06C .0305 INDEPENDENT AUDITS

(a) An audit of each state-chartered credit unions shall occur at least once each calendar year and shall cover the period elapsed since the last audit. The audit will be performed using generally accepted auditing procedures and standards. It is the responsibility of the supervisory committee, or board of directors if there is no supervisory committee, to ensure that the annual audit is timely, that generally accepted auditing standards are used, that an adequate audit of the credit union records is conducted, and the audit report is promptly prepared and submitted to the board of directors. Workpapers of the supervisory committee and/or its independent auditors shall be made available for review by the Credit Union Division.

(b) Compensated auditors performing audits for credit unions must be independent of the credit union's employees, members of the board of directors, supervisory committee, credit committee, and/or the credit union's loan officers and members of their immediate families. Compensated auditors must be a Certified Public Accountant (CPA), or a bonded auditing firm, or a person who is bonded or has accountants' professional liability insurance coverage.

(c) Annual verification of depositors' and members' accounts will be done in conjunction with the annual audit and shall be made by either a controlled verification of 100 percent of share, deposit and loan accounts or a controlled random sampling method that provides assurance that the General Ledger accounts are fairly stated and that members' and depositors' accounts are properly safeguarded.

(d) A credit union shall obtain an outside independent audit by a certified public accountant for any fiscal year during which any one of the following is present:

(1) the required annual audit was not performed or was not in accordance with Paragraphs (a), (b), and/or (c) of this Rule;

(2) the credit union has experienced serious and/or persistent recordkeeping deficiencies. Persistent means continuing to exist or endure. Serious is when there is given cause for concern that the financial condition is not fairly and accurately presented and/or that management practices are not sufficient to safeguard the assets of the credit union. When a credit union fails to comply with this Rule, the administrator has the authority to engage an outside certified public accountant at the credit union's expense to conduct the required annual audit.

(e) This Rule shall not in any manner modify or limit the administrator's responsibility or authority to examine credit unions as set forth in G.S. 54-109.16, and it shall not modify or limit the administrator's authority to assess the cost of the examination against any credit union.

History Note: *Authority G.S. 54-109.12; 54-109.17; 54-109.35(b); 54-109.49;*
Eff. February 1, 1976;
Readopted Eff. April 4, 1978;
Amended Eff. October 1, 1991; October 1, 1983; May 1, 1983; January 1, 1983.

21 NCAC 08N .0402 INDEPENDENCE

(a) A CPA, or the CPA's firm, who is performing an engagement in which the CPA, or the CPA's firm, will issue a report on financial statements of any client (other than a report in which lack of independence is disclosed) must be independent with respect to the client in fact and appearance.

(b) Independence is impaired if, during the period of the professional engagement, a covered person:

(1) Had or was committed to acquire any direct or material indirect financial interest in the client.

(2) Was a trustee of any trust or executor or administrator of any estate if such trust or estate had or was committed to acquire any direct or material indirect financial interest in the client; and

(A) The covered person (individually or with others) had the authority to make investment decisions for the trust or estate;

(B) The trust or estate owned or was committed to acquire more than 10 percent of the client's outstanding equity securities or other ownership interests; or

(C) The value of the trust's or estate's holdings in the client exceeded 10 percent of the total assets of the trust or estate.

(3) Had a joint closely held investment that was material to the covered person.

(4) Except as permitted in the AICPA Professional Standards Code of Professional Conduct and Bylaws, had any loan to or from the client or any officer or director of the client, or any individual owning 10 percent or more of the client's outstanding equity securities or other ownership interests.

(c) Independence is impaired if during the period of the professional engagement, a shareholder, a member, a partner or professional employee of the firm, his or her immediate family and close relatives, (as defined in the AICPA Code of Professional Conduct and Bylaws) or any group of such persons acting together owned more than five percent of a client's outstanding equity securities or other ownership interests.

(d) Independence is impaired if, during the period covered by the financial statements, or during the period of the professional engagement, a shareholder, a member, a partner or professional employee of the firm was simultaneously associated with the client as a:

(1) Director, officer, employee, or in any capacity equivalent to that of a member of management;

(2) Promoter, underwriter, or voting trustee; or

(3) Trustee for any pension or profit-sharing trust of the client.

(e) For the purposes of this Rule "Covered" person is

(1) An individual on the attest engagement team;

(2) An individual in a position to influence the attest engagement;

(3) A partner or manager who provides nonattest services to the attest client beginning once he or she provides 10 hours of nonattest services to the client within any fiscal year and ending on the later of the date:

(A) the firm signs the report on the financial statements for the fiscal year during which those services were provided; or

(B) he or she no longer expects to provide 10 or more hours of nonattest services to the attest client on a recurring basis;

(4) A partner in the office in which the lead attest engagement partner primarily practices in connection with the attest engagement;

(5) The firm, including the firm's employee benefit plans; or

(6) An entity whose operating, financial, or accounting policies can be controlled (as defined by generally accepted accounting principles (GAAP) for consolidation purposes) by any of the individuals or entities described in Subparagraphs (1) through (5) of this Paragraph or by two or more such individuals or entities if they act together;

(f) The impairments of independence listed in this Rule are not intended to be all-inclusive.

History Note: *Authority G.S. 55B-12; 57C-2-01; 93-12(9);*
Eff. April 1, 1994;
Amended Eff. February 1, 2011; April 1, 2003.

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American Institute of Certified Public Accountants
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May 2014

be those foreign authorities granting substantially equivalent foreign designations in accordance with Section 6(g) of this Act.

(2) The Board, its members, and its agents shall be immune from personal liability for actions taken in good faith in the discharge of the Board's responsibilities, and the State shall hold the Board, its members, and its agents harmless from all costs, damages, and attorneys' fees arising from claims and suits against them with respect to matters to which such immunity applies.

COMMENT: In many accountancy laws now in effect, the provisions regarding subpoenas and testimony that are included in this paragraph dealing with Board powers generally are found instead in the section dealing with hearings, which is section 12 in this Uniform Act, or are specified in the state's administrative procedure act. Subsection 4(g)(1) has been strengthened to facilitate greater multistate enforcement cooperation.

(h) The Board may adopt rules governing its administration and enforcement of this Act and the conduct of licensees, including but not limited to--

(1) Rules governing the Board's meetings and the conduct of its business;

(2) Rules of procedure governing the conduct of investigations and hearings by the Board;

(3) Rules specifying the educational and experience qualifications required for the issuance of certificates under Section 6 of this Act and the continuing professional education required for renewal of certificates under Section 6;

(4) Rules of professional conduct directed to controlling the quality and probity of services by licensees, and dealing among other things with independence, integrity, and objectivity; competence and technical standards; responsibilities to the public; and responsibilities to clients;

(5) Rules governing the professional standards applicable to licensees;

(6) Rules governing the manner and circumstances of use of the titles "certified public accountant" and "CPA";

(7) Rules regarding peer review that may be required to be performed under provisions of this Act;

(8) Rules on substantial equivalence to implement Section 23; and

(9) Such other rules as the Board may deem necessary or appropriate for

person or firm holding a certification, designation, degree, or license granted in a foreign country entitling the holder thereof to engage in the practice of public accountancy or its equivalent in such country, whose activities in this State are limited to the provision of professional services to persons or firms who are residents of, governments of, or business entities of the country in which the person holds such entitlement, who performs no attest or compilation services as defined in this Act and who issues no reports as defined in this Act with respect to information of any other persons, firms, or governmental units in this State, and who does not use in this State any title or designation other than the one under which the person practices in such country, followed by a translation of such title or designation into the English language, if it is in a different language, and by the name of such country.

COMMENT: The right spelled out in this provision, of foreign licensees to provide services in the state to foreign-based clients, looking to the issuance of reports only in foreign countries, is essentially what foreign licensees have a right to do under most laws now in effect, simply because no provision in those laws restricts such a right. The foreign titles used by foreign licensees might otherwise run afoul of standard prohibitions with respect to titles (such as one on titles misleadingly similar to "CPA") but this provision would grant a dispensation not found in most laws now in force.

(k) No holder of a certificate issued under Section 6 of this Act or a registration issued under Section 8 of this Act shall perform attest services through any business form that does not hold a valid permit issued under Section 7 of this Act.

COMMENT: See the comments following Sections 6(a), 7(a) and 8.

(l) No individual licensee shall issue a report in standard form upon a compilation of financial information through any form of business that does not hold a valid permit issued under Section 7 of this Act unless the report discloses the name of the business through which the individual is issuing the report, and the individual:

(1) signs the compilation report identifying the individual as a CPA or PA,

(2) meets the competency requirement provided in applicable standards, and

(3) undergoes no less frequently than once every three years, a peer review conducted in such manner as the Board shall by rule specify, and such review shall include verification that such individual has met the competency requirements set out in professional standards for such services.

(m) Nothing herein shall prohibit a practicing attorney or firm of attorneys from preparing or presenting records or documents customarily prepared by an attorney or firm of attorneys in connection with the attorney's professional work in the practice of law.

(n)(1) A licensee shall not for a commission recommend or refer to a client any product or

service, or for a commission recommend or refer any product or service to be supplied by a client, or receive a commission, when the licensee also performs for that client,

(A) an audit or review of a financial statement; or

(B) a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence; or

(C) an examination of prospective financial information.

This prohibition applies during the period in which the licensee is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in such listed services.

(2) A licensee who is not prohibited by this section from performing services for or receiving a commission and who is paid or expects to be paid a commission shall disclose that fact to any person or entity to whom the licensee recommends or refers a product or service to which the commission relates.

(3) Any licensee who accepts a referral fee for recommending or referring any service of a licensee to any person or entity or who pays a referral fee to obtain a client shall disclose such acceptance or payment to the client.

(o)(1) A licensee shall not:

(A) perform for a contingent fee any professional services for, or receive such a fee from a client for whom the licensee or the licensee's firm performs,

(i) an audit or review of a financial statement; or

(ii) a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence; or

(iii) an examination of prospective financial information; or

(B) Prepare an original or amended tax return or claim for a tax refund for a contingent fee for any client.

(2) The prohibition in (1) above applies during the period in which the licensee is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in any such listed services.

(3) Except as stated in the next sentence, a contingent fee is a fee established for the

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National Association of State Boards of Accountancy

August 2011

(5) **Willfully failing to file a report or record required by state or federal law; willfully impeding or obstructing the filing of such a report or record, or inducing another person to impede or obstruct such filing by another; and the making or filing of such a report or record which one knows to be false. A finding, adjudication, consent order or conviction by a federal or state court, agency or regulatory authority or the PCAOB that a licensee has willfully failed to file a required report or record shall be prima facie evidence of a violation of this rule.**

Rule 10-2 - Return of certificate, registration or permit to practice.

Any licensee whose certificate, registration or permit issued by the Board is subsequently suspended or revoked shall promptly return such certificate, registration or permit to the Board.

Rule 10-3 - Applicable standards.

A licensee shall follow the standards, as applicable under the circumstances and at the time of the services, set forth in this section in providing professional services. In addition to the applicable standards set forth below, a licensee shall follow standards issued by other professional or governmental bodies including international standards setting bodies with which a licensee is required by law, regulation or the terms of engagement to comply. A licensee shall comply with all applicable standards, including but not limited to the following:

(a) **A licensee shall not render services subject to the authority of the SEC or PCAOB unless the licensee has complied with the applicable standards and rules adopted and approved by the PCAOB and SEC.**

(b) **A licensee shall not render auditing services unless the licensee has complied with the applicable generally accepted auditing standards.**

(c) **A licensee shall not render accounting and review services unless the licensee has complied with the standards for accounting and review services issued by the AICPA, including subsequent amendments and editions.**

(d) **A licensee shall not permit the licensee's name to be associated with governmental financial statements for a client unless the licensee has complied with the standards for governmental accounting issued by the GASB, including subsequent amendments and editions.**

(e) **A licensee shall not render attestation services unless the licensee has complied with the Statements on Standards for Attestation Engagements issued by the AICPA, including subsequent amendments and editions.**

(f) A licensee shall not render management consulting services unless the licensee has complied with the standards for management consulting services (including the definition of such services) issued by the AICPA, including subsequent amendments and editions.

(g) A licensee shall not render services in the area of taxation unless the licensee has complied with the standards for tax services issued by the AICPA, including subsequent amendments and editions.

(h) A licensee shall not permit the licensee's name to be used in conjunction with any forecast of future transactions in a manner which may lead to the belief that the licensee vouches for the achievability of the forecast, and shall not render services associated with prospective financial statements unless the licensee has complied with the standards for accountants' services on prospective financial information issued by the AICPA, including subsequent amendments and editions.

(i) A licensee shall not express an opinion on financial statements unless the licensee complies with the Statements of Financial Accounting Standards, together with those Accounting Research Bulletins and Accounting Principles Board Opinions which are not superseded by action of the FASB, including subsequent amendments and editions.

Rule 10-4 – Model Code of Conduct.

A licensee shall comply with the principles contained in the following Model Code of Conduct. All changes in the NASBA Model Code of Conduct shall automatically be made a part of these rules unless specifically rejected by the Board.

NASBA Model Code of Conduct

PREAMBLE

The public places trust and confidence in the profession and the services it provides; consequently, licensees have a duty to conduct themselves in a manner that will be beneficial to the public and which fosters such trust and confidence. This Model Code of Conduct identifies seven fundamental principles of conduct, six of which are intended to govern licensees' professional performance whether they are in public practice, industry, not-for-profit organizations, government, education or other professional endeavors. The seventh principle, independence, applies only to those professional services where it is required by professional standards. This Model Code of Conduct defines the conduct that the public has a right to expect of the licensee, as well as all persons or entities the licensee has the authority or capacity to control.

With the exception of independence, these principles are universal and apply to all services and activities performed by the licensee in all aspects of his or her professional conduct. Independence, however, is a unique principle that applies only to those professional services where it is required in accordance with professional standards. This Model Code of Conduct is not intended to replace professional standards applicable to specific engagements. In applying any of the principles of this Model Code of Conduct to deliberations in disciplinary or other proceedings, the Board may consider as persuasive, but not necessarily conclusive, and/or adopt by reference applicable interpretations and rulings of the Code of Professional Conduct adopted by the American Institute of Certified Public Accountants, as well as similarly applicable interpretations and rulings issued by other authorities such as the Securities and Exchange Commission, the Government Accountability Office and the Public Company Accounting Oversight Board.

Users of the licensee's services draw confidence from the knowledge that the profession is bound to a framework which requires continued dedication to professional excellence and commitment to ethical behavior that will not be subordinated to personal gain.

I. PRINCIPLE: PUBLIC INTEREST

The grant of a license indicates that an individual has met the criteria established by state boards of accountancy to perform services in a manner that protects the public interest. The licensee must, therefore, have a keen consciousness of the public interest. The public consists of clients, credit grantors, governments, employers, investors, the business and financial community, and others who use the services of licensees. Services provided by licensees support and facilitate many societal needs, including the orderly functioning of commerce and the capital markets.

Because the licensee is seen as a representative of the profession by the public who retains or employs him or her or uses his or her services, the licensee should avoid conduct that might conflict with the public interest or erode public respect for, and confidence in, the profession.

II. PRINCIPLE: INTEGRITY

Integrity is a character trait demonstrated by acting honestly, candidly, and not knowingly misrepresenting facts, accommodating deceit, or subordinating ethical principles. Acting with integrity is essential to maintaining credibility and public trust. It incorporates both the spirit and substance in the application of the ethical and technical standards that govern the profession, or in the absence thereof, what is just and right.

A licensee should act with integrity in the performance of all professional activities in whatever capacity performed.

III. PRINCIPLE: OBJECTIVITY

Objectivity is a distinguishing feature of the accounting profession and is critical to maintaining the public's trust and confidence. It is a state of mind that imposes the

obligation to be impartial and free of bias that may result from conflicts of interest or subordination of judgment. Objectivity requires a licensee to exercise an appropriate level of professional skepticism in carrying out all professional activities.

Although a licensee may serve multiple interests in many different capacities, objectivity must be maintained. This requires a careful assessment of the effects on objectivity of all professional relationships and activities.

A licensee should maintain objectivity in the performance of all professional activities in whatever capacity performed.

IV. PRINCIPLE: DUE CARE

Due care imposes the obligation to perform professional activities with concern for the best interest of those for whom the activities are performed and consistent with the profession's responsibility to the public. It is essential to preserving the public's trust and confidence. Due care requires the licensee to discharge professional responsibilities with reasonable care and diligence and to adequately plan and supervise all professional activities for which he or she is responsible.

A licensee should act with due care in the performance of all professional activities in whatever capacity performed.

V. PRINCIPLE: COMPETENCE

Competence is derived from a combination of education and experience. It begins with a mastery of the common body of knowledge, skills, and abilities, and requires a commitment to lifelong learning and professional improvement. A licensee should possess a level of competence, sound professional judgment, and proficiency to ensure that the quality of his or her activities meets the high level of professionalism required by these Principles. A licensee is responsible for assessing his or her own competence, which includes evaluating whether education, experience, and judgment are adequate for the responsibility assumed.

A licensee should be competent in the performance of all professional activities, in whatever capacity performed, and comply with applicable professional standards.

VI. PRINCIPLE: CONFIDENTIALITY

A licensee has an obligation to maintain and respect the confidentiality of information obtained in the performance of all professional activities. Maintaining such confidentiality is vital to the proper performance of the licensee's professional activities.

A licensee shall not use or disclose, or permit others within the licensee's control to use or disclose, any confidential client or employer information without the consent of the client or employer. This obligation continues after the termination of the relationship between the licensee and the client or employer and extends to information obtained by the licensee in

professional relationships with prospective clients and employers.

This principle shall not be construed to prohibit a licensee from disclosing information as required to meet professional, regulatory or other legal obligations.

VII. PRINCIPLE: INDEPENDENCE

Independence, where required by professional standards, is essential to establishing and maintaining the public's faith and confidence in, and reliance on, the information reported on by the licensee.

A licensee in the practice of public accounting should be independent in fact and appearance when engaged to provide services where independence is required by professional standards. Independence in fact is the state of mind that permits a licensee to perform an attest service without being affected by influences that compromise professional judgment, thereby allowing the licensee to act with integrity and exercise objectivity and professional skepticism. Independence in appearance is the avoidance of circumstances that would cause a reasonable and informed third party, having knowledge of all relevant information, to reasonably conclude that the integrity, objectivity or professional skepticism of a licensee had been compromised.

AU Section 220

Independence

Source: SAS No. 1, section 220.

Issue date, unless otherwise indicated: November, 1972.

.01 The second general standard is:

> The auditor must maintain independence in mental attitude in all matters relating to the audit.

[Revised, November 2006, to reflect conforming changes necessary due to the issuance of Statement on Auditing Standards No. 113.]

.02 This standard requires that the auditor be independent; aside from being in public practice (as distinct from being in private practice), he must be without bias with respect to the client since otherwise he would lack that impartiality necessary for the dependability of his findings, however excellent his technical proficiency may be. However, independence does not imply the attitude of a prosecutor but rather a judicial impartiality that recognizes an obligation for fairness not only to management and owners of a business but also to creditors and those who may otherwise rely (in part, at least) upon the independent auditor's report, as in the case of prospective owners or creditors.

.03 It is of utmost importance to the profession that the general public maintain confidence in the independence of independent auditors. Public confidence would be impaired by evidence that independence was actually lacking, and it might also be impaired by the existence of circumstances which reasonable people might believe likely to influence independence. To *be* independent, the auditor must be intellectually honest; to be *recognized* as independent, he must be free from any obligation to or interest in the client, its management, or its owners. For example, an independent auditor auditing a company of which he was also a director might be intellectually honest, but it is unlikely that the public would accept him as independent since he would be in effect auditing decisions which he had a part in making. Likewise, an auditor with a substantial financial interest in a company might be unbiased in expressing his opinion on the financial statements of the company, but the public would be reluctant to believe that he was unbiased. Independent auditors should not only be independent in fact; they should avoid situations that may lead outsiders to doubt their independence.

.04 The profession has established, through the AICPA's Code of Professional Conduct, precepts to guard against the *presumption* of loss of independence. "Presumption" is stressed because the possession of intrinsic independence is a matter of personal quality rather than of rules that formulate certain objective tests. Insofar as these precepts have been incorporated in the profession's code, they have the force of professional law for the independent auditor.

.05 The Securities and Exchange Commission (SEC) has also adopted requirements for independence of auditors who report on financial statements filed with it that differ from the AICPA requirements in certain respects.[1]

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[1] [Footnote deleted, December 2001, to acknowledge the dissolution of the Independence Standard Board.]

.06 The independent auditor should administer his practice within the spirit of these precepts and rules if he is to achieve a proper degree of independence in the conduct of his work.

.07 To emphasize independence from management, many corporations follow the practice of having the independent auditor appointed by the board of directors or elected by the stockholders.

LexisNexis®

TECHNOLOGY IN PARTNERSHIP, INC., Plaintiff, -- against -- RUDIN, et al., Defendants.

10 Civ. 8076 (RPP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2011 U.S. Dist. LEXIS 114127

October 3, 2011, Decided
October 4, 2011, Filed

SUBSEQUENT HISTORY: Motion denied by *Tech. in P'ship v. Rudin, 894 F. Supp. 2d 274, 2012 U.S. Dist. LEXIS 123992 (S.D.N.Y., 2012)*

CASE SUMMARY:

OVERVIEW: The complaint did not allege that the accountant defendants were officers or employees of the partnership with authority to draw on its accounts, did not allege a professional relationship between the accountant defendants and the corporate defendants, and as alleged, the professional services provided by the accountant defendants did not demonstrate any control over the enterprise. Therefore, the partnership had not satisfied the participation element required for both the civil RICO violation and the civil RICO conspiracy claims against the accountant defendants under *18 U.S.C.S. § 1962*.

OUTCOME: Accountant defendants' motion to dismiss granted.

CORE TERMS: accountant's, accounting, fiduciary duty, discovery, preliminary hearing, factual allegation, fraudulent, state law claims, tax returns, fiduciary relationship, malpractice, departure, omission, fraudulent concealment, statutes of limitations, tax preparation, particularity, constructive, plausibility, concealment, disclose, divert, advice, steal, excessive, server, fraudulent scheme, statute of limitations grounds, accounting firm, financial records

LexisNexis(R) Headnotes

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

[HN1] To establish a private civil cause of action under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1962*, a plaintiff must properly set forth: (1) a violation of *§ 1962*; (2) an injury to business or property; and (3) that the injury was caused by the violation. To state a claim under *18 U.S.C.S. § 1962(d)* based on a conspiracy to violate *18 U.S.C.S. § 1962(c)*, a plaintiff must allege a substantive RICO violation. A substantive RICO violation is pled properly by a factual showing of: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity for each individual defendant. To meet the standard in Iqbal, those allegations must establish the existence of the enterprise not by pleading conclusions of fact, but by pleading factual allegations plausibly leading to these conclusions.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

[HN2] While liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1962*, is not limited to those with primary responsibility for the enterprise's affairs, in order to participate in the conduct of such affairs, the defendant must have had some part in directing those affairs. That is met when the defendant participates in the operation or management of the enterprise itself. The provision of professional services in itself is insufficient to meet RICO's participation requirement because those services do not require taking

part in the direction of the enterprise's affairs. In addition, the plaintiff cannot simply allege that certain entities provided services which were helpful to an enterprise; the complaint must allege that those entities exerted any control over the enterprise.

Torts > Malpractice & Professional Liability > Professional Services

[HN3] A claim for accounting malpractice must show: (1) a departure from the accepted standards of practice; and (2) that the departure was the proximate cause of the injury.

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

[HN4] A claim for breach of fiduciary duty requires: (1) a fiduciary relationship between the parties; and (2) a breach of that fiduciary duty. Absent special circumstances, the accountant-client relationship generally does not give rise to a fiduciary duty. Rather, a relationship is fiduciary in nature based on the services agreed to by the parties and evidenced by influence, control, or responsibility over the client. Alleging a fiduciary relationship based on active fraud requires compliance with *Fed. R. Civ. P. 9(b)*.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[HN5] A claim for fraudulent concealment must show: (1) failure to discharge a duty to disclose; (2) an intention to defraud, or scienter; (3) reliance; and (4) damages. Claims alleging fraudulent omission must be made with particularity. Thus, the complaint must allege with particularity: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff; and (4) what the defendant obtained through the fraud.

Torts > Business Torts > Fraud & Misrepresentation > Constructive Fraud > Remedies

[HN6] A party seeking an accounting must meet four requirements: (1) relations of a mutual and confidential nature; (2) money or property entrusted to the defendant imposing upon him a burden of accounting; (3) that there is no adequate legal remedy; and (4) in some cases, a demand for an accounting and a refusal.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims > Statutes of Limitations

[HN7] The statute of limitations period for civil Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1962* claims begins to run when the plaintiff discovers or should have discovered the injury that underlies the cause of action. Under New York law, the running of the statute of limitations for a claim based in fraud is subject to the plaintiff's actual or imputed discovery of the facts constituting the fraud. *N.Y. C.P.L.R. § 213(8)*. Thus, the discovery rule is applicable to all state law claims.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > General Overview

[HN8] *N.J. Stat. § 14A:6-14(1)-(2)* provides that directors of corporations must discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent people would exercise under similar circumstances in like positions and may in good faith rely on written financial reports as represented by the officer of the corporation having charge of its books of account.

COUNSEL: [*1] For Technology in Partnership, Inc., Plaintiff: Jarrett Michael Behar, Sinnreich Kosakoff & Messina LLP, Central Islip, NY.

For Edward M. Rudin, Alyse Rudin, Gloria Rudin, Alyfunkids Inc., doing business as My Gym Children's Fitness, My Gym Westfield Inc., doing business as My Gym Children's Fitness Center, My Gym Glen Rock, Inc., Rudin Appraisals LLC, Defendants: Nathaniel B. Smith, LEAD ATTORNEY, Law Office of Nathaniel B. Smith, New York, NY.

For Alan Zverin, Zverin & Fisher, LLP, Defendants: Jennifer Wu, Sophia Ree, Landman Corsi Ballaine & Ford PC, New York, NY.

For Eisman, Zucker, Klein & Ruttenberg, LLP, Defendant: John H. Eickemeyer, LEAD ATTORNEY, Vedder Price P.C. (NY), New York, NY.

JUDGES: Robert P. Patterson, Jr., U.S.D.J.

OPINION BY: Robert P. Patterson

OPINION

OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff Technology in Partnership ("TIP" or "Plaintiff") filed a complaint on October 22, 2010, alleging that defendants created an enterprise with a common goal to divert and steal funds from TIP. See (Compl. ¶ 1.) Specifically, Plaintiff alleges a fraudulent scheme taking place over the nearly thirteen year period between October 1997 and May 2010 in violation of the Racketeer Influenced and [*2] Corrupt Organizations Act, *18 U.S.C. § 1962* ("RICO") and other state law claims.

On January 26, 2011, defendants Alan Zverin ("Zverin"), Zverin & Fischer, LLP ("Z&F"), and Eisman, Zucker, Klein & Ruttenberg, LLP ("EZKR") (collectively, "Accountant Defendants") moved pursuant to *Fed. R. Civ. P. 12(b)(6)* to dismiss all claims against them. Defendants Edward Rudin ("Rudin"), Alyse Rudin, Gloria Rudin, Alyfunkids, Inc. d/b/a/ My Gym Children's Fitness Center ("Alyfunkids"), My Gym Westfield, Inc. d/b/a My Gym Children's Fitness Center ("My Gym Westfield"), My Gym Glen Rock, Inc. ("My Gym Glen Rock"), and Rudin Appraisals, LLP ("Rudin Appraisals") (collectively, "Rudin Defendants") moved separately to dismiss Plaintiff's Complaint in its entirety on statute of limitations grounds, or in the alternative, to hold a hearing with limited discovery pursuant to *Fed. R. Civ. P. 12(i)*.

For the reasons stated below, Accountant Defendants' motion to dismiss is granted and Rudin Defendants' motion to dismiss and motion for preliminary hearing are denied.

I. BACKGROUND

Plaintiff is a closely-held corporation formed to provide computer consulting services, including installation and support to businesses. [*3] (Compl. ¶ 28.) On October 3, 1997, Robert Baker ("Baker") and Rudin incorporated TIP in New Jersey, and during the period of the claims, its principal place of business was in New York. (Id. ¶¶ 34, 14-15.) Baker and Rudin were the sole shareholders and officers of TIP: Baker became President of TIP and received 60% of TIP's stock, and Rudin became Vice-President or Secretary of TIP and received 40% of TIP's stock. (Id. ¶¶ 30-32.) Rudin has an accounting background, and was responsible for TIP's day-to-day operations and TIP's financial filings. (Id. ¶¶ 32, 35.) Plaintiff's counsel acknowledged at oral argument that between October 1997 and May 2010, Baker received and reviewed Schedule K-1 statements annually, but did not otherwise perform his duties as a director and officer of TIP until May 2010, when he approached Rudin and asked for further documentation -- which he was denied -- after which Baker locked Rudin out of the company and gained access to financial documents and records that were on the company's file server. (Tr. at 26-27.) Based on these financial documents and records, Baker, who brings this action on behalf of TIP, "first discerned the existence of the Enterprise and [*4] its scheme to divert and steal funds from TIP . . . ." (Compl. ¶ 43.) The Complaint cites to no other sources for the allegations made therein.

Accountant Defendants were appointed by Rudin as accountants for TIP. Rudin first engaged Z&F as TIP's accountants. (Id. ¶ 36.) At Z&F, Robert Fischer, Rudin's brother-in-law, "took direction from Rudin concerning TIP's accounting and tax filings" until his death. (Id. ¶¶ 37-38.) Afterwards, Zverin and his new firm EZKR were responsible for TIP's accounting and tax filings. (Id. ¶ 38.) Plaintiff contends that Baker never received TIP's corporate tax returns or other financial documents, other than the yearly Schedule K-1 statements, which only contained TIP's reported profit or loss. (Id. ¶¶ 39, 44, 81.) Plaintiff also alleges Rudin and Accountant Defendants engaged in a pattern and practice of conduct of filing false information with the Internal Revenue Service (IRS), and paid Rudin excessive compensation. (Id. ¶ 38.) Specifically, Plaintiff contends that from 1999 to 2009 Accountant Defendants prepared TIP's federal and state tax returns, which "contained fraudulent and false information," "at the direction of defendant Edward Rudin, and [*5] without independent verification of the underlying data." (Id. ¶¶ 57-58.) The Complaint suggests that Accountant Defendants "paid Mr. Rudin excessive compensation in an effort to funnel money out of TIP." (Id. ¶38.) There is no supporting allegation demonstrating Accountant Defendants were employed by TIP with the authority to cause payments to be made by TIP. Similarly, the Complaint alleges that the fraudulent efforts of the Rudin Defendants and Accountant Defendants "were successful in preventing Mr. Baker from learning of the Enterprise from TIP's incorporation in October 1997 through in or about May 2010," but does not allege what actions each group of defendants took in this regard. (Id. ¶ 42.) Plaintiff also alleges "a professional relationship" between the Rudin Defendants and Accountant Defendants. (Id. ¶ 60.)

Plaintiff alleges the Rudin Defendants engaged in various conduct to carry out the fraudulent scheme. (Id. ¶ 3.) Plaintiff alleges Rudin received excessive and unwarranted salary and bonus payments between 2001 and 2009, and diverted TIP funds through a series of cash withdrawals from the Operating Account and cash deposits into the Payroll Account between July 2007 and [*6] November 2008. (Id. ¶ 41.) Plaintiff contends that the cash deposits were actually TIP's client payments; checks originally made payable to TIP were cashed against a TIP account, which Rudin later used to make a deposit into the Payroll Account. (Id. ¶¶ 66-70.) Plaintiff also alleges Rudin diverted and stole TIP funds by sending checks to defendants Alyse Rudin and Gloria Rudin,

Rudin's wife and mother, respectively. (Id. ¶¶ 71-76.) Defendants Alyfunkids, My Gym Westfield, and My Gym Glen Rock (collectively, "My Gym Defendants") and Rudin Appraisals are owned and operated by Rudin. (Id. ¶ 2.) Plaintiff alleges Rudin used TIP's offices, equipment, systems and personnel to run My Gym Defendants and Rudin Appraisals, (id. ¶¶ 88-89,) and diverted and stole TIP funds to fund and operate My Gym Defendants and Rudin Appraisals, (id. ¶ 82). Other than Gloria Rudin, who lives in Del Ray Beach, Florida, all of the Rudin Defendants either live in or have their principal place of business at 19 Princess Drive, North Brunswick, New Jersey. (Id. ¶¶ 19-27.)

On October 22, 2010, Plaintiff filed a Complaint claiming: (1) civil RICO violation against all defendants; (2) civil RICO conspiracy against [*7] all defendants; (3) breach of fiduciary duty against Rudin; (4) malpractice against Accountant Defendants; (5) breach of fiduciary duty against Accountant Defendants; (6) aiding and abetting breach of fiduciary duty against Alyse Rudin, Gloria Rudin, My Gym Defendants, and Rudin Appraisals; (7) fraud against Rudin; (8) fraudulent concealment against Rudin and Accountant Defendants; (9) constructive trust against Rudin Defendants; (10) conversion against Rudin Defendants; (11) unjust enrichment against Rudin Defendants; and (12) accounting against Rudin, Accountant Defendants, My Gym Defendants, and Rudin Appraisals. Accountant Defendants and Rudin Defendants filed separate *Rule 12(b)(6)* motions to dismiss on January 26, 2011. Rudin Defendants also filed a motion for a preliminary hearing on January 26, 2011. Plaintiff filed a memorandum in opposition to the motions on March 28, 2011. ("Pl.'s Opp. Mem.") On April 29, 2011, Accountant Defendants and Rudin Defendants filed reply memorandum in support of their motions to dismiss. Oral argument was held on September 20, 2011.

II. DISCUSSION

A. Legal Standard

On a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court must accept [*8] "all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor." *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 91 (2d Cir. 2010)*. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Applying this plausibility standard, a complaint must do more than offer "'naked assertions devoid of further factual enhancement,' and a court is not 'bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal, 129 S. Ct. at 1949-50* (quoting *Twombly, 550 U.S. at 555, 557)*. See *Vargas v. Choice Health Leasing, No. 09 Civ. 8264 (DLC), 2011 U.S. Dist. LEXIS 49310, at *5-6 (S.D.N.Y. May 9, 2011)* (applying Iqbal and Twombly plausibility standard to civil RICO claim).

A motion to dismiss an action on statute of limitations grounds is treated as a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted. *Ghartey v. St. John's Queens Hospital, 869 F.2d 160, 162 (2d Cir. 1989)*.

B. [*9] Accountant Defendants

Accountant Defendants move to dismiss under *Fed. R. Civ. P. 12(b)(6)* on the grounds that the Complaint fails to state a claim. They contend that (1) the Complaint fails to allege facts that satisfy the requirements for the civil RICO claims, (2) the Court should decline to exercise supplemental jurisdiction over the state law claims once the civil RICO claims are dismissed, and (3) the Complaint contains conclusory allegations or otherwise fails to satisfy the elements of the state law claims. Plaintiff contends that the pleading standard was met for the claims in question. Specifically, Plaintiff argues that Accountant Defendants' work as accountants for TIP and the Rudin Defendants is prima facie evidence of participation in the enterprise, malpractice, and breach of fiduciary duty. (Pl.'s Opp. Mem. at 19.)

1. *Civil RICO (18 U.S.C. § 1962)*

[HN1] To establish a private civil cause of action under RICO, a plaintiff must properly set forth: "(1) a violation of . . . *[section] 1962*; (2) an injury to business or property; and (3) that the injury was caused by the violation." *De Falco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001)*; *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 767 (2d Cir. 1994)*. [*10] To state a claim under *section 1962(d)* based on a conspiracy to violate *section 1962(c)*, a plaintiff must allege a substantive RICO violation. See *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. N.Y. 1996)*, vacated on other grounds, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *SKS Constructors, Inc. v, Drinkwine, 458 F. Supp. 2d 68, 80 (E.D.N.Y. 2006)*; *Medinol Ltd. v. Boston Sci. Corp., 346 F. Supp. 2d 575, 613 (S.D.N.Y. 2004)*. A substantive RICO violation is pled properly by a factual showing of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" for each individual defendant. *De Falco, 244 F.3d at 306*. To meet the standard in Iqbal, these allegations must establish the existence of the enterprise not by pleading conclusions of fact, but by pleading factual allegations plausibly leading to these conclusions. Here, as stated in paragraph 43 of

the Complaint: "In or about May 2010, however, Mr. Baker obtained access to TIP's financial documents and records, and first discerned the existence of the Enterprise and its scheme to divert and steal funds from TIP." No other source of information relating to the events of the prior thirteen years is cited in the Complaint. [*11] Accordingly, it must be read in this light.

[HN2] While RICO liability is not limited to those with primary responsibility for the enterprise's affairs, in order to participate in the *conduct* of such affairs, the defendant must have had some part in *directing* those affairs. *Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)* (emphasis added). This is met when the defendant participates in the "operation or management of the enterprise itself." *Id. at 185-86* (finding no participation by accounting firm where AICPA's professional standards were not in conflict with the firm's alleged activities). The provision of professional services in itself is insufficient to meet RICO's participation requirement because these services do not require taking part in the direction of the enterprise's affairs. *Azrielli v. Cohen Law Offices, 21 F.3d 512, 521-22 (2d Cir. 1994)* (holding the provision of legal representation during a fraudulent transaction insufficient to show operation or management); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 254 (S.D.N.Y. 1997)* (accounting firm's misrepresentations and omissions of material facts in financial statements for the enterprise did not equate [*12] to participation in the operation or management of the enterprise); *Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.), 924 F. Supp. 449 (S.D.N.Y. 1996)* (accounting firm's concealment of an enterprise's fraudulent activities did not amount to operation or management). In addition, the plaintiff cannot simply allege that certain entities provided services which were helpful to an enterprise; the complaint must allege that those entities exerted "any control" over the enterprise. *City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 449 (2d Cir. 2008)*; *Hayden, 955 F. Supp. at 255* (noting even the provision of essential services to an enterprise does not amount to control).

The Complaint alleges that Accountant Defendants filed false information with the IRS and paid Rudin excessive compensation. (Compl. ¶ 38.) It does not allege that any Accountant Defendant was an officer or employee of TIP with authority to draw on its accounts. Plaintiff does allege a professional relationship between Accountant Defendants and the Rudin Defendants. (Id. ¶ 60.) The Complaint also alleges, however, that Accountant Defendants acted "at the direction of defendant Edward Rudin." (Id. ¶ 57.) As [*13] alleged, the professional services provided by Accountant Defendants do not demonstrate any control over the enterprise. Indeed, at oral argument, Plaintiff's counsel disclosed that TIP's financial records were maintained on the company's file server using QuickBooks, a line of accounting software for small business owners, from which Rudin deleted some records by remote access. (Tr. at 27.) These disclosures of how Baker "first discerned the existence of the Enterprise and its scheme to divert and steal funds from TIP," (Compl. ¶ 43,) make even less plausible the Complaint's conclusory allegations about Accountant Defendant's "assistance and cooperation" and their participation in the diversion of TIP funds to the Rudin Defendants, (Tr. at 30.)[1]

1 The only improper payments alleged are funds received by various Rudin Defendants.

As Plaintiff has not and, based on the facts disclosed, cannot satisfy the participation element required for both the civil RICO violation and the civil RICO conspiracy, Counts I and II against Accountant Defendants are dismissed with prejudice. See *Vargas, 2011 U.S. Dist. LEXIS 49310, at *8-10* (finding that plaintiff failed to plead with plausibility any predicate [*14] acts of racketeering activity, and granting defendant's motion to dismiss and entering judgment for defendant on the federal civil RICO claim); cf. *Hayden, 955 F. Supp. at 253-54* (dismissing with prejudice plaintiff's civil RICO claims for failure to allege or present facts "permitting a rational inference" of defendant's participation in the enterprise).

2. *Accounting Malpractice*

[HN3] A claim for accounting malpractice must show (1) a departure from the accepted standards of practice, and (2) that the departure was the proximate cause of the injury. *Housing Works, Inc. v. Turner, 179 F. Supp. 2d 177, 216 (S.D.N.Y. 2001)*. Plaintiff alleges gross negligence by Accountant Defendants in failing to verify information in TIP's tax returns and failing to provide copies of the tax returns to Baker. (Compl. ¶¶ 57-58.) The unverified information alleged relates to the identity of the corporation's officers and the extent of their ownership interest in the company. (Id. ¶¶ 45-55.) Plaintiff also alleges that this failure to act establishes causation because it was reasonably foreseeable that performance would have prevented the harm -- namely the funneling of TIP funds to the Rudin Defendants. (Pl.'s [*15] Opp. Mem. at 29.)

As tax preparers, Accountant Defendants were subject to AICPA Professional Standards, which state in pertinent part: "In preparing or signing a return, a member may in good faith rely, without verification, on information furnished by the taxpayer or by third parties." American Institute of Certified Public Accountants, AICPA Professional Standards § TS 300.02 (2011). Re-

liance on information furnished by Rudin, who was the director and officer responsible for TIP's financial filings, (Compl. ¶ 35,) is not a departure from accepted practice. And, the failure by Accountant Defendants to furnish copies to Baker is also not a departure from accepted practice because Rudin was responsible for TIP's financial filings and he is alleged to have distributed Schedule K-1 statements to Baker annually. (Compl. ¶¶ 35, 39.) Furthermore, the provision of tax return preparation services containing the types of errors alleged in the Complaint is not proximate enough to constitute malpractice. As the Complaint fails to allege facts that plausibly show a departure from standard accounting practices, Count IV is dismissed with prejudice.

3. *Breach of Fiduciary Duty*

[HN4] A claim for breach of [*16] fiduciary duty requires: (1) a fiduciary relationship between the parties and (2) a breach of that fiduciary duty. *Kottler v. Deutsche Bank AG, 607 F. Supp. 2d 447, 465-66 (S.D.N.Y. 2009)*. Absent special circumstances, the accountant-client relationship generally does not give rise to a fiduciary duty. *Vtech Holdings Ltd. v. PriceWaterhouseCoopers LLP, 348 F. Supp. 2d 255, 268 (S.D.N.Y. 2004)* (noting an accountant's commission of active fraud would establish a fiduciary relationship, while a consulting relationship would not);[2] *Lavin v. Kaufman, Greenhut, Lebowitz & Forman, 226 A.D.2d 107, 640 N.Y.S.2d 57, 58 (N.Y. App. Div. 1st Dept. 1996)* (inferring a fiduciary relationship when accountants regularly advised clients beyond basic advice and the client unquestionably followed such advice). Rather, a relationship is fiduciary in nature based on the services agreed to by the parties and evidenced by influence, control, or responsibility over the client. *Vtech Holdings Ltd., 348 F. Supp. 2d at 268*. Here, there are no factual allegations showing Accountant Defendants committed any fraud or gave TIP advice beyond basic advice.[3]

> 2 Alleging a fiduciary relationship based on active fraud requires compliance [*17] with *Fed. R. Civ. P. 9(b)*. The Complaint fails to allege with particularity the elements for fraudulent concealment. See infra Part II.B.4.
>
> 3 Although the Complaint does allege that Accountant Defendants provided accounting services for TIP, it does not identify the nature of any services other than tax preparation.

Plaintiff argues that a fiduciary relationship arises where the complaint alleges knowledge and concealment of illegal acts, and failure to withdraw in the face of a conflict of interest. See *Nate B. & Frances Spingold Found. v. Wallin, Simon, Black and Co., 184 A.D.2d 464, 585 N.Y.S.2d 416, 417 (N.Y. App. Div. 1st Dept. 1992)*. Here, however, the allegations of knowledge and concealment of illegal acts are allegations regarding Accountant Defendants' provision of tax preparation services to TIP and the Rudin Defendants. Further, the mere preparation of tax returns containing the type of factual errors alleged in the Complaint, coupled with bald conclusory allegations of knowledge and concealment do not meet the plausibility standard in *Iqbal*. As there are no factual allegations showing special circumstances giving rise to a fiduciary duty, Count V is dismissed with prejudice.

4. *Fraudulent* [*18] *Concealment*

[HN5] A claim for fraudulent concealment must show: "(1) failure to discharge a duty to disclose, (2) an intention to defraud, or scienter, (3) reliance, and (4) damages." *TVT Records v. Island DefJam Music Group, 412 F.3d 82, 90-91 (2d Cir. 2005)*. Claims alleging fraudulent omission must be made with particularity. *DirecTV Latin Am., LLC v. Park 610, LLC, 691 F. Supp. 2d 405, 436 (S.D.N.Y. 2010)*; see *Fed. R. Civ. P. 9(b)*. Thus, the complaint must allege with particularity "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff; and (4) what the defendant obtained through the fraud." *DirecTV Latin Am., 691 F. Supp. 2d at 436*. The Complaint does not meet this standard.

Plaintiff argues that a duty to disclose arose because Accountant Defendants possessed superior knowledge of essential facts. See *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 301 A.D.2d 373, 754 N.Y.S.2d 245, 252 (N.Y. App. Div. 1st Dept. 2003)*. However, the Complaint makes clear that Accountant Defendants worked "at the direction of defendant Edward Rudin," who had an accounting background and was responsible [*19] for TIP's financial records.[4] (Compl. ¶¶ 4, 35.) And the Complaint contains no factual allegations showing that Accountant Defendants provided accounting services to TIP other than tax preparation services, knew of the fraudulent transactions, and failed to disclose them to TIP. The Complaint also lacks factual allegations regarding the facts not disclosed to TIP by Accountant Defendants, on what date, and why that omission is evidence of an intention to defraud or scienter. Count VIII therefore fails to meet the particularity standard and is dismissed with prejudice as against Accountant Defendants.

> 4 These records were maintained on TIP's file server using QuickBooks. (Tr. at 27.)

5. *Accounting*

[HN6] A party seeking an accounting must meet four requirements: "(1) relations of a mutual and confidential nature; (2) money or property entrusted to the defendant imposing upon him a burden of accounting; (3) that there is no adequate legal remedy; and (4) in some cases, a demand for an accounting and a refusal." *Pressman v. Estate of Steinvorth, 860 F. Supp. 171, 179 (S.D.N.Y. 1994)* (quoting *300 Broadway Realty Corp. v. Kommit, 37 Misc. 2d 325, 235 N.Y.S.2d 205, 206 (N.Y. Sup. Ct. 1962))*.

Plaintiff contends that [*20] an accounting is necessary to gain a full financial picture of the fraudulent scheme which Accountant Defendants directly participated in. (Pl.'s Opp. Mem. at 33.) Accountant Defendants argue that the Complaint failed to properly allege a mutual and confidential relationship. However, the Complaint alleges Plaintiff maintained a nearly thirteen-year relationship with Accountant Defendants for tax preparation services, (Compl. ¶ 4,) and therefore, it is plausible that a relationship of a mutual and confidential nature emerged during that time. Nonetheless, the Complaint lacks allegations regarding any money or property entrusted to Accountant Defendants. As alleged, TIP's financial records were only kept by Rudin. Plaintiff is now in possession of QuickBook records on TIP's file server, except for documents Rudin deleted in May 2010. (Tr. at 26-27.) Therefore, Count XII is dismissed without prejudice against Accountant Defendants, and upon a factual showing that Accountant Defendants have duplicate copies of TIP's financial books and records, Count XII may be reinstated.

B. The Rudin Defendants

The Rudin Defendants moved to dismiss the Complaint, arguing that Plaintiff's claims are time-barred [*21] by the applicable statutes of limitations. In the alternative, the Rudin Defendants request a hearing with limited discovery pursuant to *Fed. R. Civ. P. 12(i)*, to settle the issue of whether Baker knew or should have known of the misconduct prior to May 2010. As a matter of law, the Rudin Defendants argue Baker, as a director and majority shareholder of TIP from October 1997 to present, had an affirmative duty to know and understand the corporation's financial status by reviewing the financial documentation regularly during that period and instead did nothing. Plaintiff contends dismissal is inappropriate because the determination of whether the claims are barred by their respective statutes of limitations requires consideration of the facts. Plaintiff also argues that a *Fed. R. Civ. P. 12(i)* hearing is unavailable on statute of limitations grounds and the issue of Baker's affirmative duty is intertwined with the merits.

1. *Statutes of Limitations*

[HN7] The statute of limitations period for civil RICO claims begins to run when the plaintiff discovers or should have discovered the injury that underlies the cause of action. *Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988)*. Under [*22] New York law, the running of the statute of limitations for a claim based in fraud is subject to the plaintiff's actual or imputed discovery of the facts constituting the fraud. *N.Y. C.P.L.R. § 213(8)*; see *Malone v. Bayerische Hypo-Und Vereins Bank, Nos. 08 Civ. 7277 (PGG) & 09 Civ. 3676 (PGG), 2010 U.S. Dist. LEXIS 9529, at *12 (S.D.N.Y. Feb. 4, 2010)* (citing *Guilbert v. Gardner, 480 F.3d 140, 147 (2d Cir. 2007))*; see also *Bouley v. Bouley, 19 A.D.3d 1049, 797 N.Y.S.2d 221, 224 (N.Y. App. Div. 4th Dept. 2005)* (applying the discovery rule to equitable actions). Thus, the discovery rule is applicable all state law claims.

While it is true that Baker is subject to the fiduciary duties of a director as defined by New Jersey law, *In re Luxottica Group S.p.A. Sec. Litig., 293 F. Supp. 2d 224, 237 (E.D.N.Y. 2003)*, the degree of care Baker owed the corporation in relation to the constructive discovery date of the alleged injuries, is not a pure question of law, but one requiring determination of the facts and circumstances of Baker's activities. [HN8] *N.J. Stat. § 14A:6-14(1)-(2)* (directors of corporations must "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily [*23] prudent people would exercise under similar circumstances in like positions" and may in good faith rely on written financial reports "as represented by the officer of the corporation having charge of its books of account"). As the constructive date of discovery cannot be determined at this stage in the proceedings, the statute of limitations periods cannot be determined and the motion is denied without prejudice.

2. *Preliminary Rule 12(i) Hearing*

The preliminary hearing under *Fed. R. Civ. P. 12(i)* requested by the Rudin Defendants authorizes the court to decide threshold issues raised by the defendants. *See Beltre v. Lititz Healthcare Staffing Solutions LLC, 757 F. Supp. 2d 373, 376 (S.D.N.Y. 2010)*. However, the hearing should not concern the merits of the case, or issues closely interwoven with the merits so as to render it unlikely or impractical that the hearing would achieve a productive outcome in light of the stage of the proceedings. *Id.*

The issue raised by the Rudin Defendants -- when Baker should have discovered the alleged misconduct -- is not a procedural matter, see *United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir. 1966)* (reviewing a district court's ruling after [*24] a preliminary hearing on personal jurisdiction), and is closely interwoven with

the merits of the case. Plaintiff alleges that prior to May 2010 it did not have access to documents where misconduct was evident. Accepting Plaintiff's factual allegations as true, the Court denies the motion for a preliminary hearing, but orders that a deposition of Baker be conducted within 30 days to determine at what date he, as director, President, and majority shareholder of TIP knew or should have known of the actions complained of in the civil RICO causes of action.

III. CONCLUSION

Accountant Defendants' January 26, 2011 motion to dismiss is granted. On the federal civil RICO claims and the state law claims, all claims other than Count XII are dismissed with prejudice. Count XII is dismissed as to the Accountant Defendants without prejudice.

The Rudin Defendants' January 26, 2011 motion to dismiss on statute of limitations is denied. The Rudin Defendants' motion for preliminary hearing is denied. The Court orders that Baker be deposed within 30 days on the issue of the constructive discovery date.

IT IS SO ORDERED.

Dated: New York, New York

October 3, 2011

/s/ Robert P. Patterson, Jr.

Robert P. Patterson, Jr. [*25]

U.S.D.J.