



**THE SIZE OF YOUR BOARD  
AND  
SARBANES-OXLEY**

By Steven John Fellman,  
Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.

Although Sarbanes-Oxley does not apply directly to Boards of Directors of non-profit organizations such as trade associations and professional societies, all of the corporate governance guru's are predicting that Sarbanes-Oxley will be extended to some degree to non-profits. Further, all are recommending that non-profit Boards try to conform their practices to the Sarbanes-Oxley principles. We think that this is good advice.

In today's world where corporate governance has become high profile, the issue for Directors of non-profit organizations becomes one of responsibility. Most non-profit corporations do not pay Directors a fee for serving on the Board of Directors. In most non-profit organizations, Directors do not provide services to the non-profit organization and do not work for companies that do provide services to the non-profit organization. Thus, there is a less of a chance of a financial conflict of interest between the Director and the corporation. There is no need to distinguish between "inside" and "outside" directors. However, some Directors who serve on the Boards of non-profit organizations see such service as an "honor" and do not take the responsibility involved seriously.

In many Boards of Directors of non-profit organizations, we find that a number of Directors have spotty attendance records,

do not read the materials sent to the Board prior to Board meetings, and are not fully aware of the financial affairs of the association. Such Board Members are not vocal at Board meetings. They do not actively serve on Committees. They have highly recognized positions in the industry or profession involved. Other members of the Board think that it adds to the prestige of the organization to have such individuals listed as a member of the Board. Yet these Board Members are not meeting their responsibilities as Board Members.

Under the principles of Sarbanes-Oxley and in light of some of the corporate governance holdings in recent case law, it is clear that every member of the Board of Directors of a non-profit corporation must regularly attend Board Meetings, read the materials provided to all Board Members prior to Board meetings and fully understand the financial affairs of the corporation. Further, the Board has a responsibility to question recommendations from the staff and fully understand the ramifications of actions proposed at Board Meetings. Board Members of non-profit corporations are fiduciaries. They have a fiduciary responsibility to the corporation and to the membership. A Board Member, who sits on a Board and basically does nothing, is not meeting his fiduciary responsibility. He is subjecting himself to personal liability.

The fact that Board Members do have the responsibility to be active has a direct ramification on the size of your Board of Directors. If your Board is very large, there is a question of whether individual Directors have the opportunity to express their views on major issues. As an example, assume that you are asked to serve on the Board of Directors of a non-profit organization and you are informed that there are 100 members on this Board. The Board meets three times a year. Each meeting lasts for approximately four hours. Before accepting such a position, you must ask yourself if you could actively serve as a Director and meet your fiduciary responsibilities under this corporate structure.

If the Directors of such an organization have only limited opportunities to express their views and I would be concerned as to whether such Directors could meet their fiduciary responsibility. I certainly would not serve on a Board where I was only a figurehead and did not have an

opportunity to exercise my role as a Director.

For organizations that have traditionally been structured with a very large Board, it may be time to restructure and create a smaller active Board of Directors and a large Honorary Board of Governors. The Board of Directors would be responsible for managing the affairs of the association. The Honorary Board of Governors would be an advisory organization. Its role would be limited. Members of the Honorary Board of Governors would only be responsible for making periodic reports to the Board of Directors. Members of the Honorary Board of Governors would not have the same fiduciary responsibility as members of the Board of Directors.

If your organization has a large Board of Directors, this is a good time to reevaluate your corporate structure and implement a change.