new york state society of
NYSSCPA
certified public accountants

Home of the Trusted Professional
3 park avenue, at 34th street, new york, ny 10016-5991
212.719.8300 • fax 212.719.3364
www.nysscpa.org

May 15, 2007

Sheri Bango Cavaney, AICPA
Louise Dratler Haberman, NASBA

By email: sbango@aicpa.org and lhaberman@nasba.org

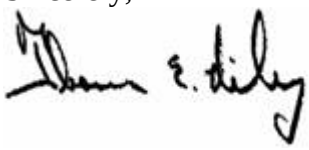
Re: Exposure Draft-Proposed Revisions to AICPA/NASBA Uniform Accountancy Act Sections 23, 7, and 14

To Ms. Bango and Ms. Haberman:

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the above captioned exposure draft. NYSSCPA thanks the AICPA and NASBA for the opportunity to comment on this exposure draft.

The NYSSCPA deliberated the exposure draft and prepared the attached comments. If you would like additional discussion with the committee, please contact Dennis O'Leary, NYSSCPA staff, at (212) 719-8418.

Sincerely,



Thomas E. Riley
President

Attachment

NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

COMMENTS ON AMMENDED EXPOSURE DRAFT

PROPOSED REVISIONS TO AICPA/NASBA UNIFORM ACCOUNTANCY ACT SECTIONS 23, 7, AND 14

May 15, 2007

Principal Drafters

Thomas E. Riley, CPA

NYSSCPA 2006-2007 Board of Directors

Thomas E. Riley,
President
David A. Lifson,
President-elect
Mark Ellis,
Secretary
Neville Grusd,
Treasurer
Sharon Sabba Fierstein,
Vice President
Richard E. Piluso,
Vice President
Robert E. Sohr
Vice President
Louis Grumet,
ex officio

Edward L. Arcara
Deborah L. Bailey-Browne
Thomas P. Casey
Debbie A. Cutler
Anthony G. Duffy
David Evangelista
Joseph M. Falbo, Jr.
Myrna L. Fischman, PhD.
Daniel M. Fordham
Phillip E. Goldstein
Scott Hotalen
Don A. Kiamie
Lauren L. Kinkaid
Stephen F. Langowski
John J. Lauchert
Kevin Leifer

Elliot A. Lesser
Howard B. Lorch
Beatrix G. McKane
Mark L. Meinberg
Ian M. Nelson
Jason M. Palmer
Robert A. Pryba Jr.
Robert T. Quarte
Judith I. Seidman
C. Daniel Stubbs, Jr.
Anthony J. Tanzi
Edward J. Torres
Liren Wei
Ellen L. Williams
Margaret A. Wood
Richard Zerah

NYSSCPA Staff

Dennis O'Leary

NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS

COMMENTS ON AMENDED EXPOSURE DRAFT

Proposed Revisions to AICPA/NASBA Uniform Accountancy Act Sections 23, 7, and 14

The "Common Questions" section of the AICPA's Amended Exposure Draft: *Proposed Revisions to AICPA/NASBA Uniform Accountancy Act Sections 23, 7, and 14* provides a useful, "plain English" guide to many of the concerns being raised by opponents of the proposed changes. It also reveals—through the Institute's answers to these questions—the rationale behind many of the proposed revisions. As such, the New York State Society of CPAs (Society) has decided to address its concerns to the Amended Exposure Draft by commenting on the Institute's answers within this section.

COMMON QUESTION

"If I don't require Notice I won't be able to do anything to an out-of-state CPA who does bad work in my state."

INSTITUTE RESPONSE

Under the new proposed Section 23, you can do more against the out-of-state licensee because that individual will automatically be subject to the Board's administrative jurisdiction….[T]he Board can initiate a proceeding against the out-of-state individual, serve notice on the individual's home state board, conduct the hearing (even in absentia) and discipline the individual (by reprimand, civil penalty, or even revocation of practice privileges). The Board can post that discipline on its website and inform the state board in the individual's home state for further appropriate action, i.e., revocation of license issued by the home state based upon the revocation of the practice privilege.

SOCIETY RESPONSE

From the perspective of many state legislators in New York, the first line of defense under the heading "Consumer Protection" is to ensure that out-of-state licensees who enter New York State meet equivalent requirements to New York's education, examination, and experience requirements for licensure to practice public accountancy. Obviously, this equivalency question cannot be resolved without Notice, and the authority in the new Section 23 language to automatically subject a "no-notice" and "unqualified" out-of-state licensee to the New York Board's administrative jurisdiction is a hollow form of public protection, especially considering the fact that Notice would afford the state the opportunity to preclude such an unqualified licensee from practicing in New York.

New York's education and experience requirements for the practice of the profession of public accountancy exceed the education and experience requirements for CPAs in certain states; nevertheless, the AICPA/NASBA Section 23 proposal for no notice would ask New York legislators to disregard New York's higher licensure standards and allow CPAs from those states to practice in New York without Notice. Post-violation enforcement against a no-notice out-of-state practitioner is an insufficient means of consumer protection.

The AICPA and NASBA should not forget that restrictions imposed on the licensure of the profession remain firmly in the hands of state legislatures, and are likely to stay there. Indeed, one of the reasons the UAA's substantial equivalency provisions have not been adopted precisely is because many state legislators believe these provisions would hamper their ability to protect their citizens from unqualified out-of-state practitioners.

Also, while it may be true that the Amended Exposure Draft would allow state boards to carry out the actions listed above in the Institute's response, state legislators are unlikely to accept anything less than the authority to discipline CPAs, and they should not have to.

INSTITUTE RESPONSE

Almost all states make a licensee's violation of another state's laws an automatic violation in the home state.

SOCIETY RESPONSE

The fact that "almost all states make a licensee's violation of another state's laws an automatic violation…" is not good enough. What about the states that do not make a licensee's violation of another state's laws an automatic violation in the home state? Would the proposed changes to Section 23 allow practitioners who break the law in these states to go unpunished? The public's perception of such a rule would not be favorable.

In addition, New York is not one of the states that makes a New York licensee's violation of another state's laws an automatic violation in New York. To be actionable as unprofessional conduct in New York, the crime or unprofessional conduct upon which the licensee's violation or conviction was based by the other state must be found by New York to constitute a crime or unprofessional conduct if committed in New York. (See New York Education Law 6509 (5))

COMMON QUESTION

"If I don't require Notice I won't know who is practicing as a CPA in my state."

INSTITUTE RESPONSE

If you require Notice you only know the people who bother to give Notice. If you have a Temporary Practice or Incidental Practice or your law only allows you to regulate persons engaged in the "practice of public accountancy," there are probably already a lot of out-of-state CPAs offering or rendering professional services in your state whom you don't know about.

SOCIETY RESPONSE

These answers do not sufficiently address the question. To suggest that Notice should be eliminated because states currently "only know the people who bother to give Notice" or there are "probably already a lot of out-of-state CPAs offering or rendering professional services in your state whom you don't know about" is faulty logic. These facts should be seen as opportunities to fix the problem, not make it worse. Proposing to eliminate Notice because it does not work perfectly is akin to saying the government should not prosecute crime because some criminals do not get caught.

The simple fact is this: The removal of the notification requirement within Section 23 essentially asks state legislators to abrogate their duty to protect citizens from inappropriate professional practices. Legislators are extremely concerned about consumer protection, but—if Notice is eliminated—states would not even be given basic information about out-of-state practitioners. This is, therefore, an uncompromising solution that is unlikely to win approval from many states' legislators.

The AICPA and NASBA should work to get notification right. State legislatures may want to work jointly with the profession and state boards to develop an interstate compact to establish a uniform, electronic notice of intent to practice by out-of-state CPAs who meet the definition of substantial presence, and include provisions for cross-border cooperation on enforcement and discipline.

Perhaps the easiest way to accomplish this goal would be to take advantage of NASBA's national online CPA database. CPAs wishing to practice outside their "home" state would simply go online and fill out an electronic "intent to practice" form. This form would then be transmitted to the outside state's appropriate legislative body, along with information from the CPA's NASBA database record.

COMMON QUESTION

"If I don't require Notice I won't know where an out-of-state CPA has his/her principal place of business."

INSTITUTE RESPONSE

If your disciplinary process is primarily complaint driven, the complainant should have that information unless the individual foolishly engaged accounting services without knowing where the CPA was located. If the out-of-state CPA is operating a web-based practice, the address of the CPA can usually be obtained by virtue of the domain registration.

SOCIETY RESPONSE

The fact that complainants "should have" information about an out-of-state CPA is not good enough. The profession needs to make sure state legislators or state boards have this information. Also, condemning individuals for engaging accounting services without knowing where the CPA is located seems like blaming the victim, and does not change the fact that—under the Amended Exposure Draft—CPAs may be able to break the law without consequence if they cannot be found.

INSTITUTE RESPONSE

Often the violation is brought to light by a governmental agency (i.e., SEC, GAO, etc.) which can provide the CPA's principal place of business.

SOCIETY RESPONSE

Again, "often" is not good enough. The profession needs to be absolutely sure that state legislators or state boards have this information. Creating a stringent and successful notification system will not be easy, but the accounting profession has the talent, patience, skill, and tenacity to accomplish this goal if it is willing to put the time and work into it. We must not back away from the challenge, and should strive to enforce the highest possible standards.

What's more, the public's perception of the accounting profession will suffer if "bad work" is exposed and it is perceived that the AICPA and NASBA have shirked responsibility to clients. In New York, it is also likely that these clients would expect the state regulatory authorities to know where the out-of-state CPA is located, but this would be denied under the AICPA/NASBA's no-notice proposal for mobility of out-of-state CPAs.

INSTITUTE RESPONSE

This can also be effectively regulated by enforcing the UAA internet practice requirement that CPAs must affirmatively disclose the address of their principal place of business and state of licensure. [See UAA Rule 7-6 (Jointly Adopted 2002)].

SOCIETY RESPONSE

But what if practitioners do not own an Internet address or do not practice on the Internet? When working to revise the notification requirement, the profession should seek to close every notification requirement loophole, not open them further.

INSTITUTE RESPONSE

This is a requirement that can be easily enforced in the state of principal place of business.

SOCIETY RESPONSE

This response is confusing. Even if a “home” state has detailed information about every CPA with a principal place of business in that state, how would the home state know which practitioner did “bad work” in another state—and what information to hand over to that other state—unless CPAs practicing out-of-state are required to give Notice?

COMMON QUESTION

"Can a law make an out-of-state CPA automatically consent to the Board's jurisdiction unless the individual confirms that consent in a written notice?"

INSTITUTE RESPONSE

If you depend upon notice and an out-of-state CPA fails to give Notice, you can sue the out-of-state CPA for failing to provide notice, but you will not have administrative jurisdiction over that individual so you will have to seek an injunction or an indictment.

SOCIETY RESPONSE

The Institute's response fails to recognize that an out-of-state CPA who practices in New York without providing Notice required by New York would be engaging in unlawful practice of public accountancy in New York and would be subject to civil enforcement proceedings and civil penalties, as well as administrative cease and desist orders.

Under Education Law section 6516, service of orders in civil enforcement for unlawful practice is by personal service or by certified mail, return receipt requested, to the respondent's last known address by the department of education. Without Notice from such an individual, it will be difficult for the department to ascertain the individual's last known address. This demonstrates the need for state board access to the NASBA CPA database, which could be the source of the last known address of an out-of-state CPA who practices unlawfully in New York without providing Notice. AICPA and NASBA should pursue the viability and acceptance of the NASBA database by all states.

New York's expedited civil enforcement for unlawful practice of a profession permits the Education Department to proceed by administrative action and hearings rather than seeking civil court injunctions or criminal prosecutions.

INSTITUTE RESPONSE

Also, since you are depending upon written Notice, you will not be able to serve process on the individual via the state of the individual's principal place of business. You will have to obtain service out-of-state by service upon the person.

SOCIETY RESPONSE

New York Education Law section 6516 recognizes service by certified mail to the individual's last known address.

INSTITUTE RESPONSE

To prosecute criminally, you may have to seek extradition.

SOCIETY RESPONSE

Criminal prosecution for unlawful practice of professional services is seldom used by New York's Attorney General. This fact prompted the New York State Legislature to pass section 6516 of the education law for civil enforcement proceeding and civil penalties by the Education Department and the Board of Regents in 2000.

COMMON QUESTION

"Can a state make someone practicing from out-of-state who offers or renders services into that state without physically entering the state automatically subject to that state's laws by requiring a written notice?"

INSTITUTE RESPONSE

If you cannot lawfully require automatic consent, you probably cannot even require written notice (and written consent). Such automatic consents to jurisdiction have been used and upheld in several other lines of interstate commerce, including securities, insurance, interstate transportation.

SOCIETY RESPONSE

Depending on the business form, if a concern wishes to do business in New York, statutory law requires that the entity file with the NY Secretary of State. This is true for:

- Foreign general corporations, NY Business Corporation Law § 1301 ff;
- Foreign professional service corporations, NY Business Corporation Law § 1530;
- Foreign limited partnerships, NY Partnership Law 101-902;
- Foreign limited liability companies, NY Limited Liability Company Law § 802;
- Foreign professional LLCs, NY Limited Liability Company Law § 1306, and
- Foreign limited liability partnerships, NY Partnership Law § 121-1502.

In each of these instances, the Secretary of State is designated as agent for service of process. Also, in each instance, there are consequences for failure to file with the Secretary of State, most importantly the inability to sue in state court, see for example, NY Business Corporation Law § 1312, and being vulnerable to suit by the attorney general restraining activities in New York, see for example NY Business Corporation Law § 1303. In addition, a foreign limited liability partnership that fails to timely comply with certain of the filing requirements, loses the ability to transact business in New York altogether. NY Partnership Law §. 121-1501(f)(II).

CONCLUSION

Many within the profession believe that limiting a state's ability to impose a notification or fee requirement on CPAs who cross state lines has the potential to increase a CPA's mobility and unshackle the current inhibitions on interstate commerce. But whether or not the states that impose these requirements are inhibiting interstate commerce is another matter. The licensing of nearly every profession in the United States is handled by the individual states, not the federal government.

The accounting profession should begin to look beyond itself to craft uniform, legislative language if it hopes to solve the mobility crisis. If the profession is to achieve substantial equivalency, it must not disregard the perspective of the states, whose duty to protect the public must be considered. Attempting to push every state to uniformly adopt the same statutory or regulatory language both could be futile. State officials understandably want to know what's going on inside their borders, which is, in fact, the very idea behind state licensure and regulation of the profession by state boards of accountancy.

The real challenge is to determine what constitutes a substantial presence within a state and what does not. In this regard, the profession would do well to help states define exactly what a "substantial presence" might mean. Alternatively, the profession should uniformly define "Incidental Practice," which allows an out-of-state CPA to provide specified services for his home-state client within another state in which the CPA is not licensed. The key to Section 23 is that it must be linked to a uniform definition of Incidental Practice. The AICPA/NASBA's no-notice proposal extends beyond Incidental Practice to any and all cross-border practice, so long as the out-of-state CPA maintains a principal place of business in the home state. New York currently has a statutory exemption from its accountancy laws and regulations for Incidental Practice under Education Law section 7407(d):

> Nothing contained in this article shall be construed to prohibit:
>
> (d) Any individual, not engaged in practice as a certified public accountant or public accountant within the state, from performing services within the state which are incidental to the practice conducted by him outside the state.

Unfortunately, New York law and regulations do not provide a definition of what constitutes Incidental Practice of the profession of public accountancy. The AICPA and NASBA should provide a uniform definition of Incidental Practice and limit their no-notice proposal to Incidental Practice. All cross-border practice which is not incidental should require a Temporary Practice Permit based upon uniform electronic notice or notice through means of NASBA's CPA database, with uniform qualifications for the Temporary Practice Permits, and uniform limited duration of such permits.

The interstate compact may be the appropriate vehicle to achieve interstate practice mobility and public protection. The very nature of the compact demands buy-in from all involved stakeholders; every state in the compact would need to reach consensus on its

language, and each state would have the option to join. For an interstate compact to become law, the states must propose—and agree upon—exact language. To accomplish this with all 50 states will be difficult, but once it's done, the profession will have achieved a long-lasting solution.

Finally, without the chance to have a greater voice in the process, it is no more likely that the 50 states that rejected the UAA's former and current Section 23 mobility language would now adopt the forthcoming revisions to Section 23, which would further curtail the ability of states to protect the public.