Fiduciary Duties and Legal Obligations

As a director, you have a “fiduciary duty” to the Association and its members. “Fiduciary duty” means you must exercise your responsibilities as a reasonably prudent business person in the interests of the Association and its members. Among your obligations is the expectation that you will help ensure that NCA complies with its legal obligations. This chapter summarizes the specific fiduciary duties of Association Board members, and related legal considerations.

Fiduciary Duties
A Board member’s fiduciary duties include the following:

Duty of Care
The duty of care owed by a director of the Association includes the following obligations:

- Prepare carefully for Board meetings by reading relevant documents and relying on information in reports received from its staff, accountants, attorneys, and other consultants;
- Attend Board meetings, pay attention, and ask questions to clarify actions that are being taken;
- Participate in discussions by using independent judgment, exercising good faith, and with the care of an ordinary prudent person in similar circumstances;
- Protect the assets of the Association and ensure that they are expended in the members’ best interest; and
- Comply with legal requirements and the Bylaws and Policies of the Association.

Duty of Loyalty

- **Conflict of Interest.** The duty of loyalty requires a director to exercise his/her powers in the interest of the Association and not in the director’s own personal interest or in the interest of another. In essence, a director must avoid conflicts of interest between his/her personal interests and those of the organization. Should a conflict of interest arise, the director is obligated to disclose the nature of the conflict and recuse himself/herself from participating in discussions and voting on any issue where a conflict of interest exists.
- **Confidentiality.** Another element of the duty of loyalty is that directors are obligated to preserve the confidentiality of issues raised before the Board that are not to be disclosed to those outside the Board.
Association Legal Considerations
Although NCA programs are monitored by Legal Counsel, Board members must do their part to ensure that the Association operates within legal parameters. To that end, each Board member must keep in mind the following:

**Preservation of Tax Exempt Status**
- NCA is 501(c)(6) not-for-profit tax exempt corporation organized under Delaware law;
- The IRS recognizes the tax exempt status of associations of persons sharing a common business interest for the purpose of promoting such common interests;
- Tax exempt status may be jeopardized by activities outside of this purpose or the scope of the Association charter; and
- Certain revenue generating activities are permissible, even if not within the exemption, but may be subject to Unrelated Business Income Tax (UBIT).

**Compliance with Antitrust Laws**
- In general, federal and state antitrust laws prohibit combinations and conspiracies in restraint of trade and impose civil and criminal penalties for violations.
- Anticompetitive “agreements” may be inferred from conduct and conversations.
- Because trade associations, by their nature, bring competitors together, they come under the careful scrutiny of enforcement bodies.
- Accordingly, the Association must avoid even the appearance of anticompetitive behavior by avoiding discussions of such issues as costs, prices, market divisions, and boycotts of suppliers or vendors.
- NCA has a strict compliance policy including:
  - Review of agendas in advance of meetings;
  - Preparation of minutes of every meeting;
  - Attendance of Legal Counsel as appropriate; and
  - Review of its statement of Antitrust compliance at all meetings.

**Exposure to Civil Liability**
- In addition to potential exposure under antitrust and tax laws, associations may be subject to other forms of civil liability.
- Defamation laws apply to associations. Defamation encompasses both libel (generally written) and slander (generally oral). A defamatory communication is one which harms the reputation of someone through libel or slander.
Defamation laws are relevant to associations because (a) officers, directors and other members of an association may be *personally* liable for certain kinds of actions—including defamation, (b) publishers—including associations—are liable for defamatory statements in publications, including publications on the website.

Additionally, infringement of intellectual property rights and breach of contract are common areas of potential association liability.

The principal duty of the Association’s officers and directors is to faithfully and loyally discharge their responsibilities to the organization. This duty is personal to the individual and cannot be assumed by the Association. Directors who violate these duties may be sued individually for damages incurred by the Association or, in some cases, by a third party who is injured and can show that the injury would not have occurred but for the negligence or misconduct.