

M E M O R A N D U M

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TO: Howard Michel, WB2ITX  
Chief Executive Officer, ARRL

FROM: Edward B. Spinella

DATE: July 17, 2019

RE: Vice Directors

Purpose

In your capacity as Chief Executive Officer of The American Radio Relay League, Incorporated (“ARRL”), and consistent with ARRL’s Policy Governing League Counsel, you have asked me, as special counsel in the area of Connecticut nonstock corporation governance, to provide some high level thoughts and recommendations regarding ARRL’s use of Vice Directors in connection with its activities and affairs.

Background

ARRL is a unique and venerable organization in regards to its history, mission and governance structure. ARRL’s use of Vice Directors is especially novel in that I have never seen an analogous concept.<sup>1</sup>

ARRL’s use of Vice Directors is a longstanding practice. ARRL amended its Articles of Association (the “Articles”) in 1951 to reflect its use of Vice Directors. Vice Directors are intended to be a resource to ARRL. More specifically, Vice Directors: (a)

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<sup>1</sup> I anecdotally add that, without naming ARRL, I spoke to other leading Connecticut nonstock governance attorneys I regularly work with and none of them have encountered a concept analogous to ARRL’s Vice Directors.

**Murtha Cullina LLP**  
185 Asylum Street  
Hartford, CT 06103  
T 860.240.6000  
F 860.240.6150

attend meetings of ARRL's Board of Directors (the "Board"), (b) take the place of their respective Director counterparts when they cannot attend a Board meeting and (c) fill the resulting vacancy triggered by their counterpart Director's resignation, death or removal.

#### Reaffirmation of the Board's Consensus Regarding ARRL's Course of Conduct Relating to Vice Directors

As noted above, it appears there is a longstanding course of conduct regarding the Vice Directors' authority and responsibilities. Presumably this course of conduct is also consistent and uniform. The Board should reaffirm its current consensus regarding the precise nature of this course of conduct. Article 4 of the Articles indicates that the Board is composed solely of Directors (which I interpret to exclude Vice Directors). However, it seems prudent and consistent with the aforesaid course of conduct that the Vice Directors provide advisory input to the Board as it reaffirms its consensus.

It is important for the Board to reaffirm the aforesaid course of conduct because the authority and responsibilities of the Vice Directors are not clearly or comprehensively defined in the Articles as well as ARRL's Bylaws, Standing Orders and/or Director Workbook (collectively, the "Governing Documents"). While Article 5 of the Articles explicitly provides that Vice Directors have the "power of succession," the Governing Documents are prevalently silent regarding the precise nature of the Vice Directors' authority and obligations prior to exercising said power of succession and/or during a temporary substitution for their respective counterpart Director.<sup>2</sup>

Should a disagreement within ARRL emerge regarding the authority or obligations of Vice Directors, the disagreement will focus on ARRL's course of conduct which is a fact intensive and time consuming process. Should such a disagreement escalate into litigation, related legal fees would unlikely be covered by ARRL's insurance coverage. Accordingly, it would be in ARRL's best interests to proactively address potential areas of confusion or disagreement by memorializing the Board's consensus via making amendments to some or all of the Governing Documents.

As a relevant aside, I note that a certain amendment to the Articles previously approved by the Board would have provided some clarity regarding the Vice Directors' authority and obligations but this amendment was never formally effectuated. More specifically, an accompanying certificate of amendment was not filed with the Connecticut Secretary of State after said amendment was approved. The text of the amendment was an addition of language to Article 7 of the Articles such that Article 7 would read as follows (amended language in *italics*):

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<sup>2</sup> I say "prevalently silent" because Section 45 of ARRL's Bylaws states that Vice Directors are subject to ARRL's Conflict of Interest Policy such that Vice Directors have the same conflict of interest disclosure obligations as Directors and Officers.

The Vice Director shall also serve as Director at any meeting of the Board of Directors which the Director is unable to attend, *and during such period of service, the Vice Director shall be considered to have all of the duties, responsibilities, authority and obligations of a member of the Board of Directors.*

### Legality and Legal Risks of Maintaining Vice Directors

ARRL is incorporated under the Connecticut Revised Nonstock Corporation Act (the "Act"). Accordingly, the Act governs ARRL's internal affairs along with the Governing Documents.

There is a colorable argument that the Act's so-called "freedom of contract clause" or "enabling clause" (Section 33-1001(a) of the Act) supports the legality of the Vice Directors' authority and obligations as currently defined by the aforesaid course of conduct. Amending some or all of the Governing Documents as discussed above would bolster the legality of the Vice Directors' responsibilities and obligations.

The primary legal risk to ARRL surrounding its use of Vice Directors is that the underlying legality or authority of an action taken by the Board is later challenged via an ultra vires action commenced under Section 33-1038 of the Act. If there is a broad consensus among ARRL's Members, Vice Directors<sup>3</sup> and Directors regarding the authority and responsibility of the Vice Directors, the risk of an ultra vires action would presumably be remote. This risk would likely increase should controversial actions be taken by ARRL resulting in a Member's, Vice Director's or Director's use of an ultra vires action as attempt to challenge the validity of said action. There may be certain practical ways to mitigate this risk, such as ensuring that any controversial action is approved by the requisite number of Directors (excluding Vice Directors substituting for unavailable Directors) present at a meeting where a quorum of Directors (again excluding Vice Directors substituting for unavailable Directors) is present.

Should ARRL desire definitive advice regarding the legality of its use of Vice Directors, it could adopt the aforesaid amendments and proceed to request a declaratory judgment ruling that such amendments are authorized by the Act and are enforceable. In considering the advantages and disadvantages of requesting such a ruling, ARRL should consider the associated costs and public nature of the request as well as the possibility, however unlikely, that the court could declare ARRL's use of Vice Directors to be impermissible and unenforceable under the Act.

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<sup>3</sup> This assumes Vice Directors would be considered to be "directors" as contemplated by Section 33-1038 of the Act.

## Recommendations

To summarize my recommendations:

1. The Board should reaffirm its current consensus regarding the precise nature of ARRL's course of conduct relating to the Vice Directors' authority and responsibilities.
2. Once the Board reaffirms its consensus, the Board should amend some or all of the Governing Documents to clearly and comprehensively define the Vice Directors' authority and responsibilities.