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I.

STATEMENT OF INTEREST

Texas Association of Certified Public Accountants (“TACPA”) files this Amicus Curiae Brief on behalf of nearly three hundred smaller- and solo-practitioner Texas Certified Public Accountants affected by the Court’s decision in the above-styled matter. TACPA supports Plaintiff Beakley in his Motion for Summary Judgment that:

The Texas State Board of Public Accountancy (“TSBPA” or “Board”) lacks the statutory authority to discipline a licensee for good faith performance of services without also proving the person so charged also committed fraud, dishonesty, or gross negligence; and

The Due Process Clause of the United States Constitution prohibits the Board from disciplining a licensee for violations of professional standards without proving the licensee so charged acted with a culpable mental state.

TACPA members have a vital interest in jurisprudence of the Texas Occupations Code as it affects accountants licensed to practice public accountancy in Texas. TACPA members are entitled to enforcement statutes that provide “fair warning” of proscribed activities, the undertaking of which subjects them to professional sanction. Accordingly, even though TACPA is not a party to the matter before this Court, this brief is submitted through the undersigned independent attorney who was paid a fee by TACPA to prepare it.

II.

ISSUE PRESENTED

This case presents an important issue for this Court to determine: Whether professional standards adopted by the Board give fair warning to licensees—and in particular as those standards have been applied to licensee Beakley—of the conduct proscribed by those standards.

III.

SUMMARY OF THE ARGUMENT

TACPA argues that Board’s reliance on Texas Occupations Code sections 901.502(6) and 901.502(12) as the basis to discipline licensees for *any* deviation from the standards referred to therein is

unconstitutionally infirm. This infirmity arises because the professional standards adopted by the Board – Generally Accepted Accounting Principles (“GAAP”) and Generally Accepted Auditing Standards (“GAAS”)—pursuant to the statute have not been organized or written with the specificity necessary to sustain a quasi-criminal sanction. These standards have been recognized by the Supreme Court as “often indeterminate” and by the Financial Accounting Standards Board as lacking a “logical structure” such that they are “unwieldy, difficult to understand, and difficult to use.” As a result, application of the Board’s professional standards invites arbitrary Board enforcement, often with discrimination. Licensees are not given fair warning of proscribed conduct; the Board’s rules, therefore, are unconstitutionally infirm.

Jurisdiction, venue, and facts of Petitioner’s claim for relief are incorporated herein by reference.

IV. ARGUMENT AND AUTHORITIES

The Board may not adopt a business regulation that fails to provide “fair warning” of conduct that will subject a licensee to sanction. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 502 (1982). Furthermore, a state Board may not enforce a business regulation that impermissibly subjects a licensee to sanction “based not on their own objective behavior, but on the subjective viewpoints of others.” *Women’s Med. Ctr. of N.W Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001); *see also TXU Generation Co., L.P. v. Pub. Util. Comm’n*, 165 S.W.3d 821, 838-39 (Tex. App.—Austin 2005, pet. denied) (declining to apply a less stringent standard for vagueness as applicable to economic regulations that impose significant civil and administrative penalties).

The very purpose of GAAP and GAAS are to guide accountants as they develop a “subjective” conclusion, i.e. “the expression of an *opinion* on the fairness with which (financial statements) present, in all material respects, financial position, results of operations, and its cash flows in conformity with generally accepted accounting principles.” AM. INST. OF CPAS, PROFESSIONAL STANDARDS 41 (1972) (hereinafter AU 110) (stating the objective of the ordinary audit) (emphasis added). The Board seeks to

sanction Mr. Beakley for expressing his opinion—that the financial statements on which he opined are in conformity with GAAP—different than that which the Board would reach—that the financial statements are not in conformity with GAAP—under similar circumstances. The Board may not sanction a licensee for having a subjective viewpoint different from it.

A. GAAP AND GAAS ARE DISPARATE, DISORGANIZED ACCUMULATIONS OF ADVISORIES THAT DO NOT PROVIDE LICENSEES WITH “FAIR WARNING” OF PROSCRIBED CONDUCT.

“[G]enerally Accepted Accounting Principles (GAAP) are not the product of legislative bodies or judicial systems to be enforced as a matter of law. Instead, accounting rules (and auditing standards as well . . .) have been almost exclusively developed by a series of organizations, committees, and boards established within the accounting profession itself.” MATTHEW BENDER, ATTORNEY’S HANDBOOK OF ACCT. AND FIN. REPORTING 1.02 (2008). The result has been that GAAP developed into a fluid set of instructions that even the United States Supreme Court acknowledged “is not the lucid or encyclopedic set of pre-existing rules that (some) might perceive it to be.” *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 100 (1995).

GAAP changes and, even at any one point, is often indeterminate. ‘The determination that a particular accounting principle is generally accepted may be difficult because no single source exists for all principles. There are 19 different GAAP sources, any number of which might present conflicting treatments of a particular accounting question. When such conflicts arise, the accountant is directed to consult an elaborate hierarchy of GAAP sources to determine which treatment to follow.’

Id. (quoting R. Kay & D. Searfoss, Handbook of Accounting and Auditing, ch. 5, p. 7 (2d ed. 1989)).

The Board asserts that adoption of GAAS as a professional standard provides it sufficient basis upon which to complain of Mr. Beakley’s conduct. *See* Def.’s Resp. to Pl.’s Mot. for Final Summ. J. 4-12. These “indeterminate” standards, however, were not intended to be used as the basis for a quasi-criminal complaint. The Financial Accounting Standards Board (“FASB”), for example, has recognized the structure of U.S. GAAP to be “unwieldy, difficult to understand, and difficult to use.” FINANCIAL ACCOUNTING STANDARD BOARD, ACCOUNTING STANDARDS CODIFICATION 33 (2009). Acknowledging

that “the volume, complexity, and lack of integration made it difficult for professionals to stay up-to-date and to train staff,” the FASB undertook a five-year “structural overhaul” of U.S. GAAP by combining “disparate standards into a codified format.” *Id.* at 5. “Before the Codification, authoritative U.S. GAAP was a proliferation of thousands of standards established by a variety of standard setters over the last 50-plus years. **The standards lacked a consistent and logical structure.**” *Id.* at 33 (emphasis added). The pre-codification accumulation of advisories, one that lacks a consistent and logical structure, is the basis for the Board’s quasi-criminal sanction against Mr. Beakley. The Court should not permit the Board to impose sanctions on a licensee based on a set of advisories that are inconsistent, illogical, and disparate. These advisories are generally accepted “principles,” not rules.

It is against this backdrop of acknowledged disparity and inconsistent structure that the TSBPA continues to misdirect the Court’s attention: Arguing the issue of whether or not the Occupations Code authorizes the Board to discipline accountants for violations of professional standards. First Am. Compl., *TSBPA v. Beakley* at 4-7 (SOAH No. 457-09-3015). No argument exists here; the TACPA is not maintaining a challenge to the Board’s authority to discipline accountants and adopt professional standards under which it may discipline a licensee. However, contrary to the Board’s argument that legislative intent is the “paramount issue,” Def.’s Resp. at 4, the truly paramount issue is whether or not professional standards adopted by the Board, GAAP and GAAS, provide “fair warning” of proscribed conduct. It is important, therefore, that the Court examine the specific language of the auditing standards upon which the Board bases its complaint.

B. GAAP AND GAAS ARE NOT DECLARATIVE STATEMENTS THAT PROVIDE USERS WITH “FAIR WARNING” OF PROSCRIBED CONDUCT.

The Board alleges that Mr. Beakley, during the course of undertaking his audit activities, failed to “document” his procedures related to certain accounts receivable of the subject client. First Am. Compl. at 4, ¶¶ 15 – 23. Specifically, the Board alleges Mr. Beakley failed to comply with Auditing Standards

330.31-.35, *Id.*, and Statements on Auditing Standards (“SAS”) Numbers 59 and 67¹, *Id.* at 7, ¶ 33, as those have been published by the AICPA. The Board’s allegations, however, fail to recognize or acknowledge that Auditing Standards are not clear declarations of required action but, rather, advisories to the auditor of his responsibilities under those Standards.

The Auditing Standards upon which Board bases its allegations, provide only “guidance on performing alternative procedures,” AM. INST. OF CPAS, *supra* at 355 (1992) (hereinafter referred to as AU 330) (AU 330.01 referring to AUs 330.31, .32) (emphasis added), and “guidance on evaluating the results of confirmation procedures.” *Id.* (AU 330.01 referring to AU 330.33) (emphasis added). These Standards instruct the auditor that “he or she should apply alternative procedures” to obtain the evidence necessary to reduce the audit risk, *Id.* at 361 (AU 330.31) (emphasis added), and that alternative procedures “may include examination of subsequent cash receipts.” *Id.* (AU 330.32) (emphasis added). With regard to documentation, the basis for many of the Board’s allegations, First Am. Compl. at 4, the Standard once again only directs that the auditor “should document” how he or she overcame the presumption. *Id.* at 362 (AU 330.35) (emphasis added). There is no guidance, however, on what documentation is required or how much documentation is “enough.” Auditing Standard 341 is similarly couched in advisory words that “[t]he auditor should evaluate whether there is substantial doubt about the entity’s ability to continue as a going concern for a reasonable period of time” AM. INST. OF CPAS, *supra* at 506 (1989) (hereinafter AU 341) (AU 341.03) (emphasis added). As with the other standards, there is little, if any, guidance within the standard as to the meaning of the advisory terms used therein. If these Standards were codified as black-letter law, the Court would not sustain their use, without some evidence of culpable intent, as the basis for quasi-criminal sanctions.

What the Board charges Mr. Beakley with is not so much that he did not “document in the Blue Moon audit” the procedures he undertook with respect to receivables due Blue Moon and its ability to

¹ The AICPA’s Statements on Auditing Standards have been codified as Auditing Standards. The Auditing Standards referred to have been respectively codified as Auditing Standards AU 330 and AU 341.

continue as a going concern but, rather, that he did not *document enough* the procedures he undertook. First Am. Compl. at 4 ¶¶ 16-23; *see also* Expert Report and Affidavit of Ken Skrabanek 1 (concluding that Beakley “did not perform *adequate* procedures in confirming accounts receivable”) (emphasis added). Mr. Beakley is being punished because, in the Board’s estimation, he did not perform *adequate* audit procedures. The Board is attempting to sanction this licensee because his subjective viewpoint, that he adequately performed audit procedures, differs from that of the Board’s expert. The Board may not sanction another for deviating from a regulation that utilizes a subjective term as the basis for its punishment. 248 F.3d at 422; *see also Sanders v. State Dept. of Public Welfare*, 472 S.W.2d 179, 182 (Tex. Civ. App.—Corpus Christi 1971, writ dismissed) (a regulation that is vague, indefinite, or uncertain violates the first essential of due process of law).

“Words have meaning.” *In re Lock*, 54 S.W. 3d 305 (Tex. 2001). The Board acknowledges this in its Response to Plaintiffs’ Motion for Final Summary Judgment wherein it attacks Mr. Beakley’s interpretation of Code section 901.502 as an “absurdity” because Mr. Beakley fails to distinguish between the Legislature’s use of the word “or” from the word “and.” Def.’s Resp. at 6. Absent from TSBPA’s complaint, however, is any direct reference to the actual wording of the auditing standards upon which it relies to make its complaint against Mr. Beakley. This is because the applicable auditing standards are rife with advisory and open-ended terms that depend on professional judgment for their application. *See, e.g.*, AUs 330.01, .31, .32, .35, and 341.03. The AICPA, much as a legislature would be, should be presumed to have said what it meant; surely the words it chose are the surest guide to the Institute’s intent. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.* 996 S.W.2d 864, 866 (Tex. 1999). The Court, therefore, must not ignore the AICPA’s use of the word “should” in the rules. “Should” does not mean “must.”

The Board has adopted rules of professional conduct that incorporate GAAS. 22 T.A.C. §§ 501.60, .74(a); *see also* Def.’s Resp. at 5. If the Board’s adoption of this rule is to have any effect, the result is to validate and bind GAAS as a statute. *Gen. Elec. Credit Corp. v. Smail*, 584 S.W.2d 690, 694 (Tex. 1979).

The Court, therefore, much as it would any statute, should give effect to “[e]very word, sentence, clause, and phrase” of the auditing rules upon which the Board rests its complaint. *Southwestern Bell Tel. Co. v. Pub. Util. Comm’n*, 79 S.W. 3d 226, 229 (Tex. App.— Austin 2002, no pet.).

The application of Auditing Standards, evinced by the AICPA’s use of the words “should” and “may,” requires the use of subjective judgment. This is acknowledged by the Board’s expert: “An auditor is not always required to request third party confirmation of accounts receivable if the use of the confirmation would be ineffective.” Skrabanek, *supra* at 6. Mr. Beakley completed auditing steps that, in his professional judgment, he considered necessary to deduce his opinion: that his client’s financial statements fairly presented the financial condition of his client in accordance with GAAP. The Board disagrees with his conclusion and is seeks to sanction Mr. Beakley accordingly. This is not permitted; the Board cannot arbitrarily sanction a licensee because his subjective opinion about whether or not he adequately performed certain audit steps differs from that of the Board’s. 165 S.W. 3d at 838.

The State Office of Administrative Hearings will make findings on the facts of the underlying dispute between Mr. Beakley and the Board. *See TSBPA v. Beakley*, SOAH No. 457-09-3015 (2009). The TACPA leaves that decision to that forum. TACPA’s argument is that, as a facial matter, the auditing standards, when applied to the conduct of licensees without requiring a culpable mental state, do not provide licensees with “fair warning” of proscribed activities. The Auditing Standards and GAAP are not written as affirmative instructions to be clearly applied in all circumstances; rather, the AICPA writes them with the expectation that CPAs will exercise professional judgment. *See* AU 110.05 (“In the observance of GAAS, the independent auditor must exercise his judgment in determining which auditing procedures are necessary in the circumstances to afford a reasonable basis for his opinion.”). The Board has not alleged any fraud, dishonesty, or gross negligence. Its substantive allegation is that Mr. Beakley’s *opinion* was not founded on the *proper implementation* of GAAS. First Am. Compl. at 8. TACPA argues that a difference of opinion should not form the basis for the Board to impose quasi-criminal sanctions.

C. THE CPA PROFESSION MAINTAINS HIGH PROFESSIONAL STANDARDS THROUGH PEER-REVIEWS.

The Board argues that in furtherance of legislative mandates to “maintain high standards of professional competence, integrity, and learning and (to) demonstrate competence and integrity in all dealings with the public”, Tex. Occ. Code § 901.005(e)(3) (2007), it must be permitted to discipline licensees for *any* deviation from professional standards regardless of licensee’s culpable mental state. Def.’s Resp. at 7. That in furtherance of “professional competence, the Board has been given authority to consider as grounds for discipline the accountant’s failure to comply with professional standards. . . .” *Id.* TACPA argues the Board maintains the “professional competence” of licensees through the use of peer-reviews.

Section 901.159 of the Occupations Code provides for a “peer review program to review the work product of a license holder . . . to the extent necessary to comply with any applicable standards adopted by generally recognized bodies responsible for setting accounting standards.” § 901.159(a). This “peer review” mechanism is designed to ensure that licensees “meet the competency requirements of the professional standards” applicable to the services being provided. *Id.*; *see also* 22 T.A.C. § 527.1 (“[T]he board establishes a peer review program to monitor CPA’s compliance with applicable accounting, auditing, and other attestation standards adopted by generally recognized standard-setting bodies.”). The AICPA also supports the peer-review system: “The goal of practice monitoring, and the program itself, is to promote quality in the accounting and auditing services provided by the CPA firm (and individuals) subject to these standards.” AM. INST. OF CPAS, AICPA STANDARDS FOR PERFORMING AND REPORTING ON PEER REVIEWS 1005 (2009). Any firm licensed or registered with the Board that performs “attest service or any accounting and/or auditing engagement, including audits, review, compilations, forecasts, projections, or special reports” is required to participate in the peer review program. 22 T.A.C. § 527.4(a). Mr. Beakley participates in the peer-review program.

There are two types of peer reviews: System and Engagement. AM. INST. OF CPAS, QUESTIONS AND ANSWERS ABOUT THE AICPA PEER REVIEW PROGRAM 3 (2009). “A System Review includes determining whether the firm’s system of quality control for its accounting and auditing practice is designed and complied with to provide the firm with reasonable assurance of performing and reporting in conformity with applicable professional standards, including SQCS No. 7, in all material aspects.” *Id.* “The objective of an Engagement Review is to evaluate whether engagements submitted for review are performed and reported in conformity with applicable professional standards in all material respects.” *Id.*

Mr. Beakley and his firm have been subjected to Systems Review. In the opinion of the reviewer, for the period ended April 30, 2008,

the accounting and auditing practice of Beakley & Associates, P.C. in effect for the year ended April 30, 2008, has been designed to meet the requirements of the quality control standards for an accounting and auditing practice established by the AICPA and was complied with during the year then ended to provide the Firm with reasonable assurance of conforming with professional standards.

Report of Condley & Co., LLP CPAs to Beakley & Assoc. of 9/25/08. In addition, Mr. Beakley has testified before the State Office of Administrative Hearings that the Blue Moon audit, subject of the Board’s complaint, was examined by the reviewing firm and no exceptions were found; that is, the firm received a “clean”² opinion that the firm has the systems in place to ensure its work, *including the Blue Moon audit*, conforms to professional standards. Reporter’s Record at 299 - 303, *TSBPA v. Beakley*, S.O.A.H. No. 457-09-3015.

This dispute between the Board and Mr. Beakley is nothing more than a difference of opinion as to whether Mr. Beakley *adequately* applied applicable auditing standards. This is a subjective determination. A practitioner should not be sanctioned for having a subjective viewpoint with which the Board disagrees.

² Referring to an audit as “clean” is a term of art referring, generally, to an audit report that contains no exceptions with respect to the firm being reviewed.

V.

CONCLUSION

“The practice of public accountancy is a learned profession that requires specialized education and experience.” § 901.005(a). As learned professional, CPA/auditors are called upon to express opinions. *See* AU 110.01. Relying upon learned professional judgment, accountants are no different than practitioners of the medical or legal professions: they sometimes develop opinions different from those which others might develop under similar circumstances. Accepting the Board’s premise that *any* deviation from its interpretation of applicable standards, without a requirement that the licensee’s culpable mental state be established, is a basis for sanction sends a chilling message to CPAs across the state: Your professional judgment is subject to second-guessing on the part of the state. A practitioner should not be subject to sanction for expressing a good-faith opinion that differs from that of the TSBPA.

For the foregoing reasons, Amicus Curiae TACPA supports Plaintiff’s Motion for Final Summary Judgment and his Motion to Reconsider the Motion for Summary Judgment.

This 20th day of November, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 20th day of November, 2009, I electronically filed the foregoing Amicus Curiae Brief with the District Clerk using the Texas Online eFiling for courts system and that a true and correct copy was forwarded to counsel of record for the parties as follows:

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This the 20th day of November, 2009.

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