March 30, 2001

VIA TELECOPY and REGULAR MAIL

Jeanne M. Crouse
Legal Counsel, USMS
600 Marcia Lane
Rockville, MD 20851-1510

Re: United States Masters Swimming, Inc., Corporate Governance

Dear Jeanne:

You have asked me to respond to a number of questions relating to the Ohio Nonprofit Corporation Law, Chapter 1702 of the Ohio Revised Code. I have responded below to the issues you raise, as well as a few others raised in the materials you have sent to me. My responses are in part based upon my general knowledge of United States Masters Swimming, Inc. ("USMS"), my retention by USMS and its predecessor at the time of its incorporation in the 1979-1981 period, and my review of the materials you sent me, including correspondence to USMS from Thomas N. Tripp, a copy of Part Five of the most recent USMS Rule Book, the Articles of Incorporation as on file with the Secretary of State of Ohio, the most recent Statement of Continued Existence on file with the Secretary of State, and a number of e-mails exchanged among USMS members over the last few months.

It is sometimes difficult to separate the legal issues from the political issues raised in the correspondence. Often there is no right or wrong answer to political issues raised, and my responses to the legal issues below may do little to quell debate among USMS members. Hopefully, however, I can at least clarify the legal issues so that there is focus provided to the political discussion.

I should also point out that the Ohio General Assembly recently passed amendments to the Ohio Nonprofit Corporation Law, which Governor Taft signed on January 8 and which take effect April 9, 2001. While the amendments do not change any of my answers below, I will point out where those amendments may effect the analysis.

I shall first respond to your questions in the reverse order that you raise them. I will then proceed to respond to a few Ohio legal issues touched upon in the correspondence.

Does Ohio law require open meetings for nonprofit corporations?

No.

There is no provision in the Ohio Nonprofit Corporation Law which speaks to whether or not others, including members of the corporation, have the right to attend meetings of the House of Delegates, the Board of Directors, or any committee or other entity of the corporation of which they are not members. Nor am I aware of any common law requirement of open meetings.

Ohio does have an Open Meetings Act, codified at O.R.C. § 121.22. This lengthy statute applies to boards of county commissioners, school boards, state college boards and many other governmental bodies, including their respective committees, but it does not apply to private entities, such as USMS, which are incorporated under Chapter 1702.

The Open Meetings Act provides a number of exceptions, where a public body is allowed to go into executive session to consider a specific list of matters. Charitable organizations such as USMS might use the list of exceptions as a starting point to craft its own internal legislation regarding when meetings should be closed, but there is nothing that requires a private entity such as USMS to be open at all.

I personally favor an open meetings rule in an organization such as USMS, for many of the reasons articulated in Mr. Tripp's e-mail of January 3, 2001. I believe his rule proposed as Exhibit A to his November 27, 2000, letter to Nancy Ridout, however, is more complicated than it needs to be. Hugh Moore's comments in his December 30, 2000, e-mail are also worthy of consideration; Ohio and other states have spent an awful lot of time litigating issues such as whether a few members of any public body getting together socially violate the Act. Clearly USMS would want to carefully draft any legislation relating to open meetings so as to avoid those kinds of disagreeable arguments.

No organization wants to publically discuss matters of an obviously sensitive nature, such as discipline problems of employees, volunteers or athletes, details of contracts, or questions relating to litigation. I can also imagine that there could be other issues, that cannot be predicted, that could come up that would suggest that some secrecy should be involved. I agree with the concepts enumerated in the draft proposed by Mr. Tripp in Exhibit A to his November 27 letter, but I believe it is too lengthy and legalistic. I am partial to the language in the preamble to USA Swimming's Regulations which, adapted for USMS, would read:

> All meetings of USMS, its LMSC's and committees, shall be open to all members of USMS except in those situations where by majority vote of the meeting body it is determined to go into executive session in the best interests of USMS (e.g., those relating to corporate or committee personnel or legal matters).

Does Ohio law require USMS to keep its books and records open to members or others?

To a very limited extent.

Tom Tripp correctly states in his e-mail to you of January 9 that O.R.C. § 1702.15 requires that books and records of a corporation shall be open to members, but he seems to carry his point further than is appropriate. The statute states in its entirety:

> Each corporation shall keep correct and complete books and records of account, together with minutes of the proceedings of its incorporators, members, trustees, and committees of the trustees or members. Subject to limitations prescribed in the articles or the regulations upon the right of members of charitable corporations to examine the books and records, all books and records of a corporation, including the membership book prescribed by section 1702.13 of the Revised Code, may be examined by any member or trustee or the agent or attorney of either, for any reasonable and proper purpose and at any reasonable time.
>
> (A number of changes to the quoted language take effect April 9, but none of them affect this analysis.)

I do not believe the statute is as expansive as Mr. Tripp implies. "Complete books and records of account" suggest financial statements and records of who was paid what; it does not permit a member to look at every single piece of paper of the corporation relating to finances. The statute is intended to cover all minutes of the corporation, wherever kept. The second sentence indicates that a member may examine books and records, "including the membership book[1]" which is elsewhere defined as the list of names and addresses of each member with dates of admission to membership and classes if members are classified.

Section 1702.15 is limited by its last clause, which states that examination of books and records may only be "for any reasonable and proper purpose and at any reasonable time." This clause at least

[1]Or "membership record" as the revised statute will say.

suggests that, before documents are publicly aired, there must be a request, and the request must state a purpose which is deemed by someone to be reasonable and proper. Courts have interpreted similar language to require some level of legitimacy by the person seeking the records, and I do not believe the good intentions of the seeker is enough.

Section 1702.15 must also be read in conjunction with Section 1702.11, which comments on the types of provisions which may be included in the code of regulations of a nonprofit corporation. In particular, Section 1702.11(A)(4) states that such regulations may include provisions with respect to the rights of members, how members vote,

> and, in the case of charitable corporations, limitations upon or regulations governing their right to examine the books and records of the corporation....

Historically this provision has allowed a charitable organization to properly determine not to allow donors' names which are listed among "books and records" be available for examination by members by so stating in the corporation's code of regulations. The current amendments delete the phrase "in the case of charitable corporations," thereby suggesting that any nonprofit corporation is free, notwithstanding O.R.C. § 1702.15, to adopt regulations limiting members' rights to examine the corporation's books and other records,

As broad as the definition of "books and records" may be, it is not as broad as Mr. Tripp argues, and it certainly does not extend to e-mail communications among members of the Board of Directors of the corporation, even when individual members of the Board send blanket e-mails to all of the other members of the Board.

Again, Ohio has a Public Records Act (primarily O.R.C. § 149.43, but involving other provisions as referenced therein), which is much broader than section 1702.15, and which, like the Open Meetings Act, applies only to governmental entities. There is a provision in O.R.C. § 149.431 which applies to nonprofit corporations that enter into contracts with federal or state governmental entities, but I do not believe USMS fits that description.

There was a suggestion in the e-mails I reviewed that there may be minutes of some USMS meetings that were never created, and some which may have been generated but were not shared beyond a very small circle. I would recommend that USMS do its best to have the Board and every committee, as well as the House of Delegates, take minutes of all duly called meetings, and maintain those minutes at a centralized location. Of course, these minutes do not need to be verbatim transcripts or even begin to reflect everything that everybody said, but they should reflect what motions were made

and the result of all votes. Indeed, it can be argued that until the action is reflected in the minutes of the corporation, it never occurred. All USMS minutes should be retained in a single location and be accessible to a member for a proper purpose. It may be that putting such minutes on a website is a good solution, but it is by no means legally required.

Is the payment of compensation to two volunteers, presumably as payment for work previously and concurrently done for the corporation, in accordance with Ohio law?

Yes. The answer to the question is simple, but it may be the wrong question.

There is nothing in the Ohio Nonprofit Corporation Law that prohibits payment of any sort of compensation to any individual, reasonable or unreasonable, for services in the past or contemporaneously with payment. An Ohio nonprofit corporation, however, need not be a charitable organization, exempt from taxation and to whom contributions are deductible under the United States Internal Revenue Code. In order to maintain its status as a tax exempt organization under section 501(c)(3) of the Code, USMS must be careful not to benefit individuals.

The private inurement concept relating to charitable organizations under U.S. tax law is also captured in the Amended and Restated Articles of Incorporation of USMS, Article Fourth, which states in part:

> No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its members, directors, officers or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article III hereof.

Payment of reasonable compensation for services rendered to USMS is not contrary to the Articles or the Internal Revenue Code. Clearly, USMS can agree to pay Messrs. Volckening and Matysek a reasonable wage, salary or honorarium for services rendered.

Even the fact that payment was made after-the-fact as a compensatory thank you for services previously rendered to USMS should not jeopardize USMS's exempt status or be considered to be prohibited private inurement, so long as the total compensation received was reasonable.

Mr. Tripp argues in his letter to you of November 27, 2000, that the decisions to compensate violate the Financial Operating Guidelines, and that the Professional Management Guidelines were not

properly adopted. I have seen neither of these, and do not know how they may have been adopted, so I am unable to say with any degree of certainty whether USMS followed its own rules.

Should USMS's corporate structure be changed, and do its Articles of Incorporation need amendment?

It is not necessary for the structure to be changed, but it may be desirable to do so.

In his letter of January 11, 2001, Mr. Tripp makes a number of confusing assumptions and inaccurate conclusions. Rather than try to navigate through his narrative, let me just state as follows:

Ohio Revised Code section 1702.30(A) states in part:

> Except where the law, the Articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its trustees.

"Trustees" is defined at O.R.C. § 1702.01(L) to mean "the persons vested with the authority to conduct the affairs of the corporation irrespective of the name by which they are designated."

In the original Articles of Incorporation filed with the Secretary of State of Ohio on April 19, 1979, under the name Masters Swimming Committee of the AAU, Inc., the names and addresses of the Initial Directors ("Trustees") were listed, as O.R.C. § 1702.04(A)(4) then required (and will continue to require until April 9, 2001). Although I do not have copies of the USMS minutes from 1979-81, the normal progression would be for the Initial Directors to adopt an initial code of regulations which would have created a House of Delegates. I suspect that this was done at the 1979 AAU Convention in Miami Beach or at the latest at the first USAS Convention in Snowbird, Utah, in October of 1980.

I do have copies of the Code of Regulations of Masters Swimming Committee of the AAU, Inc., as it appeared at section 230.3 of the 1980 AAU Swimming rule book. The Board of Governors was the name then given to the voting members of the corporation, and the Board of Directors was the entity with "the authority to act for the corporation between meetings of the Board of Governors." The responsibilities of the Board of Governors were enumerated then and were virtually identical to those responsibilities enumerated for the House of Delegates now at section 504.2 of the USMS Code.

One of the actions taken in Snowbird in 1980 was the vote by the Board of Governors to change the name to USMS; this action required the amendment of the Articles, which was accomplished by the Amended Articles filed April 20, 1981, with the Secretary of State.

The Initial Trustees listed in the original Articles of Incorporation, would have no authority after a new Board of Directors was elected by the Board of Governors in 1979 or 1980.

Neither would anything need to be filed with the Secretary of State of Ohio to reflect USMS's current structure, no matter how much it has changed since 1979. Section 1702.04(A) of the Ohio Revised Code lists what **must** be filed with the Secretary of State: name, office location, purpose, and initial trustees. Section 1702.04(B) states that the articles may include other information, but usually that information is found in the code of regulations, which is Part 5 of the USMS rules.

I do not accept Mr. Tripp's assertion that section 504.2 delegates the power to act for USMS to the House of Delegates. Article 504.2 does list a number of specific powers that the House of Delegates has, but so too does Article 506.4 indicate that the Board of Directors has the authority to act for USMS between meetings of the House of Delegates.

Ohio law does not dictate whether the Board of Directors, the House of Delegates, or some other entity governs, controls, or has power or authority to exercise over the corporation, nor should it necessarily. When I spoke to Mr. Tripp in early January, he made it sound as if at some point USMS had determined that the Board of Directors was going to be powerless and that all decisions affecting the corporation were to be made by the House of Delegates. Nothing in Ohio law would prevent that from being the case, but my review of his correspondence and the Code of Regulations suggests that no such decision has ever been made. I would compare what I see in the correspondence to the situation in most for-profit corporations. General Motors, for example, has a Board with the power to control the corporation, but it also has an annual meeting of shareholders who can, and sometimes do, enact resolutions contrary to what the Board of Directors desires. The House of Delegates is a similar entity, meeting once a year, with the authority to second guess virtually anything that the Board of Directors has done in the last year, if it can merely muster a majority.

Although the general rule in Ohio could be construed to be that the board of directors of a nonprofit corporation has all authority of that corporation, O.R.C. § 1702.30(A) makes clear that the general rule can be modified by "the law, the articles, or the regulations". Clearly USMS has crafted its regulations over many years, and the authority of USMS is as Part 5 states it is. Mr. Tripp is incorrect in suggesting that the articles or the regulations must be amended to comply with Ohio law.

The more I have heard about the functioning of the Board of Directors, the more I do question its utility. If the Board is not meeting during the year except at Convention, it may be desirable to delete it and either call the current Executive Committee the Board or not have a Board at all. Either would be legal, although there is nothing illegal or improper about the way the Board is structured now.

Is it necessary for the Board of Directors to meet after the House of Delegates to ratify its actions?

No.

I share Mr. Tripp's confusion, expressed in his letter of January 11, regarding the Board of Director's meetings to ratify actions of the House of Delegates. There would seem to be no need for the Board to do anything regarding actions taken by the voting membership, although there may well be reasons to meet to take other actions that were not considered by the House, presumably because they are not set forth in section 504.2.

Does USMS hold too much in reserve, thereby creating a tax problem?

No, I don't think so.

There could be a number of Internal Revenue Code issues relating to where USMS raises its revenues, and how it spends them. I don't wish to suggest that I have done a complete audit of the finances of USMS or even know its financial position. I would urge USMS to have an audit of its financial statements performed, if not yearly at least every few years, by a certified public accountant. I am also sure that USMS files a Form 990 with the IRS every year, and that the IRS is generally aware of the finances of USMS.

That having been said, I am virtually certain that having funds in reserve is not an issue that in and of itself should be of concern. I currently serve on the Board of a charitable organization that has approximately eighty million dollars ($80,000,000.00) in reserve and has for a number of years. So long as the reserves are held for the charitable purposes of USMS, the mere existence of growing reserves should not be a problem.

Should there be a provision in the USMS Rules that all meetings shall be conducted in accordance with Roberts Rules of Order?

I think so. That doesn't mean that Robert's Rules trumps everything else, but it does give a person the knowledge that if things get out of hand they will be brought back into order in accordance with a set of procedures that aren't arbitrarily set by a dictator. The rule should allow for exceptions

when the rules themselves say to do things differently, and of course Robert's Rules can always be suspended in accordance with Robert's Rules.

I generally agree with Mr. Tripp's suggestion in his letter of November 27. I would modify his suggested language only slightly so it would read:

> At all meetings of USMS, its LMSCs and committees, Robert's Rules of Order shall be the governing procedural rules, unless otherwise modified in these regulations.

* * *

Please feel free to contact me with any questions. So there is no misunderstanding, I should add that I'm not anxious to join anyone's e-mail address list, and I think questions to me would be more expeditiously addressed if they came only through you or the President rather than a number of individuals.

Sincerely,

Ross E. Wales

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