MEMORANDUM

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| TO: | Philip Barnes, Vice ChairmanMichael Nolan, Chief Operation Officer |
| FROM: | Gabriel M. NugentRobert J. Thorpe |
| CC: | Donald T. Kinsella |
| DATE: | March 26, 2019 |
| RE: | Compensation of Directors of Western Regional Off-Track Betting Corporation |

In this memorandum we give our opinion on whether it is appropriate for directors of the Western Region Off-Track Betting Corporation (“Western Region”) to receive health insurance benefits from the Western Region in exchange for their service on the Western Region’s Board.[[1]](#footnote-1) As set forth more fully below, we recommend that Western Region directors no longer accept compensation in excess of the statutorily fixed compensation set forth in Section 502(10) of the Racing, Pari-Mutuel and Breeding Law (the “Racing Law”), whether in the form of health benefits or otherwise. Continued receipt of such additional compensation invites material risk of civil (and possibly other) liability to the Western Region directors.

Section 502(10) of the Racing Law, which governs compensation of directors of regional off-track betting (“OTB”) corporations, provides as follows:

1. The directors may receive a sum of two hundred fifty dollars for each day or part thereof spent in attendance at meetings held in accordance with subdivision eight of this section, but not to exceed twenty-five hundred dollars during any one year.
2. The directors may receive a sum of one hundred dollars for each day or part thereof at meetings other than those defined in subdivision eight of this section or otherwise in the work of the corporation; provided that such activities are approved by the board as a whole. Such additional expenses shall not exceed fifteen hundred dollars in any calendar year.
3. The chairman of the board elected in accordance with subdivision one of this section shall receive additional compensation of one thousand dollars per year to cover those expenses and activities associated with such office.
4. In addition, the directors shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.
5. Any expenses incurred by a director in excess of those authorized by paragraph d of this subdivision shall be the responsibility of the appointing political subdivision, payable on vouchers certified or approved by the chief fiscal officer of such political subdivision as is provided by law.

In short, Section 502(10) authorizes OTB directors to receive $250 per day for attending regularly scheduled meetings (up to $2,500 annually), $100 per day for other OTB-related business (up to $1,500 annually), and reimbursement for actual and necessary expenses incurred in the performance of their official duties. *Id*. Section 502(10) authorizes no other form of compensation for OTB directors, and expressly states that compensation above the authorized amounts are the responsibility of the political entities that appoint the directors.

No New York court has addressed the question analyzed in this memorandum. Indeed, only eleven reported cases reference Section 502 of the Racing Law, and not one of those cases address OTB director compensation, let alone the provision of health insurance benefits to OTB directors.

In October 1978, the Office of the State Comptroller published an opinion concluding that “the directors of a regional off-track betting corporation may be included in a health insurance plan provided by such corporation for its officers and employees.” Op. St. Comptr. No. 78-811 (reasoning that “the inclusion of the directors of a private business corporation in the corporation’s health insurance plan would be a common business practice”). At that time, however, the Racing Law was much different than it is today, having been amended in 1982 and multiple times thereafter.[[2]](#footnote-2) Thus, the October 1978 opinion of the Office of the State Comptroller should arguably be given reduced weight for purposes of evaluating whether the provision of health insurance benefits to OTB directors is prohibited by Section 502(10).[[3]](#footnote-3)

Moreover, in 2007, the Office of the State Comptroller conducted an audit of the Buffalo Sewer Authority (“BSA”), after which it concluded the provision of health insurance benefits to BSA directors was not allowed, specifically finding:

Public Authorities Law provides that authority board members are to be compensated at a fixed dollar amount[[4]](#footnote-4) for each full year of service, and be reimbursed for their actual and necessary expenses incurred in the performance of their official duties. The term “compensation” refers to the total consideration paid to an officer or employee for his of [sic] her services, including wages and authorized benefits. Therefore, any additional fringe benefits provided to board members are not allowed.

The Authority provides health insurance benefits to four of its five Board members. The cost to the Authority to provide this benefit to its Board members was approximately $87,000 for the two-year period July 1, 2005 through June 30, 2007. However, the Board members’ total compensation from the Authority for these two years included $22,000 in salaries and the $87,000 for the health insurance benefits, totaling $109,000. This situation resulted in the Authority paying $87,000 more than it should have in compensation for these Board members.

Authority officials told us that it is a past practice to provide Board members with health insurance coverage. However, we did not identify any provision in the Authority’s enabling act, or any other State statute, that would authorize the Authority to do so. Therefore, the Authority may not provide this benefit to its Board members.

*See* Office of the N.Y. State Comptroller, Buffalo Sewer Authority: Internal Controls over Health Insurance 9 (2007). Thus, even assuming the 1978 opinion could be considered persuasive, despite the subsequent amendments to the Racing Law, the Office of the State Comptroller’s conclusion in the 2007 BSA audit report not only contradicts the reasoning of the 1978 opinion, it also suggests the 1978 opinion may no longer represent the view of the Office of the State Comptroller.[[5]](#footnote-5)

In May 2008, the Office of the Attorney General issued an informal opinion concluding the compensation authorized by Section 502(10) is the total compensation available to OTB directors, and as such, the OTB (in that case, the Suffolk Regional OTB Corporation) may not provide health insurance benefits to its directors. Op. Att’y Gen. (Inf.) No. 2008-3. The Office of the Attorney General reasoned as follows:

First, the board of directors has no specific authority to provide health insurance benefits for or, more generally, to establish the compensation of its own members. Cf. [Rac. Pari-Mut. Wag. & Breed. Law § 503(6) (authorizing the board of directors to appoint officers, agents, and employees, and fix their compensation). Nor are the directors specifically authorized to participate in an existing health insurance program. Cf. id. § 606(3) (certain officers and employees of the New York City OTB Corporation may participate in City-authorized health insurance program). As a creature of statute, the OTB, acting through the board of directors, lacks powers not granted to it by express or necessarily legislative delegation. Abiele Contracting, Inc. v. New York City School Const. Authority, 91 N.Y.2d 1, 10 (1997).

When the absence of any specific authority for the board of directors to establish compensation for its members is viewed in combination with the precise compensation parameters laid out in section 502(10), the conclusion that only the compensation prescribed by section 502 is permissible is strengthened. Under these circumstances, we believe the principle of statutory construction of expression unius est exclusion alterius applicable: where a law expressly describes a particular act, an irrefutable inference must be drawn that what was not included was intended to be excluded. Town of Riverhead v. State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 42-43 (2005), quoting Statutes § 240, 1 McKinney’s Cons. Laws of N.Y. at 411-12 (1971).

Finally, we note that members of the board of directors are authorized to hold outside employment. Rac. Par-Mut. Wag. & Breed. Law § 502(11). They are thus not prohibited from receiving compensation from other sources. Therefore, equity does not weigh against our concluding that directors are limited in receiving the compensation prescribed in section 502(10). Indeed, an argument could be made that paying for the health insurance benefits of the directors, who are specifically authorized to be compensation for only up to 25 days of OTB-related work each year, would unfairly deprive the authorizing county of some of the funds it otherwise would receive. See Rac. Pari-Mut. Wag & Breed. Law § 516(2) (after payment of the costs of the OTB’s functions, remaining net revenue is divided between the participating counties).

*Id*. In that May 2008 opinion, the Office of the Attorney General suggested that the Office of the State Comptroller may have changed the position in its 1978 opinion based on the more recent 2007 BSA audit report. Though the Office of the State Comptroller’s current position on the issue is not known, it is clear that the Office of the Attorney General has not changed its position. *See* Letter from Kathryn Sheingold, Assistant Solicitor General, dated February 25, 2019 (“[W]e have reviewed our 2008 opinion and the relevant statutes and see no reason why the opinion from 2008 would not apply to the Western Regional OTB”).

If the matter at issue were ever to be litigated, the court would not be bound by the opinions of either the Office of the Attorney General or the Office of State Comptroller. However, those opinions would be considered by the court and may be given significant weight. *See* *Nelson v. N.Y. State Civil Serv. Com.*, 96 A.D.2d 132, 134 (3d Dep’t 1983) (“[W]e are not unmindful that an opinion of the Attorney-General is usually accorded great deference but we are not bound by an erroneous interpretation of law”); *Rochester v. Cnty. of Monroe*, 93 A.D.2d 625, 631 (4th Dep’t 1983) (declining to follow the Comptroller’s opinion, noting that, “[i]f we were to adopt the Comptroller’s opinion, we would be writing an additional requirement of certification into the Tax Law”); *Inc. Vill. of Manorhaven v. Toner*, 51 Misc. 3d 545, 550 (Sup. Ct. Nassau Cnty. 2016) (“While such opinions are not dispositive, they are entitled to significant weight where, as here, they are contemporaneous interpretations of the then-recodified Village Law”); *Paikoff v. Harris*, 178 Misc. 2d 366, 375 (Civ. Ct. Kings Cnty. 1998) (“Interpretation and construction of a statute is a judicial function. However, in the court’s exercise of that function in this case, the opinions expressed by the Attorney-General’s Office, while not dispositive, are an important element to be considered”); *Schampier v. Office of Gen. Servs.*, 99 Misc. 2d 1049, 1051 (Sup. Ct. Albany Cnty. 1979) (“It is axiomatic that although opinions of the Attorney-General and State Comptroller ‘are of great weight in determining the construction of the statute", that those opinions are ‘not necessarily binding on this court’”); *Shpack v. Baretti*, 75 Misc. 2d 901, 903 (Civ. Ct. N.Y. Cnty. 1973) (“[A]lthough the opinions of the Attorney-General may be persuasive they are not conclusive or binding on the courts. In this case, however, the court is very much persuaded by his opinion”).

It is true that only the Office of the State Comptroller, and not the Office of the Attorney General, is vested with discretionary authority under Article X, Section 5 of the New York State Constitution to supervise the accounts of public corporations, including public benefit corporations. However, because the Office of the State Comptroller has not specifically opined as to the whether the provision of health insurance benefits to OTB directors is prohibited by Section 502(10) of the Racing Law, a court may be persuaded by the Office of the Attorney General’s 2008 informal opinion, which, unlike any opinion expressed by the Office of the State Comptroller, speaks directly to the issue at hand. Any such court also could decline to follow the opinion(s) expressed by the Office of the Attorney General. In that event, the court would “ascertain from the language of the statute the intent of the Legislature and apply it to the instant factual situation in a manner consistent with that intent.” *See Schampier*, 73 A.D.2d 1011, 1012 (3d Dep’t 1980) (noting that the issue was “one of law more appropriate for judicial rather than administrative resolution”).

In conclusion, in the absence of express statutory authority or supportive judicial precedent, we recommend that the Western Region directors no longer accept health insurance benefits or other compensation in excess of the amounts set forth in Section 502(10). The Western Region directors may face civil or other liability if a court subsequently determines that the provision such compensation violated the Racing Law. In addition to the potential for a whistleblower claim under the New York False Claims Act, the OTB should be mindful of its fiduciary obligations, which require, among other things, that its officers and directors act in the best interests of the corporation.

1. We considered the following materials in conducting our analysis: (1) Section 502 of the Racing Law (and case law referencing same); (2) the Office of the State Comptroller’s opinion regarding the City of Batavia (October 31, 1978); (3) the Office of the State Comptroller’s Report of Examination regarding the Buffalo Sewer Authority (2007); (4) the Office of the Attorney General’s opinion regarding the Suffolk Regional Off-Track Betting Corporation (May 22, 2008); (5) the letter from Laura Crisafulli, Supervising Attorney, Office of the State Comptroller, to Henry Wojtaszek enclosing Op. St. Comptr. No. 78-811 (February 11, 2019); and (6) the letter from Kathryn Sheingold, Assistant Solicitor General, Office of the Attorney General, to Assemblymember Sean Ryan regarding the Western Regional OTB (February 25, 2019). [↑](#footnote-ref-1)
2. In 1978, the law governing OTB director compensation read as follows: “The directors shall not be entitled to any compensation for their services, but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties.” In 1982, the law governing OTB director compensation was amended again to read as follows: “The directors may receive a sum of one hundred dollars for each day or part thereof spent in attendance at meetings or otherwise in the work of the corporation, but not to exceed twelve hundred dollars during any one year, and in addition they shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.” The law was subsequently amended multiple other times between 1982 and 2000. [↑](#footnote-ref-2)
3. In this regard, it should also be noted that, in the 1978 opinion, the Office of the State Comptroller included the following disclaimer: “This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.” *Id*. (emphasis added).

 [↑](#footnote-ref-3)
4. Annual compensation is $2,500 for each Board member and $3,500 for the Chairman of the Board. [↑](#footnote-ref-4)
5. It is also noteworthy that the disclaimer referenced in the 1978 opinion was recently repeated in a letter from Laura Crisafulli, Supervising Attorney, Office of the State Comptroller, to Henry Wojtaszek enclosing a copy of the 1978 opinion in response to Mr. Wojtaszek’s request and pursuant to the Freedom of Information Law. [↑](#footnote-ref-5)