

AUXILIARY SERVICES RISK RESPONSIBILITY ASSESSMENT CHECKLISTS

I. Background and Purpose. Enumerated functions may be performed by auxiliary organizations in good standing for each campus of the California State University. These authorized functions are spelled out in Trustee regulations.¹ Generally, the campus must enter into an appropriate operating agreement with the campus auxiliary in order to perform a function or combination of functions.² If campus facilities are used, there must also be a lease or license to complement the operating agreement authorizing operation of the functions.

The Chancellor's Office offers model operating agreements and support service lease instruments³ for campuses. The model instruments include risk responsibility provisions that prescribe insurance, indemnification, and hold harmless requirements. These generally favor the Trustees and the campus for which auxiliary functions are provided.

The Chancellor's Executive Order No. 849, dated February 5, 2003, restates certain minimum risk responsibility requirements for agreements, contracts and purchases, including auxiliary organization operating agreements and leases. Any departures from these requirements for special situations must be supported on an exception basis by a "risk identification and evaluation."

This *Auxiliary Services Risk Responsibility Checklist* provides the auxiliary organization and the University with a comprehensive template to more closely discern: the nature and extent of authorized or proposed function(s); the specific roles of the Auxiliary organization and the University in performing the function(s) sought by the University; and what risk and likely loss exposure the function poses.

The *Checklists* summarize the *minimum* risk responsibility requirements. It then offers a series of analysis-inducing questions for the fact-finding and risk assessment process. The outcome should be a set of risk responsibility clauses for each operating agreement and facility lease/license covering the function(s) in a fair and responsible manner. These *Checklists* are also useful to help determine appropriate risk responsibility clauses in other instruments between the University and the Auxiliary organization.

II. Minimum Risk Responsibility Requirements

Executive Order No. 849⁴ "assigns responsibility to the campus president to implement insurance requirements for agreements, contracts and purchases consistent with [CSU] Insurance Requirements" and "establishes the approved hold harmless provisions based upon the risk assessment of the contract category." It identifies minimum risk responsibility⁵ requirements that should be applied in a wide range of contractual relationships, including operating agreements and support service leases with auxiliary organizations - absent a "risk identification and evaluation in special situations" that will permit a campus to depart from the minimum requirements.

The *minimum* requirements spelled out in EO 849, and summarized below, derive from a procedure manual adopted and published by the *California State University Risk Management Authority (CSURMA)*.⁶ It is noted that the manual cites a range of "sample" hold harmless/indemnity clauses (in Appendix C). This Appendix also includes a useful summary analysis on the use of hold harmless/indemnity clauses and their limitations.

Adequate Insurance

Appropriate evidence of insurance coverage shall be certificate(s) of insurance denoting limits, additional endorsements, and shall provide:

- **Coverage Notice:** 30 day advance written campus notice of coverage modification, change or cancellation.
- **Insurers Rating:** AM Best - AVII or equivalent.
- **Additional Insureds:** State of California, the Trustees of the California State University, the campus and the officers, employees, volunteers and agents of each. Professional Liability and Workers Compensation insurance excepted.

Operating Agreements

- **General Liability:** minimum limits \$1 million Comprehensive or Commercial form each occurrence.
- **Employer Liability:** \$1 million.
- **Business Auto Liability:** minimum \$1 million each occurrence, combined single limit for owned, scheduled, non-owned or hired autos.

- **Workers Compensation:** as required under California law.

Support Service Leases

- **General Liability:** same as above + \$2 million General Aggregate.
- **Employer Liability:** same as above.
- **Business Auto Liability:** same as above.
- **Workers Compensation:** same as above.

Hold Harmless Clauses

Operating Agreements

- "Auxiliary agrees to indemnify, defend, and save harmless the State of California, the Trustees of the California State University, and (campus name), the officers, employees, volunteers, and agents of each of them (all of which are hereinafter referred to as 'State') from any and all loss, damage, or liability that may be suffered or incurred by State, caused by, arising out of, or in any way connected with the operations of Auxiliary."

Support Service Leases

- "Lessee shall hold harmless, indemnify, and defend the State of California, the Trustees of the California State University, the (campus) and the officers, employees, volunteers and agents of each of them from and against any and all liability, loss, damage, expense, costs of every nature, and causes of actions arising out of or in connection with the use by the Lessee of said property."

III. Function(s) Analysis Checklist

The auxiliary organization operating agreement is the framework within which the auxiliary operates one or more of the service functions, designated by the Trustees in Title 5, and sought by the campus from the auxiliary. In crafting such operating agreements, it is critical that the authorized function(s) be clearly identified in terms: consistent with, and with reference to, the applicable Title 5, Section 42500(a) list of functions; the scope of

extent of the auxiliary organization's complete, shared or joint control of the function vis-à-vis the campus; and any delegations of operational responsibility for any function-related activities.

The following *Function(s) Analysis Checklist* should be used **before** undertaking the *Risk Identification & Evaluation Checklist* (in Section IV below):

- ❑ Is the auxiliary organization authorized to perform a single function or multiple functions?
- ❑ In performing the authorized function(s), will the auxiliary lease campus facilities and thereby have operational control over such spaces, or will it merely have nonexclusive access to use (license) campus facilities?
- ❑ Will the auxiliary have exclusive management control over the day-to-day operations of the function to be authorized?
- ❑ Will the campus perform policy and fiscal **oversight**, or also exercise a substantial degree of operational and/or policy control over **how** the function is carried out by the auxiliary organization?
- ❑ Is performance of the function a shared or joint endeavor between the auxiliary organization and the campus or another related entity?
- ❑ Does the campus president exercise actual budgetary control over the function, or merely review it for consistency with campus and CSU policy and mission?

Remember: authorizing a function to be performed by an auxiliary organization does not necessarily equate to having either operational control over its performance, or performing all of the activities essential to the function.

IV. Risk Identification & Evaluation ("RI&E") Checklist

After responding to applicable questions in the Section III checklist, analyzing and concluding upon that analysis, the following "RI&E" checklist should be used to help identify activity risks and evaluate potential loss exposures that

may plausibly be related to the function to be authorized and performed by the auxiliary organization:

- What activities will take place?
- Who could be harmed?
- What property could be damaged and how severely?
- What is the maximum likely loss or each activity?
- Is there a possible pollution exposure?
- Are crowds or bystanders/passersby likely to be involved?
- Will inherently dangerous activities be involved?
- How likely is it that the campus will be a defendant in the event of a loss?

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Based upon the analysis and conclusions drawn from responses to the above checklists, the University and Auxiliary organization may agree to alter the minimum requirements or depart from the standard practices expressed in Executive Order No. 743 and outlined above.

Best risk management practices call for documentation of checklist responses, the analysis from those responses, and conclusions regarding appropriate agreement risk responsibility provisions.

V. Campus Collaboration & Risk Management Consultation

The University and Auxiliary organization management will collaborate closely in the development of risk management strategies and in conducting function analyzes and RI&Es. These efforts should also include respective risk managers. Clear and documented governing board risk management policy should be in consonance with campus and CSU policies.

¹ Title 5, Subchapter 6, Chapter 1, Division 5, Section 42400 *et seq.*, California Code of Regulations.

² *op cit.* Section 42500(a).

³ See CSU *Policy Manual for Contracting & Procurement*, Sections 202 and 413. This Manual is online at (<http://www.calstate.edu/tier3/CS+P/crl/policy/Policy.html>); and CSU *Contracting Resource Library, Model Agreements*, online at (<http://www.calstate.edu/tier3/CS+P/crl/crl.html#models>).

⁴ Supercedes Executive Order No. 829.

⁵ The term ***risk responsibility requirements*** refers to insurance policy coverage and limits, coupled with indemnification and hold harmless provisions.

⁶ CSURMA, *Insurance Requirements in Contracts*, April 2000 Edition. The “risk evaluation” questions are from Chapter Three, at page 9.