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February 19, 2021

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Mr. David Nock, President
Eastern Federation of Mineralogical
and Lapidary Societies, Inc.
133 Short Beach Road
East Haven, CT 06512

RE: Election of Officers, December 30, 2020
Our File No. 14451-001

Dear Mr. Nock,

I have been asked to provide an opinion concerning the purported election of officers that occurred over three (3) days from December 30, 2020 and January 1, 2021 (the "December Election"). A copy of the email of December 30, 2020, calling for a vote for officers, is attached.

Before discussing the details of the December Election, it should be noted that the Attorney General of the State of New York has described the fiduciary duties of directors of a not-for-profit Board of Directors. Their primary legal duties are commonly referred to as the duties of care, loyalty and obedience.

Duty of Care. The duty of care requires a director to be familiar with the organization's finances and activities and to participate regularly in its governance.

Duty of Loyalty. Directors are charged with the duty to act in the interest of the corporation.

Duty of Obedience. A Board has a duty of obedience to ensure that the organization complies with applicable laws and regulations, its mission and its internal governance documents and policies, meaning its Certificate of Incorporation, Bylaws, and resolutions and policies adopted by the Board of Directors.

More information is available here:
www.charitiesnys.com/pdfs/Right-From-the-Start.pdf.

With that as background, my opinion is that in light of the Federation Bylaws and New York law, the December Election is void and a nullity for at least

♦Admitted in NJ
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the following reasons (Federation Bylaws can be accessed here:
https://efmls.org/wp-content/uploads/2020/11/2020-10-21_EFMLS-Bylaws40856.pdf):

1. Officers are to be Elected at the Annual Meeting. Bylaws Article 8: Section 8A provides: “The Officers shall be elected at the Annual meeting.”

While the Covid pandemic disrupted regular operations for countless organizations, New York State responded to the need of nonprofits to hold annual membership meetings. On April 16, 2020, Governor Cuomo issued Executive Order No. 202.18 permitting electronic, remote annual membership meetings. Then, effective June 17, 2020, the Not-for-Profit Corporation Law (“NPCL”) itself was amended to do the same. NPCL § 603(a). I am informed that the Annual meeting was held remotely on October 23, 2020 but was adjourned before the budget and elections could be addressed. That is unfortunate. The Federation should reconvene its Annual meeting in compliance with law as soon as reasonably possible. The December Election was not an adequate substitute.

2. Board Action. Officers are to be elected by the Board of Directors. An election of officers is an action by the Board of Directors. Under NPCL § 708, action can be taken by a Board of Directors in only three ways:

a. At a regular meeting of the Board of Directors. It is clear that the December Election did not take place during a regular meeting of the Board of Directors.

b. At a special meeting of the Board of Directors. Federation Bylaws ARTICLE 7: SECTION 7F addresses special meetings:

The President may call a meeting of the Board of Directors or the Executive Committee or a special member meeting, when necessary, by notifying the members of the date, time, and place at least fifteen (15) days prior to the meeting.

Because the December 30, 2020 email (i) was not sent by the President, (ii) did not give notice of the date, time, and place at least fifteen (15) days prior to the meeting, and (iii) was not sent to every Board member, it was inadequate to call a special meeting and void.

For many years now the law has allowed Board meetings to be held remotely and electronically provided that every participant can simultaneously hear and be heard. These remote meetings are deemed equivalent to meetings in person, whether regular or special. NPCL § 708(c). However, this is not what occurred on December 30, 2020, either.

c. Any action required or permitted to be taken by the Board may be taken without a meeting if all members of the Board consent in writing to the adoption of a resolution authorizing the action. NPCL § 708(b). To be clear, the voting requirement is unanimity of the entire Board of Directors. If the unanimous vote of the entire Board of Directors is not obtained, the proposed action must be taken up at a meeting.

The ballot emailed on December 30, 2020, and the emails sent back in response, could together possibly be interpreted as a resolution authorizing the election of the named officer candidates within the meaning of NPCL § 708(b). However, those emails do not meet the legal requirements because (i) the ballot was emailed to only 16 out of more than 100 Board members, (ii) there has been no indication that every Board member responded to that email (likely impossible since not every Board member received the email), (iii) there has been no indication of how many “votes” were affirmative, negative, or abstentions. For these reasons there has been no election by unanimous written consent.

3. Ineligible Candidates. As you know, the Federation bylaws were amended effective October 21, 2020. The amendment included additions or modifications resulting in the following:

ARTICLE 4: SECTION 4H. No officer of the EFMLS may hold more than one (1) elected office, or more than two (2) co-chair positions concurrently.

ARTICLE 8: SECTION 8B. The President shall be elected for a term of two (2) years only and no President may serve more than one (1) term. The First Vice President, Second Vice President, Treasurer, the Assistant Treasurer and Secretary shall be elected for a term of two (2) years and may be elected to one consecutive / successive term.

Based on the foregoing, several of the candidates for election in the December Election were not eligible to be elected, as follows:

- Ellery Borow was not eligible to run for President due to having previously served as President.
- Bill Stephens was not eligible to run due to his currently holding office as Region 4 Vice President.
- Larry Huffman was not eligible to run due to his currently holding office as Region 6 Vice President.
- Gary Bergtholdt was not eligible to run for Treasurer because he has served in that office for more than four (4) consecutive years. I have also been informed that he was placed on the ballot without his knowledge or consent.

For the foregoing reasons, and possibly others, the December Election is void and a nullity. This being the case, all the officers who were in office on December 30, 2020, are still in office and will remain so until a new election is held and their respective successors have been elected and qualified. NPCL § 703(c).

Based on the foregoing I recommend that the Federation plan to reconvene the remote annual meeting, as permitted by New York law, for the election of officers and for such other

business as may come before the meeting. All notice requirements should be noted and complied with. I can assist with these matters if that is desired.

Please let me know if you have any additional questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "GMS", with a long horizontal stroke extending to the right.

Gary M. Schuster

GMS/ms/Enclosure

From: Cheryl Neary <ciervo.neary@gmail.com>

Date: Wed, Dec 30, 2020, 10:40 AM

Subject:

To: <fontsyscp8@hotmail.com>, <charlesstoneman@aol.com>, <rvlct@bellsouth.com>, Claudia Barton <bartonclaudia65@gmail.com>, <smith030750@yahoo.com>, <paulspickapartinc@yahoo.com>, <mirmark@earthlink.net>, <lhoffelder@gmail.com>, <ach@pwless.net>, <washingtoncountygms@gmail.com>, Ellery <rocknellery@fairpoint.net>, <jrpatzer@gmail.com>, Alan Pribula <apribula@towson.edu>, <chESApeakegemandmineral@gmail.com>, <president@gemcuttersguild.com>, <roddy.frank2014@comcast.net>

To all EFMLS Member Club Presidents:

Due to the unusual circumstances related to the continued presence of COVID-19, and not having an election at the annual meetings, please complete the following EFMLS Election Ballot. (PDF Form attached)

The year's end is fast approaching. Please help the EFMLS expedite progress toward the busy year ahead. If this ballot does not reach the current club president, please forward accordingly.

EFMLS Election Ballot for the election of 2020-2021 EFMLS Officers

Please return the completed ballot as soon as possible and no later than **January 1st, 2021**. E-mail the completed ballot to the EFMLS Election Administrator as follows: (see end of the Ballot form for U.S. Mail-in / call-in ballots).

Election Administrator: e-mail Ballot to Cheryl Neary -- ciervo.neary@gmail.com

Cheryl is a highly respected EFMLS past president and AFMS Immediate Past Regional Vice President.

The slate of officers remains mostly the same since the nominating committee report published in the March 2020 edition of the EFMLS News. We are proud to announce the addition of Mr. Larry Huffman to the slate of officers.

To refresh memories from last March, biographies for slate of officers:

President-- Ellery Borow : Serves as a club president, club editor, EFMLS Safety and Club Rockhound of the Year chair and current 1st VP in EFMLS. Supports keeping communications strong and innovative.

1st VP -- Bill Stephens - Present EFMLS Region 4 VP, served as chair on Website Ad Hoc and Conservation and Legislation committees, avid collector, knowledgeable with Zooming and websites. 2

2nd VP -- Larry Huffman - Present EFMLS Region 6 VP, served EFMLS as general show chair and club liaison to the EFMLS, and as EFMLS fund raising auctioneer, as well as being an avid member club participant.

Secretary - Mark Kucera: Serves as member of Wildacres Workshop Committee, Member / Officer in several clubs, serves as EFMLS Liaison in several clubs, background in virtual conferencing.

Treasurer - Current EFMLS treasurer.

Nominating Committee - Dan Record: Served as officer and committee chair in several clubs.

Nominating Committee - Carrie Meyers: Serves as EFMLS Region 3 VP and president
CPRMC

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Have a great day!

Cheryl Neary

