

## RECOMMENDATION PAPER TO THE BOARD OF DIRECTORS

### PROPOSED AMENDMENT TO BYLAWS PROVIDING A NEW INDEMNIFICATION POLICY FOR MEMBERS OF THE BOARD OF DIRECTORS

APRIL 2013

#### RECOMMENDATION

That the Board of Directors approve the attached amendment to the Bylaws which proposes a new policy governing the Airports Authority's indemnification of members of the Board of Directors. This amendment was recommended by the Executive and Governance Committee at its March 2013 meeting and was subsequently revised in two ways, addressed below, to reflect comments made during the Committee's meeting.

#### BACKGROUND

The Airports Authority's policy for the indemnification of members of the Board of Directors, set out in Article XI of the Bylaws, has been in effect for over twenty years. Last fall, the Board recognized a need for the policy to be reviewed and for appropriate revisions to be recommended for its consideration.

Over the past few months, a Board working group, consisting of Chairman Curto and Directors Conner and Session, evaluated the current indemnification policy, reviewing "best practices" and considering a range of potential revisions of the policy. The working group undertook this work with assistance from staff and outside consultants. The working group's proposed new indemnification policy for the Board and its officers is in the form of a new section 2 of Article XI of the Bylaws. The proposed new policy was reviewed, and recommended to the Board for adoption, by the Executive and Governance Committee at its March meeting. Two small revisions have been made to the policy since that meeting, to reflect comments made by members of the Committee, and they are described below (in *italics and underlined*) in the Discussion section of this paper.

The proposed new indemnification policy, showing these two revisions in redlining, is attached as Attachment A. A detailed summary of the proposed policy is set out in Attachment B.

## DISCUSSION

The proposed policy provides generally that the Airports Authority will supply *legal representation* to and will *indemnify* Directors from personal liability whenever they are made a party or a participant in a judicial, administrative or investigative proceeding based upon their status as a member of the Board or conduct they have undertaken as a Board member. In providing direct legal representation to Directors, the policy represents a significant shift from the current policy under which Directors may be indemnified after the conclusion of a proceeding for the legal representation costs they actually incurred during the proceeding.

*As presented to the Executive and Governance Committee in March, the proposed new policy provided for a Director who has been made a party to or another form of participant in a legal Proceeding to notify the General Counsel of this fact, and for the General Counsel to determine whether the Director is eligible for legal representation. Based on Board member comments, this provision has been revised to provide for the General Counsel, following receipt of a Director's notice, to refer the notice to the Legal Committee which will determine the Director's eligibility for legal representation.*

The proposed policy imposes two conditions on the provision of legal representation and indemnification: the absence of any *Exclusions*, and the Director's satisfaction of a *Standard of Conduct*.

The *Exclusions* identify certain Director conduct for which neither legal representation nor indemnification will be provided. The Exclusions are twofold: (1) proceedings in which a Director, based on personal conduct, is charged with a criminal offense or is being investigated for having committed a criminal offense; and (2) proceedings in which the *sole* allegations against a Director consist of fraudulent or dishonest activities, intentional violation of a fiduciary or other duty owed to the Authority, or activities undertaken for personal gain.

The proposed policy does provide an exception to the application of these Exclusions. This occurs if and when a Director ultimately prevails in a proceeding involving conduct falling within an Exclusion. In that case, the Director will be *indemnified* for the reasonable legal costs he or she incurred in the course of the proceeding, subject to the Director's satisfaction of the Standard of Conduct.

The *Standard of Conduct* condition requires a determination that the Director, when engaging in the personal conduct that has been alleged in a proceeding, had both a good faith belief and a reasonable belief that the conduct was within the scope of the Director's duties and was consistent with the interests of the Authority. This determination is made after the conclusion of the proceeding, and it is made by the Board or independent counsel selected by the Board. However, the proposed policy provides that, when a Director prevails in a proceeding (other than a proceeding addressed in the prior paragraph), the Director will be deemed to have satisfied the Standard of Conduct in

which case no Board or independent counsel determination will need to be made. When a Director does not prevail in the proceeding and does not satisfy the Standard of Conduct, two consequences occur: the Director will not be eligible for the indemnification of any personal liability imposed in the proceeding; and the Director will be obligated to reimburse the Authority for the cost he/she incurred in receiving legal representation during the proceeding.

The proposed policy also addresses a different type of proceeding involving Directors—the removal of a Director from the Board of Directors. Here, the proposed policy defines a process to determine whether the Director may be indemnified by the Airports Authority for the legal costs incurred in contesting the removal. The process is as follows, with step 4 reflecting a slight revision based on comments made at the Executive and Governance Committee's March meeting:

1. A Director intending to initiate a proceeding to contest the removal may request that the Board authorize the indemnification of the legal costs the Director will incur during the proceeding.
2. Upon receipt of the request, the Board will select an outside independent counsel to review the request and will forward the request to that counsel.
3. The independent counsel, following whatever inquiry is deemed necessary, will determine whether approval of the Director's request is in the best interest of the Airports Authority, will state the reasons for the determination, and will recommend that the Airports Authority approve or deny the request.
4. The Chairman and Vice Chairman of the Board and the General Counsel will review the independent counsel's recommendation, and will decide to approve or disapprove the Director's request. However, in the event that the Chairman or Vice Chairman is the Director making the indemnification request, that Officer, for purposes of reviewing the independent counsel's recommendation, will be replaced by the Chairman of the Legal Committee.
5. If the request is approved, the Authority will indemnify the Director for all reasonable legal costs incurred during the proceeding, subject to the Director's satisfaction of the Standard of Conduct at the conclusion of the proceeding.
6. If the Director prevails in the proceeding, the Standard of Conduct will be deemed to have been satisfied, and the Director will be indemnified for incurred costs; if the Director does not prevail, indemnification will occur only if the Director satisfies the Standard of Conduct.

## CONCLUSION

The proposed amendment to the Bylaws, which is attached as Attachment A, sets out a new indemnification policy for Directors and Board Officers. It was recommended to the Board by the Executive and Governance Committee at its March 2013, and has been revised since that meeting in the two ways described above to reflect Committee and Board member comments. It is recommended that the Board adopt the Bylaws amendment in Attachment A.

Prepared by

Office of General Counsel  
April 2013

Attachments

## **Proposed New Indemnification Policy for Board of Directors**

### **BYLAWS**

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### **ARTICLE XI**

#### **Miscellaneous**

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#### **Current Section 2 (Proposed to be deleted)**

**Section 2. Indemnity.** The Authority shall indemnify each Director and Officer against all costs and expenses (including counsel fees) the Director actually incurs in connection with or resulting from any action, suit or proceeding, of whatever nature, to which the Director is or shall be made a party by reason of his being or having been a Director or Officer of the Authority, provided (1) that the Director or Officer conducted him- or herself in good faith and (2) reasonably believed that his or her conduct was in the best interest of the Authority. This indemnity shall not apply in actions when the Director or Officer is adjudged liable to the Authority.

#### **Proposed New Section 2**

**Section 2. Representation and Indemnification.** The Authority shall defend and indemnify each Director as follows. For purposes of subsections (a) through (e) of this section, the term Director includes Officers elected or appointed by the Board.

a. *Legal Representation.*

(i) A Director shall be provided legal representation by the Authority, at no cost to the Director, whenever the Director is made or required to become a participant in a Proceeding, as defined in subsection (f), whether as a defendant or respondent, a witness, a deponent, the recipient of a subpoena for physical materials, or otherwise, as the result of an action of another person *other*

*than the Authority itself*, and due to the Director's status as a member of the Board or to conduct in which the Director is alleged to have engaged while acting as a member of the Board; provided, that legal representation shall not be provided for a Director when a Legal Representation Exclusion, as defined in subsection (c), is applicable; and provided further, that the Director shall be required to reimburse the Authority for its actual cost of providing legal representation if, at the conclusion of the Proceeding, it is determined, pursuant to subsection (d), that the Director has not satisfied the Standard of Conduct.

(ii) A Director shall immediately notify the General Counsel of any Proceeding to which the Director has been made or is required to become a participant. The General Counsel, shall refer the notice to the Legal Committee of the Board for a determination whether —after determining that— the Director is eligible for legal representation under paragraph (i). Following an affirmative determination by the Committee, the General Counsel, shall obtain legal counsel for the Director at the Authority's expense. Throughout the Proceeding, the General Counsel will maintain a financial oversight of the Director's legal representation to ensure that it is being provided in an efficient and cost effective manner. However, that oversight shall not interfere with or alter the duties of loyalty and representation that legal counsel owes to the Director.

(iii) In the event a Director elects not to accept legal representation provided by the Authority under paragraph (i) and to obtain his or her own counsel in the Proceeding, the Director shall be responsible for the entire cost of such representation, and none of the cost shall be eligible for indemnification by the Authority.

b. *Indemnification.* A Director shall be indemnified and held harmless by the Authority for any judgment or order entered in a Proceeding against and imposing a personal financial liability upon the Director, or for any settlement approved by the Board in a Proceeding that imposes such liability upon the Director, when the judgment or order, or settlement, arises from or is based upon the Director's status as a member of the Board or upon conduct in which the Director engaged while acting as a member of the Board; provided, that such indemnification shall not be provided for a Director in the event an Indemnification Exclusion, as defined in subsection (c), is applicable; it is determined, pursuant to subsection (d), that the Director has not satisfied the Standard of Conduct; or the Director refuses to assign to the Authority all claims that the Director has or may have against any person, including an insurer, that arise from or relate to the events or circumstances giving rise to the judgment or

order, or settlement, for which the Director is being indemnified.

c. *Exclusions.*

(i) *Legal Representation Exclusions.* A Director shall be not be eligible for legal representation under subsection (a) in any of the following circumstances:

(1) The Proceeding is an Individual Criminal Action in which the Director is charged with a criminal offense based upon the Director's personal conduct, rather than his or her institutional conduct as a member of the Board;

(2) The Proceeding is an Investigative Matter in which a Director is being investigated for having engaged in personal conduct that, if true, would form the basis for an Individual Criminal Action against the Director; or

(3) The *sole* conduct in which the Director is alleged to have engaged and which is the subject of the Proceeding consists of fraudulent or dishonest activities, the intentional misuse of the Director's position as a member of the Board, the intentional violation of a fiduciary or other duty owed to the Authority, or activities undertaken for personal financial gain or the financial gain of members of the Director's immediate family or other relatives;

provided, however, that in the event a Director prevails "on the merits," as defined in subsection (d)(v), of a Proceeding described above in subparagraph (1), (2) or (3) and thereafter satisfies the Standard of Conduct, the Director shall be indemnified for the reasonable legal costs the Director actually incurred in the course of the Proceeding.

(ii) *Indemnification Exclusion.* A Director shall not be eligible for indemnification under subsection (b) for any of the following judgments or order:

(1) Any judgment or order in a Criminal Action; or

(2) Any judgment or order in a Civil Action that is based solely upon any of the conduct described in subparagraph (2) or (3) of paragraph (i).

d. *Standard of Conduct.* A Director shall be required to reimburse the Authority for its cost in providing the Director with legal representation during a Proceeding under subsection (a), and a Director shall not be eligible for any financial indemnification under subsection (b), if the Director does not satisfy the Standard of Conduct when applicable to the Director and as applied in accordance with this subsection. Provisions describing the circumstances in which the Standard of Conduct is applicable, defining the Standard of Conduct, and explaining the manner in which the Standard of Conduct shall be applied are set out below in this subsection.

(i) *Applicability.* A Director shall be required to satisfy the Standard of Conduct whenever the Director's participation in a Proceeding is based, in whole or in part, upon personal conduct in which the Director is alleged to have participated as a member of the Board; the Standard of Conduct shall not be applicable when a Director's participation in a Proceeding is based solely upon other factors (e.g., his or her status as a member of the Board, participation in a vote or other action taken by the Board, or ability to contribute to the Proceeding's fact-finding process (e.g., as witness, deponent, producer of documents)).

(ii) *Standard.* A Director shall be deemed to have satisfied the Standard of Conduct when it is determined that, based upon the circumstances surrounding the Director's conduct that were known or reasonably should have been known by the Director, the Director was acting with both a good faith belief and a reasonable belief that the conduct was within the scope of the Director's duties and responsibilities as a member of the Board and was consistent with the interests of the Authority;

(iii) *Decision-maker.* The determination whether a Director has satisfied the Standard of Conduct shall be made in good faith by the Board based upon a majority vote of disinterested Directors or in good faith by an independent counsel selected by such members of the Board.

(iv) *Timing.* The determination whether a Director has satisfied the Standard of Conduct is to be made as soon as practicable after the conclusion of the Proceeding in question.

(v) *Effect of Proceeding Outcome.* Except as otherwise provided in this paragraph, while the outcome of the Proceeding may be a factor in deciding whether a Director has satisfied the Standard of Conduct, it shall not be determinative on this question. Thus, the fact that a Proceeding concludes in a



manner that is favorable to, or adverse to, a Director shall not conclusively determine whether the Director, when engaging in the personal conduct that was alleged in the Proceeding, satisfied the Standard of Conduct. However, when a Director prevails on the merits of a Proceeding other than a Proceeding described above in subsection (c)(i), the Director shall be deemed to have satisfied the Standard of Conduct; prevailing “on the merits of a Proceeding” shall mean that the substance of the claims or allegations made in the Proceeding that were based upon the Director’s personal conduct were considered and were dismissed, denied or otherwise rejected by the Proceeding’s decision-maker and, for this reason, whether in whole or in part, the Proceeding was terminated, the Director was dismissed from the Proceeding, or the Director’s participation in the Proceeding otherwise was ended.

e. *Definitions.*

(i) *Proceeding* means any Civil Action, Criminal Action, Administrative Proceeding or Investigative Matter, as defined below in this subsection, but *excluding* any such action, proceeding or matter that has been filed by the Authority at the direction of the Board and names a Director as defendant or respondent or has been filed or initiated by a federal, state or local government agency at the request of, or as the result of a complaint filed or similar submission made by, the Authority at the direction of the Board, and any Removal Proceeding.

(ii) *Civil Action* means any civil lawsuit filed in a federal or state court that seeks monetary (including damages for bodily injury, personal injury or property damage, or civil penalties), injunctive or other form of relief against a Director or the Authority, and any appeal filed by the plaintiff or petitioner in such a lawsuit from a decision of a court of record; the term does not include an appeal filed by a Director in such a lawsuit (unless, in a particular matter, the Board determines that a Director’s appeal is to be considered a part of the Civil Action).

(iii) *Criminal Action* means any criminal action filed in a federal or state court in which a Director or the Authority is named as a defendant or respondent, and any appeal filed by the prosecuting entity in such a criminal action from a decision of a court of record; the term does not include an appeal filed by a Director in such an action (unless, in a particular matter, the Board determines that a Director’s appeal is to be considered a part of the Criminal Action).

(iv) *Institutional Criminal Action* means a Criminal Action that alleges a violation of criminal law that is based upon conduct of the Authority or of the Board, as a whole, rather than the conduct of one or more particular Directors.

(v) *Individual Criminal Action* means a Criminal Action that alleges a violation of criminal law that is based upon the conduct of one or more particular Directors.

(vi) *Administrative Proceeding* means a process that is initiated by a federal, state or local government agency as the result of a complaint, charge or similar submission filed with the agency by an individual or entity that makes allegations regarding, and that may seek a remedy against, a Director or the Authority, and provides for the agency to consider information presented by the filing party and the Director or Authority, to assist the parties in reaching a resolution of the matter complained about, or to enter a decision on the matter which may be advisory only.

(vii) *Investigative Matter* means any investigation initiated by a federal, state or local government agency that may result in the assessment by the agency or another government agency of a civil penalty, or in the filing by the agency or another government agency of a Civil Action or Criminal Action, against a Director or the Authority.

(viii) *Removal Proceeding* means a civil lawsuit in a federal or state court or any other form of proceeding filed or otherwise initiated by a Director that contests a decision by an appointing official to remove the Director from the Board or filed or otherwise initiated by an appointing official or another person or entity that seeks the removal of a Director from the Board.

f. *Director Removal.* This subsection addresses Removal Proceedings and the Authority's indemnification, if any, of the legal representation costs incurred by a Director in a Removal Proceeding. Removal Proceedings and the legal costs incurred by a Director in connection with a Removal Proceeding are addressed solely by this subsection and not otherwise in this Section 2.

(i) *Written Request.* A Director who wishes to initiate or is the subject of a Removal Proceeding may submit a written request to the Board that the Authority indemnify the Director for the reasonable costs of legal representation the Director will incur in the Removal Proceeding. This written request shall include the following: documents showing the reasons for the

decision to remove the Director or the grounds on which the Director's removal is sought; a statement of the reasons for the Director's belief that the removal decision is legally invalid or that the grounds for the removal are legally insufficient; a statement of the reasons for the Director's belief that it is in the best interest of the Authority for the removal decision to be contested or the request for removal to be opposed; and an identification of any other sources of indemnification, actual or potential, including insurers, that are or may be available to the Director in connection with the Removal Proceeding.

(ii) *Board Referral.* Upon receipt of a request made under paragraph (i), the Board, acting in good faith through its disinterested members, shall select an independent counsel and refer the Director's request to that counsel for action under paragraph (iii).

(iii) *Independent Counsel Review and Recommendation.* The independent counsel shall review the written request submitted by the Director to the Board and make such further inquiry as the counsel deems necessary. The independent counsel acting in good faith shall then determine whether approval of the request would be in the best interest of the Authority, shall state in writing the reasons for the determination and, based upon the determination, shall recommend that the Authority approve or disapprove the Director's request for indemnification.

(iv) *Decision.* Except as otherwise provided in this paragraph, The Chairman and Vice Chairman of the Board and the General Counsel shall review the determination, the reasons therefor and the recommendation of the Independent Counsel, and acting in good faith shall approve or disapprove the Director's request for indemnification. Any such approval shall be subject to the Director's eventual satisfaction of the Standard of Conduct in accordance with paragraph (vi) below. ~~In the event If~~ the Director's request is not approved, the Director shall be responsible for the costs of the independent counsel; if the request is approved, the Authority shall be responsible for such costs. When the Chairman or Vice Chairman is the Director making the request for indemnification, such officer shall, for purposes of exercising the responsibilities described in this paragraph, be replaced by the Chairman of the Board's Legal Committee.

(v) *Advancement of Costs.* Following a decision to approve the Director's request, the Chairman and Vice Chairman of the Board and the General Counsel, if requested by the Director, may authorize advance payments of legal representation costs to the Director while the Removal Proceeding is pending;

provided, that no advance payments shall be made unless the Director enters a written agreement with the Authority in which the Director represents that, with respect to the Director's conduct that is given or alleged as the basis for his or her removal, the Director either did not engage in the conduct or did so in compliance with the Standard of Conduct, and agrees to repay all advance payments made by the Authority if it is later determined in accordance with paragraph (v) that, with respect to such conduct, the Director has not satisfied the Standard of Conduct.

(vi) *Application of Standard of Conduct.* In the event a Director prevails in a Removal Proceeding, the Director shall be deemed to have satisfied the Standard of Conduct, as defined in subsection (d)(ii) above. In the event a Director does not prevail in a Removal Proceeding, that outcome may be a factor in deciding whether the Director, with respect to the conduct that is the basis for the removal, has satisfied that Standard of Conduct, but shall not conclusively determine this question which shall be determined by the Board or an independent counsel selected by the Board.

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Amended: January 8, 1992; April 1, 1992; September 6, 2000; January 3, 2001; June 5, 2002; August 8, 2007; April 20, 2011; January 4, 2012; February 15, 2012; October 17, 2012; January 16, 2013; and April 17, 2013.

SUMMARY OF PROPOSED AMENDMENT TO BYLAWS  
ESTABLISHING NEW INDEMNIFICATION POLICY  
FOR MEMBERS OF THE BOARD OF DIRECTORS

**Overview**

1. Two Coverage Areas. The proposed policy provides for two distinct areas of “coverage” for Directors.

a. “General Coverage.” This area of coverage applies when a Director is made a party to a Proceeding (e.g., as a defendant) or is otherwise made a participant in a Proceeding (e.g., as a deponent or trial witness). The term “Proceeding” is defined broadly to include civil and criminal actions, administrative proceedings and investigative matters; it does not, however, include a Removal Proceeding, which is addressed in the second area of coverage.

- General Coverage is described in subsections (a) through (e) of the proposed new section 2 of Article XI of the Bylaws (Attachment A to Committee paper).

b. “Removal Coverage.” The second area of coverage applies when a Director is a party to or the subject of a Removal Proceeding. The term “Removal Proceeding” is defined to mean a civil lawsuit filed by a Director that contests a decision to remove the Director from the Board or filed by an appointing official or other party that seeks the removal of the Director.

- Removal Coverage is described in subsection (f) of section 2 of the proposed new Bylaws section 2, Article XI.

**“General Coverage”**

2. Legal Representation. Under the "General Coverage," a Director will receive legal representation from the Authority whenever “the Director is made or required to become a participant in a Proceeding,” whether as a defendant, witness, deponent or otherwise, “as the result of an action of another person other than the Authority itself, and due to the Director's status as a member of the Board or to conduct in which the Director is alleged to have engaged while acting as a member of the Board.” This provision of legal representation to a Director is a significant change from the current policy which provides for the indemnification of legal costs actually incurred by a Director in the course of a Proceeding.

- While legal counsel will be provided under this General Coverage by the Authority, the attorney will owe a duty of representation and loyalty to the Director.
- A Director who declines legal representation offered by the Authority will not be indemnified for legal costs he or she incurs in the Proceeding.
- The provision of legal representation to a Director is subject to two conditions:
  - the absence of Exclusions (see paragraph 4); and
  - the Director’s satisfaction of the Standard of Conduct (see paragraph 5).

3. Indemnification of Personal Liability. Under the "General Coverage," a Director will be indemnified by the Authority for any personal financial liability arising from a judgment entered

against the Director in his or her personal capacity in a Proceeding or arising from a settlement that has been approved by the Board.

- The indemnification of a Director's personal liability is subject to two conditions:
  - the absence of Exclusions (see paragraph 4); and
  - the Director's satisfaction of the Standard of Conduct (see paragraph 5).

4. Exclusions. The proposed policy provides for certain Exclusions from this "General Coverage." Under these Exclusions, legal representation and indemnification of personal liability are *not* provided in the following circumstances:

a. Criminal conduct.

- i. Legal representation is excluded when a Director is charged in a Proceeding that is a criminal action with an offense that is based on the Director's personal conduct, as opposed to an offense based upon the Director's institutional conduct (e.g., mere participation in a Board vote).
- ii. Indemnification of personal liability is excluded when the liability arises from a judgment in a criminal action, whether the underlying Director conduct is personal or institutional, and also when the liability arises from a judgment in a civil action that is based *solely* on a Director's personal conduct that would constitute a criminal offense.

b. Fraudulent and other conduct.

- i. Legal representation is excluded when a Director is made a party to a Proceeding *solely* on the basis of conduct that is: (i) fraudulent or dishonest; (ii) an intentional misuse of Board position; (iii) an intentional violation of a fiduciary or other duty; or (iv) an activity undertaken for personal gain.
- ii. Indemnification of personal liability that arises from a judgment in a Proceeding that is a civil action is excluded when the *sole* basis for the judgment is any of the "fraudulent" or other conduct identified above.

However, in the event a Director ultimately prevails on the merits of a Proceeding described above in (a)(i) or (b)(i) and satisfies the Standard of Conduct, the Director shall be indemnified for the reasonable legal costs the Director actually incurred in the course of the Proceeding.

5. Standard of Conduct. Under the "General Coverage," a Director whose participation in a Proceeding is based upon his or her personal conduct (rather than institutional conduct, Board member status, or ability to assist the Proceeding's fact-finding process (e.g., as deponent or witness)) must, following the conclusion of the Proceeding, be determined to satisfy the Standard of Conduct. There is, however, one exception to this requirement – when a Director has prevailed "on the merits of the Proceeding" in which his or her personal conduct was in issue (other than the Proceedings referenced in 4(a)(i) and 4(b)(i) above), the Director shall be deemed to have satisfied the Standard of Conduct.

The content of the Standard of Conduct, the person applying and deciding the Standard, the effect on the Standard of an adverse-to-Director outcome in the Proceeding, and the consequences of not satisfying the Standard are described below.

a. Content of standard. The Standard of Conduct asks the following: whether a Director, "based upon the circumstances surrounding the Director's conduct that were known or reasonably should have been known by the Director, . . . was acting with both a good faith belief and a reasonable belief that the conduct was within the scope of the Director's duties and responsibilities . . . and was consistent with the interests of the Authority."

b. Decision-maker. The Standard of Conduct is to be applied and decided following the conclusion of the Proceeding either by the disinterested members of the Board or by an independent counsel selected by such members of the Board.

c. Effect of an *adverse* outcome. When the outcome of a Proceeding involving the personal conduct of a Director is adverse to the Director, this shall not conclusively determine the decision on the Standard of Conduct. Rather, the adverse outcome may only be considered as a factor in deciding whether the Standard has been satisfied.

d. Consequences of not satisfying the standard. A Director who fails to satisfy the Standard of Conduct will incur the following consequences:

- The Director will be required to reimburse the Authority for costs it has incurred in providing legal representation to the Director during the Proceeding; and
- The Director will be not be eligible for the indemnification of any personal liability imposed upon the Director in the Proceeding.

### **“Removal Coverage”**

6. Removal Coverage Generally. This coverage, distinct from General Coverage, is intended to address the situation in which a Director is the subject of a decision made by the Director’s appointing official to remove the Director from the Board, or of a removal proceeding that has been initiated by the appointing official or a third party and seeks the Director's removal. The provisions in the draft proposal that address Removal Coverage (subsection (f) of section 2) defines a process for determining whether a Director, who intends to initiate a proceeding to contest a removal decision or to participate in a proceeding initiated by another that seeks the Director’s removal, will be indemnified by the Airports Authority for the legal costs he or she incurs during the course of the proceeding.

7. Director Request. Under the Removal Coverage, a Director wishing to be indemnified in connection with a removal proceeding may file a written request for indemnification with the Board. The request is to contain information that is outlined in the proposed policy (see subsection (f)(i) of section 2).

8. Board Referral. Upon receipt of a Director's indemnification request, the disinterested members of the Board shall select an independent counsel and shall refer the request to that counsel for consideration.

9. Independent Counsel Review and Recommendation. The independent counsel shall review the Director's request and conduct such further inquiry as is deemed necessary. Based on that review and inquiry, the independent counsel is to determine "whether approval of the request [for indemnification] would be in the best interest of the Authority." Counsel is to state in writing the reasons for the determination and, based upon that determination, is to recommend that the Authority approve or disapprove the Director's request.

10. Decision on Director Request. A decision on the Director's request shall then be made by the Chairman and Vice Chairman of the Board and the General Counsel. *(In the event the Chairman or Vice Chairman is the Director seeking indemnification, this official will be replaced by the Chairman of the Legal Committee.)* These officials will review the independent counsel's determination, the reasons for the determination and the counsel's recommendation, and will then approve or disapprove the Director's request. If the request is approved, the Director will be indemnified by the Authority for the reasonable legal costs the Director incurs during the removal proceeding, *subject to the Director's eventual satisfaction of the Standard of Conduct* (see paragraph 5 above).

11. Advancement of Costs. If a decision is made to approve the Director's indemnification request, the Chairman and Vice Chairman and the General Counsel, if requested by the Director, may authorize the advance payments of legal costs to the Director while the removal proceeding is pending. However, for such payments to be made, the Director is required to enter into an agreement with the Authority in which the Director (i) represents that, with respect to his or her conduct that is alleged as the basis for removal, the Director either did not engage in the conduct or did so in compliance with the Standard of Conduct, and (ii) agrees to repay all advance payments made by the Authority if it is later determined that the Director has not satisfied the Standard of Conduct.

12. Application of Standard of Conduct. The content of the Standard of Conduct that is applicable to a Director under the Removal Coverage is the same as under the General Coverage. See paragraph 5(a) above. A Director who fails to satisfy the Standard of Conduct following the conclusion of a Removal Proceeding shall not be eligible for indemnification and, if legal costs were advanced to the Director during the Proceeding, the Director shall be obligated to reimburse the Authority for those payments. However, if the Director prevails in the Removal Proceeding, the Director shall be deemed to have satisfied the Standard of Conduct and shall, therefore, be eligible for indemnification of reasonable legal costs incurred during that proceeding.