

January 16, 2014

THE NEW YORK NONPROFIT REVITALIZATION ACT OF 2013: AN OVERHAUL OF NEW YORK STATE'S NOT-FOR-PROFIT CORPORATION LAW

On December 18, 2013, Governor Andrew M. Cuomo signed into law the New York Nonprofit Revitalization Act of 2013 (the "Act") which represents the first major overhaul to New York's nonprofit laws in more than 40 years. The Act goes into effect on July 1, 2014. The Act makes a key number of reforms in two main areas: (1) enhancing nonprofit corporate governance and oversight to prevent fraud and improve public trust and (2) reducing unnecessary and outdated burdens on nonprofit corporations.

With respect to governance and oversight, the Act includes, amongst others, the following reforms:

- **Financial Reporting.** The Act raises the gross revenue thresholds for the filing of certain financial reports by nonprofit corporations with the Attorney General. Corporations with gross revenues equal to or less than \$250,000 must file unaudited financial statements, corporations with gross revenues more than \$250,000 but not more than \$500,000¹ must file financial statements with an independent certified public accountant's review report and corporations with gross revenues more than \$500,000² must file audited financial reports with an independent certified public accountant's audit report.
- **Active Oversight of Financial Audits.** For nonprofit corporations required to file an independent certified public accountant's audit report with the Attorney General (i.e. corporations with gross revenues more than \$500,000), the board or a designated audit committee of the board comprised of independent directors will be required to oversee the accounting and financial reporting processes of the corporation and the audit of the corporation's financial statements. For larger corporations (annual gross revenue in excess of \$1 million), additional oversight requirements will be required such as a more detailed review of the scope and results of the audit with the independent certified public accountant.
- **Related Party Transactions.** Related party transactions between a nonprofit corporation and an insider will be required to be fully disclosed, and the board or a designated committee of the board must determine if such transaction is fair, reasonable and in the corporation's best interest. A related party transaction is generally defined as any transaction, agreement or any other arrangement in which a director, officer or key employee of the corporation has a financial interest and in which the corporation or any affiliate of the corporation is a participant. Prior to the approval of a related party transaction, the board or a designated committee of the board must consider alternatives and document in writing the basis of its approval.
- **Policing of Fraud and Abuse by the Attorney General.** The Attorney General may void any related party transaction that is not fair, reasonable or in the best interests of the nonprofit corporation or seek other relief including the payment of damages.

¹ Effective July 1, 2017, corporations with gross revenues more than \$250,000 but not more than \$750,000 must file financial statements with an independent certified public accountant's review report. Effective July 1, 2021, corporations with gross revenues more than \$250,000 but not more than \$1,000,000 must file financial statements with an independent certified public accountant's review report.

² Effective July 1, 2017, corporations with gross revenues more than \$750,000 must file audited financial reports with an independent certified public accountant's audit report. Effective July 1, 2021, corporations with gross revenues more than \$1,000,000 must file audited financial reports with an independent certified public accountant's audit report.

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- Maintaining Board Independence. No employee of a nonprofit corporation may serve as chair of the board or hold any other title with similar responsibilities.
- Adoption of Conflict of Interest and Whistleblower Policies. All nonprofit corporations will be required to adopt a conflict of interest policy requiring its directors, officers and key employees to act in the corporation's best interest. For larger nonprofit corporations (i.e. corporations with annual revenue in excess of \$1 million and 20 or more employees), implementation of a whistleblower policy will also be required.
- Compensation. No member, director or officer who is the recipient of compensation from the nonprofit corporation may participate in any board or committee deliberation or vote concerning such person's compensation.

With respect to reducing administrative burdens, the Act includes, amongst others, the following reforms:

- Classifications. The Act eliminates the current Type A, B, C and D classification system, and nonprofit corporations will be classified as either "charitable" or "non-charitable." Corporations currently classified as Type B and C organizations, as well as Type D organizations formed for a charitable purpose, will be automatically considered "charitable." Corporations currently classified as Type A and Type D organizations not formed for a charitable purpose will be considered "non-charitable."
- Streamlining of Procedures for Mergers, Consolidations, Asset Sales and Corporate Dissolution. For mergers, consolidations, asset sales and dissolutions, the Act will permit such transactions to proceed with the approval of the Attorney General in lieu of obtaining court approval.
- Real Estate Transactions. The purchase of real property or the nonprofit corporation's sale, mortgage, lease, exchange or other disposition of its real property may be approved by a majority of the board or a committee authorized by the board (rather than the current two-thirds requirement). Furthermore, board approval is no longer needed for the corporation's lease of real property from a third party.
- Electronic Technology. Notices and waivers of notice for board and member meetings will be permitted to be sent by fax or email. In addition, proxy designations by members as well as board and member unanimous consents will be permitted to be transmitted electronically. The Act also permits directors to participate in meetings through videoconferencing.
- Elimination of Unnecessary and Costly Requirements for Nonprofit Formation. While schools, libraries, museums and historical societies will still be required to obtain the approval of the State Education Department prior to incorporation, other nonprofit corporations that promote science, literature, art, history or any educational purpose will need to only provide notice to the State Education Department within 30 days of incorporation.
- Committees. The Act eliminates the distinction between standing and special committees of the board.
- Number of Directors. The Act defines "entire board" as the number of directors as fixed in the by-laws. If the by-laws provide that the board may consist of a range between a minimum and maximum number of directors, then the "entire board" shall consist of the number of directors elected at the most recently held election of directors.

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