

THE NEW YORK NONPROFIT REVITALIZATION ACT

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MAJOR NEW YORK LAWS AFFECTING NOT-FOR-PROFIT ORGANIZATIONS

- **NOT FOR PROFIT CORPORATION LAW**
 - **Adopted 1972**
 - **Major Revision Effective July 1, 2014**
- **RELIGIOUS CORPORATIONS LAW**
 - **Article 10 “Other Denominations” Applies to Jewish Congregations**
 - **Applicability of NFP Law to Religious Corporations**
- **EDUCATION LAW**
- **ESTATES, POWERS & TRUSTS LAW**
- **EXECUTIVE LAW (ARTICLE 7A)**

MAJOR NEW YORK LAWS AFFECTING NOT-FOR-PROFIT ORGANIZATIONS

- **MISCELLANEOUS**
 - **Out of State Incorporation**
 - **Single Member LLC (SMLLC)**
 - **IRS Notice 2012-52 (Contributions)**

BACKGROUND

- **THE NEW YORK NONPROFIT REVITALIZATION ACT**
 - **Passed New York State Legislature in June 2013 – Signed by Governor Cuomo in December 2013**
 - **First major revision to the New York Not-For-Profit Corporation Law in over 40 years**
 - **Most provisions will become effective on July 1, 2014**

TOPICS FOR DISCUSSION

MODERNIZATION AND STREAMLINING OF PROCEDURES

CHANGED GOVERNANCE REQUIREMENTS

- **Board Independence**
- **Related Party Transactions**
- **Conflict of Interest Policy**
- **Whistleblower Policy**
- **Financial Reporting**
- **Audit Procedures**
- **Approval of Real Estate Transactions**

NONPROFIT REVITALIZATION ACT

GENERAL APPLICABILITY

- Most provisions apply only to not-for-profit corporations (and trusts) that are incorporated in New York
- Applicability to Religious Corporations
- Consider out of state (e.g. Delaware) Formation (and subsequent qualification in New York)

EXCEPTIONS

- Audit Committee Provisions
- Submission of Annual Financial Reports
 - Both apply to organizations registered, or required to be registered, for purpose of charitable solicitation in New York, irrespective of where they are incorporated.

MODERNIZATION AND STREAMLINING

ELIMINATION OF LETTER TYPES – CHARITIES VS. NON-CHARITIES

- No Longer A, B, C, D
- Post July 1, 2014
 - “Charitable” – formed for charitable purposes (charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals)
 - “Non-charitable” – formed for any other purpose
- Most changes apply to both charities and non-charities

IMPROVED INCORPORATION PROCESS

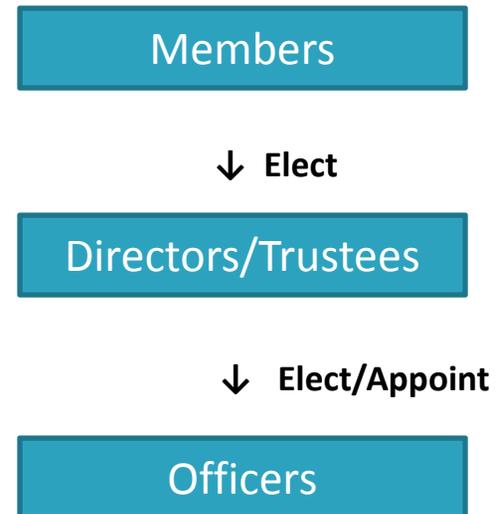
- Eliminates Corporate “Types”
- Minimizes Agency Pre-Approvals for Some Organizations

CORPORATE GOVERNANCE

The Corporate Model



The Non-Profit Model



DEFINITION OF MEMBERSHIP

NOT-FOR-PROFIT LAW – Section 601 (Members)

- Defined in By-Laws
- Self Perpetuating – Directors as Sole Members

RELIGIOUS CORPORATIONS

- e.g. Section 195 of the Religious Corporations Law

SPECIAL PROBLEM OF DEFINITION OF MEMBERSHIP

- **Limit Class of Members by Definition in By-Laws (e.g. Incorporators or those Elected by Them as Members)**
 - **Proxy Voting By Members**

MODERNIZATION AND STREAMLINING

MODERNIZED COMMUNICATIONS OF ORGANIZATION WITH BOARDS & MEMBERS

- **Email**
 - **Member Meeting Notice** – email appearing on the record of members, unless two consecutive bounce backs
 - **Proxies** – May be submitted by electronic mail
 - **Unanimous Resolution/Members & Directors** – For directors, unless restricted by Certificate of Incorporation or By-laws.
Must include information from which it can be determined that the transmission was authorized.
- **Video Conferencing (Directors)** - must be able to hear one another and meaningfully participate

ATTORNEY GENERAL OPTION FOR MERGER, DISSOLUTION, AND FUNDAMENTAL TRANSACTIONS

- **Charitable entities have one-step approval process.**
- **Apparently applies to Religious Corporations.**

GOVERNANCE: BOARD INDEPENDENCE

INDEPENDENT DIRECTORS:

RELEVANT TO AUDIT (CHARITABLE SOLICITATION), WHISTLEBLOWER

- Has not been an employee of, or does not have a relative that was a key employee of, the corporation or an affiliate of the corporation in past three years;
- Has not received \$10,000 or more in direct compensation from the corporation or an affiliate in the last three years (other than expense reimbursement or reasonable compensation as a director);
- Is not a current employee of, or does not have substantial financial interest in, an entity that made or received payments from the corporation or an affiliate of more than \$25,000 or 2% of the corporation's gross revenue (whichever is less) in the last three years (excluding charitable payments); and
- Does not have a relative who is a current officer of, or has a substantial interest in, an entity making or receiving payments of a similar amount to the organization in the past three years.

GOVERNANCE: BOARD INDEPENDENCE

PROHIBITS EMPLOYEES FROM SERVING AS CHAIR OF THE BOARD OR IN AN OFFICER POSITION WITH SIMILAR RESPONSIBILITIES <i.e. President if there is no Chairman of the Board>

- **Effective July 1, 2015**
- **Applies To All New York Non-Profit Entities**

GOVERNANCE: RELATED PARTY TRANSACTIONS

RELATED PARTY TRANSACTION:

- **Related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant**
 - **(1) any director, officer, or key employee of the corporation or any affiliate of the corporation;**
 - **(2) any relative of any director, officer, or key employee of the corporation or any affiliate of the corporation; or**
 - **(3) any entity in which any individual described in (1) or (2) has a 35 percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.**

GOVERNANCE: RELATED PARTY TRANSACTIONS

REQUIREMENTS:

- Fair, reasonable and in the nonprofit's best interest
- Directors and Officers who have a direct or indirect interest in a related-party transaction must disclose such interest to the board

CHARITABLE ORGANIZATIONS:

- Board must consider alternative transactions to the extent available, and
- Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting

GOVERNANCE: CONFLICT OF INTEREST POLICY

ACT REQUIRES ALL NONPROFITS TO ADOPT A CONFLICT OF INTEREST POLICY COVERING DIRECTORS, OFFICERS, AND KEY EMPLOYEES

Must Include:

- **A definition of circumstances that constitute a conflict of interest**
- **Procedures for disclosing a conflict to the audit committee or the board**
- **A requirement that the person with a conflict of interest not be present at or participate in board or committee deliberations or voting on the matter giving rise to the conflict**
- **A prohibition on any attempt by a conflicted person to influence board deliberations**
- **Documentation procedures for detailing the existence and resolution of the conflict, and**
- **Procedures for disclosing and addressing related-party transactions**

GOVERNANCE: CONFLICT OF INTEREST POLICY

THE ACT PROVIDES THAT, PRIOR TO THE INITIAL ELECTION OF ANY DIRECTOR, AND ANNUALLY THEREAFTER, DIRECTORS MUST:

- **Complete, sign, and submit a written statement identifying any potential conflict.**

THE BOARD OR DESIGNATED AUDIT COMMITTEE OF THE BOARD MUST OVERSEE THE ADOPTION, IMPLEMENTATION OF, AND COMPLIANCE WITH ANY CONFLICT OF INTEREST POLICY

GOVERNANCE: WHISTLEBLOWER POLICY

REQUIRED FOR NONPROFITS HAVING:

- 20 or more employees and
- Annual revenue in excess of \$1 million in the prior fiscal year

The WHISTLEBLOWER POLICY SHALL INCLUDING THE FOLLOWING PROVISIONS:

- Procedures for the reporting of violations or suspected violations of laws or corporate policies, including procedures for preserving the confidentiality of reported information;
- A requirement that an employee, officer or director of the corporation be designated to administer the whistleblower policy and to report to the audit committee or other committee of independent directors or, if there are no such committees, to the board; and
- A requirement that a copy of the policy be distributed to all directors, officers, employees and to volunteers who provide substantial services to the corporation.

GOVERNANCE

RECOMMENDATIONS:

- **Review Current Policies and Compare to Detailed Provisions of the Act**
 - **Conflict of Interest Policy Filed with IRS Form 990/1023**
 - **No need for new policy if “substantially compliant” with the Act**

GOVERNANCE: FINANCIAL REPORTING

NEW THRESHOLDS FOR FINANCIAL REPORTS UNDER CHARITABLE SOLICITATION LAW

- July 1, 2014
 - Gross Revenue <\$250,000 – unaudited financial statements signed by chief financial officer and president under penalties of perjury
 - Gross Revenues Between \$250,000 and \$500,000 – annual financial reports accompanied by independent certified accountant’s review report
 - Gross Revenues >\$500,000 – Annual financial statement accompanied by an independent certified public accountant’s audit report with opinion that financial statement and balance sheet fairly present the financial operation and position of the organization
 - Financial statements submitted with the independent accountant’s review or audit report must conform with Generally Accepted Accounting Principles (GAAP), including compliance with all pronouncements of the Financial Accounting Standards Board and the American Institute of Certified Public Accountants that establish principles relevant to not-for-profit corporations

GOVERNANCE: FINANCIAL REPORTING

- **July 1, 2017 – thresholds change to <\$250,000 (unaudited);
\$250,000 - \$750,000 (review report); >\$750,000 (audit report)**
- **July 1, 2021 – thresholds change to <\$250,000 (unaudited);
\$250,000 - \$1,000,000 (review report); >\$1,000,000 (audit report)**

GOVERNANCE: AUDIT PROCEDURES

MANDATORY AUDIT COMMITTEE

- For nonprofits required to submit an independent auditor's report under charitable solicitations law
(NY Exec. Law 172-b)
- Independent auditor's report requirement – gross revenue above \$500,000 (2014); \$750,000 (2017); \$1 million (2021)

AUDIT COMMITTEE MUST BE COMPRISED SOLELY OF “INDEPENDENT DIRECTORS” RESPONSIBLE FOR:

- Retaining an independent auditor
- Reviewing the results of the audit

GOVERNANCE: AUDIT PROCEDURES

BASIC RESPONSIBILITIES FOR AUDIT COMMITTEE

- **Audit Committee or Independent Directors Must:**
 - **Oversee the accounting and financial reporting processes of the organization and the audit of its financials**
 - **Annually retain or renew the retention of the independent auditor**
 - **Review with the independent auditor the results of the audit, including the management letter**
 - **Oversee the adoption and implementation of Conflict of Interest and Whistleblower policies (unless performed by another committee of independent directors)**
 - **Consider Adopting an Audit Committee Charter**

GOVERNANCE: AUDIT PROCEDURES

ADDITIONAL RESPONSIBILITIES FOR AUDIT COMMITTEE OF ORGANIZATIONS WITH REVENUES OVER \$1 MILLION

- **Audit Committee or independent directors must:**
 - **Review with the independent auditor the scope and planning of the audit PRIOR to its commencement**
 - **Review and discuss with the independent auditor any material risks or weaknesses in internal controls identified by the auditor, any restrictions on the scope of the auditor's activities, and significant disagreements between the auditor and management**
 - **Annually consider the performance and independence of the auditor**
 - **Report to the board (if duties performed by audit committee)**

REAL ESTATE TRANSACTIONS: CURRENT LAW

PURCHASE, SALE, MORTGAGE OR LEASE

- For small boards: two-thirds vote of entire board
- For large board: majority of entire board
- Size: large board if 21 or more members
- Delegation to committee not permitted
- Counting “entire board”
- Special rules for Religious Corporations

SALE, LEASE, EXCHANGE OR OTHER DISPOSITION OF “ALL OR SUBSTANTIALLY ALL ASSETS”

- If there are members entitled to vote: two-thirds vote of members, after vote and recommendation by board
- Special rules for Religious Corporations

FOR TYPE B OR C – IF “ALL OR SUBSTANTIALLY ALL”

- Review by NY State Attorney General’s Office AND
- Court approval

REAL ESTATE TRANSACTIONS: THE ACT

PURCHASE, SALE, MORTGAGE, LEASE, EXCHANGE OR DISPOSAL OF REAL PROPERTY –

SMALL OR ROUTINE TRANSACTIONS – NOT “ALL OR SUBSTANTIALLY ALL” OF ASSETS

- **Majority of Board**
- **Delegation to committee is allowed**
- **Committee must report back to board**
- **Special rules for Religious Corporations**
 - **Member Approval**
 - **Lease in Excess of 5 years**

REAL ESTATE TRANSACTIONS: THE ACT

IF “ALL OR SUBSTANTIALLY ALL” OF ASSETS

- For small boards: two-thirds vote of entire board
- For large boards: majority of entire board
- Size: large board if 21 or more members
- Counting “entire board”: when documents provide a range clarified as # elected at last election
- Delegation to committee not permitted
- For a disposition: If there are members entitled to vote two-thirds vote of members, after vote and recommendation by board

FOR CHARITABLE CORPORATIONS, DISPOSITION OF “ALL OR SUBSTANTIALLY ALL” OF ASSETS

- Approval by NY State Attorney General’s Office OR
- Court approval

REAL ESTATE TRANSACTIONS

RECOMMENDATIONS:

- **Review by-laws – may contain greater quorum and voting requirements**
- **Ascertain value of real property and consideration; must be disclosed if Attorney General and/or Court approval required**

THINGS TO CONSIDER:

- **Terms of transaction must be fair and reasonable**
- **Transaction must be in furtherance of corporate purposes and interests of members**

DELAWARE AND NEW JERSEY LAW FOR CHARITABLE NON-STOCK CORPORATIONS

- **Most of Not-For-Profit Revitalization Act not applicable (unless subject to charitable reporting requirements)**
 - **Delaware**
 - **Loans to officers and employees permitted (even without interest) (Compare NY – NPCL Section 716; Loans for directors, officers, and some affiliates prohibited)**
 - **\$25 Annual Fee**
 - **No Charity Registration/Disclosure Statute/Local Registered Agent**
- **SALE OF ALL OR SUBSTANTIALLY ALL OF THE ASSETS**
 - **Delaware**
 - **Board approval (New Jersey – two-thirds of board required)**
 - **Delaware**
 - **Majority member approval (New Jersey – two-thirds of members voting)**
No AG or Court approval
- **MORTGAGE**
 - **Board approval is sufficient (New York – majority of the “entire” board unless there are 21 or more directors)**

EXECUTIVE COMPENSATION: THE ACT

PROVISIONS THAT WERE INCLUDED IN FINAL BILL

- **Person who will benefit from compensation decision may not be present at or otherwise participate in board or committee deliberation or vote**
- **Exception: board or committee may request information, background or response to questions prior to beginning deliberations or voting**
- **Covers compensation to directors, officers, employees**

FUTURE DEVELOPMENTS

ENHANCED ENFORCEMENT BY ATTORNEY GENERAL

- New Section 309 of NFP Law:

“309. Personal Jurisdiction and Service of Process on Non-Domiciliary Resident Director, Officer, Key Employee or Agent. A person, by becoming a director, officer, key employee or agent of a corporation is subject to the personal jurisdiction of the Supreme Court of the State of New York, and in an action or proceeding by the Attorney General under this chapter process may be served upon such person as provided in Section Three Hundred Thirteen or the Civil Practice Law and Rules.”

- **Constitutionality?**
- **Additional Staff in Attorney General’s Enforcement Bureau**

INTERNET FUNDRAISING – MULTI-STATE JURISDICTION

- Charleston Principles of National Association of State Charities Officials (www.nasconet.org)

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