



Alert

Nonprofit, Charitable and Religious Planning Team

To: Our Clients and Friends

April 1, 2014

New York's Non-Profit Revitalization Act of 2013 and Its Impact on Non-Profit Organizations

At the end of 2013, Governor Cuomo signed into law the Non-Profit Revitalization Act of 2013 (the "Revitalization Act"), which made significant changes to the way not-for-profit corporations will be required to operate in the State of New York. The Revitalization Act presents the first significant changes in 40 years to the New York Not-for-Profit Corporation Law (the "NPCL"). The changes focus on corporate governance reforms as well as updates to certain procedural rules. Most of the Revitalization Act's provisions will go into effect on July 1, 2014.

The following summary highlights the significant provisions of the Revitalization Act:

Governance Requirements

Audit Committee and Audits

Not-for-profit corporations receiving support in excess of \$500,000 per fiscal year will be required to have an audit committee, which shall be made up entirely of "independent directors"¹. The

¹ "Independent Director" is defined in Section 102(a)(21) as a Director who: (i) is not, and has not been within the last three years, an employee of the corporation or an affiliate of the corporation, and does not have a relative who is, or has been within the last three years, a key employee of the corporation or an affiliate of the corporation; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than \$10,000 in direct compensation from the corporation or an affiliate of the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (A) of Section 202(general and special powers)); and (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation or an affiliate of the corporation for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of \$25,000 or 2% of such entity's consolidated gross revenues. For purposes of this subparagraph, "payment" does not include charitable contributions.

independent directors making up the audit committee must: (i) oversee accounting and financial reporting processes; (ii) oversee the audit of the corporation's financial statements; (iii) retain an auditor annually; and (iv) review the audit results with the auditor. There are additional review requirements of the audit committee for corporations with annual revenue greater than \$1,000,000 in the prior fiscal year.

Additionally, the Revitalization Act relaxes certain audit-related thresholds related to financial reporting with the Attorney General. Corporations receiving gross revenue and support greater than \$500,000 in a fiscal year will be required to file with the Attorney General an annual financial report and an audit report prepared by an independent CPA.² Corporations receiving gross revenue and support greater than \$250,000 but less than \$500,000 in a fiscal year will be required to file with the Attorney General an annual financial report and a review report prepared by an independent CPA. Corporations receiving gross revenue and support less than \$250,000 in a fiscal year will be required only to file with the Attorney General an unaudited financial report.

Related Party Transactions

The Revitalization Act increases the approval and oversight powers of the Board of Directors for transactions involving "related parties."³ Related party transactions are prohibited unless they meet the standard of "fair, reasonable and in the corporation's best interest at the time of such determination."⁴ In the evaluation process, the Board of Directors must: (i) consider alternative transactions to the extent possible; (ii) approve the transaction by a majority vote of directors present at the meeting; and (iii) document the approval by the Board of Directors, including any discussion regarding alternative proposals. If the Board of Directors does not follow these prescribed procedures, the Revitalization Act authorizes the Attorney General to bring action to enjoin, void or rescind the related party transaction and it may seek restitution, remove directors and officers or take other remedial actions. With respect to these provisions, there is no "de minimis" threshold, and in the case of willful or intentional misconduct, the Attorney General is authorized to require a corporation to repay double the amount of improperly obtained benefit.

Conflict of Interest Policy

The Revitalization Act requires all not-for-profit corporations to adopt a conflict of interest policy that applies to all directors, officers and key employees.⁵ The policy must: (i) define the circumstances

² This threshold will increase to \$750,000 in 2017 and to \$1,000,000 in 2021.

³ "Related party" is defined in Section 102(a)(23) as (i) any director, officer, or key employee of the corporation; (ii) any relative of a director, officer, or key employee of the corporation; or (iii) any business entity in which a person described in clauses (i) or (ii) has a 35% or greater ownership stake.

⁴ NPCL Section 715(a).

⁵ The term "key employee" is defined in Section 102(a)(25), but it is also a defined term pursuant to Internal Revenue Service Form 990, which must be filed by certain organizations exempt from federal income tax under Sections 501(c) or (d) of the Internal Revenue Code. Therefore, it is advised that for such organizations, the conflict of interest policy should cover both definitions of "key employee."

constituting a conflict of interest; (ii) establish procedures for disclosing, addressing and documenting conflicts of interest; (iii) prohibit interested persons from being present at, participate in, or improperly influence deliberations or votes; and (iv) require documentation of the existence and resolution of any conflicts of interest.⁶ Directors must submit annually a list of entities with which the director is affiliated and the corporation has a relationship.

Whistleblower Policy

Not-for-profit corporations with 20 or more employees and more than \$1,000,000 in annual revenue are required under the Revitalization Act to adopt a whistleblower policy. The policy must: (i) establish reporting procedures for actual or suspected violations of law or corporate policy, including a method to keep the reported information confidential; and (ii) designate an individual to administer the policy and report to the Board of Directors. The policy must be distributed to all directors, officers, employees and volunteers who provide substantial services to the corporation.⁷

Determination of Compensation

The Revitalization Act prohibits any member, director or officer from voting or participating in deliberations regarding compensation to be paid to them by the corporation.⁸

Board Chair

The Revitalization Act prohibits any employee of the corporation to serve as the Chair of the Board of Directors or hold any other title with similar responsibilities.⁹

Additional Operational and Administrative Reforms

Corporation Categories Eliminated

Prior to the passing of the Revitalization Act, in the formation of a not-for-profit corporation under the NPCL, there were four “types” of corporations designated by the letters A through D. The Revitalization Act simplifies the categories into two: “charitable” and “non-charitable”.¹⁰ As of July 1, 2014, all existing A corporations will be deemed “non-charitable organizations,” all existing type B or C

Such organizations may already have adopted a conflict of interest policy, but it is advised that such policies be reviewed to determine their compliance with the Revitalization Act requirements.

⁶ NPCL Section 715-a(b).

⁷ NPCL Section 715-b(b).

⁸ NPCL Section 515(b).

⁹ NPCL Section 73(f). This provision will go into effect on January 1, 2015.

¹⁰ NPCL Section 201(a). The terms “charitable corporation” and “non-charitable corporation” are defined in Section 102(a).

corporations will be deemed charitable and all existing type D corporations will be deemed charitable only if the organization has a “charitable purpose”.¹¹ Any corporation that has both charitable and non-charitable purposes will be deemed a charitable corporation.

Incorporation Process Streamlined

The Revitalization Act simplifies the incorporation process in connection with obtaining state agency consents.¹² With some exceptions, most corporations that would have been required to obtain advance approval from the Department of Education will be required to provide notice instead.

Additionally, at the time of incorporation, corporations will not be required to set forth how the purpose or purposes stated in the certificate of incorporation will be achieved or the specific activities the corporation will pursue in furtherance of such purpose(s).¹³

Real Estate Transactions

Under the Revitalization Act, the purchase, sale, lease or mortgage of real property by a corporation shall be approved only by a vote of the majority of the Board of Directors or committee appointed by the Board of Directors. The Revitalization Act amends the provisions related to these transactional approvals by distinguishing transactions that involve “all or substantially all” of the corporation’s assets. Those real estate transactions involving all or substantially all of the corporation’s assets continue to require approval by two-thirds of the Board of Directors.¹⁴

Electronic Communications

The Revitalization Act authorizes corporations to use e-mail as an acceptable means to communicate in the following situations: (i) notices of member meetings;¹⁵ (ii) written consent by members in lieu of a meeting¹⁶; (iii) waivers of notice by directors¹⁷; and (iv) written consent by directors in lieu of a

¹¹ NPCL Section 201(b), 201(c) and 201(d).

¹² NPCL Section 404(d).

¹³ NPCL Section 402(a)(2).

¹⁴ NPCL Section 509(a), 509(b) and 509(c).

¹⁵ NPCL Section 605(a).

¹⁶ NPCL Section 614(a).

¹⁷ NPCL Section 711(c).

meeting¹⁸. Directors also will have the ability to participate in Board meetings through videoconference without specific authorization in the corporation's by-laws.¹⁹

Approval Process for Major Transactions

Prior to the Revitalization Act, corporations attempting to accomplish one of the following transactions were limited to obtaining the approval of the Supreme Court and providing notice to the Attorney General: (i) sale of all or substantially all of the corporation's assets²⁰; (ii) amendment of the corporation's corporate purpose or powers of a type B or C corporation²¹; and (iii) merger or consolidation²². The Revitalization Act provides an option now for corporations attempting to proceed with one of the aforementioned actions by forgoing approval by the Supreme Court and petitioning the Attorney General instead²³. Corporations will continue to be able to seek approval of the Supreme Court in such instances.

Board Committees

The Revitalization Act eliminates the distinction between "standing" and "special" committees. Committees shall be elected by a majority of the "entire board"²⁴ and committees shall have no authority to bind the Board of Directors.²⁵

Privacy

Pursuant to the Revitalization Act, corporations will continue to be required to produce a list of their directors and officers upon demand from a member of the corporation or a law enforcement agency. However, the requirement to produce residential addresses for the directors and officers has been eliminated.²⁶

¹⁸ NPCL Section 708(b).

¹⁹ NPCL Section 708(b) and 708(c).

²⁰ NPCL Sections 510 and 511.

²¹ NPCL Section 804.

²² NPCL Section 907.

²³ NPCL Sections, 510, 511, 804 and 907.

²⁴ The term "entire board" in NPCL Section 102(a)(6-A) has been amended to clarify that if the by-laws of a corporation provide that the Board shall consist of a range between a minimum and maximum number of directors, then the "entire board" shall consist of the number of directors within such range that were elected as of the most recently held election of directors.

²⁵ NPCL Section 712.

²⁶ NPCL Section 718.

For questions or further information about the Revitalization Act, please contact your regular Bryan Cave contact, a member of our Nonprofit, Charitable and Religious Planning Team or the authors of this Client Alert:

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