

NON-PROFIT REVITALIZATION ACT of 2013

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The Non-Profit Revitalization Act of 2013 becomes effective on July 1, 2014. This law (NY S.5845/A.8072) (the “Act”), unanimously passed by both houses, was signed by the Governor on December 18, 2013. It is the first major overhaul of New York’s nonprofit laws in over 40 years.

The Act has two main goals:

- ❖ eliminate unnecessary administrative and procedural burdens on nonprofit activities, and
- ❖ enhance public trust by requiring nonprofits to comply with best practices and safeguards related to financial accountability and governance oversight.

Many nonprofits may not need to do anything to comply with the new law. The best practices in the Act are similar to the best practices recommended by the Internal Revenue Service for 501c3 tax exempt organizations. The new rules apply to all nonprofits formed in New York and in certain instances to foreign nonprofits that solicit charitable contributions in New York.

This memo focuses on the aspects of the law that may require the adoption of new policies and procedures for the administrative and governance functions of a charitable¹ nonprofit organization.

Board Communication

- The Act makes it easier for boards to communicate by expressly authorizing the use of electronic or facsimile mail to transmit board and membership meeting notices and waivers of notice.
- Boards may also use these methods for decisions based on voting by unanimous written consent.
- Board members may now participate in meetings by video conference, Skype or other forms of video communication.

Committees

- The Act increases nonprofit board flexibility to develop a committee structure that will work for the organization.
- The Act eliminates the concept of standing and special committees.
- Nonprofits may now have either “committees of the board” or “committees of the corporation”.
- Committees of the board may have the authority to bind the corporation. Committees of the corporation may not.

¹ The Act eliminates an outmoded classification system for not-for-profit corporations (Type A, B, C or D) and replaces it with just two types – charitable and non-charitable. All 501c3 tax exempt organizations are charitable.

Compensation

- No employee of a nonprofit may serve as chair of the board of directors.
- Any board member who receives compensation from the corporation cannot participate in deliberations or votes on their compensation.

Required Policies

- The Act's goal of enhancing the public trust is furthered by requiring two policies, both of which are already considered best practice by the IRS.
- All nonprofit organizations must adopt and implement a conflict of interest policy which
 - Defines conflicts of interests
 - Provides procedures for disclosing conflicts
 - Incorporates Related Party Rules (see below)
 - Requires that the person with the conflict not be present at, participate in or attempt to influence the deliberations or votes on the matter
 - Requires documentation of the existence and resolution of a conflict in the records.
- Organization which employ more than 20 people and have annual revenue in excess of \$1 million must adopt an effective whistleblower policy which
 - Establishes procedures to report actual or suspected violations of law or corporate policy
 - Includes a way to keep reports confidential
 - Designates an individual to administer the policy and report to the board
 - Distributes the policy to all directors, officers, employees and volunteers.

Related Party Rules

- As part of the conflict of interest policy, related party transactions must be closely scrutinized.
- Related parties are (i) directors, officers and key employees, (ii) any relatives of directors, officers or key employees, or (iii) any business in which any of these individuals is a 35% or more owner.
- The board must
 - consider alternatives to any related-party transactions,
 - approve the transaction upon the vote of at least a majority of the directors and
 - document contemporaneously the basis of the board's approval.
- The attorney general may bring an action, solely in his or her discretion, to enjoin, void, or rescind any related-party transaction or proposed related-party transaction that is not reasonable or in the best interest of the nonprofit at the time the transaction was approved. Alternatively, the attorney general may seek restitution and removal of directors or officers.

Financial Oversight

- The Act implements new audit and financial reporting requirements for all nonprofits based on the amount of gross revenues received by that organization.

- Thresholds for audits and reports to the attorney general are relaxed to:
 - Over \$500,000 (previously \$250,000) - audit by CPA and annual report required.
 - \$250,000-\$500,000 (previously \$100,000-\$250,000) – Review report by CPA and annual report required.
 - Up to \$250,000 (previously \$100,000) – unaudited financial report required.²

- Charitable nonprofits must appoint an audit committee or task independent board members to provide the functions of an audit committee to oversee the accounting and financial reporting and audit processes, including the engagement of the auditor.

- If the organization has annual gross revenue and support in excess of \$1 million, the board or audit committee must:
 - Prior to commencement, review with the independent auditor the scope of the audit,
 - Upon its completion, discuss any material risks and weaknesses in internal controls identified by the auditor, and
 - Annually review the auditor’s performance and independence.

What Should Nonprofits Do Now?

The Act is not effective until July 2014 so NOW is the time to review bylaws and policies and procedures and to put in place the required governance and financial oversight best practices.

The Attorney General has recently announced that James G. Sheehan has been appointed to enforce the Act. Mr. Sheehan has a long career in government compliance initiatives, particularly in the healthcare fraud and abuse arena. We can expect to see more rules and regulations promulgated and enforcement activity in the near future.

² These thresholds will increase in 2017 to \$500,000 and \$1,000,000.