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New York Non-Profit Revitalization Act: Steps to Take as Effective Date Approaches

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The New York Non-Profit Revitalization Act (the "Act") was enacted into law late last year in an attempt to simplify and modernize rules pertaining to non-profits, while also strengthening governance requirements. Many provisions of the Act will take effect on July 1, 2014. Some provisions, as noted below, will not be effective until January 1 or July 1, 2015. The Act applies in general to charitable and other non-profit corporations created, operated or soliciting contributions in New York. Those provisions that also apply to wholly charitable trusts are specifically noted below. To meet the new requirements and to take advantage of the opportunities provided under the Act, virtually all non-profit organizations, including private foundations, will need to review and make changes to their governing documents and operating procedures. Directors and trustees will want to be aware of and attend to the following:

1. New Audit Procedures: Each non-profit, whether in corporate or trust form, that is required to file a certified public accountant's audit report with the New York Charities Bureau because it solicits contributions and expects to receive more than $500,000 in its current fiscal year, must appoint an audit committee. Because private foundations do not generally solicit contributions, most will not be subject to this requirement. The committee must be composed of at least three "independent" directors or trustees or of the whole board other than non-independent directors or trustees. It is charged to oversee the organization's accounting and financial reporting functions, retain or renew an independent auditor yearly, and review the results of the audit and any management letter with the independent auditor. The audit committee of an organization that had in its last fiscal year, or expects to have in its current fiscal year, annual revenues of more than $1 million must in addition review with the independent auditor the scope and planning of the audit prior to its commencement; review and discuss with the independent auditor material risks and weaknesses in internal controls, any restriction on the scope of the auditor's activities or access to requested information, and any significant disagreements between management and the auditor regarding the adequacy of the organization's accounting and fiscal reporting processes; and annually consider the performance of the independent auditor. An organization that had gross revenue for its last fiscal year that ended before January 1, 2014 of less than $10 million has until January 1, 2015 to meet this requirement, whereas an organization that received more than $10 million in that year must comply by July 1, 2014.

An "independent" director or trustee is one who has not been an employee of and does not have a relative who has been a key employee of the organization, and who has not received, and does not have a relative who has received, $10,000 or more in compensation from the organization in any of the past three years; an independent director or trustee also cannot be a current employee of or have a substantial financial interest in any entity that has made payments to or received payments from the organization for property or services in excess of the lesser of $25,000 or 2 percent of the entity's gross income in any of the past three fiscal years. Charitable contributions do not, but membership dues do, count in calculating the $25,000 or 2 percent floor.

The audit committee also will be responsible for reviewing and recommending amendments to existing, and for adopting and implementing, conflict of interest and whistleblower policies discussed below unless a separate committee specifically undertakes that obligation.

2. Conflict of Interest Policy: Every charitable organization, whether corporation or trust, is required to adopt by July 1, 2014, a conflict of interest policy and annual disclosure statement that ensures that its directors, trustees, officers and key employees act only in the organization's best interest. At a minimum, a conflict of interest policy must define "conflict of interest;" provide a procedure to disclose conflicts; prohibit a conflicted person from participating in or influencing any deliberation regarding the transaction at hand; and require documentation of the conflict and its resolution. Each director and officer must disclose his/her potential conflicts in writing both before taking office initially and annually thereafter. The organization's audit committee shall create and implement the conflict of interest policy or, in the absence of an audit committee, the governing body or other responsible committee shall do so. Organizations that received exempt status from the Internal Revenue Service in the past dozen years have been required to have in place a conflict of interest policy, and such policy will be deemed to comply with the new requirement. Any other existing policies should be reviewed to ensure compliance with the Act.

3. Compensation: Chairman of the Board and Other Positions: The Chairman of the Board of a non-profit corporation, or person having a different title but assuming the same role, may not also be an employee of the organization. As a practical matter, this limitation means that an organization that wants to continue to have a paid CEO should now appoint an uncompensated chair of the board if it does not already have one. This provision will not be effective until January 1, 2015, giving organizations time to reconfigure their chairmanship arrangements.

   More generally, organizations must utilize a procedure for determining compensation for all employees that prohibits the person compensated from being present at or participating in the deliberations or vote concerning his/her compensation.

4. Related Party Transaction Procedures: The organization must adopt a procedure that ensures that a transaction between the organization and a "related party" is fair, reasonable and in the best interest of the organization. This provision applies to any transaction, agreement or other arrangement with the organization in which a "related party" has a financial interest. In general, "related

party" includes a director, trustee, officer or key employee, as well as certain relatives of directors, trustees, officers and key employees, and any entity in which a director, trustee, officer or key employee or a relative of any of those persons owns a 35% or greater beneficial interest. "Key employee" refers to an employee who is in a position to exercise substantial influence over the affairs of the non-profit in accordance with the "disqualified persons" provisions of the excess benefit transactions applicable to public charities under Internal Revenue Code Section 4958.

Under the Act, the board of a charitable organization, or a committee thereof, must consider alternatives to any related-party transactions, approve the final transaction upon the vote of at least a majority of the directors or trustees, and document contemporaneously the basis of the board's approval. The Act gives the Attorney General the authority to enjoin, void or rescind any related-party transaction or proposed related-party transaction that the Attorney General determines is not in the best interest of the organization, and further to remove directors and officers involved in the transaction.

5. Whistle-blower Policy: Each non-profit, whether corporation or trust, having annual revenue in excess of $1 million and which has 20 or more employees must adopt a whistle-blower policy by July 1, 2014. This is a new requirement and one that is not required by the Internal Revenue Service. The policy must protect employees from retaliation for good faith reports of organization action that is illegal, fraudulent or contrary to any policy of the organization. The policy must maintain employee confidentiality, provide a reporting mechanism, appoint an individual to investigate any violations, and require that the policy be distributed to all directors, trustees, officers, employees and volunteers. Existing whistle-blower policies should be reviewed for compliance with the Act.

6. Notices of Member and Board Meetings: The Act confirmed that notice may be given by fax or email. The organization will need to collect all relevant email addresses.

7. Member meeting proxies: A member may submit a proxy by email to authorize another person to act for him/her. However, subject to rules permitting a unanimous written consent, the membership must still hold a meeting to vote on any actions i.e., votes may not be effectuated by email. Directors continue to be prohibited from delegating responsibility through proxies.

8. Electronic transmission of unanimous written consent: Unanimous written consent may be achieved through electronic signatures in lieu of meetings of members, directors and committees.

9. Videoconferencing: Members, directors, and committee members may now participate in a meeting by means of videoconference so long as all attendees can hear all others.

10. Ordinary real estate transactions: The Act relaxes existing rules concerning real estate. Entering into third party leases no longer requires board approval. Decisions involving routine disposition, purchases, and mortgages of real estate assets may now be approved by a simple majority vote of the board or the relevant committee rather than the current two-thirds, unless the disposition is of

substantially all (generally interpreted by the Attorney General as more than one-half) of the assets of the organization.

11. A sale or other disposition of substantially all of the organization's assets: Once approved by a two-thirds vote of the board, a sale or other disposition of substantially all of the organization's assets may now be approved through petition to the Attorney General or, as with current law, to the Supreme Court upon notice to the Attorney General, at the organization's option. However, the Attorney General may, after review, require an organization to petition the Court nonetheless.

12. Types of non-profit organizations changed: Current law assigns non-profits to one of four categories. The number of categories is replaced by two: charitable and non-charitable. Old Type B and C organizations will now be "charitable" as will Type D organizations having an underlying charitable purpose, while old type A organizations and D organizations with a non-charitable purpose will be "non-charitable."

13. Mergers of non-profits with other organizations: Whether involving non-profit, for-profit, domestic or foreign organizations, mergers may now be approved by the Attorney General rather than a court, at the option of the organization.

14. The Attorney General: Additional Expanded Discretion: The Attorney General may approve certain transactions in lieu of a Court proceeding, namely approvals of "assets" dissolutions and the change, elimination or addition of a purpose or a power. The Attorney General may also enjoin, void or rescind a proposed or completed related party transaction. In addition, the Attorney General now has authority to seek other relief with regard to related party transactions, such as damages, restitution, removal and/or an accounting, and may impose double damages with regard to willful conduct.

15. Changes in financial reporting procedures: Over the period 2014 through 2021, the annual revenue that triggers the filing of an independent certified public accountant's audit report by a non-profit that solicits contributions in New York State will increase from its current floor of "more than $250,000" to a new floor of "more than $1 million." The annual revenue required to trigger an independent review report by an independent CPA will increase in tandem from the current "more than $100,000" to $1,000,000 in 2021. The changes will go into effect for an organization's first return due after the effective date, whether it is due as an initial filing or on extension. Organizations with annual revenues of $100,000, increasing to $250,000 on July 1 and forward, will have to file only the Form CHAR 500. The above changes will be phased in over the seven-year period as shown in the following table:

Gross Revenues	Simple Financial Report on Form CHAR 500	Review Report by independent Certified Public Accountant	Audit Report by Independent Certified Public Accountant
Current rules	$100,000 or less	More than $100,000 but not more than $250,000	More than $250,000
Effective July 1, 2014	$250,000 or less	More than $250,000 but not more than $500,000	More than $500,000
Effective July 1, 2017	$250,000 or less	More than $250,000 but not more than $750,000	More than $750,000
Effective July 1, 2021	$250,000 or less	More than $250,000 but not more than $1,000,000	More than $1,000,000

16. Residential addresses of directors and officers: Corporations no longer will be required to provide residential addresses for board members.

17. Definition of "entire board": If an organization's by-laws provide that the entire board may be a number in a range of numbers, any reference to the "entire board" shall refer to the number of directors elected during the most recent election.

This writing is meant to alert organizations to changes in certain duties and reporting obligations, not to detail all specific provisions of the new Act. The Act contains other changes that make it easier to start up a new organization, but these provisions will not be discussed here.

Please contact me for additional details and assistance in meeting the new Act requirements.

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