

Memorandum

Enactment of Amendments to the New York Non-Profit Revitalization Act

December 23, 2015

Introduction

The New York Non-Profit Revitalization Act of 2013 (the “Act”) was enacted into law on December 18, 2013 and generally took effect as of July 1, 2014.¹ Three bills reforming the Act (collectively, the “Amendments”) have been enacted in 2015 and took effect immediately upon enactment. The most recent Amendment was enacted on December 11, 2015. The following is a summary of the substantive provisions of the Amendments.

I. Related Party Transactions

- Under the Act, every not-for-profit corporation and charitable trust must take specified affirmative actions before entering into any related party transaction. A “related party transaction” is a transaction, agreement, or other arrangement in which a related party has a financial interest and in which the not-for-profit corporation or charitable trust or an affiliate thereof is a participant. The Amendments modify the category of transactions that qualify as related party transactions by expanding the definitions of “related party” and “relative” and narrowing the definition of “affiliate.”
- Under the Amendments, the term “related party” has been expanded to include not just a person occupying the title of “director,” “trustee,” “officer,” or “key employee,” but any person who “exercises the power” of that position over the affairs of a not-for-profit corporation or charitable trust or any affiliate thereof, and his or her relatives and related entities.
- The definition of “affiliate” has been narrowed to include only an entity controlled by, or in control of, a not-for-profit corporation or charitable trust. Two entities under common control are no longer considered affiliates. This change narrows the category of transactions that constitute related party

¹ For more information regarding the Act, please see our Memorandum “Enactment of the New York Non-Profit Revitalization Act of 2013,” dated December 30, 2013, available [here](#).

transactions requiring special approval under the Act, as the term affiliate is used in the definitions of both “related party” and “related party transaction.”

- In addition, the definition of “relative” has been expanded to include domestic partners of an individual’s ancestors, brothers and sisters, children, grandchildren, and great-grandchildren, in addition to spouses.

II. Audit Oversight

- Under the Act, not-for-profit corporations and charitable trusts required to file an independent certified public accountant’s audit report with the attorney general must designate an audit committee of the board comprised solely of independent directors or independent trustees to fulfill specified audit oversight functions.
- The Act defines an “independent director” or “independent trustee” as a director or trustee, as applicable, who: (i) is not, and has not been within the last three years, an employee of the not-for-profit corporation or charitable trust or an affiliate thereof, and does not have a relative who is, or who has been within the last three years, a key employee of the not-for-profit corporation or charitable trust or an affiliate thereof; (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 not-for-profit corporation or charitable trust or an affiliate thereof (other than reimbursement for expenses reasonably incurred as a director or trustee or reasonable compensation for service as a director or trustee); 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 not-for-profit corporation or charitable trust or an affiliate thereof, for property or services in an amount that exceeds the lesser of \$25,000 or 2% of such entity’s consolidated gross revenue in any of the last three fiscal years.
- The Amendments modify the definitions of “independent director” and “independent trustee,” including as a result of the modifications to the definitions of “affiliate” and “relative.”
- Under the Amendments, in addition to the qualifications listed above, an “independent director” or “independent trustee” is a director or trustee, as applicable, who is not, and does not have a relative who is, a current owner (wholly or partially), director, officer, or employee of the outside auditor of the not-for-profit corporation or charitable trust or has worked on the not-for-profit corporation’s or charitable trust’s audit during the prior three years.
- The Act excludes charitable contributions from the term “payments,” as used in the definitions of “independent director” and “independent trustee.” The Amendments clarify that dues or fees paid to the not-for-profit corporation or charitable trust for services that are performed as part of its not-for-profit purposes and, with respect to not-for-profit corporations only, are available to individual members of the public on the same terms, will also not be considered payments.

- As discussed above in the context of related party transactions, the definition of “affiliate” has been narrowed and the definition of “relative” has been expanded.

III. Governance Matters

- *Quorum.* Under the Act, as modified by the Amendments, (i) only independent directors or independent trustees may participate in board or committee deliberations or voting relating to audit oversight matters, (ii) a related party with an interest in a related party transaction may not participate in the deliberations or voting related to the related party transaction, (iii) a person with a conflict of interest may not be present at or participate in board or committee deliberations or voting on the matter giving rise to the conflict, and (iv) a person who may benefit from compensation paid to a not-for-profit corporation’s members, directors, or officers may not be present at or otherwise participate in the deliberations or voting related to the compensation (except in the case of uniform board fees). The Act eliminated a provision of prior law under which recused interested directors continued to be counted for purposes of determining a quorum. However, the Amendments clarify that directors who are present at a meeting of the board or a committee, but not present at the time of a vote due to a conflict of interest or related party transaction, will be considered to be present for purposes of determining whether or not a quorum is present.
- *Board Governance.* Under the Act, no employee of a not-for-profit corporation may serve as the chair of the board or hold any other title with similar responsibilities. This provision originally had a delayed effective date of January 1, 2015 and was subsequently delayed to January 1, 2016. Under the Amendments, the effectiveness of this provision is further delayed until January 1, 2017.
- *Entire Board.* Under the Act, the term “entire board” means the total number of directors who would be entitled to vote if there were no vacancies. The Amendments clarify that where the by-laws of a not-for-profit corporation provide that the board may consist of a range between a minimum and maximum number of directors, and the number within that range has not been fixed by the board, the “entire board” will include the number of directors elected or appointed as of the most recently held election of directors, as well as any directors whose terms have not expired. In addition, under the Amendments, the boards of not-for-profit corporations without members (in addition to those of not-for-profit corporations with members) are empowered to change the number of directors by action of the board, so long as the action is specifically authorized under the by-laws.

IV. Whistleblower Policies

- The Act requires that not-for-profit corporations and charitable trusts with 20 or more employees and annual revenue in the prior fiscal year in excess of \$1 million adopt a whistleblower policy and distribute a copy to all directors, trustees, officers, employees, and volunteers, in the case of a charitable trust, and volunteers who provide substantial services, in the case of a not-for-profit corporation. The Amendments clarify that the distribution requirement may be satisfied by posting the whistleblower policy on the

website or at the offices of the not-for-profit corporation or charitable trust, as applicable, in a conspicuous location accessible to employees and volunteers.

V. Executive Compensation

- Under the Act, a person who may benefit from compensation paid to a not-for-profit corporation's members, directors, or officers may not be present at or otherwise participate in the deliberations or voting related to the compensation. The Amendments clarify that it is possible for the board to approve board fees paid to all directors. Specifically, a director is not prohibited from deliberating or voting on compensation for service on the board that is to be made available or provided to all directors on the same or substantially similar terms.

VI. Authorizations of Real Property Transactions

- The Act simplifies the required approval process for certain substantial transactions, allowing for a one-step approval process, consisting of attorney general approval, in lieu of the prior two-step approval process, consisting of court approval following attorney general review. Under the Amendments, the streamlined approval process is extended to religious corporations seeking to sell, mortgage, or lease for a term exceeding five years any real property.

VII. Other

- The Amendments include several other technical changes, clarifications, and corrections relating to provisions of the Act. For example, the annual conflict of interest disclosure statements required by the Act may be submitted to a designated compliance officer, as an alternative to the secretary. In addition, a related party is restricted from participating in deliberations or voting with respect to a related party transaction in which he or she has an interest, but not all related party transactions. Revisions to each of the audit oversight, related party transaction and conflict of interest provisions clarify that individuals otherwise restricted from participation in voting and deliberations may present background information or answer questions upon request of the board or board committee prior to the commencement of deliberations or voting.

The Amendments can be found at:

<https://www.nysenate.gov/legislation/bills/2015/s5868>

<https://www.nysenate.gov/legislation/bills/2015/s5870>

<https://www.nysenate.gov/legislation/bills/2015/a7641>

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