



## Enactment of the New York Non-Profit Revitalization Act of 2013

*December 30, 2013*

**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| I. Introduction.....   | 1           |
| II. Enhancing Governance and Oversight.....                      | 1           |
| Audit Oversight.....   | 1           |
| Definition of Independent Director or Independent Trustee.....   | 3           |
| Related Party Transactions .....                                 | 3           |
| Conflict-of-Interest Policies.....                               | 4           |
| Whistleblower Policies .....                                     | 5           |
| Executive Compensation .....                                     | 5           |
| Board Governance .....   | 6           |
| III. Reducing Unnecessary and Outdated Burdens .....             | 6           |
| Elimination of Types.....  | 6           |
| Notice to the State Education Department in Lieu of Consent..... | 6           |
| Streamlining the Incorporation Process .....                     | 7           |
| Procedural Governance Matters.....                               | 7           |
| Definition of the Entire Board .....                             | 7           |
| Financial Reporting.....   | 7           |
| Authorizations of Real Property Transactions .....               | 8           |
| Approvals of Substantial Transactions .....                      | 8           |
| IV. Applicability of the Act to Foreign Corporations. ....       | 9           |

## I. INTRODUCTION

On December 18, 2013, New York Governor Andrew M. Cuomo enacted into law the Non-Profit Revitalization Act of 2013 (the “Act”). The Act was sponsored by New York State Senator Michael H. Ranzenhofer and New York State Assemblyman James Brennan at the request of New York State Attorney General Eric T. Schneiderman. Both the New York State Senate and the New York State Assembly unanimously passed the Act on June 21, 2013. The Act addresses certain recommendations included in the report drafted by the Leadership Committee for Nonprofit Revitalization and released on February 16, 2012 by Attorney General Schneiderman (the “Report”).<sup>1</sup>

The Act will generally take effect as of July 1, 2014.<sup>2</sup> The Act applies to New York non-profit corporations and, in certain cases, to New York charitable trusts, New York education corporations, and New York religious corporations. As discussed below, certain provisions of the Act apply to corporations and trusts registered with the attorney general to solicit contributions in the State of New York. The following is a summary of certain key amendments to New York law included in the Act.<sup>3</sup>

## II. ENHANCING GOVERNANCE AND OVERSIGHT

- Audit Oversight. The Act requires every charitable corporation<sup>4</sup> and charitable trust that is registered with the attorney general to solicit contributions and required to file an independent certified public accountant’s audit report with the attorney general<sup>5</sup> to designate an audit committee of the board to perform certain oversight responsibilities.<sup>6</sup>

---

<sup>1</sup> For more information regarding the Report, please see our Memorandum “Report on Nonprofit Revitalization Released by Attorney General Eric T. Schneiderman,” dated February 16, 2012, available [here](#). The Report can be found [here](#). For more information regarding the prior introduction of the Act, please see our Memorandum “Introduction of the New York Non-Profit Revitalization Act,” dated May 25, 2012, available [here](#).

<sup>2</sup> As indicated below, certain provisions of the Act will take effect at later dates.

<sup>3</sup> The Act contains amendments to the Executive Law, the Banking Law, the Benevolent Orders Law, the Education Law, the General Business Law, the Insurance Law, the Mental Hygiene Law, the Public Authorities Law, the Private Housing Finance Law, the Public Lands Law, the Racing, Pari-Mutuel Wagering and Breeding Law, the Religious Corporations Law, the Surrogate’s Court Procedure Act, the Not-for-Profit Corporation Law, and the Estates, Powers and Trusts Law.

<sup>4</sup> As discussed below, the Act creates two categories of non-profit corporations, charitable and non-charitable. In this memorandum we use the term “non-profit corporation” to refer to both charitable corporations and non-charitable corporations generally.

<sup>5</sup> As discussed below, the Act gradually increases the minimum annual gross revenue and support that a charitable corporation or charitable trust must receive in order to be required to file an

For any charitable corporation or charitable trust with annual revenue of less than \$10 million in its last fiscal year ending prior to January 1, 2014, the audit oversight requirements of the Act will not take effect until January 1, 2015.

- The Act requires that the audit committee consist solely of independent directors or trustees, but permits audit committee functions to be performed by the board as a whole, as long as only independent directors or trustees participate in deliberations and voting relating to audit committee matters.
- The Act requires that the audit committee or the board (i) oversee the accounting and financial reporting processes of the charitable corporation or charitable trust and the audit of its financial statements, (ii) annually retain or review the retention of an independent auditor to conduct the audit, and (iii) upon completion of the audit, review the results of the audit and any related management letter with the independent auditor.
- In addition, the audit committee or the board is required to oversee adoption and implementation of, and compliance with, any conflict-of-interest policy or whistleblower policy (unless this function is performed by another committee of the board comprised solely of independent directors).
- In addition to the foregoing, the board or audit committee of a charitable corporation or charitable trust that is required to file an independent certified public accountant's audit report with the attorney general, and that in the prior fiscal year had or in the relevant fiscal year reasonably expects to have annual revenue in excess of \$1 million must also take the following steps:
  - prior to the commencement of the audit, review with the independent auditor the scope and planning of the audit;
  - upon completion of the audit, review and discuss with the independent auditor (a) any material risks and weaknesses in internal controls identified by the auditor, (b) any restrictions on the scope of the auditor's activities or access to requested information, (c) any significant disagreements between the auditor and management, and (d) the adequacy of accounting and financial reporting processes of the applicable charitable corporation or charitable trust;
  - annually consider the performance and independence of the independent auditor; and
  - if applicable, report on the audit committee's activities to the board.

---

independent certified public accountant's audit report and audited financial statements with the attorney general.

<sup>6</sup> The audit oversight provisions generally do not apply to New York religious corporations, but do apply to certain New York education corporations.

- Definition of Independent Director or Independent Trustee. The Act defines the terms “independent director” and “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 non-profit corporation<sup>7</sup> or charitable trust or an affiliate<sup>8</sup> thereof, and does not have a relative<sup>9</sup> who is, or who has been within the last three years, a key employee of the non-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 non-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 (other than charitable contributions) to, or received payments (other than charitable contributions) from, the non-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.
- Related Party Transactions. In an effort to prevent self-dealing, the Act requires every non-profit corporation and charitable trust to take specified affirmative actions before entering into any related party transaction.
  - The Act defines a “related party transaction” as a transaction, agreement, or other arrangement in which a related party has a financial interest and in which the non-profit corporation or charitable trust or an affiliate thereof is a participant. A “related party” is (i) any director, trustee, officer, or key employee of the non-profit corporation or charitable trust or any affiliate thereof; (ii) any of their respective relatives; or (iii) any entity in which any of the foregoing individuals has a 35% 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 5%.

---

<sup>7</sup> Throughout the remainder of this memorandum, requirements noted as applicable to a “non-profit corporation” generally also apply to New York education corporations and New York religious corporations, except where otherwise noted.

<sup>8</sup> For purposes of the Act, an “affiliate” of a non-profit corporation or charitable trust means any entity controlled by, in control of, or under common control with such non-profit corporation or charitable trust.

<sup>9</sup> For purposes of the Act, a “relative” of an individual means his or her (i) spouse, ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren, and spouses of brothers, sisters, children, grandchildren, and great-grandchildren; or (ii) domestic partner as defined in Section 2994-A of the Public Health Law.

- Specifically, prior to entering into any related party transaction, the board must determine that the transaction is fair, reasonable, and in the best interest of the non-profit corporation or charitable trust at the time of the determination.
  - In addition, enhanced review is required for related party transactions involving a charitable corporation or charitable trust and in which a related party has a substantial financial interest.<sup>10</sup> Specifically, the board, or an authorized committee thereof, must (i) prior to entering in the transaction, consider alternative transactions to the extent available; (ii) approve the transaction by not less than a majority vote of the directors or trustees or committee members present at the meeting; and (iii) contemporaneously document in writing the basis for the board or authorized committee's approval, including its consideration of any alternative transactions.
  - Related parties are not permitted to participate in deliberations or voting with respect to related party transaction matters. However, any director, officer or key employee who has an interest in a related party transaction must disclose the material facts concerning such interest in good faith to the board or authorized committee thereof. In addition, the board or authorized committee may request that any related party present information concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting related thereto.
  - In addition, the Act clarifies the authority of the attorney general to remedy self-dealing. In particular, the Act provides that the attorney general may bring an action to enjoin, void, or rescind any related party transaction or proposed related party transaction that violates any provision of the Not-for-Profit Corporation Law or was otherwise not reasonable or in the best interests of the non-profit corporation or charitable trust at the time the transaction was approved, or seek other relief, including, for example, restitution, removal of directors, trustees, or officers, or, in the case of willful and intentional conduct, payment of an amount up to double the amount of any benefit improperly obtained.
- Conflict-of-Interest Policies. The Act requires every non-profit corporation and charitable trust to adopt a conflict-of-interest policy to ensure that its directors, trustees, officers, and key employees act in the best interest of the non-profit corporation or charitable trust and comply with applicable legal requirements, including the requirements set forth in the Act's provisions regarding related party transactions (as described above). The Act requires that each conflict-of-interest policy, at a minimum, (i) contain a definition of the circumstances that constitute a conflict-of-interest; (ii) set out procedures for disclosing conflicts-of-interest to the audit committee, or if there is

---

<sup>10</sup> "Substantial financial interest" is not defined for purposes of the Act. Guidance on this point from the Attorney General's Charities Bureau would be useful.

none, to the board; (iii) require that a person with a conflict not be present at<sup>11</sup> or participate in the board or committee deliberation or vote on the matter giving rise to such conflict; (iv) prohibit any attempt by a person with a conflict to improperly influence the deliberation or voting on the matter giving rise to such conflict; (v) require that the existence and resolution of the conflict be documented in the corporation's records, including meeting minutes; and (vi) contain procedures for disclosing, addressing, and documenting related party transactions. In addition, the Act requires directors or trustees to submit a statement disclosing any potential conflicts of interest prior to joining the board and then on an annual basis thereafter. Non-profit corporations or charitable trusts that have adopted a conflict-of-interest policy pursuant to federal, state, or local law that is substantially consistent with the requirements set forth in the Act will be deemed to be in compliance with the Act.

- Whistleblower Policies. The Act requires that non-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 to protect from retaliation persons who report suspected improper conduct. The Act requires generally that the whistleblower policy provide that no director, trustee, officer, employee, or volunteer who in good faith reports any action or suspected action taken by or within the non-profit corporation or charitable trust that is illegal, fraudulent, or in violation of any adopted policy of the non-profit corporation or charitable trust will suffer intimidation, harassment, discrimination, or other retaliation, or, in the case of employees, adverse employment consequences. In addition, the Act requires that the whistleblower policy contain the following provisions: (i) procedures for reporting violations or suspected violations of laws or policies, including procedures for preserving the confidentiality of reported information; (ii) a requirement that an employee, officer, director, or trustee of the non-profit corporation or charitable trust be designated to administer the policy and report to the audit or other committee consisting of independent directors or trustees, or, if none, the board; and (iii) a requirement that a copy of the policy be distributed to all directors, trustees, officers, employees, and to volunteers who provide substantial services to the non-profit corporation or charitable trust. Non-profit corporations or charitable trusts that have adopted a whistleblower policy pursuant to federal, state, or local law that is substantially consistent with the requirements set forth in the Act will be deemed to be in compliance with the Act.
- Executive Compensation. While a non-profit corporation may pay reasonable compensation to its members, directors, or officers for services rendered, the Act

---

<sup>11</sup> We note that the requirement that the person with the conflict of interest "not be present at" the board or committee deliberation or vote, in addition to "not participate in" the board or committee deliberation or vote, appears only in the conflict-of-interest policy and compensation provisions of the Act. In contrast, the audit oversight provision requires only that only independent directors participate in any board or committee deliberations or voting on audit matters, and the related party transaction provision requires only that no related party participate in deliberations or voting relating to a related party transaction, and not that these individuals not be present at the applicable meetings. These provisions are not necessarily contradictory, but guidance on this point from the Attorney General's Charities Bureau would be useful.

requires that no person may be present at or otherwise participate in any board or committee deliberation or voting concerning his or her own compensation. However, the board or authorized committee may request that a person present information as background or answer questions at a board or committee meeting prior to the commencement of deliberations or voting with respect to his or her compensation.

- Board Governance. The Act requires that no employee of a non-profit corporation may serve as the chair of the board or hold any other title with similar responsibilities. This provision of the Act is not effective until January 1, 2015.

### III. REDUCING UNNECESSARY AND OUTDATED BURDENS

- Elimination of Types. The Act creates two categories of non-profit corporations (charitable and non-charitable) rather than the current four types (Type A, B, C, and D). The Act defines a “charitable corporation” as a non-profit corporation formed, or deemed to be formed, for charitable purposes, and “charitable purposes” as purposes included in the certificate of incorporation of a non-profit corporation that are charitable, educational, religious, scientific, literary, cultural, or for the prevention of cruelty to children or animals. The Act defines a “non-charitable corporation” as any non-profit corporation formed under the Not-for-Profit Corporation Law, other than a charitable corporation, including but not limited to one formed for any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, or animal husbandry, or for the purpose of operating a professional, commercial, industrial, trade, or service association. Non-profit corporations formed prior to July 1, 2014 will not be required to amend their formation documents to conform to the new categories, rather: (i) Type A corporations will be deemed to be non-charitable corporations; (ii) Type B and Type C corporations will be deemed to be charitable corporations;<sup>12</sup> (iii) Type D corporations formed for charitable purposes will be deemed to be charitable corporations; and (iv) Type D corporations formed for non-charitable purposes will be deemed to be non-charitable corporations.
- Notice to the State Education Department in Lieu of Consent. The Act eliminates the requirement that certain non-profit corporations obtain the advance approval of the State Education Department prior to incorporation. As a result, only schools, colleges, universities, or other entities providing post-secondary education; libraries; museums; and historical societies are required to obtain approval of the State Education Department, or, in the case of a college or university, the Regents of the University of the State of New York, prior to incorporation. Any other non-profit corporation whose certificate of incorporation includes a purpose for which a corporation might be chartered by the Regents of the University of the State of New York is required only to provide notice to the State Education Department of its incorporation within 30 business

---

<sup>12</sup> The Act makes conforming amendments to the Education Law and the Religious Corporations Law to provide that education corporations or religious corporations, as applicable, to which the Not-for-Profit Corporation Law is applicable, are charitable corporations, not Type B corporations.

days after receipt of confirmation that the non-profit corporation's certificate of incorporation has been accepted for filing.

- Streamlining the Incorporation Process. The Act clarifies the required contents of the certificate of incorporation of a non-profit corporation. Specifically, the Act makes clear that the certificate of incorporation must state the purpose or purposes for which the non-profit corporation is being formed and whether it is a charitable corporation or a non-charitable corporation, but that the certificate of incorporation need not set forth the activities to be undertaken by the non-profit corporation in furtherance of its purpose or purposes. In addition, the Act empowers the Department of State to correct minor errors in filings with the authorization of the non-profit corporation. Specifically, the Department of State may, upon the written or electronic mail authorization of a non-profit corporation, correct any typographical or similar non-material error in a certificate or other instrument relating to a domestic or foreign non-profit corporation submitted to the Department of State under the Not-for-Profit Corporation Law.
- Procedural Governance Matters. The Act clarifies that board and membership meeting notices, waivers of notice, and votes requiring unanimous consent may be transmitted electronically, including via electronic mail. In addition, the Act allows meetings to be held by videoconference.
- Definition of the Entire Board. The Act modifies the definition of "entire board." Pursuant to the Act, the entire board means the total number of directors who would be entitled to vote if there were no vacancies. If the by-laws of the non-profit corporation provide that the board will consist of a fixed number of directors, then the entire board is that number of directors. If the by-laws of the non-profit corporation provide that the board may consist of a range between a minimum and maximum number of directors, then the entire board is the number of directors within such range that were elected as of the most recently held election of directors.
- Financial Reporting. The Act will gradually increase the thresholds for financial reporting applicable to certain non-profit corporations<sup>13</sup> and charitable trusts in order to reduce burdens on smaller organizations.
  - Currently, charitable corporations and charitable trusts that are registered with the attorney general to solicit contributions and that have annual gross revenue and support in excess of \$250,000 must file with the attorney general an annual written financial report, accompanied by an independent certified public accountant's audit report and audited financial statements. The Act will increase this threshold to annual gross revenue and support in excess of \$500,000 for the period July 1, 2014 through June 30, 2017, to annual gross revenue and support in excess of \$750,000 for the period July 1, 2017 through June 30, 2021, and to annual gross revenue and support in excess of \$1 million thereafter.

---

<sup>13</sup>

The Financial Reporting provisions of the Act are generally not applicable to religious corporations.

- In addition, charitable corporations and charitable trusts that are registered with the attorney general to solicit contributions and that have annual gross revenue and support of at least \$100,000 but not more than \$250,000 are currently required to file with the attorney general an annual written financial report, accompanied by an independent certified public accountant's review report. The Act will increase this threshold to annual gross revenue and support of at least \$250,000 but not more than \$500,000 for the period July 1, 2014 through June 30, 2017, to annual gross revenue and support of at least \$250,000 but not more than \$750,000 for the period July 1, 2017 through June 30, 2021, and to annual gross revenue and support of at least \$250,000 but not more than \$1 million thereafter. However, the Act provides that the attorney general may require the charitable corporation or charitable trust to obtain and file an independent certified public accountant's audit report and audited financial statements following the attorney general's review of the independent certified public accountant's review report.
- Finally, charitable corporations and charitable trusts that are registered with the attorney general to solicit contributions and that have annual gross revenue and support of up to \$100,000 are currently required to file with the attorney general an unaudited financial report. The Act will increase this threshold to annual gross revenue and support of up to \$250,000.
- Authorizations of Real Property Transactions. The Act lowers the board approval threshold required for routine real estate transactions. Specifically, non-profit corporations are permitted to undertake most purchases, sales, mortgages, leases, exchanges and other dispositions of real property with the authorization of a majority of the directors or a majority of a committee authorized by the board. However, purchases, sales, mortgages, leases, exchanges or other dispositions of real property that constitute all or substantially all of the assets of the non-profit corporation will continue to require the approval of (i) two-thirds of the entire board or (ii) if there are twenty-one or more directors, a majority of the entire board.
- Approvals of Substantial Transactions. The Act simplifies the approval processes for dispositions of all or substantially all assets, merger and consolidation transactions, and dissolutions by certain non-profit corporations. Specifically, a charitable corporation seeking to sell, lease, exchange, or otherwise dispose of all or substantially all its assets is permitted to undertake a one-step approval process, consisting of attorney general approval, in lieu of the current two-step approval process, consisting of court approval following attorney general review. Likewise, a charitable corporation seeking to merge or consolidate is permitted to seek approval of the attorney general, rather than court approval following attorney general review. Finally, a charitable corporation or a non-charitable corporation that holds assets legally required to be used for a particular purpose may seek approval of the attorney general of any plan of dissolution, rather than court approval. In each case, if the attorney general does not approve of the transaction or if the attorney general concludes that court review is appropriate, the non-profit corporation may seek court approval on notice to the attorney general. In addition, the Act amends applicable provisions of the Education Law and Religious Corporations Law to permit education corporations and religious corporations to enter into merger transactions like other non-profit corporations.

#### IV. APPLICABILITY OF THE ACT TO FOREIGN CORPORATIONS.

Generally, the Act applies to non-profit corporations incorporated in New York State, and, in certain cases, to New York charitable trusts. The Act also eliminates certain burdens on foreign corporations applying for authority to do business in New York and has a number of provisions applying specifically to corporations and trusts required to register to solicit charitable contributions in New York. If you wish to discuss the applicability of the Act's provisions to your organization, please contact one of the attorneys in the Exempt Organizations Group.

The Act can be found at

<http://open.nysenate.gov/legislation/bill/A8072-2013>.

\* \* \*

For more information, please contact one of the following members of Simpson Thacher & Bartlett LLP's Exempt Organizations Group:

David A. Shevlin  
(212) 455- 3682  
[dshevlin@stblaw.com](mailto:dshevlin@stblaw.com)

John N. Bennett  
(212) 455- 3723  
[jbennett@stblaw.com](mailto:jbennett@stblaw.com)

Jennifer I. Reynoso  
(212) 455-2287  
[jreynoso@stblaw.com](mailto:jreynoso@stblaw.com)

Maura L. Whelan  
(212) 455-2494  
[mwhelan@stblaw.com](mailto:mwhelan@stblaw.com)

Jennifer L. Franklin  
(212) 455- 3597  
[jfranklin@stblaw.com](mailto:jfranklin@stblaw.com)

Kevin E. Roe  
(212) 455- 2647  
[kevin.roe@stblaw.com](mailto:kevin.roe@stblaw.com)

Jillian P. Diamant  
(212) 455-3303  
[jillian.diamant@stblaw.com](mailto:jillian.diamant@stblaw.com)

*This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).*

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication.

## UNITED STATES

### New York

425 Lexington Avenue  
New York, NY 10017  
+1-212-455-2000

### Houston

2 Houston Center  
909 Fannin Street  
Houston, TX 77010  
+1-713-821-5650

### Los Angeles

1999 Avenue of the Stars  
Los Angeles, CA 90067  
+1-310-407-7500

### Palo Alto

2475 Hanover Street  
Palo Alto, CA 94304  
+1-650-251-5000

### Washington, D.C.

1155 F Street, N.W.  
Washington, D.C. 20004  
+1-202-636-5500

## EUROPE

### London

CityPoint  
One Ropemaker Street  
London EC2Y 9HU  
England  
+44-(0)20-7275-6500

## ASIA

### Beijing

3919 China World Tower  
1 Jian Guo Men Wai Avenue  
Beijing 100004  
China  
+86-10-5965-2999

### Hong Kong

ICBC Tower  
3 Garden Road, Central  
Hong Kong  
+852-2514-7600

### Seoul

West Tower, Mirae Asset Center 1  
26 Eulji-ro 5-gil, Jung-gu  
Seoul 100-210  
Korea  
+82-2-6030-3800

### Tokyo

Ark Hills Sengokuyama Mori Tower  
9-10, Roppongi 1-Chome  
Minato-Ku, Tokyo 106-0032  
Japan  
+81-3-5562-6200

## SOUTH AMERICA

### São Paulo

Av. Presidente Juscelino Kubitschek, 1455  
São Paulo, SP 04543-011  
Brazil  
+55-11-3546-1000