

Holland & Knight

Nonprofit Revitalization Act of 2013

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New York's Nonprofit Revitalization Act of 2013 (A.8072/ S.5845) (the "Act"), signed into law by Governor Cuomo in December 2013, will become effective on July 1, 2014. The Act makes several major changes and additions to New York's Not-for-Profit Corporation Law ("NPCL") and other New York statutes governing non-profit corporations and charitable trusts, including the Estates, Powers & Trusts Law ("EPTL").

The following is a comprehensive, section-by-section overview of the substantive changes to enumerated sections of the NPCL and related New York statutes under the Act.¹

NPCL sections 102 and 201 (amendments) (A.8072 §§ 29, 38)

- Eliminates corporate "types" A, B, C, and D, creating instead two categories of corporations: "charitable corporations" (corporations having purposes that are charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals) and "non-charitable corporations" (corporations formed under the NPCL, other than charitable corporations)
- "Grandfathers" nonprofits that have already formed as a particular type by providing that former Type A corporations will be non-charitable; former Type B and C corporations will be charitable; and former Type D corporations formed for charitable purposes will be charitable, with all other Type D corporations being non-charitable; and provides that corporations formed for both charitable and non-charitable purposes will fall into the new charitable category
- Adds definitions of "entire board," "affiliate," "independent auditor," "independent Director," "relative," "related party," "related party transaction," and "key employee" for purposes of the NPCL

NPCL section 105 (amendment) (A.8072 § 32)

- Permits the Department of State, when authorized in writing by the filer, to correct minor errors in certificates of incorporation or applications for authority without the need to resubmit entire filings

NPCL section 114 (amendment) (A.8072 § 36)

- Authorizes directors and officers, in addition to members and creditors, to petition for visitation and inspection by a justice of the Supreme Court, and of a non-profit's book and records, and requires notice to the Attorney General

NPCL sections 306 (amendment) and 309 (new section) (A.8072 §§ 45-46)

- Provides that a director, officer, key employee or agent of a nonprofit corporation is subject to the personal jurisdiction of the Supreme Court of the State of New York and may be served with process by the Attorney General
- Clarifies that the designation of the Secretary of State as the agent for service of process is required of all domestic nonprofit corporations, not just those formed, or for which amended certificates of incorporation were filed, after the effective date of chapter 564 of the Laws of 1981

NPCL section 402(a) (amendment) (A8072 § 47)

- Clarifies that nonprofits need only state their corporate purposes, and not specific activities they plan to undertake

NPCL section 404(d) (amendment) (A.8072 § 48)

- Allows organizations other than schools, colleges, universities, libraries, historical societies and museums that must be chartered by the Board of Regents to notify the State Education Department of their formation within 30 days after the Department of State confirms filing of the certificate of incorporation, rather than having to obtain the Education Department's pre-approval

NPCL section 509 (amendment) (A.8072 § 53)

- Permits a majority vote of the board or a committee of the board to approve small, routine real estate transactions (currently requiring a two-thirds vote)
- Leaves in place the requirement that substantial transactions, i.e., transactions involving property constituting all or substantially all of the nonprofit corporation's assets, be approved by a two-thirds vote (unless there are 21 or more directors of the board, in which case approval by a majority of the board will suffice)
- Provides that if an authorized committee of the board acts with respect to real estate

transactions, the committee is required to promptly notify the board, and in no event after the next regularly scheduled board meeting

NPCL sections 510, 511 and 907 (amendments) and 511-a, 907-a and 907-b (new sections) (A.8072 §§ 54-56, 83-85)

- Allows nonprofits seeking to merge or sell assets the option of obtaining approval from the Attorney General in lieu of court approval
- Authorizes either judicial or Attorney General approval of a merger or consolidation where the existing or resulting nonprofit corporation is charitable
- Permits nonprofits to appeal to the courts at any time, including if the AG does not grant approval of the asset sale or merger
- Gives the AG the option to refer petitions to merge or sell significant assets to the courts if the AG believes judicial review is more appropriate NPCL section 515 (amendment) (A.8072 § 58)
- Clarifies that an individual who may benefit from compensation cannot be present at or participate in any board or committee deliberation or vote concerning that individual's compensation NPCL section 555 (amendment) (A.8072 § 60)
- Clarifies that the NPCL does not limit the application of the equitable doctrines of cy pres or deviation

NPCL sections 605, 606, 609, 614, 621, 708 and 711 (amendments) (A.8072 §§ 62-66, 68-69)

- Allows electronic or facsimile transmission of board and membership meeting notices, waivers of notice and votes requiring unanimous written consent
- Allows meetings to be held by videoconference, Skype, and other forms of video communication

NPCL section 712 (amendment) (A.8072 § 70)

- Eliminates provisions allowing for standing committees and special committees of boards under the section, and provides that no committee of a board of directors shall have
- authority to bind the board NPCL section 712-a (new section) and EPTL 8-1.9(b) (new section) (A.8072 §§ 72, 130, 132)

- Raises the annual revenue threshold above which charities that solicit donations from the public are required to obtain external financial audits from \$250,000 to \$500,000 (threshold to escalate to \$1 million by 2021)
- Requires that the board, or an audit committee of the board, be responsible for retaining the outside auditor and reviewing with the auditor both the audit's scope and results, including any identified material risks and weaknesses in internal controls, restrictions on the scope of the auditor's activities or access to requested information, significant disagreements between the auditor and management, and the adequacy of the nonprofit corporation's accounting and financial reporting processes
- Requires the board or audit committee to review the performance of the auditor annually
- Requires the board or audit committee of charities having over \$1 million in annual revenue to follow additional oversight procedures

NPCL 713(f) (new section) (A.8072 §§ 73, 132)

- Prohibits the CEO and other employees of a nonprofit corporation from also serving as chair of its board (effective Jan. 1, 2015)

NPCL section 715 (amendment) and EPTL 8-1.9(c) (new section) (A.8072 §§ 74, 130)

- Requires an interested party to a transaction between a nonprofit or charitable trust and a director, officer or key employee (or a relative of such interested party or other entity with which the interested party is affiliated or has a substantial interest) to disclose in good faith the material facts concerning his or her relationship to the transaction to the board
- Requires the interested party to such a transaction to absent him or herself from board discussions and votes regarding such transaction
- Requires the board to make an affirmative determination, by a majority vote of the directors or committee members present at the meeting, that the transaction is fair, reasonable and in the best interests of the nonprofit; consider alternative transactions; and document the basis for approval of the related party transaction
- Provides that the corporation's certificate of incorporation, bylaws or any board policy may contain additional restrictions and additional procedures regarding related party transactions
- Gives the Attorney General the power to bring an action to enjoin or rescind any related

party transaction that is not reasonable or in the best interests of the nonprofit or charitable trust, and to seek damages in cases of willful misconduct
NPCL section 715(a) (new section) and EPTL 8-1.9(d) (new section) (A.8072 §§ 75, 130)

- Requires nonprofits and charitable trusts not already required to adopt written conflict of interest policies to do so
- Provides that such conflict of interest policies must include, at a minimum: (1) a definition of the circumstances that constitute a conflict of interest; (2) conflict disclosure procedures to the audit committee or board; (3) a requirement that the individual who is the subject of the conflict of interest not be present at, or participate in, any board or committee deliberation or vote concerning such conflict; (4) a prohibition against any attempt by the individual with the conflict to improperly influence deliberations concerning such conflict; (5) procedures for documenting the existence and resolution of a conflict; and (6) procedures for dealing with related-party transactions
- Provides that such policies must require that prior to the initial election of any director or trustee, and annually thereafter, such director/trustee shall complete a written statement identifying any potential conflict known to such director/trustee
- Provides that a nonprofit corporation or charitable trust with a conflict of interest policy pursuant to federal, state or local laws substantially consistent with NPCL 715-a/ EPTL 8-1.9(d) shall be deemed in compliance with the new section

NPCL section 715(b) (new section) and EPTL 8-1.9(e) (new section) (A.8072 §§ 75, 130)

- Requires nonprofits and charitable trusts with 20+ employees and annual revenue of in excess of \$1 million to adopt whistleblower policies
- Provides that such whistleblower policies must include: (1) procedures for reporting suspected violations and keeping such information confidential; (2) a requirement that an employee, trustee, officer or director of the non-profit or charitable trust administer the policy and report to the board or committee thereof; and (3) a requirement to provide copies of the policy to employees, officers, trustees, directors and volunteers who provide substantial services to the non-profit or charitable trust
- Provides that a nonprofit corporation or charitable trust with a whistleblower policy pursuant to federal, state or local laws substantially consistent with NPCL 715-b/ EPTL 8-1.9(e) shall be deemed in compliance with the new section

NPCL section 724 (amendment) (A.8072 § 80)

- Requires advance notice to the Attorney General of applications for court-ordered indemnification of directors and officers NPCL section 804 (amendment) (A.8072 § 82)
- Provides that if a certificate of incorporation was originally required to be delivered by the incorporator to a governmental entity, officer, or any other person or body, certificates of amendment adding, changing or eliminating a purpose, power or provision or changing the nonprofit corporation's name must be delivered to such entity or person within 30 business days after receipt of the Department of State's confirmation that the certificate of amendment has been filed

NPCL sections 1001, 1002, 1003 and 1007 (amendments) (A.8072 §§ 88-92)

- Simplifies the process for dissolving nonprofits
- Provides that a charitable corporation or non-charitable corporation holding assets legally required to be used for a specific purpose must seek approval of a plan of dissolution from the Attorney General or a court

Executive Law section 172-b (amendment) (A.8072 §§ 3, 3-a, 3-b, 132)

- Raises the annual gross revenue threshold above which nonprofits are required to obtain and submit an auditor's report and audited financial statements to the Attorney General each year from \$250,000 to \$500,000 (threshold to escalate to \$750,000 in 2017 and to \$1 million in 2021)
- Raises the annual gross revenue threshold above which nonprofits are required to obtain and submit an independent CPA's report to the Attorney General each year from \$100,000 to \$250,000
- Gives the Attorney General the authority to request auditors' reports from nonprofits with gross revenue of over \$250,000 after reviewing their annual filings Education Law section 223 (amendment) (A.8072 § 9)
- Permits education corporations to enter into merger transactions, as other nonprofits are permitted to do

Religious Corporation Law sections 13, 15-a, 208 and 209 (amendments) (A.8072 §§ 24-27)

- Permits religious corporations to enter into merger transactions, as other nonprofits are permitted to do

EPTL section 8-1.4 (amendment) (A.8072 § 129)

- Authorizes the AG to accept financial reports and other mandatory filings in electronic form

SCPA section 711 (amendment) (A.8072 § 28)

- Adds a fiduciary's non-compliance with new EPTL section 8-1.9(c) (discussed *supra*) as grounds for his removal from office

¹ Many of the Act's provisions merely correct typographical errors in the existing statutes, or revise sections of the NPCL and other statutes to make them consistent with the change to two types of not-for-profit corporations in place of the previous four types.

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