

Non-Profit Revitalization Act of 2013: **New York Law Would Reform Governance Rules for Nonprofits**

In late June, the New York state legislature passed legislation designed to reform the statutory requirements for governance of nonprofit organizations – both not-for-profit corporations and wholly charitable trusts. It also would expand the Attorney General's enforcement powers and modernize and clarify some of the more mechanical and procedural New York rules applicable to not-for-profit corporations.

The legislation – known as the Non-Profit Revitalization Act of 2013 – follows several rounds of review and comment from the nonprofit community and represents the largest overhaul of New York nonprofit law since 1970.

The bill awaits Governor Cuomo's signature. Although there is no indication that the Governor will not sign it, readers should continue to monitor the situation before taking steps in response to the legislation and we will send an update once the Governor acts. If the bill becomes law, most provisions would take effect July 1, 2014.

The legislature took no action on a related measure, the Executive Compensation Reform Act of 2013.

Click [here](#) for an Overview of Applicability. Click [here](#) for a Summary of the Bill's Governance Requirements.

Click [here](#) for a Summary of the Bill's Financial Reporting Rules for Organizations Required to Register to Conduct Charitable Solicitations.

Click [here](#) for Highlights of the Bill's Update of the Not-for-Profit Corporation Law and Expansion of the Attorney General's Enforcement Powers.

The Attorney General press release and summary can be viewed by clicking [here](#).

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Non-Profit Revitalization Act of 2013: **Overview of Applicability**

Applicability is a threshold issue for any organization trying to understand the Non-Profit Revitalization Act. This chart shows the architecture of the legislation, so that you can identify the portions that would apply to your organization.

All Not-for-Profit Corporations	→ <u>Compensation: Deliberations and Voting</u>
All Not-for-Profit Corporations and Wholly Charitable Trusts	<ul style="list-style-type: none"> → <u>Related Party Transaction Rules (Basic)</u> → <u>Mandatory Conflict of Interest Policy</u> → <u>Defined Terms</u>
Not-for-Profit Corporations and Wholly Charitable Trusts with 20 or More Employees and Annual Revenue in Excess of \$1,000,000	→ <u>Mandatory Whistleblower Policy</u>
Charitable Corporations and Wholly Charitable Trusts (“Charities”)	→ <u>Related Party Transaction Rules (Augmented)</u>
Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$500,000	→ <u>Mandatory Audit Committee or Board Audit Function (Basic Duties)</u>
Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$1,000,000	→ <u>Mandatory Audit Committee or Board Audit Function (Augmented Duties)</u>

Non-Profit Revitalization Act of 2013: Summary of the Bill's Governance Requirements

Covered Organizations	Topic	Summary
All Not-for-Profit Corporations	Compensation: Deliberations and Voting	No person who may benefit from a compensation arrangement may be present at or otherwise participate in any Board or committee deliberation or vote concerning that person's compensation, except that the Board or committee may request that the person present information as background or answer questions at a committee or Board meeting prior to the commencement of deliberations or voting thereon.
All Not-for-Profit Corporations and Wholly Charitable Trusts*	Related Party Transaction Rules (Basic) <i>(See augmented rules below applicable only to Charitable Corporations and Wholly Charitable Trusts.)</i>	<p>A covered organization may not enter into a related party transaction unless the Board determines that the transaction is fair, reasonable and in the organization's best interest at the time of determination.</p> <p>A director, officer or key employee who has an interest in a related party transaction must disclose in good faith to the Board or an authorized Board committee the material facts concerning such interest.</p> <p>Additional restrictions and procedures may be set forth in the organization's governing documents or a policy adopted by the Board.</p> <p>No related party with an interest in a related party transaction may participate in deliberations or vote on the related party transaction, except that the Board or an authorized committee may request that such related party present information concerning the transaction at a meeting of the Board or such committee prior to commencement of deliberations or voting thereon.</p>

New defined terms under the Non-Profit Revitalization Act appear in this summary in bold. A glossary of defined terms appears at the end of the summary.

References to "directors" include trustees of wholly charitable trusts. References to the "Board" refer to a Board of Directors or other governing body of a corporation and to the collective trustees of a wholly charitable trust.

**Unless otherwise specified, references to "not-for-profit corporations" include both charitable and non-charitable not-for-profit corporations (such as those formed for social, fraternal or political purposes). The legislation clearly applies to New York not-for-profit corporations and New York wholly charitable trusts. Some portions of the legislation also apply in certain circumstances to non-New York charities required to register to conduct charitable solicitations in New York. The applicability, if any, of the remaining portions of the legislation to non-New York organizations that conduct activities or hold property in New York is not stated.*

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Covered Organizations	Topic	Summary
<p>All Not-for-Profit Corporations and Wholly Charitable Trusts* (cont'd)</p>	<p>Mandatory Conflict of Interest Policy</p> <p><i>Note that an organization that has adopted a Conflict of Interest Policy pursuant to federal, state or local laws that is substantially consistent with these new requirements will be deemed in compliance, as will a corporation that is a state or local authority that has complied substantially with Public Authorities Law Sections 2824 and 2825(3).</i></p>	<p>Each covered organization must adopt a Conflict of Interest Policy to ensure that its directors, officers and key employees act in the organization's best interest and comply with applicable laws.</p> <p><u>Contents of the Conflict of Interest Policy</u></p> <p>The Conflict of Interest Policy, at a minimum, must include:</p> <ul style="list-style-type: none"> (a) a definition of the circumstances that constitute a conflict of interest; (b) procedures for disclosing a conflict of interest to the Audit Committee, or if no Audit Committee exists, to the Board; (c) a requirement that the conflicted person not be present at or participate in Board or committee deliberations or vote on the matter; (d) a prohibition of any attempt by the conflicted person to influence improperly the deliberations or voting on the matter; (e) a requirement that the existence and resolution of the conflict be documented in organization records, including minutes of any meeting where the conflict is discussed or voted on; and (f) procedures for disclosing, addressing and documenting related party transactions. <p>The Policy must also require that, prior to initial election and annually thereafter, each director submit to the secretary a signed written statement identifying, to the best of the director's knowledge, (1) any entity of which the director is an officer, director, trustee, member, owner or employee, with which the organization has a relationship and (2) any transaction in which the organization is a participant and in which the director might have a conflicting interest. The secretary must provide copies of all such statements to the chair of the Audit Committee or, if none, to the chair of the Board.</p>

Covered Organizations	Topic	Summary
<p>Not-for-Profit Corporations and Wholly Charitable Trusts with 20 or More Employees and Annual Revenue in Excess of \$1,000,000</p>	<p>Mandatory Whistleblower Policy</p> <p><i>Note that an organization that has adopted a Whistleblower Policy pursuant to federal, state or local laws that is substantially consistent with these new requirements will be deemed in compliance, as will a corporation that is a state or local authority that has complied substantially with Public Authorities Law Section 2824 and is subject to Public Authorities Law Section 2857.</i></p>	<p>Each covered organization must adopt a Whistleblower Policy to protect from retaliation persons who report suspected improper conduct.</p> <p><u>Contents of the Whistleblower Policy</u></p> <p>The Whistleblower Policy must provide that no director, officer, employee or volunteer who in good faith reports any action or suspected action taken by or within the organization that is illegal, fraudulent or in violation of any policy of the organization shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequences.</p> <p>The Whistleblower Policy must include:</p> <p>(a) procedures (including confidentiality provisions) for reporting violations or suspected violations of laws or organization policies;</p> <p>(b) a requirement that an employee, officer or director be designated to administer the Policy and report to the Audit Committee, another committee of independent directors or the Board; and</p> <p>(c) a requirement that a copy of the Policy be distributed to all directors, officers, employees, and volunteers who provide substantial services to the organization.</p>
<p>Charitable Corporations and Wholly Charitable Trusts (“Charities”)</p>	<p>Related Party Transaction Rules (Augmented)</p>	<p>If a related party of a covered organization has a substantial financial interest in a related party transaction, the Board or authorized Board committee must:</p> <p>(a) prior to entering into the transaction, consider alternative transactions to the extent available;</p> <p>(b) approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and</p> <p>(c) contemporaneously document in writing the basis for its approval of the transaction, including consideration of any alternative transactions.</p>

Covered Organizations	Topic	Summary
<p>Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$500,000</p>	<p>Mandatory Audit Committee or Board Audit Function (Basic Duties)</p> <p><i>(See augmented duties below if annual revenue in excess of \$1,000,000.)</i></p> <p><i>Note that a corporation that is a state or local authority and has complied substantially with Public Authorities Law Sections 2802 and 2824 will be deemed in compliance with these new requirements.</i></p>	<p>Either each covered organization must have an Audit Committee consisting of independent directors, or the independent directors on its Board must perform the duties of an Audit Committee.</p> <p><u>Basic Duties of the Audit Committee</u></p> <p>The Audit Committee or the independent directors on the Board must:</p> <ul style="list-style-type: none"> (a) oversee the accounting and financial reporting processes of the organization and the audit of its financial statements; (b) annually retain or renew the retention of an independent auditor; (c) review with the independent auditor the results of the audit (including the management letter); and (d) oversee the adoption and implementation of, and compliance with, any Conflict of Interest Policy or Whistleblower Policy (unless performed by another committee consisting solely of independent directors).
<p>Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$1,000,000</p> <p><i>Note that this provision is not applicable until January 1, 2015 for any organization that had annual revenue of less than \$10,000,000 in the last fiscal year ending prior to January 1, 2014.</i></p>	<p>Mandatory Audit Committee or Board Audit Function (Augmented Duties)</p>	<p><u>Augmented Duties of the Audit Committee</u></p> <p>In addition to the basic duties listed above, the Audit Committee or the independent directors on the Board of a covered organization must:</p> <ul style="list-style-type: none"> (a) review with the independent auditor the scope and planning of the audit prior to its commencement; (b) review and discuss with the independent auditor any material risks and weaknesses in internal controls identified by the auditor, any restrictions on the scope of the auditor’s activities or access to requested information, any significant disagreements between the auditor and management and the adequacy of the organization’s accounting and financial reporting processes; (c) annually consider the performance and independence of the auditor; and (d) if the duties are performed by an Audit Committee, report its activities to the Board.

DEFINED TERMS

affiliate	An entity controlled by an organization, in control of the organization or under common control with the organization.
independent auditor	A certified public accountant performing the audit of the financial statements of the organization required by Executive Law Section 172-b(1).
independent director	<p>A director who:</p> <p>(a) is not, and in the last three years has not been, an employee of the organization or any affiliate and does not have a relative who is, or in the last three years has been a key employee of the organization or any affiliate;</p> <p>(b) in each of the last three fiscal years, has not received (and does not have a relative who has received during this period) more than \$10,000 in direct compensation from the organization or any affiliate (other than reimbursement of expenses reasonably incurred as a director or reasonable compensation for services as a director); and</p> <p>(c) 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 made payments to (or received payments from) the organization or any affiliate for property or services in an amount which, in any of the last three fiscal years, exceeded the lesser of \$25,000 or 2% of the entity's consolidated gross revenue.</p>
key employee	Any person who is in a position to exercise substantial influence over the affairs of the organization, as referenced in the U.S. Internal Revenue Code and regulatory provisions governing "excess benefit transactions."
related party transaction	Any transaction, agreement or other arrangement in which a related party has a financial interest and in which the organization or an affiliate is a participant.
related party	Any director, officer or key employee of an organization or an affiliate ; any relative of any such individual; and any entity in which any such individual or relative 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%.
relative	An individual's spouse, domestic partner, child, grandchild, great-grandchild, sibling, half-sibling, ancestor, or the spouse of the individual's child, grandchild, great-grandchild, or sibling.
total compensation	Any compensation, whether paid or accrued, by or on behalf of an organization or an affiliate for services rendered to, on behalf of or at the request of the organization, including, but not limited to, salary, bonus and deferred compensation, and any benefits having monetary value provided by or on behalf of the organization or any affiliate , including, but not limited to, housing allowances, living expenses, perquisites, fringe benefits, employer contributions to defined contribution retirement plans and other retirement benefits.

Non-Profit Revitalization Act of 2013: **Summary of the Bill's Financial Reporting Rules for Organizations Required to Register to Conduct Charitable Solicitations**

Every charitable organization required to register to conduct charitable solicitations in New York State must file with the Attorney General an annual report and statement. The requirements for these reports and statements are based on gross revenue and support thresholds. In each case where a report is required, the Non-Profit Revitalization Act would require the organization to:

- Include a statement of any changes in the information required to be contained in the organization's registration form.
- Have the report signed by the president or other authorized officer and the chief fiscal officer.
- Pay a filing fee of \$25.

The table below describes the revenue and support thresholds and the additional requirements applicable in each case.

Effective Dates	If the organization's fiscal year gross revenue and support is...	Then the organization must...
July 1, 2014 through June 30, 2017	Less than \$250,000	Prepare and file an annual unaudited financial report on forms prescribed by the Attorney General.
	At least \$250,000 but not more than \$500,000	Prepare and file an annual GAAP-compliant financial report, accompanied by an annual financial statement that includes an independent CPA's review report.
	More than \$500,000	Prepare and file an annual GAAP-compliant financial report on forms prescribed by the Attorney general, accompanied by an annual financial statement that includes an independent CPA's review report containing a signed opinion that the financial statements are presented fairly in all material respects and in conformity with GAAP.
July 1, 2017 through June 30, 2021	The \$500,000 threshold increases to \$750,000; the \$250,000 threshold remains constant.	See above for applicable requirements.
July 1, 2021 and continuing	The \$750,000 threshold increases to \$1,000,000; the \$250,000 threshold remains constant.	See above for applicable requirements.

Non-Profit Revitalization Act of 2013: **Highlights of the Bill's Update of the Not-for-Profit Corporation Law and Expansion of the Attorney General's Enforcement Powers**

The Non-Profit Revitalization Act would bring about a number of provisions designed to update certain features of the current New York Not-for-Profit Corporation Law and expand the enforcement tools available to the New York Attorney General. These provisions would:

- Establish rules for ***conducting certain corporate activities electronically***, including:
 - Email and fax notice and waiver of notice of member meetings;
 - Email waiver of notice of board meetings;
 - Notice of member meetings by website posting, in addition to publication in a newspaper, if a corporation has more than 500 members;
 - Email proxy voting for members and unanimous written consent via email for member, board and committee actions; and
 - Videoconferencing for board and committee meetings.
- Redefine the phrase "***entire board***" so that, if the bylaws provide for a range between a minimum and maximum number of directors, the "entire board" consists of the number of directors elected at the most recently held election of directors.
 - *This amendment would eliminate the cumbersome process requiring that members or boards "fix" the number of directors constituting the entire board and the inadvertent existence of "vacancies" or unauthorized seats simply because the number of directors was not "re-fixed" to reflect the election of a lesser or greater number of directors than the number "fixed" under or pursuant to the bylaws.*
- End the requirement for board approval for ***leasing real property from a third party***.
- Permit ***committee authorization of the purchase or disposition of real property***, unless the transaction involves all or substantially all of the corporation's assets, in which case the board's approval would be necessary.

- State that **"committees of the corporation"** (i.e., committees that include non-directors) **may not "have the authority to bind the board."**
 - *This amendment also imposed an affirmative duty on the committee to report promptly to the board concerning any approved purchase or disposition of real property, and in no event after the next regularly scheduled board meeting.*
- Prohibit any employee from serving as chair of the board or holding any other title with similar responsibilities.
- End the requirement that private foundations publish notice of availability for **public inspection of Form 990-PF.**
- Confer **discretion on the Attorney General to grant certain approvals that now require a court proceeding**, namely, approvals of "assets" dissolutions; the change, elimination or addition of a purpose or power of a charitable corporation; and the sale, lease, exchange or other disposition of all or substantially all of a corporation's assets.
- Simplify the categories of not-for-profit corporation into **"charitable corporations"** and **"non-charitable corporations."**
 - *Existing types of corporations – known as Types A, B, C and D – would be assigned to one category or the other. Although there would be some nuances for Type D corporations, all existing Type B and C corporations would become charitable corporations under the legislation and all Type A corporations would become non-charitable corporations.*
- Empower the Attorney General to commence proceedings to **enjoin, void or rescind a related party transaction or proposed related party transaction**, including a compensation arrangement with an officer, director, trustee or key employee, if the transaction violates any law or is otherwise not fair, reasonable or in the best interests of the corporation.
- Grant the Attorney General specific authority to seek other relief with regard to related party transactions, such as **damages, restitution, removal and/or an accounting**, including **double damages** in cases of "willful and intentional conduct."

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