



Introduction of the New York Non-Profit Revitalization Act

May 25, 2012

On May 15, 2012, New York State Senators Carl L. Marcellino and Michael H. Ranzenhofer introduced the Non-Profit Revitalization Act (the “Act”) in the New York State Senate. 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 Eric T. Schneiderman (the “Report”).¹

The purpose of the Act is to modernize New York law in order to reduce unnecessary, costly, and outdated regulatory burdens on nonprofits, while also enhancing nonprofit governance, oversight, and accountability. The Act includes a number of provisions that the sector has requested in order to make New York a more hospitable environment for nonprofits. In addition, the Act is reflective of a number of the recommended practices included in the Report. If enacted in current form, the Act would apply to New York nonprofit corporations and, in certain cases, to New York charitable trusts. The following is a summary of certain key amendments to New York law included in the Act.²

- Audit Oversight. The Act would require certain nonprofit corporations and charitable trusts to designate an audit committee of the board. Specifically, the Act would require every charitable corporation³ and charitable trust that is registered to solicit charitable contributions in New York, and has revenues in excess of \$500,000, and that therefore is required to file an independent certified public accountant’s audit report with the attorney general, to designate an audit committee of the board to perform certain oversight responsibilities. The Act would require that the audit committee consist of at least three independent directors or trustees and could be comprised of the entire board of the charitable corporation or charitable trust, as long as only independent directors or trustees attend and participate in deliberations or voting relating to audit committee matters. The Act would specify in detail certain minimum oversight activities to be performed by the audit committee. For example, the audit committee would be

¹ 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 at: <http://stblaw.com/siteContent.cfm?contentID=4&itemID=80&focusID=1372>.

² The Act contains amendments to the Not-For-Profit Corporation Law, the Estates, Powers and Trusts Law, the Surrogates Court Procedure Act, Article 7-A of the Executive Law, the Education Law, the Religious Corporations Law, and the Public Authorities Law.

³ As discussed below, the Act would create two categories of nonprofit corporations, charitable and non-charitable.

required to review and discuss with the independent auditor the results of the audit and any significant disagreements between the auditor and management. In addition, the audit committee would be required to oversee the implementation of any conflict-of-interest and whistleblower policies adopted pursuant to other provisions of the Act. The Act would also require the audit committee to adopt a charter.

- Executive Compensation. The Act would require board oversight with respect to compensation and would require certain charitable corporations and charitable trusts to designate a compensation committee of the board. Specifically, the Act would require that: (i) the total compensation paid by any nonprofit corporation or charitable trust to any employee be fair, reasonable, and commensurate with the services provided by the employee; (ii) in the case of any nonprofit corporation or charitable trust, no individual be permitted to attend or participate in any board or committee deliberation or vote with respect to his or her own compensation; and (iii) every charitable corporation and charitable trust that is registered to solicit charitable contributions in New York and that has annual revenues in excess of \$1 million be required to designate a compensation committee of the board to establish and review executive compensation. The Act would require that the compensation committee consist of at least three independent directors or trustees and could be comprised of the board of the charitable corporation or charitable trust, as long as only independent directors or trustees are present at and participate in deliberations or voting relating to compensation committee matters. The Act would specify in detail the compensation review and approval to be undertaken by the compensation committee. For example, the compensation committee would be required to review the total compensation paid to the officers and five highest-compensated employees of the charitable corporation or charitable trust, affirmatively determine that the total compensation paid to each individual is fair, reasonable, and commensurate with the services provided, approve of the total compensation paid to each individual by a majority vote, and contemporaneously document in writing the basis for the determination. The compensation committee would be permitted to retain and oversee an independent compensation consultant. The Act would also require the compensation committee to adopt a charter.
- Related-Party Transactions. In an effort to prevent self-dealing, the Act would require every nonprofit corporation and charitable trust to take specified affirmative actions before entering into related-party transactions. Related-party transactions are defined in the Act as transactions or arrangements in which the nonprofit corporation or charitable trust is a participant and in which a related party has a financial interest. A related party would include any director, trustee, officer, or key employee of the nonprofit corporation or charitable trust, or any of their respective relatives, or any entity in which any of the foregoing has a 35% or greater ownership or beneficial interest. Specifically, in reviewing related-party transactions, boards would be required to consider alternative transactions, affirmatively determine that any alternative transactions would not be more advantageous to the nonprofit corporation or charitable trust, determine by a vote of two-thirds of the board that the related-party transaction is fair, reasonable, and in the best interests of the nonprofit corporation or charitable trust, and contemporaneously document in writing the basis for the approval of the transaction. In addition, the Act would clarify the authority of the attorney general to remedy self-dealing. In particular, the Act would provide that the attorney general may bring an

action to enjoin, void, or rescind any related-party transaction that violates any law or is otherwise not fair, reasonable, or in the best interests of the nonprofit corporation or charitable trust, or seek other relief, including, for example, damages, restitution, the removal of directors, trustees, and officers, or, in the case of willful conduct, an amount up to double the amount of any benefit improperly obtained.

- Conflict-of-Interest Policies. The Act would require every nonprofit corporation and charitable trust to adopt a conflict-of-interest policy. The Act would specify certain provisions that must be included in the conflict-of-interest policy. For example, the Act would require that the conflict-of-interest policy include a definition of the circumstances that constitute a conflict of interest and set forth the procedures for disclosing conflicts of interest. In addition, the Act would require directors or trustees to submit an annual statement disclosing any potential conflicts of interest. Any charitable corporation or charitable trust that solicits charitable contributions in New York would be required to deliver a copy of the conflict-of-interest policy to the attorney general and notify the attorney general of any subsequent material changes to the conflict-of-interest policy.
- Whistleblower Policies. The Act would require certain nonprofit corporations and charitable trusts to adopt a whistleblower policy to protect from retaliation persons who report suspected improper conduct. Specifically, the Act would require that every nonprofit corporation and charitable trust with five or more employees and annual revenues in excess of \$1 million adopt a whistleblower policy. The Act would specify certain provisions that must be included in the whistleblower policy. For example, the Act would require that the whistleblower policy state that no director, trustee, officer, employee, or volunteer who in good faith reports any action or suspected action taken by or within the nonprofit corporation or charitable trust that is illegal, fraudulent, or in violation of any adopted policy will suffer intimidation, harassment, discrimination, or other retaliation. In addition, the Act would require that the whistleblower policy specify procedures for reporting and investigating suspected violations. The Act would require that the whistleblower policy provide that an employee of the nonprofit corporation or charitable trust be designated to administer, implement, and oversee compliance with the whistleblower policy and report to the audit committee, a committee of independent directors or trustees, or the board, as applicable.
- Authorizations of Real Property Transactions. The Act would lower the board approval threshold required for routine real estate transactions. Specifically, the Act would allow a nonprofit corporation to undertake most purchases, sales, mortgages, or leases of real property with the authorization of a majority of the directors or a committee authorized by the board. However, any purchase, sale, mortgage, or lease of real property that constitutes all or substantially all of the assets of the nonprofit corporation would 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 would expedite the approval process for dispositions of all or substantially all assets and merger and consolidation transactions by charitable corporations. Specifically, the Act would allow a charitable corporation seeking to sell, lease, exchange, or otherwise dispose of all or substantially all its assets

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, charitable corporations seeking to merge or consolidate would be permitted to seek approval of the attorney general, rather than court approval following attorney general review. In both cases, if the attorney general does not approve of a transaction, the charitable corporation may seek court approval.

- Elimination of Types. The Act would create two categories of corporations (charitable and non-charitable) rather than the current four (Type A, B, C, and D). Corporations formed prior to January 1, 2013 would not be required to amend their documents to conform to the new categories, rather: (i) Type A corporations would be deemed to be non-charitable corporations; (ii) Type B and Type C corporations would be deemed to be charitable corporations; (iii) Type D corporations formed for charitable purposes would be deemed to be charitable corporations; and (iv) Type D corporations formed for non-charitable purposes would be deemed to be non-charitable corporations.
- Correction of Typographical and other Non-Material Errors. The Act would empower the department of state to correct minor errors in filings with direction from the nonprofit corporation. Specifically, the department of state could, upon the written or electronic mail authorization of a nonprofit corporation, correct any typographical or other non-material error in a certificate or other instrument submitted to the department of state under the Not-for-Profit Corporation Law.
- Definition of the Entire Board. The Act would modify the definition of “entire board.” The entire board would be defined as (i) the total number of directors who would be entitled to vote if there were no vacancies and (ii) in the event that a nonprofit corporation’s by-laws provide that the number of directors will be within a specified minimum and maximum range, the number of directors elected at the most recent election.
- Notice to the State Education Department in Lieu of Consent. The Act would eliminate the requirement that certain nonprofit corporations obtain the advance approval of the State Education Department prior to incorporation. As a result, only schools, libraries, museums, and historical societies would be required to obtain approval of the State Education Department prior to incorporation. Other nonprofit corporations would be required only to provide notice to the State Education Department of their incorporation within 10 days.

The Act can be found at

<http://open.nysenate.gov/legislation/api/1.0/lrs-print/bill/S7431-2011>.

The Report can be found at

[http://www.ag.ny.gov/sites/default/files/press-releases/2012/NP%20Leadership%20Committee%20Report%20\(2-16-12\).pdf](http://www.ag.ny.gov/sites/default/files/press-releases/2012/NP%20Leadership%20Committee%20Report%20(2-16-12).pdf).

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