New York's Nonprofit Revitalization Act: A Guide to the Law's Key Provisions

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BY ANTHONY E. HUBBARD AND DANIEL E. WILCOX

Anthony E. Hubbard, *Member*

Daniel E. Wilcox, *Associate*

Significant portions of the New York Nonprofit Revitalization Act (the "Revitalization Act" or the "Act") went into effect in 2014. The Act represents the first overhaul in more than 40 years of laws applicable to nonprofit organizations that are incorporated and operate or solicit charitable contributions in the State of New York. This advisory summarizes the most significant portions of the Act.

Governance

The Revitalization Act did not change existing law that requires the board of directors, board of trustees or other governing body[1] of a nonprofit corporation to consist of at least three individuals. There continues to be no cap on the number of directors who may serve. However, the Act prohibits an employee of a nonprofit corporation from serving as the chair of its governing board or holding any other title with similar responsibilities.

Types of Committees

The Revitalization Act provides that nonprofit corporations may establish and maintain two types of committees. The first type is a "committee of the board" and only members of the board may serve on this type of committee, which may be delegated one or more powers of the board. [2] The Act provides that only a committee of the board may exercise authority to bind the corporation. The second type is a "committee of the corporation," which may include directors and non-directors. The Act dispenses with the distinction made between standing and special committees under the prior law.

Board Actions

The Revitalization Act expressly permits the use of electronic communication to provide notice of meetings, cancel meetings and serve as a means for directors to cast votes. In addition to conducting board and committee meetings via conference telephone, which was allowed prior to the Act, New York nonprofit corporations are expressly permitted to conduct board or committee meetings via video-conference. However, the Act did not change the requirement that board and committee actions taken outside of a meeting, using electronic communication, must be unanimous to be effective.

In addition, notices of meetings sent to members of New York nonprofit corporations via electronic communication are valid. So, too, member waivers of notice of meetings, consent to corporate actions and proxies may be transmitted using electronic communication. Nonprofit corporations with more than 500 members are still permitted to serve notice by publication in a newspaper published in the county in the state in which the principal office of the corporation is located, once a week for three successive weeks preceding the date of the meeting. In the event that a corporation elects to provide notice by publication, the Act requires the corporation to also "prominently post" notice of such meeting on the homepage of its website through the date of the meeting. Unfortunately, the Act does not define "prominently post."

Board Independence

As a means of strengthening board oversight of important governance matters, the Revitalization Act requires

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that certain actions may only be approved by “independent” members of the organization’s governing board. For example, charitable organizations that solicit contributions in New York and that have gross annual revenue and support in excess of $500,000 must have an audit committee composed solely of independent directors. Alternatively, the entire board may perform audit committee functions, but only independent directors may participate in deliberations and votes concerning audit matters. Further, the audit committee, the entire board or a committee composed solely of independent directors must supervise the adoption, implementation and compliance with an organization’s conflicts of interest policy and its whistleblower policy, if a whistleblower policy is required.

An “independent” director is defined under the Act as a director who:

1. is not, and has not in the last three years been, an employee of the organization or any of its affiliates;
2. has not received more than $10,000 in direct compensation from the organization or any of its affiliates in any of the last three fiscal years (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for services as a director);
3. does not have a substantial financial interest in any entity that has made payments to or received payments from the organization (or an affiliate of the organization) in exchange for property or services with value exceeding the lesser of either $25,000 or 2% of the organization’s annual gross revenue during the last three fiscal years; and
4. does not have a relative who is described under any of the first three parts of the definition. [3]

Importantly, the term “payment” does not include charitable contributions. Unfortunately, the Act does not define “substantial financial interest.”

Duty of Loyalty Matters

Related Party Transactions

Under the prior law, related party transactions gave rise to questions as to whether any director or officer involved was fulfilling their duty of loyalty to the organization; however, such transactions, if approved and entered into, were valid, binding and enforceable against the organization. Now, under the Revitalization Act, the presumption is that a related party transaction is invalid and, therefore, unenforceable, unless the organization’s governing body determines that the transaction is fair, reasonable and in the best interest of the organization. A “related party” is a person who serves as a director, officer or key employee[4] of the nonprofit organization or any affiliate thereof, or is any such person’s relative. In addition, 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%, constitutes a related party. Assuming that a related party has an interest in a proposed transaction involving the nonprofit organization, for the transaction to be valid, the related party must (a) disclose in good faith the material facts concerning his or her interest in the proposed transaction and (b) refrain from participating in deliberations and votes on the proposed transaction. Of course, a related party is allowed to provide information to the board (or a board committee) regarding the proposed transaction and to respond to questions. In addition, when evaluating a related party transaction, the organization’s governing board must: (1) consider alternative transactions not involving a related party; (2) approve the transaction by no less than a majority vote of the directors present at the meeting; and (3) contemporaneously document the basis for approval.

The Act provides the New York Attorney General with clear authority to bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of the law or that was otherwise unreasonable or not in the best interests of the organization at the time that the transaction was approved. Alternatively, the Attorney General has authority to seek other relief, including restitution, removal of directors 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.

Conflicts of Interest and Whistleblower Policies

While it has been a longstanding element of good governance practices for the governing board of an organization to formally adopt and require compliance with a written conflicts of interest policy, the Revitalization Act has codified this practice by requiring that all nonprofit organizations adopt a written conflicts of interest policy that meets certain statutory requirements, including a requirement that the existence and resolution of conflicts of interest be documented in the organization's minutes.

In addition, every nonprofit organization that has 20 or more employees and has annual revenue and support exceeding $1 million must adopt a written whistleblower policy. A compliant whistleblower policy must prohibit intimidation, harassment, discrimination, adverse employment consequences or other retaliation against a director, officer, employee or volunteer, who, in good faith, reports any action or suspected action by or within the organization that is illegal, fraudulent or violates any policy of the organization. If required, the adoption, implementation and compliance with the whistleblower policy must be overseen by the audit committee or a committee consisting only of independent directors or, if that is not possible, by the entire board.

Financial Statements

The board, or a board-designated audit committee composed only of independent directors, must oversee the accounting and financial reporting processes of the nonprofit and the auditing of financial statements. Oversight includes retaining auditors and reviewing audits, if required, on an annual basis.

When financial statements must be submitted to the New York Bureau of Charities (the "Charities Bureau"), they must be accompanied by the type of reports prepared by the organization's management or review or audit report prepared by the organization's independent certified public accountants ("CPA") as follows:

Requirements through June 30, 2017	
Gross Revenue	**Required Financial Statements Report**
$250,000 or less	Unaudited financial report
More than $250,000 but $500,000 or less	Independent CPA review report
More than $500,000	Independent CPA audit report
Requirements beginning July 1, 2017	
$250,000 or less	Unaudited financial report
More than $250,000 but $750,000 or less	Independent CPA review report
More than $750,000	Independent CPA audit report
Requirements beginning July 1, 2021	
$250,000 or less	Unaudited financial report
More than $250,000 but not more than $1,000,000	Independent CPA review report
More than $1,000,000	Independent CPA audit report

It is important to note that, regardless of the requirements indicated by the table above, if the New York Attorney General determines within its discretion that a charitable organization should obtain an audit report prepared by a CPA, then the organization must do so.

Executive Compensation

The Act prohibits any person who may benefit from the payment of compensation by a nonprofit to a member, director or officer from attending or participating in any deliberations and votes regarding such person's compensation. Of course, any person who is excluded from deliberations and votes may be present to furnish information or otherwise answer questions before any such deliberations and votes.

Charitable Solicitation

All charitable organizations soliciting funds in New York are required to register with the Charities Bureau, and to file an annual report detailing certain financial information. The Revitalization Act eliminated the requirement that all nonprofits retaining paid fundraisers submit audited financial statements. Instead, the requirements for filings with the Attorney General are tied to gross revenue and support thresholds indicated in the table above. In addition, the Act resolved a longstanding nagging question about grant-writers. The Act expressly exempts individuals engaged by Section 501(c)(3) organizations solely to draft grant applications to governmental agencies and philanthropic organizations from being required to register with the Charities Bureau as a fundraising professional.

Major Corporate Actions

The Revitalization Act has also streamlined the process for obtaining approval for the following major corporate actions:

1. sale, transfer or other disposition of all or substantially all of a corporation's assets;
2. amendment of the purposes or powers in the corporation's articles of incorporation;
3. merger or consolidation; or
4. dissolution.

It now is no longer necessary to obtain court approval to take the above actions. Instead, it is only necessary to obtain approval from the Charities Bureau. In the event that the Charities Bureau does not approve the transaction, or concludes that court review is appropriate, the corporation must seek court approval to execute the transaction. Further, court approval is required if the corporation is insolvent, or would become insolvent as a result of the contemplated transaction.

Incorporation

The Revitalization Act simplifies the formation process for New York nonprofit corporations. Under the prior law there were four types of nonprofit corporations. Now there are only either charitable or non-charitable nonprofit corporations. Corporations formed under the prior law are now deemed to be charitable or non-charitable corporations as follows:

Former Type of Nonprofit Corporation	Type of Nonprofit Corporation under the Revitalization Act
Type A	Non-charitable corporation
Type B	Charitable corporation
Type C	Charitable corporation
Type D	If formed for charitable purposes, a charitable corporation. If not formed for charitable purposes, a non-charitable corporation.

While the certificate of incorporation must continue to state the purposes, or mission, of the nonprofit corporation, incorporators no longer are required to include a list of intended corporate or programmatic activities in the certificate of incorporation.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

Endnotes

[1] For the remainder of this advisory, as in the Act, the term "director" refers to any member of the governing board of a nonprofit corporation, whether designated as director, trustee, manager, governor or by any other title. In addition, the term "governing board" includes "board of directors" and "board of trustees," and refers to any board constituting the governing body of a nonprofit organization. For the remainder of this advisory, "governing board" and "board of directors" are used interchangeably.

[2] Applicable law, which did not change due to enactment of the Revitalization Act, limits the extent to which a governing board may delegate its power to a committee. A committee of the board does not have authority to take any of the following actions: (1) submission to members of any action requiring member approval; (2) filling of vacancies on the governing board or any committee; (3) setting compensation of the directors for serving on the board or as members of any committee; (4) amendment or repeal of the by-laws or the adoption of new by-laws; or (5) amendment or repeal of any resolution of the governing board which by its terms is not be so amendable or repealable.

[3] The Act defines "relative" as an individual's (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 New York State's public health law.

[4] A "key employee" is defined as any person who is in a position to exercise substantial influence over the affairs of the nonprofit organization.

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