

NONPROFIT ORGANIZATIONS

ALERT

DECEMBER
2013NONPROFIT LAW REVITALIZATION
COMES TO NEW YORK

By Sarah Hewitt

On December 18, 2013, New York Governor Andrew Cuomo signed into law the Nonprofit Revitalization Act of 2013 which modernizes the New York nonprofit corporation law. The Act overwhelmingly passed both houses of the New York State Legislature on June 21, 2013, almost six months prior to the bill's signing. The most sweeping change to New York State's nonprofit law in 40 years and about two years in the making, the new Act generally takes effect July 1, 2014.

The Act brings reform to New York nonprofit law by enhancing nonprofit governance and oversight to prevent fraud and improve public trust while reducing unnecessary and outdated burdens on nonprofits. Many nonprofits adopted corporate best practices in conjunction with the revisions to the IRS Form 990 in 2008. With the new Act taking effect on July 1, it's time for New York nonprofits to take another look at their governance documents, policies and procedures as well as their governance structures to comply with the detailed requirements of the Act.

Below are highlights of some of the most significant changes under the Act facing nonprofits in New York:

Chair of the Board. The Act prohibits nonprofits from having an employee serve as Chair of the Board or in a comparable position with the goal of ensuring Board independence but allows until July 2015 for nonprofits to make this transition. Consider whether your organization will need a new Board chair before July 2015 in order to comply with this prohibition.

Conflict of Interest Policy Requirements. The Act requires that all nonprofits adopt a conflict of interest policy that requires directors, officers and key employees to act in the organization's best interests and specifies the minimum requirements for such a policy including standards for related party transactions, disclosure of conflicts and resolution of conflicts by the full Board or a committee of independent directors. The Act further requires that each director submit a statement regarding potential conflicts of interest prior to his or her election to the Board and annual-

ly thereafter. Consider whether your organization needs to review its Conflict of Interest Policy for compliance with the Act's standards.

Whistleblower Requirements. The Act requires nonprofits with at least 20 employees and \$1 million or more in annual revenues to have a whistleblower policy in place to protect persons who report suspected wrongdoing from retaliation. If your organization meets these thresholds, be sure it has a compliant Whistleblower Policy in place.

Electronic Communications and Meeting and Approval Options. The Act brings nonprofits up-to-date with technology and enables nonprofits to conduct Board and membership votes and take other actions via e-mail without a meeting as well as conduct Board meetings via videoconference or Skype, if the nonprofit's governing documents so allow. Further, the Act allows Boards to delegate the approval of small transactions to committees. Consider whether your organization's charter and bylaws allow it to take advantage of the new electronic communication and meeting options or need to be amended to do so.

Related Party Approval Process. The Act prohibits a nonprofit's Board from entering into a related party transaction unless the transaction is fully disclosed and the Board has determined that the transaction is fair, reasonable and in the nonprofit's best interests. The Act defines a "related party" and sets forth the review and approval process that Boards must undertake before entering into such a transaction, including requiring that consideration be given to alternatives and documentation be made of the Board's basis for choosing the insider transaction. The Act also empowers the Attorney General to challenge a related party transaction and, in certain cases, to impose a penalty on the nonprofit or its directors of twice the improperly obtained benefit in addition to other remedies such as unwinding the interested-party transaction. Consider whether your organization has appropriate related party approval processes in place in light of the new requirements.

(continued on page 2)

(continued from page 1)

Executive Compensation Approval Process. The Act contains a number of procedural requirements for approval of executive compensation packages. For example, the Act restricts compensated employees from being present in Board or committee meetings when their compensation is presented for discussion and vote except to the extent the Board or committee requests that they be present to present information or answer questions. Be sure your organization reviews the new procedural requirements for approval of executive compensation and documents in minutes that compensated employees were not present for the deliberation and vote on their compensation.

Approval of Corporate Changes. The Act simplifies and expedites the process for applying for approval of major corporate changes like merger plans, asset dispositions and changes in corporate purpose. Rather than first obtaining the approval of the Attorney General and then the State Supreme Court, as currently, upon effectiveness of the Act, nonprofits may apply for approval directly from the New York Attorney General to approve major corporate changes. Only if the Attorney General disapproves the application or concludes that court review is necessary will judicial review be required. Be sure your organization reviews the new, simpler approval process before your next major corporate change.

Financial Reporting and Audit Oversight. Although most provisions of the Act apply to nonprofits that are incorporated in New York, two important sections of the Act relating to financial audits and financial reporting to the State apply to all nonprofits that are registered in New York for charitable solicitation purposes. First, the Act requires independent directors of a nonprofit with over \$500,000 of annual revenue which is required to register with New York State to conduct charitable solicitations to actively oversee the nonprofit's accounting and financial reporting as well as review its annual audit. In addition to these duties, independent directors at larger nonprofits with more than \$1 million in annual revenue that are required to register with New York State to conduct charitable solicitations are now subject to additional, more robust financial oversight requirements. These audit oversight provisions do not go into effect until January 1, 2015 for nonprofits

with annual revenues less than \$10 million in the most recent fiscal year. Separately, the provisions of the Act which require nonprofits, wherever formed, to make annual financial reports to the Attorney General have been amended to increase the annual gross revenue thresholds for reporting and the type of filing required. All nonprofits soliciting donations in New York should become conversant with the changes to both the Financial Reporting and Audit Oversight provisions in the Act.

The New York Nonprofit Revitalization Act is a welcome modernization of the laws applicable to nonprofits and should bring much needed relief to organizations that have been hampered by outdated regulations and red tape for so many years, making operations easier and less onerous while allowing for improved governance and oversight. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader's Nonprofit Organizations Practice Group or to speak with a member of the Firm, please contact:

*Sarah Hewitt
Chair, Corporate and Finance Practice Group
212-973-8123; 215-751-2123
shewitt@schnader.com*

*Cynthia G. Fischer
Co-Chair, Nonprofit Organizations Practice Group
212-973-8175
cfischer@schnader.com*

*Marla K. Conley
Co-Chair, Nonprofit Organizations Practice Group
215-751-2561
mconley@schnader.com*

www.schnader.com

©2013 Schnader Harrison Segal & Lewis LLP