



## Not-For-Profit Organizations Practice Group

### Revitalization of New York Not-for-Profit Corporation Law

Syracuse, New York

January 2014

After much anticipation, Governor Andrew Cuomo signed the Non-Profit Revitalization Act of 2013 (the "Act") on December 18, 2013. The Act passed both houses of the New York legislature in July and, with the Governor's approval, this legislation represents a historic milestone and the first major overhaul of the New York Not-for-Profit Corporation Law (the "NPCL") in over 40 years.

The Act goes into effect on July 1, 2014 and is intended to modernize and simplify not-for-profit formation and governance. Material changes to the NPCL include:

1. **Elimination of Letter Types** – Rather than categorizing not-for-profit corporations as Type A, Type B, Type C, and Type D, the entities will now be classified as either "charitable" or "non-charitable".
2. **Modernization of Governance** – The Act recognizes the use of modern technology in governance and now permits electronic communications (email and fax) as a form of providing notice, designation of a proxy, and as a method for directors and members to give unanimous written consent in lieu of a meeting. The Act also recognizes the use of video conferencing for participating in board or committee meetings.
3. **Corporate Integrity:**
  - a. **Required Conflict of Interest Policy** – The Act requires all not-for-profit corporations to adopt a conflict of interest policy. Corporations with annual revenue in excess of \$1 million and twenty or more employees must also adopt a whistleblower policy.
  - b. **Limitation on Employees Serving as Chair** – Effective January 1, 2015, and in an attempt to create board independence, the Act prohibits employees from serving as chair of the board or in an officer position with similar responsibilities.
  - c. **More Stringent Related Party Transaction Rules** – The Act updates the definition of what constitutes a "related party" and prohibits all corporations from entering into a related-party transaction unless it is fair, reasonable and in the best interest of the corporation. For charitable organizations the board may approve a related-party transaction only if it has considered alternative transactions and approved the transaction with a majority vote of disinterested directors participating in the meeting. The Act also permits the New York State Attorney General broad discretion to enjoin, void or rescind any related-party transaction that is not reasonable and in the best interest of the corporation at the time the transaction was approved.

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#### 4. Audit Procedures and Financial Thresholds:

- a. **Establishment of an Audit Committee** – All organizations that are required to file an independent auditor's report with the Attorney General's Office under Section 172-b of the New York Executive Law are now required to establish an audit committee comprised of independent directors. The audit committee is tasked with selecting and retaining an independent auditor and reviewing the results of the audit. The audit committee is also charged with overseeing adoption, implementation, and compliance with the mandatory conflict of interest and whistleblower policies.
- b. **Thresholds for Independent Financial Audit and Review** – The Act raises the financial thresholds dictating which organizations must obtain an annual financial audit or review from an independent CPA. Effective July 1, 2014, the annual gross revenue threshold for the independent CPA audit is \$500,000, an increase from the current \$250,000. The audit threshold will be raised to \$750,000 in 2017 and to \$1 million in 2021. The annual gross revenue threshold for an independent CPA's annual financial review will be raised to \$250,000 (currently \$100,000).

5. **Streamline Approval Process** – The Act allows charitable entities to proceed with certain fundamental corporate transactions (changes to the certificate of incorporation, mergers, sale of all or substantially all assets, and dissolutions) with the approval of the Attorney General (rather than the onerous two-step process of judicial approval followed by notice to the Attorney General). The process for non-charitable entities remains unchanged.

6. **Real Property Transactions** – Small or routine real estate transactions no longer require the approval of two-thirds of the board. A simple majority of the board, or a board authorized committee, may now approve the purchase, sale, mortgage, or lease of real property so long as the property in question does not constitute "substantially all" of the assets of the corporation.

**For more information on the New York Non-Profit Revitalization Act and its impact on your organization please contact any of the following Bousquet Holstein attorneys:**

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