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In December 2013, Governor Cuomo signed into law the Nonprofit Revitalization Act of 2013 (the NPRA or the Act). The Act contained many welcome changes for nonprofit organizations, and elements of the law eased the burdens relating to certain major corporate transactions, such as mergers. The Act also included changes directed at increasing operational transparency and optimizing fiduciary oversight, duplicating at the state level many of the safeguards that had been in place in federal tax law for decades.

Amendments to the Act were made each year thereafter with the most recent amendments signed into law on November 28, 2016. The 2016 amendments provide relief in some aspects, but New York still imposes extraordinary governance challenges on nonprofit organizations formed in the state. Most of the 2016 amendments go into effect on May 27, 2017, with the exception of the provisions relating to an employee serving as chair, which went into effect on January 1, 2017.

Many of the changes in the Act do not impact the day-to-day operations of a nonprofit organization and include:

- eliminating the New York corporate "typing" system;
- eliminating unnecessary agency pre-approvals for incorporation;
- clarifying the incorporation process; and
- allowing nonprofit organizations seeking to amend purposes, or to merge or sell assets the option of obtaining approval from the Attorney General in lieu of court approval.

However, some changes were designed to improve oversight and governance of nonprofits that require changes to governing documents as well as some operating policies.

Defining "entire Board"

The Act changed the definition of "entire Board" that was a bit amorphous. Under the previous law, it was not clear regarding what this term would mean without a specific resolution from the Board setting the number of directors. The Act still allows the Board to set the actual number by resolution or, in the alternative, it will automatically mean the number of directors after the most recently held meeting of directors.

Committees

The Act clarified the use of committees. The previous law referenced standing committees and special committees. Many organizations interpreted "standing" committees to be committees that an organization has all the time when in fact it refers to committees that are comprised entirely of Board members. The same applied to "special" committees. The Act clarified the proper use of committees. Authority under the corporate law is a function of governing board action, either direct or indirect. So when the governing board elects a committee of the board—comprised of individual board members who already have the triune fiduciary duties to the corporation—it has the power to delegate the power of the board, or at least some portion of it not otherwise prohibited by law.

In contrast, a committee of the corporation can be created by mere appointment by, say, a board chairperson and may include non-fiduciaries. The mere appointment of these individuals does not give them the rights, or responsibilities, attendant to full board service. So committees of the corporation can provide sage, measured advice to the board, but cannot act on behalf of the organization.

The 2016 amendments adopt some further refinements on committee structure. Specifically, the amendments require election of the Executive Committee by a majority of the entire board unless there are 30 or more directors, in which circumstances a three-quarters vote of directors present may elect. All other committees of the board may now be elected by a majority of a quorum, similar to other board actions. Many organizations continue to use the majority of the entire board standard for all committees of the board to avoid having different standards for various committees.

The 2016 amendments also clarify the statutory limitations on the executive and other board committees by collecting those items in N-PCL Section 712. Still missing, but also applicable, is the requirement for board approval of certain real property transactions under N-PCL Section 509.

Audit Oversight

The Act imposed several requirements with respect to required audits as well as audit oversight generally. The audit requirements under the Act flow from the charitable solicitation registration and reporting under Executive Law Article 7-A. If an organization is required to submit an audit with its annual report to the Charities Bureau, then it is subject to the Act's audit requirements.[1] The Act now **prescribes** certain actions items that must be taken if an organization meets the audit threshold. Therefore, it is important that an organization review its audit committee charge and audit policies/procedures to ensure compliance with these new requirements because they are no longer optional or considered best practices.

Independent Directors

The Act created a new standard of "independent directors" for the approval of specified audit oversight functions, bifurcating the governing board into those who possess full fiduciary oversight and those who do not. The identification of independent directors must be done prospectively, not based on the circumstances of any particular transaction or relationship before the board.

With the most recent amendments, "independent directors" are directors who:[2]

(a) are not, and have not been within the last three (3) years, an employee or Key Person of the Corporation or an Affiliate;
(b) do not have a Relative who is, or has been within the last (3) years, a Key Person of the Corporation or an Affiliate;
(c) have not received total compensation exceeding $10,000 in any of the last three (3) fiscal years from the Corporation or an Affiliate;
(d) do not have a Relative who meets the requirements under (c);
(e) are not a current employee of or do not have a Substantial Financial Interest in an organization that (i) provided payments, property, or services to; or (ii) received payments, property, or services from, the Corporation or an Affiliate if the amount paid by the Corporation to the organization or received by the Corporation from the organization for such property or services exceeds the following thresholds in any of the last three (3) fiscal years:

Consolidated Gross Revenue[3]	Threshold Amount
Less than $500,000	Lesser of $10,000 or 2% of consolidated gross revenue
$500,000 or more but less than $10 million	$25,000
$10 million or more	$100,000

[1] The current audit threshold is annual revenue over $500,000 and will increase to $750,000 on July 1, 2017; and to $1 million by July 1, 2021

[2] Capitalized terms are defined in the draft Audit Committee Charter we provided to the organization.

[3] Consolidated gross revenue refers to the vendor who provides payments to or receives payments from the Corporation or an Affiliate.

(f) do not have a Relative who is a current officer of or has a Substantial Financial Interest in an entity described in (e) above;
(g) do not own (wholly or partially) or are a director, officer, or employee of the Corporation's outside auditor or worked on the Corporation's audit at any time over the last three (3) years; and
(h) do not have a Relative who meets the requirements under (g).

Related Party Transactions/Conflicts of Interest.

The Act deals separately with "related party transactions" and those that may involve a "conflict of interest." However, in practice most organizations will think of these two items in tandem and we are recommending that organizations adopt a single policy to deal with these types of transactions. The Act requires that specific actions be taken in connection with "related party transactions" which the primary change being that "related party transactions" need to be approved by the board or designated committee of the board before being entered into. The Act further prescribes that the interested party cannot be present during discussion or vote on the transaction (this is currently optional).

The reach of the original definition of "related party transaction" was so broad that many organizations found compliance practically impossible. In an attempt to make the law workable, the Attorney General's Charities Bureau published non-binding guidance to carve out certain transactions from its enforcement actions. Many of these carve-outs are now included as statutory exceptions including:

- *de minimis* transactions;
- transactions not customarily reviewed by the board (or boards of similar organizations) in the ordinary course ***and*** offered on terms available to the public; and
- benefits provided to individuals as a member of a charitable class served.

Nonprofits still need to determine thresholds for both the *de minimis* and "not customarily reviewed by the board" standards, preferably by written policy.[4]

What were considered "best practices" are now **requirements**. Therefore, it is important to make sure that an organization's policies and procedures fully comply with the Act. Whether or not the Board follows these procedures, the Attorney General will have the power to bring an action to enjoin or rescind any related party

[4] We recommend that organizations adopt a written contract approval policy to set specific standards for terms no otherwise defined by the Act.

transaction that is not reasonable or in the best interests of the nonprofit, and to seek double damages in cases of willful misconduct.

Finally, the Act also imposes a requirement that a director complete a written conflicts disclosure form prior to election and annually thereafter.

Whistleblower Policy

An organization is required to maintain a whistleblower policy if it has twenty or more employees and annual revenue in excess of $1 million. An organization will need to review its policy to ensure compliance with the Act which includes volunteers who provide substantial services to the organization on both the distribution of the policy and its coverage. The policy will also need to cover suspected violations as well as organizational policies. If an organization has adopted a whistleblower policy to comply with other applicable law, then it may continue to use that policy.

Chair of the Board

The Act originally included a prohibition against an employee serving as chair or officer with similar authority. The effective date of this provision was delayed several times and the most recent amendments include a provision that seems to bring this issue to a final conclusion. Effective January 1, 2017, an employee may now serve as chair if the board approves service by two-thirds vote of the entire board and contemporaneously documents its approval. The amendments also make it clear that the employee shall not be considered an independent director.

Use of Fax or Electronic Communications.

The Act formally recognized the use of fax or e-mail for certain communications (i.e., Board notice, waivers of notice, written consents). Many organizations were utilizing these processes, relying on New York's electronic signature laws, but the Act now specifically authorizes their use. However, the Act contains some special requirements on electronic notice – a two strikes and you are back to "old" requirements. So, it is important to incorporate these provisions.