

# Non-Profit Revitalization Act

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The Non-Profit Revitalization Act of 2013 (the Act) is the first major overhaul of New York's Not-for-Profit Corporation Law (the NFP Law) in decades. Its provisions apply not only to non-profits that are incorporated in New York, but also to non-profits that are registered in New York for charitable solicitation purposes. Most provisions became effective on July 1, 2014. Many non-profits will need to amend their bylaws, incorporation documents and policies or modify their governance structure in order to benefit from the changes or to comply with its requirements.

## Types

Before the Act, not-for-profit corporations were of four types: "A" (often trade associations or civic groups), "B" (corporations formed for purposes specified in the Internal Revenue Code for "501(c)(3)s"), "C" (any lawful business purpose to achieve a public objective), or "D" (any non-profit formed under another law of the state, such as the Private Housing Finance Law for low income housing developers). Now there are just charitable and non-charitable corporations. Any Type "B" or "C" is deemed to be charitable, as is any Type "D" formed for charitable purposes. Any Type "A" or "D" formed for non-charitable purposes are non-charitable. Non-charitables are less regulated.

## Modernization

Electronic communication (fax and email) is explicitly permitted for notices, including waivers of notice of member and director meetings, member proxies, and consent in lieu of an in-person meeting or unani-

mous written consent by directors and members. Note that "unanimous" means ALL board or committee members, not just those who respond, and does not allow for voting by email or fax. Board members may participate in a meeting of the board or any committee through videoconference. An organization's bylaws also must be amended.

## Transaction Approvals

Generally, only consent of the Attorney General is required for real estate transactions, mergers and consolidations or dispositions of all or substantially all assets of charitable corporations. The Attorney General may, however, determine that court approval should be sought. The Act does not state the criteria to be used by the Attorney General to determine when to refer the approval to the court, with one exception: if the corporation will become insolvent following completion of the transaction.

Board approval of real estate transactions now requires only a simple majority to authorize the purchase, sale, mortgage, or other disposition of real property that does not constitute all, or substantially all, of the assets.

## Governance

The terms "standing committee" and "special committee" have been replaced by "committee of the board" and "committee of the corporation." Only committees of the board, those comprised entirely of board members, can bind the board. Organizations should review their bylaws to be sure that any committees of the corporation (those whose composition includes non-board members) have no authority to bind the board. Committees of the corporation may make policy recommendations and other-

wise function in an advisory capacity.

Under new §715 of the NFP Law, a non-profit is prohibited from entering into a "related party" transaction unless it has determined that the transaction is fair, reasonable and in the non-profit's best interest at the time of the determination. The board is required to expressly consider alternatives to the related party transaction, approve it by a vote of a majority of ALL directors then in office (not just those present), and fully document in the minutes the basis for the approval and the alternatives considered.

All non-profits must adopt a conflict of interest policy that complies with §715-a of the NFP Law. Non-profits with more than 20 employees and annual revenue greater than \$1 million are now required to have a whistleblower protection policy that complies with

§715-b of the NFP Law. Compliance with these policies is to be overseen by the audit committee or the independent directors of the board.

All non-profits, including those incorporated outside New York, that are subject to registration for charitable solicitation in New York and required to file an independent auditor's report with the Attorney General must have an audit committee of the board comprised of independent directors responsible for retaining an independent auditor and reviewing audit results. This oversight may, in the alternative, be performed by the independent directors on the board. The oversight responsibilities are set forth in great detail in §712-a of the NFP Law.

The revenue thresholds for which organizations conducting charitable solicitations in New York are

required to file certain financial reports with the Attorney General will become progressively higher as follows: \$500,000 as of July 1, 2014; \$750,000 as of July 1, 2017; and \$1,000,000 as of July 1, 2021.

Effective January 1, 2015, there is an express prohibition on an employee serving as chair of the board or holding any title with similar responsibilities.

## Conclusion

The Act was intended both to modernize the procedures for corporate formation and board operations of non-profits in New York and to improve the quality and transparency of their governance. Directors of non-profits, especially those that receive funding from governmental agencies, should review their corporate documents and seek counsel, if necessary, to achieve compliance. The Attorney General's website ([www.charitiesnys.com/guides\\_advice\\_new.jsp](http://www.charitiesnys.com/guides_advice_new.jsp)) is also a resource for board members and staff.