

December 21, 2015

NEW REVISIONS TO NOT-FOR-PROFIT CORPORATION LAW APPLICABLE TO NEW YORK CORPORATIONS

On December 11, 2015, Governor Cuomo signed the third of three bills that, collectively, effectuated a number of small but substantive revisions to the New York State Not-for-Profit Corporation Law. Unlike the wholesale overhaul of that law brought about by the adoption in 2013 of the Nonprofit Revitalization Act, these recently enacted revisions were primarily intended to either refine or clarify certain statutory definitions or to codify certain best governance practices that, although commonly employed by many nonprofits for the better part of the last decade, did not work their way into that Act. Revisions that are wholly technical in their nature are not addressed in this Legal Alert. Except as otherwise noted, the several revisions discussed below became effective upon their enactment.

Most of the changes will make governance easier if organizations decide to take advantage of them. All nonprofits incorporated in New York will need to review their bylaws to determine if amendments are necessary or advisable. This Legal Alert outlines some of the appropriate steps nonprofit managers and directors should take to update their respective organizations' bylaws and other governance documents. We suggest that all nonprofits incorporated in New York review their bylaws to:

- add to the definition of “independent director” that a director who has certain specified relationships with the corporation’s auditing firm is not independent;
- add to the term “domestic partner” to the definition of “relative”;
- consider whether any of the clarifications and optional procedures described below apply to their organization.

We also recommend that nonprofits incorporated in New York that are required to have a Whistleblower Policy (those that have 20 or more employees and in the prior fiscal year had annual revenue over \$1 million) should post the policy on their website. Under the new law, posting will satisfy the requirement to distribute the policy to directors, officers, employees, and volunteers providing substantial service. Distributing the policy to each director, officer, and employee, and to volunteers where practicable, is still a best practice.

Summary of Revisions

- *NPCL 102(a)(6-A)*: The definition of “entire board” now permits boards to designate a number within a range set forth in the bylaws rather than the number of directors as of the most recent election; includes reference to appointed as well as elected directors; clarifies that the number includes directors whose terms have not yet expired.

- *NPCL 102(a)(19)*: The definition of “affiliate” now excludes entities that are under common control.
- *NPCL 102(a)(21)*: The definition of “independent director” now excludes a director if such director or a relative is currently an owner (whether wholly or partially), director, officer or employee of the corporation’s auditing firm or has worked on the corporation’s audit at any time during the past three years; expands the definition of “payment” as used therein to exclude dues or fees paid to the corporation for services which the corporation performs as part of its nonprofit purposes, provided that such services are available to individual members of the public on the same terms, thereby enabling a director employed by, or having a substantial interest in a an entity that has paid such dues or fees to retain independent status.
- *NPCL 102(a)(22)*: The definition of “relative” is expanded by substituting “spouse or domestic partner” for “spouse.”
- *NPCL 102(a)(33)*: The definition of “related party” has been expanded to include “any other person who exercises the powers of directors, officers or key employees over the affairs of the corporation or an affiliate thereof.”
- *NPCL 515(b)*: Clarifies that nothing herein or in *NPCL 715(h)[formerly (g)]* will preclude a director from deliberating and voting upon such director’s compensation for board service if such compensation is made available or provided to all directors of the corporation on the same or substantially similar terms.
- *NPCL 702(b)(1)*: Permits a corporation with members to change the number of its directors solely by board action, subject to certain limitations, provided the bylaws contain a specific provision to that effect; a vote of members is no longer required.
- *NPCL 708(d)*: Clarifies that a quorum is not lost when a director present at a board meeting leaves that meeting so as to permit deliberations and a vote upon a conflict of interest or related party transaction involving such director.
- *NPCL 712(e)*: Clarifies that committees of the corporation shall be elected or appointed according to the by-laws, or if not set forth in the by-laws, in the same manner as officers of the corporation; also clarifies that non-directors can be members of committees of the corporation.
- *NPCL 712-a (e)*: Clarifies that notwithstanding the requirement that only independent directors may participate in deliberations and a vote on a conflict of interest or a related party transaction, the person who has an interest therein may be requested by the independent directors to appear before them and present background information or answer questions prior to the onset of such deliberations or vote.
- *NPCL 713 (f)*: The effective date of this subsection, which will prohibit an employee of the corporation from serving as chair of its board or from holding any title with

similar responsibilities, has been rolled forward from January 1, 2016 to January 1, 2017.

- *NPCL 715(e) and (h)* [Conflict of Interest Policy]: Subsection (e) now clarifies that the fixing of “compensation” of officers, if not done in or pursuant to the bylaws, requires the affirmative vote of a majority of the board unless a higher proportion is required; previously, only the fixing of officers’ salaries required such a vote. Subsection (h) [formerly (g)] has been clarified to state that a related party may not participate in deliberations or a vote on a related party transaction in which the related party has an interest; the prior text had precluded a related party from participating in deliberations and a vote on all related party transactions irrespective of whether or not the related party had any interest therein.
- *NPCL 715-a (b)(3)* [Conflict of Interest Policy]: Clarifies that notwithstanding the requirement that only directors without a conflict may participate in deliberations and a vote on a transaction giving rise to that conflict, the person who has an interest therein may be requested by the board or committee to appear before them and present background information or answer questions prior to the onset of such deliberations or vote.
- *NPCL 715-a (c)* [Conflict of Interest Policy]: Adds a “designated compliance person” as an alternative to the corporation’s secretary as the recipient of directors’ initial and annual written statements as to the existence or absence of conflicts of interest.
- *NPCL 715-b(3)* [Whistleblower Policy]: Permits a corporation to post its Whistleblower Policy on its website or at its office in a conspicuous location accessible to employees and volunteers in lieu of distributing copies of such policy to its directors, officers, employees and to volunteers who provide substantial services to the corporation.

This alert is meant to provide general information only, not legal advice. If you have any questions, please contact Laura Abel at Lawyers Alliance for New York at (212) 219-1800 x283.

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