Lawyers Alliance *for* New York

Connecting lawyers, nonprofits, and communities

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New York Nonprofit Revitalization Act of 2013 -- Frequently Asked Questions

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Enacted in 2013, the New York Nonprofit Revitalization Act ("NPRA" or "Act") comprehensively overhauled the New York Not-for-Profit Corporation Law ("N-PCL"). Most provisions of the NPRA took effect July 1, 2014. Since, then, the NPRA has been amended several times, most recently in legislation signed in December 2016. This FAQ's document is intended to help nonprofit organizations understand some of the trickier aspects of the NPRA and its amendments.

Amending Corporate Purposes

Question: How will a not-for-profit corporation amend its Certificate of Incorporation under the new system?

Answer: Charitable not-for-profit corporations amending their corporate purposes will still have to get approval for that amendment and then file the amendment with the Department of State. However, section 804(a) of the New York Not-for-Profit Corporation Law ("N-PCL") provides that charitable corporations may either secure the consent of either the Supreme Court upon notice to the Attorney General, or of the Attorney General's office itself. Previously, the only option was to obtain the consent of the Supreme Court upon notice to the Attorney General.

Applicability

Question: Does the Act apply if our organization is not a public charity under federal law?

Answer: The Act applies to all not-for-profit corporations formed under New York State law, even if the corporation is a private foundation under federal law, and even if the organization is not tax exempt at all under section 501(c)(3) or other provisions of the Internal Revenue Code ("IRC").

Question: Does this Act apply to not-for-profit corporations incorporated out of state, but operating in New York?

Answer: If an organization is registered to conduct charitable solicitations or to hold charitable assets in New York State, then the changes in audit thresholds apply regardless of the organization's state of incorporation. The other provisions of the NPRA do not apply to organizations incorporated in other states but operating in New York.

Question: If we have a fiscal sponsor and are working on becoming a separate tax exempt corporation, does this new law apply to us?

Answer: Formation as an entity is a matter of state law; 501(c)(3) tax-exempt status is a matter of federal law, in particular the IRC. If the organization is incorporated under the N-PCL, then it will need to comply with the N-PCL regardless of whether or not it has yet to receive tax-exempt status.

Attorney General Review

Question: Is there any indication of the circumstances under which the New York Attorney General's office ("NYAG") will exercise its discretion to review a dissolution, sale of assets, or merger, versus when it will require Supreme Court review?

Answer: According to guidance issued by the NYAG on June 23, 2014, circumstances in which the NYAG may determine that Supreme Court review of a merger is appropriate include: (i) if members of a constituent corporation or members of the public have complained or expressed opposition, (ii) if the transaction will have a significant impact on the public or raises conflicts of interests, (iii) if assets of a merging corporation are held for a specific purpose requiring court approval, and/or (iv) if the NYAG has objections that have not been resolved after discussion.
See http://www.charitiesnys.com/pdfs/mergers_and_consolidations.pdf

According to guidance issued by the NYAG on September 24, 2014 and updated February 3, 2016, circumstances in which the NYAG may determine that Supreme Court review of a sale or other dispositions of assets is appropriate include: (i) if the corporation is insolvent, (ii) if the NYAG has received complaints or objections from interested parties entitled to notice, (iii) if the transaction is unusually complex or will have an impact on the public, and/or (iv) if the NYAG has objections that have not been resolved after discussion.
See http://www.charitiesnys.com/pdfs/sales_and_other_dispositions_of_assets.pdf

According to guidance issued by the NYAG on October 6, 2014, circumstances in which the NYAG may determine that Supreme Court review of a dissolution with assets is appropriate include: (i) if the NYAG has received complaints or objections from interested parties and/or (ii) if the NYAG has objections that have not been resolved after discussion.
See http://www.charitiesnys.com/pdfs/dissolution_with_assets.pdf

Audit Oversight

Question: If we're not required to have an audit, but we do have an audit, do the same requirements as to Board oversight apply?

Answer: The provisions related to the audit function are specifically tied to revenue thresholds. If your organization has less than $750,000 in revenue and chooses to complete an audit, then it does not have to comply with the audit requirements of the NPRA. Having said that, it is advisable as a best practice for the Board participate in the selection of the auditor, set the scope of the audit and speak with the auditor after the audit is completed.

Question: How does the nonprofit demonstrate that the Board or Audit Committee has reviewed the selection of the auditor. Is email sign off sufficient?

Answer: As to how the Board or Audit Committee demonstrates that it has signed off on the selection of the auditor, the scope of the audit and the final audit report, the best way to memorialize this review is to note it in the minutes of a Board meeting or in the minutes of a committee meeting. Email approval would be appropriate if it was in the form of unanimous written consent by the Board or board committee, without a meeting. For example, if the

Audit Committee was not meeting in person or by phone and you wanted to circulate the auditor's engagement letter to the committee for approval, and committee members were going to approve it through unanimous written consent, then the email sign off would be fine as long as each member emails their consent.

Question: Can our Finance Committee serve the function of the Audit Committee?

Answer: If an organization is required to file audited financial statements, New York law provides that the retention of the auditors and review of the audit results and any management letter must be approved by the Board of Directors or "an Audit Committee solely comprised of Independent Directors." If the organization has a Finance Committee but not an Audit Committee, then consider expanding the scope of the Finance Committee's authority to include audit oversight and changing the committee's name. Some practitioners interpret the Act as requiring a separate committee whose function is to oversee the audit process.

Question: Are we required to change auditors; and if so, how often do we need to do so?

Answer: New York law does not require an organization to change auditors. There is not a clear consensus among nonprofit leaders about whether or how often it is necessary to change auditors. The decision should be informed by the auditors' performance. A review of that performance by the Board, or by an Audit Committee comprised solely of Independent Directors, is required by the law.

Question: Does the auditor need to present its findings to the entire Board or just a smaller committee of the Board?

Answer: The Board or Audit Committee must review the results of the audit and any related management letter with the independent auditor. According to guidance issued by the NYAG on February 24, 2015, review of communications to those charged with governance resulting from the audit (including the management letter) requires a conversation between the Committee and the independent auditor in which audit committee members participate; a face-to-face meeting is not required. If the organization has annual revenue of $1,000,000 or more and Board has delegated authority to the Audit Committee to oversee the audit process, then the auditor only needs to meet with the Audit Committee. The Audit Committee is then required to report to the full Board. If the corporation does not have an Audit Committee, then the auditor will need to meet with the Board.
See http://www.charitiesnys.com/pdfs/AuditCommittees.pdf.

Question: What would be an example of a suitable independent Director in relation to the continuing auditor relationship?

Answer: A suitable example of an Independent Director would be a volunteer member of the Board of Directors who does not receive any compensation from the corporation or have a business relationship with the corporation, is not a relative of a staff member or someone who has a business relationship with the corporation, is not an owner, director, officer or

employee of the outside auditor and has not worked on the corporation's audit, and does not have a relative with such a relationship with the auditor.

Question: What does it mean that Boards of Directors of organizations with annual revenue of $750,000 or more must oversee specific aspects of the audit process?

Answer: The 2013 law increased the threshold amounts for requiring a CPA audit.

Boards of organizations with revenue of $500,000 or more must:

1. Oversee the audit of the organization's financial records;
2. Annually renew or retain the auditor; and
3. Review results of the audit with the auditor and any related management letter.

This threshold increased to $750,000 for annual reports filed with the NYAG on or after July 1, 2017.

Additionally, for organizations with revenue of $1 million or more, either the Board or an Audit Committee comprised *solely of independent directors* must oversee the corporation's accounting and financial reporting processes and audit. The oversight must include the following:

1. Before the audit, reviewing the scope and planning of the audit with the auditor.
2. After the audit, reviewing and discussing additional items with the auditor.
3. Annually considering the auditor's performance and independence.
4. Reporting on the Audit Committee's activities to the Board (if these duties are performed by an Audit Committee instead of the full Board).

According to guidance issued by the NYAG on February 24, 2015, members of current management who are responsible for developing and maintaining financial controls should not be involved in the Audit Committee's performance of these four duties. Further, the NYAG guidance provides that only independent directors may participate in any board or committee deliberations or voting relating to these duties.
http://www.charitiesnys.com/pdfs/AuditCommittees.pdf

Question: Can the Treasurer serve on the Audit Committee?

Answer: The NPRA permits a Treasurer who is an Independent Director to serve on the Audit Committee. Best practices suggest, however, that the Treasurer should not Chair or sit on the Audit Committee because part of the purpose of the audit is to check the performance of the Treasurer and a Treasurer who serves on the Audit Committee might unduly influence the auditor's work. Additionally, if the organization has annual revenue of $1,000,000 or more, then according to guidance issued by the NYAG on February 24, 2015, members of current management who are responsible for developing and maintaining financial controls should not be involved in the Audit Committee's performance of its duties.
http://www.charitiesnys.com/pdfs/AuditCommittees.pdf

Question: Can an Executive Director attend Audit Committee meetings?

Answer: The N-PCL does not prohibit an Executive Director from attending meetings of the Audit Committee. However, section 712-a(e) of the N-PCL states that only independent directors may participate in deliberations or voting relating to issues before the Audit Committee. Best practices suggest that the Audit Committee should meet for at least a portion of the meeting with the outside auditor without staff present, to discuss the performance of management.

Question: If the organization does not have an Audit Committee and the full Board oversees the audit, is it sufficient to simply note that in the minutes?

Answer: Yes, it would be sufficient to note in the board minutes that the Board is serving the function of the Audit Committee.

Question: Is a nonprofit corporation (foreign or domestic) that is registered with the Attorney General solely under the Estates, Powers and Trusts Law ("EPTL"), rather than under Article 7-A of the Executive Law, subject to the new rules relating to audit committees?

Answer: No, section 712-a of the N-PCL only references corporations required to report under the Executive Law (because they are registered to solicit contributions). Corporations that are only required to register under the EPTL do not have to meet the new audit requirements.

Question: Are 501(c)(4) corporations that are registered to solicit in New York subject to the audit committee requirements assuming they meet the thresholds? It appears that they are.

Answer: A New York Not-for-Profit Corporation that is required to register and report under the Executive Law because it solicits contributions in New York will have to satisfy the audit requirements in Section 712-a regardless of which subsection if any, of the Internal Revenue Code, exempts it from federal taxation.

Audit Thresholds

Question: If a not-for-profit corporation is required to have an audit because its revenue exceeds the financial threshold, while its affiliated entity is a not-for-profit corporation with revenue lower than $750,000, does the related entity need to have an audit or is a fiscal review acceptable?

Answer: If the affiliated entity is separately incorporated and separately files Form 990's and CHAR500's, then the affiliate is not required to file completed audited financial statements and can file an independent certified public accountants review report if the revenue is between $250,000 and $750,000.

Question: Do the Act's amended filing requirements apply to religious organizations?

Answer: Section 172-A of the Executive Law, which exempts religious organizations from the filing requirements, including audit filings with the state, has not been amended. Therefore, religious organizations are still exempted from filing with the state.

Question: Does gross revenue for purposes of determining if an audit is necessary include amounts gained through fundraising?

Answer: Gross revenue and support for purposes of determining if an audit is necessary consists of all revenue of the organization including revenue raised through fundraising. According to guidance issued by the NYAG on April 15, 2014, all income received by the organization from any source, including contributions, grants, fees and other types of revenue, is included.
www.charitiesnys.com/pdfs/NYSGuidance2014_Audit%20Thresholds%20and%20Fee.pdf

Question: Our organization's budget is approximately $350,000, so we are under the new audit threshold. Is it still recommended that we go through the audit process?

Answer: An audit is not legally required. However, having an audit is certainly best practices and increases fiscal transparency, so there are reasons to conduct an audit even if it is not legally required.

Question: Could you please explain the difference between an "audit by an independent CPA" and an "accountant's review report by an independent CPA"?

Answer: Here is a link to the Greater Washington Society of CPAs Educational Foundation website that contains an explanation of the difference between an audit and an accountant's review: http://www.nonprofitaccountingbasics.org/audit/audit-vs-review-vs-compilation

Board Chair

Question: Even though New York law says that the corporation can elect either a President or Chair or both, are these in essence the same positions? If a corporation has only a President and not a Chair, can the President be an employee?

Answer: A corporation can have both a President and a Chair. If the corporation only has a President then beginning January 1, 2017, that position cannot be filled by an employee unless the Board unless the board approves such employee serving as chair of the board by a 2/3 vote of the entire board and contemporaneously documents in writing the basis for the board approval. This is based upon Section 713(f) of the N-PCL.

Question: Our Board Chair volunteers substantial services to our organization. Can she continue as Board Chair after January 1, 2017?

Answer: Yes, the limitation only applies to paid employees serving as Board Chair.

Charitable Reporting

Question: Can we leave off grant writers on the CHAR500?

Answer: Grant writers are longer considered Fundraising Counsel (section 171-a(9) of the Executive Law) and, therefore do not have to be included on the CHAR500 Schedule 4a.

Charitable Trusts

Question: How will the NPRA affect private foundations and charitable trusts? In particular, do the requirements related to Audit Committees and independent directors apply?

Answer: The Act adds §8-1.9 of the Estates, Powers and Trusts Law to make applicable to charitable trusts the new requirements regarding audits, related party transaction, conflicts of interest policies and whistleblower policies. New York not-for-profit corporations that are exempt under IRC 501(c)(3) and classified as private foundations must comply with the N-PCL.

Committees

Question: What are the limits on the authority of a Committee of the Board?

Answer: Under the NPRA, a Committee of the Board may have delegated authority to bind the corporation on any matter except:

(a) The submission to the Member of any action requiring the Member's consents under the N-PCL and any successor provisions or amendments thereto;
(b) The filling of vacancies in the Board or in any committee;
(c) The fixing of compensation of the directors for serving on the Board or on any committee;
(d) The amendment or repeal of the bylaws or the adoption of new bylaws;
(e) The amendment or repeal of any resolution of the Board that by its terms shall not be so amendable or repealable;
(f) The election or removal of officers and directors;
(g) The approval of a merger or plan of dissolution;
(h) The issuance of a recommendation for member action regarding, or the authorization of, the sale, lease, exchange or other disposition of all or substantially all the assets; and
(i) The approval of amendments to the certificate of incorporation.

Question: Can any committee bind the corporation or only a committee authorized in the bylaws to bind the corporation?

Answer: Only a Committee of the Board (consisting of 3 or more board members) and authorized by the Board can bind the corporation. However, Boards should be aware that they could be held responsible for agreements made by committees that appear to third parties to have authority to bind the corporation.

Question: Does every bylaw that refers to "standing" committees need to be revised and replaced with a specific designation of committees as either "of the corporation" or "of the board"?

Answer: If the composition and role of a Committee complies with N-PCL § 712, it is not necessary to immediately revise bylaws to eliminate the terms "standing" or "special" committee. We recommend, however, that the Board review the bylaws to determine what changes are necessary in order to comply with the NPRA and to begin to implement those changes.

Question: Can a Committee of the Board revise bylaws?

Answer: No, a committee of the board cannot amend the bylaws. Section 712(a)(4) of the N-PCL prohibits a committee from adopting, amending, or repealing bylaws.

Question: We have a Committee of the Board with full authority, and at least 3 board members. This committee, however, has one or more non-voting members of the committee who are not board members but participate in the committee. Are they now NOT allowed to serve on the committee?

Answer: If the committee will be a Committee of the Board, the non-board members can attend meetings and participate in the deliberations but just cannot vote. The only exception to this rule relates to deliberations by the Audit Committee. Section 712-a(e) of the N-PCL states that only independent directors may participate in deliberations or voting relating to issues before the Audit Committee.

Conflict of Interest Policy

Question: Does the sample IRS conflicts policy fulfill the new N-PCL requirements?

Answer: No, the sample IRS conflicts policy does not fulfill the N-PCL requirements. It is a sample, not a required version of a policy.

Question: If you adopted a conflicts of interest policy before being required to do so are you safe?

Answer: Unless your organization adopted a conflict of interest policy as ***required*** by another federal, state or local law the conflict of interest policy will have to be updated for compliance with the N-PCL. Having adopted a conflict of interest policy in connection with an application for federal tax exemption or completing the Form 990 does not constitute a "requirement" exempting the organization from compliance with the N-PCL.

Question: What is the timeline, and the best practice, for staff, management and the Board to sign off on conflicts disclosure forms. Is it yearly?

Answer: The NPRA requires that new board members complete a disclosure form prior to joining the Board and annually thereafter. The disclosure forms are usually executed in connection with the annual meeting of the corporation or at the end or beginning of the fiscal year. According to guidance issued by the NYAG on April 13, 2015, officers and key persons also must submit an annual conflicts statement.
http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf

Question: Are there any policies other than a conflict of interest policy or whistleblower policy that are now required of not-for-profit boards, for example, anti-nepotism, code of ethics, records retention, diversity or other personnel policies?

Answer: Beyond a conflict of interest policy (for all New York not-for-profit corporations) and a whistleblower policy (for organizations with $1 million or more in revenue and 20 or more employees), the NPRA does not require an organization to adopt additional policies. Corporations that contract with New York State or New York City government may be required to adopt additional policies as a condition of contracting with the government.

Question: Why does the Lawyers Alliance model Conflict of Interest policy contemplate that a related party would include a 5-year look back, i.e., would include any person who is, or within the past 5 years has been, a Director, Officer or Key Person?

Answer: The Lawyers Alliance conflict of interest policy is designed to satisfy both the NPRA requirements and to take advantage of the safe harbor provisions available under the federal excess benefit transaction regulations in IRC section 4958. The excess benefit transaction regulations include a five-year look back period, which is why we included it in the sample.

Question: What if one Board member is aware of another Board member who has a triggering interest but has not self-disclosed the triggering interest?

Answer: Section 715-a only imposes a duty upon Directors, Officers and Key Persons to disclose their own conflicts and a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict. However, according to guidance issued by the NYAG on April 13, 2015, it is recommended that the Board adopt a more comprehensive policy that articulates standards of conduct for Board Members, Officers and Key Persons regarding conflicts of interest, disclosure requirements, reporting requirements, and procedures for mitigation. http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf

Compliance

Question: Once we have documents in place for compliance, what is the formal process for filing in NYS? Do you have any guidelines? Does anything need to be filed with the Attorney General?

Answer: Organizations that file a Form 990 are asked whether there have been changes to their governance documents and to supply updated documents to the IRS. Organizations already registered with the AG's office that have amended their Certificate of Incorporation, By-laws or certain other information must either file a CHAR 410-A or indicate changes in the CHAR 500. The Instructions for the CHAR 410 state that registered organizations are required to notify the AG's office within 30 days, so if an organization is not filing the CHAR 500 soon it should submit the CHAR 410-A.
http://www.charitiesnys.com/pdfs/char410i.pdf

Additionally, groups that have New York State or New York City contracts and are "prequalified" through the New York State Grants Gateway or New York City HHS Accelerator must update their documents in those systems.

Corporate Type

Question: Will HDFCs formed to own low income housing automatically be deemed charitable?

Answer: Yes, section 13-a(2) of the Private Housing Finance Law was amended to provide that HDFCs governed by the N-PCL will be considered charitable.

Question: If a Type C corporation's Certificate of Incorporation does not require members, then is amendment of bylaws to specify that there will be no members going forward sufficient to convert the corporation to a non-membership corporation?

Answer: Yes, only a bylaw amendment is now required to convert the corporation from a membership to a non-membership corporation if the Certificate of Incorporation is silent as to members.

Question: If a corporation is converting from a membership corporation to a non-membership corporation, aside from new bylaws and a member vote to dissolve their own class, is an amendment to the Certificate of Incorporation necessary and are there other required legal steps?

Answer: If the Certificate of Incorporation is silent as to classes of membership then only an amendment of the bylaws is necessary. The only other step would be to disclose the change in governance structure in the next Form 990. An amendment to the Certificate of Incorporation is necessary, however, if the membership structure is contained in the Certificate of Incorporation.

Question: How are the automatic corporate classifications communicated?

Answer: The change in corporate classification happened automatically by operation of law as of July 1, 2014.

Question: How does an organization formed prior to July 1, 2014 know if it was Type A, B or C?

Answer: The corporate type will be stated in the Certificate of Incorporation. If you do not have a copy of the Certificate of Incorporation it can be ordered from the Department of State at http://www.dos.ny.gov/corps/nfpcorp.html#certinc.

Duties of Board Members

Question: As a Board member, how can I learn more about the responsibilities of Officers and Directors of nonprofit organizations in light of the New York law?

Answer: The Charities Bureau of the New York State Attorney General's Office distributes and periodically updates "Right From the Start: Responsibilities of Directors of Not-for-Profit Corporations," available at http://www.charitiesnys.com/pdfs/Right%20From%20the%20Start%20Final.pdf, which contains general information to assist current and prospective members of nonprofit boards. It summarizes the fiduciary duties of care, loyalty and obedience, and gives examples of steps board members can take to help them fulfill these duties. In addition, Lawyers Alliance periodically offers trainings on the role of Board members in corporate governance, which are announced on our website at http://www.lawyersalliance.org/workshops.php.

Entire Board

Question: How you determine what is the "entire board" if you have a range in your bylaws and if you elect directors in classes, each year electing 1/3 of the Board?

Answer: The entire board would include those elected at the last election as well as those serving out the remainder of their terms.

Question: Does the Executive Director count towards the Entire Board number?

Answer: If the Executive Director is a board member then he or she counts towards the Entire Board number.

Question: My organization's bylaws only state that a minimum number of directors shall constitute the Entire Board (not less than 3). Our bylaws do not have a maximum number, so how would we determine our Entire Board under the new law and for quorum purposes?

Answer: The Entire Board will be the number of directors elected at the last annual meeting plus those directors completing their elected term.

Question: Does a new board member who joins during the year - not at the annual meeting - count towards the quorum count?

Answer: If a new Board member joins the Board during the year, either to fill a vacancy or because the size of the Board has been expanded, then the Board member's presence at a meeting would count towards the quorum requirement. If that new Director was either (1) elected within the range that had already been set or (2) elected to fill a new vacancy after the range had been expanded, then that new Director's addition would expand the size of the "entire board." Only if the bylaws call for a fixed number of Directors would the addition of the new director leave the number constituting the "entire board" unchanged.

Foreign Corporations

Question: Do the provisions of the NPRA apply to foreign corporations?

Answer: Lawyers Alliance interprets almost all of the NPRA as only applying to domestic corporations, because the N-PCL defines a "corporation" as an entity formed under the N-PCL. As a general matter, issues of corporate governance are traditionally governed by the law of the state of incorporation. However, the provisions relating to increased audit thresholds and audit oversight in section 712-a of the N-PCL cover even foreign corporations if those corporations are required to report under the Executive Law because they are registered to solicit contributions. Foreign corporations that are only required to register under the EPTL do not have to meet the new audit requirements.

Fundraising

Question: How does the new act affect fundraising? Will not-for-profit entities no longer be able to do de minimis fundraising before registration with the NYAG?

Answer: The rules relating to registration prior to solicitation by not-for-profit corporations under the Executive Law or the Estates, Powers, and Trusts Law remain unchanged.

Executive Compensation

Question: Is there a cap on executive compensation under the Act?

Answer: There is no cap on executive compensation under the Act. The Act does prohibit a compensated person from participating in the vote or deliberation regarding such compensation, except that the individual may provide the Board with information and answer questions before the deliberation under N-PCL section 515(b). However, Executive Order 38 ("EO 38") does limit the payment of executive compensation and administrative expenses by not-for-profit corporations that receive a substantial amount of funding from New York State. Here is a link to the Lawyers Alliance Legal Alert on EO 38: www.lawyersalliance.org/pdfs/news_legal/Executive_Compensation_Legal_Alert_June_2013_final.pdf.

Incorporation Process

Question: In addition to no longer requiring Department of Education consent in advance of incorporation or an amendment to purposes where education-related activities might be implicated (notice within 30 days of filing instead, no advance consent required), are other regulatory agency consents treated similarly?

Answer: The only other consent/notice that is treated in a similar fashion is that of the Office of Children and Family Services as it relates to the provision of child care. *See* N-PCL section 404(b)(2).

Independent Directors

Question: Can an executive director retire and be appointed to a Board Emeritus position after retiring? It seems like not for 3 years?

Answer: The answer is yes, the executive director could be appointed to a Board Emeritus position after retiring, but he or she would not be an "Independent Director" until after the 3 year mark.

Question: Can an ex-officio director still be an Independent Director if there is no financial relationship?

Answer: Yes, an ex-officio director, who is a director "elected or appointed by virtue of their office or former office in the corporation or other entity," can be an Independent Director as long as that person otherwise satisfies the definition section 102(a)(21) of the N-PCL.

Question: Can a board member who is now defined as not being an Independent Director still serve on a Committee of the Corporation?

Answer: Under the N-PCL, Directors who are not "Independent Directors" can still serve on the Board, on any Committee of the Board, or on any Committee of the Corporation other than the Audit Committee.

Question: Do cousins count as "relatives"?

Answer: No, relatives are limited to spouses or domestic partners, ancestors, brothers and sisters (whether whole or half-blood), children (whether natural or adopted), grandchildren, great-grandchildren; or the spouse or domestic partner of person's brothers, sisters, children, grandchildren, and great-grandchildren. *See* N-PCL section 102(a)(22).

Question: Do step-children count as "relatives"?

Answer: A step-child who is an adoptive child would be covered by the definition of "relative." A step-child who is not an adoptive child technically would not be covered by the definition of "relative."

Question: When the Chief Executive Officer ("CEO") or other officer or top staff person employs relatives, how should supervision be treated, including verification of time records, appraisal and daily work assignments? Is there any scope for staff junior to the CEO being allowed to supervise such relatives?

Answer: The Act does not impact the ability of a not-for-profit organization to employ family members of management staff, Board members or Officers. Rather, the Act provides that when a Director is related to a staff member that Director will no longer be an "Independent Director." However, it is not a best practice for family members to supervise each other. Because the CEO is ultimately responsible for the supervision of staff, having a family member report to another staff member does not really solve the problem. Organizations that contract with the City of New York may have contractual limitations on their ability to hire family members of Board members or senior staff.

Question: How do we determine whether a Director who provides services to a charitable organization as a vendor is an Independent Director?

Answer: It depends upon the nature of the relationship. If the Board member is an independent contractor who provides services as an individual to the corporation, then the Director will not be an Independent Director if the payment exceeds $10,000 that year or in any of the prior three years. If the Board member is an employee of, or has a substantial financial interest in, an entity that does business with the nonprofit, then to determine whether the Director is an "Independent Director" you will have to determine whether the payments exceed the sliding scale amount applicable to an entity of that size:

- the lesser of $10,000 or 2% of the vendor's gross revenue if the vendor's gross revenue was less than $500,000,
- $25,000 if the vendor's gross revenue was $500,000 or more but less than $10 million,
- $100,000 if the vendor's gross revenue was $10 million or more.

In addition, a Director who is, or has a relative who is, an owner, Director, Officer, or employee of the corporation's outside auditing firm, or who has worked on the corporation's audit, cannot be considered independent.

Question: Is the Treasurer who signs checks an Independent Director with respect to the audit?

Answer: Having check signing authority on behalf of the corporation does not prohibit a director from being an Independent Director. Therefore, a Treasurer who has check signing authority but is otherwise an Independent Director can sit on an Audit Committee. Best practices suggest that a Treasurer should not sit on, or at least not Chair, an Audit Committee because part of the function of the audit is to review the work of the Treasurer. It is not, however, prohibited by the N-PCL.

Question: Can an attorney who serves as a corporation's counsel be on the Board? Does the attorney need to submit a disclosure statement as well?

Answer: An attorney who serves as corporate counsel can sit on the Board. An attorney who receives compensation for serving as corporate counsel will not be an "Independent Director" if the attorney: a) is an independent contractor who receives more than $10,000 in compensation from the corporation, or b) is a current employee of or has a substantial financial interest in a law firm that receives payments from the corporation in excess of:

- the lesser of $10,000 or 2% of the law firm's gross revenue if the law firm's revenue was less than $500,000,
- $25,000 if the law firm's gross revenue was $500,000 or more but less than $10 million,
- $100,000 if the law firm's gross revenue was $10 million or more.

Additionally, on the annual disclosure statement the Board member would have to disclose this professional relationship with the organization, and the nonprofit's retention of the firm may be considered a related party transaction.

Question: I have a board member who is employed by a corporation that makes a $26,000 GRANT to the non-profit. Is that director not independent?

Answer: The director would still be considered independent because charitable contributions are excluded for purposes of determining if a director is independent. *See* N-PCL section 102(a)(21).

Question: If a Board member's spouse works for the City of New York and the not-for-profit corporation has contracts with the City, is the board member independent?

Answer: A spouse is a Relative as defined by section 102(a)(22) of the N-PCL. However, the City contracts would only render the Director non-independent if the contracts' value exceeds $100,000 and the spouse is considered to have a "substantial financial interest" in the City. "Substantial financial interest" is not defined in the statute, but it seems unlikely that it applies to a mere employee of the City.

Question: Is a community Board member of a nonprofit organization who receives services but no cash payments from the nonprofit an Independent Director?

Answer: Yes, such an individual is an Independent Director as long as he or she has received no more than $10,000 in direct compensation from the organization that year or in any of the three prior years.

Question: If a Board member has received a total of more than $10,000 from the corporation in the last three years or is married to someone who is a staff employee, is the Board member considered independent?

Answer: A Board member who has received a total of more than $10,000 in any one of the last three fiscal years would not be an Independent Director. A board member who is married to a current staff member could still be considered an Independent Director unless the spouse is, or had been within the last three years, a key person. A board member married to a key person is not an Independent Director.

Question: Does the value of in-kind benefits count when evaluating whether a director is an "Independent Director?" For example, if we give a board member a free art studio, does this mean that board member is not independent?

Answer: A board member who receives in-kind benefits is still an "Independent Director" within the meaning of the N-PCL. That transaction, however, would be a related party transaction and should be evaluated pursuant to the organization's conflict of interest policy.

Question: Are BID property owners exempt from the definition of "independent directors" as it pertains to their assessment payments to the BIDs?

Answer: No, there is no BID exemption from the definition of independent director.

Question: Is a Director who is a partner (or other type of owner) of a law firm that does business with the corporation excluded from the definition of Independent Director?

Answer: Whether or not a board member who is a partner in a law firm (or other type of owner) that represents the corporation will be an Independent Director depends on the level of compensation that the law firm receives. Once the compensation level is determined the analysis will have to be done under section N-PCL section 102(a)(21)(ii) or (iii). Even if the Director is independent, the decision to hire the Director's law firm may still be a related party transaction.

Question: How do the Independent Director rules apply to employees of a for-profit corporation who serve as Directors of a foundation set up by the for-profit? In some such cases, there may be no Independent Directors.

Answer: There are no exceptions from the definition of Independent Director for corporate foundations. Whether the Directors are independent depends on whether the for-profit corporation and the foundation are "affiliates" within the meaning of section 102(a)(19), and whether they make payments to each other.

Question: Must all NY not-for-profits have at least one Independent Director? What about a small nonprofit that is not required to file an independent CPA's audit with the Attorney General?

Answer: Only not-for-profit corporations required to file an independent CPA's audit with the Attorney General are required to have directors who fit the N-PCL's very specific definition of an Independent Director. It is no longer required to have at least one Independent Director to oversee the conflict of interest policy and whistleblower policy. However, any Director with an interest in a conflict transaction or whistleblower complaint should not be involved in deliberating or voting on that matter.

Members

Question: Are Members still required even if there are no corporate "types"?

Answer: Non-charitable corporations are still required to have members. Charitable corporations have the option of being membership or non-membership corporations. *See* N-PCL section 601(a).

Question: Please clarify difference between members of the corporation and members of the Board, and the scope of their respective functions and authority.

Answer: Board members (also called "Directors") are individuals with fiduciary responsibility to oversee the management of the corporation. Members of the corporation are individuals without fiduciary responsibility who have the authority to elect Directors and approve significant corporate actions.

Question: Section 601 of the N-PCL, as amended by § 61 of the NPRA, appears now to exempt only "charitable corporations" from the requirement of having members. The exception used to apply to all Type B corporations, but in making the change, it looks like the exception was made more narrow. Would this mean, for example, that 501(c)(4) organizations incorporated in NY must now have members? If so, would a bylaw which states that the Directors shall also be the members of the corporation satisfy this provision?

Answer: The definition of a Charitable Corporation now covers corporations that are formed for charitable, educational, religious, scientific, literary, and cultural or for the prevention of cruelty to children or animals and encompasses corporations that would have previously been incorporated as a Type B or Type C corporation and in some instances Type D. Whether or not an entity that is exempt from taxation under section 501(c)(4) and incorporated in New York has to have members depends on whether it would be classified as Charitable (previously a Type B, Type C or, in some instances Type D) or Noncharitable (previously Type A). Noncharitable corporations must have members; charitable corporations can choose a membership or nonmembership structure. A membership corporation can choose to have its board members serve as the members of the corporation.

Notice of Meetings

Question: Are we required to post notice of Board meetings on our website even though we inform our members of the meetings via email and in our printed monthly calendar and Director report?

Answer: There is no requirement that notice of Board meetings be posted on the organization's website unless the corporation is required to satisfy the Open Meetings Law. If the corporation is a membership corporation and has more than 500 members and is giving notice of a meeting through publication in a newspaper, then the notice also must be posted on the organization's website.

Question: What is "waiver of notice of a meeting"? Under what circumstances could this occur?

Answer: The N-PCL requires organizations to provide members and Board members with notice of meetings. If the organization is unable to send the notice in a timely fashion, then the failure can be waived by any individual who did not receive notice. The NPRA now allows members and Board members to email the waiver of notice to the nonprofit corporation.

Question: Do the Bylaws have to provide for notice by email or does the N-PCL cover all non-profits regardless of the Bylaws?

Answer: When the notice to be given is a notice to members of the corporation, the N-PCL provides that "[a] copy of the notice of any meeting shall be given, personally, by mail, or by [fax] or by electronic mail, to each member entitled to vote at such meeting." *See* N-PCL section 605(a). When the notice to be given is a notice to Board members, the N-PCL provides that "[t]he bylaws may prescribe what shall constitute notice of the meeting of the

board." *See* N-PCL section 711(b). Therefore, bylaws do not need to be updated in order for a corporation to provide email notice of meeting to members of the corporation but may have to be updated to provide email notice of meetings to Board members.

Participation in Board Meetings

Question: Can board members participate in board meetings by teleconference (not videoconference) and count toward the quorum?

Answer: The answer is yes, teleconference is previously authorized by an earlier amendment to the N-PCL and it continues to be a valid method of participation as long as it is not prohibited in the bylaws and the board member can hear and be heard.

Proxy Voting

Question: Do the rules related to electronic proxy voting by members apply only to membership corporations?

Answer: The answer is yes. Under the N-PCL, Board members are not authorized to vote by proxy.

Question: How is a proxy vote valid? What are the parameters?

Answer: Proxy voting is only allowed for members of the corporation. Under Section 609 of the N-PCL, members may authorize someone to serve as their proxy to act on their behalf at membership meeting of the corporation or to take unanimous written action. Now, that authorization can be provided via email.

Real Estate Transactions

Question: Must a majority of Directors approve the leasing of office space?

Answer: Section 509(b) of the N-PCL provides that if a not-for-profit organization is leasing out space it owns or controls, then that lease must be approved by a majority vote of the Board, or an authorized committee. However, if the lease constitutes all or substantially all of the corporation's assets, then a 2/3 vote of the Entire Board is required. Board or committee approval is not required for the corporation to enter into a lease to become a tenant of space owned or controlled by someone else. Having said that, a lease can be a commitment of significant corporate assets, in which case best practices would warrant Board or committee approval.

Related Party and Related Party Transactions

Question: Can the Board Chairperson receive non-employee compensation from the Corporation?

Answer: Yes. Unless otherwise provided in the Certificate of Incorporation or the By-laws, the Board has authority to fix the compensation of Directors for services in any capacity. The NYAG, in its guidance issued on April 13, 2015, states that "[t]ransactions related to

compensation of ... directors ... are not considered related party transactions, unless that individual is otherwise a related party based on some other status, such as being a relative of another related party." http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf However, the Board Chairperson potentially would not be an Independent Director within the meaning of the NPRA and could lose the liability protections extended to volunteer members of nonprofit boards.

Question: Is it a conflict if the executive director who is a principal owner of a for-profit business company receives payment for a business venture he is trying to introduce to the not-for-profit corporation on behalf of the for-profit by which he is employed?

Answer: Yes, it would be a related party transaction under N-PCL (and a transaction with a disqualified person under the federal Internal Revenue Code) creating a conflict of interest and requiring the following:

1. Disclosure to the Board;
2. A determination of whether the transaction was in the best interests of the corporation and otherwise fair and reasonable;
3. A vote of the Board without the Executive Director's participation if they are a board member; and
4. Documenting the process and outcome in the minutes.

If the executive director has a substantial financial interest in the transaction, the Board should take additional steps:

1. Prior to entering into the transaction, consider alternative transactions to the extent available; and
2. Approve the transaction by at least a majority vote of the Directors or committee members present

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Question: What is a "substantial financial interest" in a related party transaction?

Answer: "Substantial financial interest" is not defined in the NPRA, so the transaction should be evaluated based upon the facts and circumstances of the related party.

Question: Can an Officer of a nonprofit corporation serve as an Officer of a related party under the Act?

Answer: There is no limitation on an Officer of one corporation serving as an Officer of an affiliate or of a related party under the Act. However, depending on the nature of the relationship between the two entities, and the Officer's financial interest in the other entity, the Officer may be considered a non-independent Director, and may be a related party with respect to transactions with the other entity. The conflict of interest policy must be followed when approving transactions between the two organizations.

Question: My not-for-profit corporation has a Board member in common with another not-for-profit corporation. The second not-for-profit corporation leases space from us. Is this considered a related party transaction?

Answer: As a Board member of the tenant corporation, your Board member does not have an ownership or beneficial interest in that corporation. As a result, the tenant corporation is not a related party. Moreover, unless your Board member receives compensation from your corporation that is dependent on the lease, the transaction is not a related party transaction with respect to that Board member.

Question: If a Board is considering a related party transaction and the related party is a Director, is the Board unable to permit the corporation to enter into such related party transaction by unanimous written consent?

Answer: A Board cannot act by unanimous written consent when the related party is a Board member because that Board member must be recused from considering the matter and cannot vote on the transaction.

Question: As a related party, is an Executive Director prohibited from attending a Board meeting? Does the Executive Director have to leave the room during votes?

Answer: An Executive Director should not participate in any Board votes relating to their own compensation or job performance, or to any other transaction in which he or she has a financial interest. At the request of the Board or a committee, the Executive Director may present information or answer questions regarding a related party transaction in which he or she has an interest, but should leave the room during deliberations and voting.

Question: Does the Executive Director's compensation have to be approved by the full Board?

Answer: If the Executive Director is an Officer, then the compensation must be approved by at least a majority vote of the entire board. *See* N-PCL section 715(e). The NYAG, in its guidance issued on April 13, 2015, states that "[t]ransactions related to compensation of employees, officers or directors or reimbursement of reasonable expenses incurred by a related party on behalf of the corporation are not considered related party transactions, unless that individual is otherwise a related party based on some other status, such as being a relative of another related party."
http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf

Question: What if your Board member owns a space that they are allowing the organization to use for a very small fee for a field location? Is that a related party transaction?

Answer: Yes, this would be a related party transaction but it could still be a fair transaction that is in the best interest of the corporation. Because the organization is entering into a business transaction with a board member it needs to be disclosed to the Board and can proceed only if the Board determines that the transaction is fair, reasonable and in the corporation's best interests. If the Board member is deemed to have a *substantial* financial interest in the transaction then the Board needs to consider alternative transactions to the extent available. After that analysis is done, the transaction needs to be approved by the

Board or a designated committee, and the process should be documented in minutes or a resolution.

Question: Does approval by a Board of a related party transaction require a majority vote of all INDEPENDENT Directors, or merely a majority vote of all Directors except the Director who has a financial interest in the transaction?

Answer: A related party transaction must be approved by a majority vote of the Directors present at a Board meeting (or of the Directors present at the meeting of an authorized committee), except that the Director with a financial interest may not participate. There is no requirement that only independent Directors may participate.

Question: If the Board contracts with the spouse of the Executive Director to provide services as an independent contractor, does that qualify as a related party transaction? If so, what does the Executive Director have to do other than disclose to the board that the person being hired is his/her spouse?

Answer: An organization contracting with the spouse of the Executive Director would constitute a related party transaction. The Executive Director has an obligation to disclose the conflict and the material facts to the board. N-PCL section 715(a). The board must then consider and approve the transaction. If the spouse has a substantial financial interest in the transaction, the Board must also consider alternative transactions if they are available. Other than disclosing the conflict to the Board, the Executive Director does not have specific obligations other than not "improperly influencing" the Board's decision. N-PCL section 715-a(b)(4).

Question: With regard to approval of a related party transaction, what is the difference between influencing a vote and "improperly" influencing the vote?

Answer: The term "improperly influencing the vote" is not defined by the statute. The NYAG, in a guidance issued April 13, 2015, quotes the Securities and Exchange Commission's definition of a similar term: "coercing, manipulating, misleading, or fraudulently influencing ... the decision-making when the officer, director or other person knew or should have known that the action, if successful, could result in the outcome which the officer or director could not deliberate or vote on directly." http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf. Additionally, N-PCL section 715(g) provides that the board may request "that a related party present information as background or answer questions concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting related thereto."

Question: If a Board Member is an artist, and a non-profit corporation wants to commission a piece of the Director's work for use by the corporation, how can you satisfy the related party transaction requirements when the works/services purchased by the corporation are unique and substitutes are not easily identified?

Answer: The N-PCL does not establish guidelines for determining whether a transaction is "fair, reasonable and in the corporation's best interest" or for "consideration of alternative transactions." *See* N-PCL section 715. The IRS Exempt Organization Tax Manual suggests that comparables should be determined by:

A. "Current independent appraisals of the value of the property that the organization intends to purchase or receive from, or sell or provide to, the disqualified person.
B. Offers received as part of an open and competitive bidding process."

http://www.irs.gov/irm/part7/irm_07-027-030.html#d0e1185

Question: Would an employment relationship with a child of a Director be a related party transaction?

Answer: Yes, employing the child of a Director would be considered a related party transaction since a related party includes the child of a Board member (N-PCL section 102(a)(23)) and a related party transaction is "any transaction, agreement or any other arrangement in which a related party has a financial interest ..." N-PCL section 102(a)(24).

Question: When there is a substantial financial interest in a related party transaction, how many alternative transactions should the Board look at? Is one alternative sufficient?

Answer: With respect to related party transactions involving a charitable corporation and in which a related party has a substantial financial interest, the board must consider alternative transactions to the *extent available.* The Nonprofit Revitalization Act does not provide any further guidance on what "extent available" requires, so the transaction should be evaluated based upon the facts and circumstances of the organization.

Unanimous Written Consent

Question: Does unanimous written consent by email mean without an actual signature, just an email approval?

Answer: Yes, under section 708(b) of the N-PCL, Directors can consent via email without including an actual signature if "it can be reasonably determined that the transmission was authorized by the director." Likewise, under section 614 of the N-PCL, members of the corporation can consent via email without including an actual signature if "it can be reasonably determined that the transmission was authorized by the director."

Question: Are you saying that a Board cannot vote via email?

Answer: That is correct. The only action that a Board can take by email is unanimous written consent, which means that all board members currently in office have to consent to the action. Other than that, the Board has to meet to take action although that meeting can take place over the phone or via videoconferencing.

Videoconferencing and Teleconferencing

Question: Are there any new requirements for the minutes of meetings held via videoconference?

Answer: There are no new requirements regarding the minutes of meetings in which members participate via videoconference.

Question: Will Board members who participate in Board meetings via phone or videoconference be counted towards a quorum?

Answer: A Board member participating in a Board meeting via conference call counts towards a quorum as long as: (i) The board member can hear and be heard; and (ii) the Bylaws do not prohibit participation via conference call. Corporations that are required to comply with the Open Meetings Law may have limitations on the ability of Board members to participate via conference call.

Whistleblower Policy

Question: Does the 20 or more employee threshold for the whistleblower policy refer to full time employees only or does that also apply to part time employees?

Answer: The statute only states a "corporation that has twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars" must have a whistleblower policy. *See* N-PCL section 715-b. It does not distinguish between full time and part time employees.

Question: Are there requirements for distribution of policies, e.g., in writing, or on a website?

Answer: The statute requires that a copy of the policy must be distributed to all Directors, Officers, employees, and to volunteers who provide substantial services. However, it also states that posting the policy on the corporation's website or at the corporation's offices in a conspicuous location will satisfy the requirement. N-PCL section 715-b.

Question: Is a whistleblower policy is required of corporations with 20 employees or more AND $1 million in revenue or either/or?

Answer: A whistleblower policy is required for corporations with 20 or more employees and $1 million in revenue in the prior fiscal year.

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Lawyers Alliance for New York is eager to hear your comments, questions, experiences as the nonprofit community works to comply with the Act. For a summary of the Act, visit www.lawyersalliance.org/pdfs/Summary_Nonprofit_Revitalization_Act_9-11-2013.pdf. This alert provides general information only, not legal advice. Please contact Senior Policy Counsel Laura Abel, or label@lawyersalliance.org, or visit our website www.lawyersalliance.org for further information.

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