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Key Features of The New York Nonprofit Revitalization Act

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INTRODUCTION

In December 2014, New York’s Nonprofit Revitalization Act (NPRA) was signed into law. The “Act” was introduced to the Legislature as a Program Bill from the Attorney General and passed the Legislature in June 2013. It is the first major revision of New York State Not-for-Profit Corporation Law (NPCL) in over forty (40) years and most of its provisions took effect July 1, 2014. Several alterations and clarifications have occurred since then (notably 12/11/2015 and 11/28/2016). A brief outline of the Act is provided.

The Act comprehensively reforms the NPCL and has a significant impact on the governance policies and practices of the state’s nonprofits. In order to comply with the new laws, the vast majority of nonprofits will need to amend their By-Laws and/or revise or adopt new policies. Those nonprofits who are Medicaid providers and subject to the corporate compliance regulations of the State’s Mandatory Compliance Program will have many, but not likely all of the, requirements already in place.

In order to help ensure that nonprofits are in statutory compliance, NYCON prepared this ***Action Plan for Corporate Compliance***. This Plan provides a Resolution for the Board of Directors to adopt a “Statutory Compliance Article” as a by-law amendment along with five accompanying policy documents, to be attached as Appendices to the By-Laws:

- A. By-Laws and Corporate Policy Definitions
- B. Board of Directors Conflict of Interest Policy
- C. Code of Ethical Conduct and Annual Potential Conflicts Disclosure Statement
- D. Whistleblower Protection Policy (*advisable, but only required if the organization has “twenty (20) or more employees and in the prior fiscal year had annual revenue in excess of one (\$1M) million dollars”*)
- E. Audit Oversight Policy (*advisable, but only required if the organization is registered with the [NYS Charities Bureau under Executive Law Article 7-A](#) and its annual gross revenues exceed [the current thresholds](#)*).

The above-referenced documents provided are intended to assist New York nonprofits in assuring compliance with the NPRA and related and policy statements. It is extremely important to note that “standard language” and “templates” are just that. Your organization may wish to consider modifying our template documents or integrating their content with other organizational policies and procedures.

Additionally, please be reminded that every Board of Directors has a fiduciary obligation to ensure that by-law and policy statements are properly and consistently carried out in practice. We encourage all users of this material to obtain qualified legal counsel and, where appropriate, guidance from a Certified Public Accountant to advise in any modification and to specifically identify what other provisions in the Act may mean for your organization. As always, if your organization is a member of NYCON, please feel free to contact us for further assistance or consultation.

KEY FEATURES OF THE NONPROFIT REVITALIZATION ACT

This brief outline provides an overview of key NPRA reforms that NYCON believes can have a meaningful effect on the general governance and business operations of existing community-based nonprofits. Please note that this outline does not address all the changes or all the details of the NPRA. Also, please be aware that some of these provisions may differ from IRS definitions and regulations (*for instance* [excess benefit transactions considerations](#)), standards required by the Board of Regents, or requirements imposed by the State or New York City through contract or licensing.

Meetings of the Board of Directors, Committees and Memberships Bodies

- Defines “Entire Board” as meaning the number of directors most recently elected and within the range of seats available as per the by-laws or if the by-laws cite a fixed number, then that number—important because some provisions of the NPRA require majority or supermajority vote by the “Entire Board”, as opposed to those requiring just majority vote of a simple quorum;
- Allows Board and committee meetings by audio or video conference;
- Allows Board/Committee/member actions to be taken without a meeting if done with the unanimous written consent of all entitled to vote; this can be done with email;
- Can now use email and fax to give notice and waiver of notice of member meetings, and use the website for notice of member meetings;
- Proxy voting for member meetings can now be done by e-mail (please note that proxy voting is never allowed for Board business);
- If using fax or email, the number or address must be what is on the record of the Secretary—invalid if the notice cannot be delivered or if the organization is unable to deliver two (2) consecutive notices;
- Defines “Committees of the Board” as those that may have the power to bind the Board within the limitations of NPCL. These committees must be comprised solely of, at least three (3), Board members. Examples include an Executive Committee and an Audit Committee. These committees must be appointed by the Board, and there are currently nine (9) authorities no committees can be delegated (i.e.: by-laws amendments);
- Defines “Committees of the Corporation” as those that cannot bind the Board and may include non-Board members. These Committees can be created by the Board, or by and for a voting membership.

Employees as Board Chair

- No employee of a nonprofit may serve as Chair (or the equivalent) of its Board of Directors unless the Board approves the practice by a two-thirds majority vote of the Entire Board and contemporaneously documents in writing the basis for the Board approval.

Conflicts of Interest

- Every nonprofit Board must have written conflict of interest policies governing the identification and assessment of personal conflicts for directors, officers and employees, as well as confirming when it may enter into transactions in which directors, officers, and employees have a personal financial interest (“Related Party Transactions”):
 - Policies must define what constitutes a conflict stipulate disclosure procedures mandate annual submission of conflict disclosure statements, require documentation in the minutes of any meeting where a conflict was discussed or acted on, and prohibit any conflicted party from improperly influencing, being present for deliberations concerning or voting to authorize the conflict;
 - Signed disclosure statements must be compiled annually by the Secretary (or a designated compliance officer) and delivered to the Chair of the Audit Committee or, if there is not one, to the Chair of the Board of Directors.
- Any Related Party Transactions between a nonprofit and its directors, officers, and key employees, including their relatives and other organizational affiliations must be carefully addressed:
 - An interested party must disclose the material facts of his or her relationship to the transaction to the Board and be absent from board discussions and votes;
 - A Board may only approve a financial transaction if it is fair, reasonable, and in the best interests of the nonprofit and consider alternative options;
 - Office of the Attorney General has the power to bring action to enjoin or rescind any related party transaction which are not approved in accordance required policies and procedures.

Audits

- For nonprofits registered with the [NYS Charities Bureau under Executive Law Article 7-A](#), some form of financial statement must be submitted in the annual reporting (as part of their CHAR500). The type of review those statements must undergo is determined by [annual gross revenue thresholds](#) applicable to the applicable fiscal year:
 - Under \$250K: unaudited financial statements;
 - Over \$250K...but under the **current** ‘CPA audit’ threshold: a “review report” from an independent CPA of the unaudited financial statements:
 - Attorney General may, at their discretion, require an independent audit from nonprofits who submit a ‘review report’, due within 120 days.
 - Greater than \$500K: requires an independent CPA audit:
 - For CHAR500 due dates after July, 2017...greater than \$750K;
 - For CHAR500 due dates after July, 2021...greater than \$1M.
- If required to file an independent Certified Public Accountant’s audit, a nonprofit shall have either a designated Audit Committee consisting entirely of “Independent Directors” or the Board of Directors (with only Independent Directors participating in the deliberations or voting) oversee the accounting and financial reporting processes retain a CPA to conduct the audit and oversee the audit of the corporation’s financial statements.

- A nonprofit’s audit review and oversight policy must include provisions for:
 - Review with the auditor the scope and planning of the audit prior to commencement;
 - Upon completion of the audit, review and discuss:
 - Any material weaknesses in internal controls identified by the auditor;
 - Any restrictions on the scope of the auditor's work or access to information;
 - Any significant disagreements between the auditor and management; and
 - The adequacy of the accounting and financial reporting processes.
 - Annually consider the performance and independence of the auditor;
 - If done through an Audit Committee, a report on the Committee's activities must be made to the Board.
- If the nonprofit controls other corporations, the Board or designated Audit Committee of the controlling corporation may perform the Audit related duties required for those affiliated corporations.

Whistleblower Protection

- Nonprofits with 20 or more employees and annual revenue over \$1M must have a w r i t t e n whistleblower policy;
- The Whistleblower Policy must:
 - Have procedures for reporting suspected violations, preserving confidentiality and protecting whistleblowers from retaliation;
 - Designate an employee, officer or director to administer and report to Audit or other Committee of Independent Directors, or if no committee, to the Board;
 - Be distributed to all Directors/Trustees, officers, employees and volunteers who provide substantial services to the corporation:
 - Posting on the corporation's website or at the corporation's offices in a conspicuous location accessible to Directors, Officers, employees and volunteers” is sufficient.

Certificate Amendments, Mergers or Consolidations, and Large Transactions

- The process for approval of Certificate of Incorporation amendment, Mergers, Consolidations, and Dissolutions and disposition of assets has been streamlined by allowing the Attorney General, rather than the Supreme Court, to provide the consents;
- Education and Religious Corporations can enter into Mergers in the same way as other nonprofits;
- For transactions dealing with either the real or personal property of a nonprofit:
 - Small, routine real estate transactions that do not equal ‘*all or substantially all*’ of a nonprofit’s real property can be approved by a majority vote of the Board, or an authorized Committee;
 - If ‘*all or substantially all*’ of the corporate assets are involved in a transaction, it must be approved by, at least, two-thirds of the Entire Board.

Attorney General E-Filings

- The Charities Bureau of the Office of the Attorney General will now be able to accept required [annual reports](#) in electronic form.