

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Keeping YOUR BALANCE

NYS Legislature passes Nonprofit Revitalization Act

Act provides changes to New York nonprofit corporation law

New York Attorney General Eric T. Schneiderman set out to make New York a model for nonprofit governance and oversight through the recently passed Nonprofit Revitalization Act. The Act involves updates to New York Nonprofit Corporation Law, which aims to improve corporate governance and oversight while cutting red tape.

The Act was passed unanimously in both the Senate and Assembly on June 21, and is currently awaiting delivery to Gov. Cuomo's office, at which time Gov. Cuomo would have 10 days to take action or the bill would automatically become law, provided it is delivered before the end of the legislative session on Dec. 31. This would be the first major revision to New York's nonprofit laws in more than 40 years.

Most provisions summarized below would be effective July 1, 2014, with a few provisions taking effect in 2015, 2017 and 2021.

The major provisions include:

Elimination of letter types

The Act involves the elimination of classification as Type A, B, C and D and now classifies nonprofit corporations as either "charitable" or "non-charitable." There would be no need for existing nonprofits to amend their governing documents.

Modernization and streamlining of nonprofit governance actions and communication

The Act will allow new technology options for holding meetings and taking action. Notice or waiver of notice can be given via email, where prior to the Act it was required to be given via mail or in person. Video conferencing, such as Skype, for board meetings will be allowed unless restricted by the organization's certificate of incorporation or by-laws.

Enhanced governance procedures, policies and prohibitions

- Limitation on employee serving as chair

Effective Jan. 1, 2015, the Act expressly prohibits an employee from serving as chair of the board or in an officer position with similar responsibilities. The prohibition on an employee serving as chair would presumably not apply to the president in a nonprofit in which different individuals serve as chair and president.

- Compensation approval

The Act provides that compensation paid to directors, officers and key employees be "fair, reasonable and commensurate" with the services provided to the organization. The respective person may not participate in his/her own compensation deliberations or vote on it.

- New definition of "independent director"

An "independent director" under the Act meets all of the following criteria:

1. Has not been an employee or does not have a relative who was a key employee of the organization or affiliate in the past three years.
2. Has not received or does not have a relative who received \$10,000 or more in direct compensation from the organization in the past three years (expense reimbursement not considered)
3. Is not a current employee and does not have substantial influence in an entity that made or received payments from the organization or affiliate of more than \$25,000 or 2 percent of the organization's gross revenue for property or services.
4. Does not have a relative who is a current officer or with substantial interest in an entity making or receiving payments of a similar amount to the organization in the past three years.

- Mandatory conflict of interest policy

Nonprofits are required to adopt a conflict of interest policy covering directors, officers and key employees. As a result some

Continued ...



By **RAYMOND J. JACOBI**

Daily Record
Columnist

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

nonprofits may need to adopt a new conflict of interest policy, or update their current policy, to meet the new requirements.

The conflict of interest policy must include:

1. What constitutes a conflict of interest
2. Procedures for disclosing a conflict of interest to the audit committee or the board
3. Requirement that people with a conflict of interest cannot be present or participate in board deliberations or voting on these matters
4. Requirement that people with a conflict of interest be prohibited from influencing the board
5. Documentation procedures to detail existence and resolution of a conflict of interest
6. Procedures for disclosing and addressing related-party transactions
 - Additionally, a written statement identifying potential conflicts must be signed prior to initial election of any director and annually thereafter. The board or designated audit committee must oversee adoption, implementation and compliance of a conflict of interest policy if not performed by another committee of the board with solely independent directors.

- Related-party transaction approval process

The Act redefined what constitutes a “related party” and requires that transactions with a nonprofit be fair, reasonable and in the best interest of the nonprofit.

- Mandatory whistleblower protection policy

The Act mandates that nonprofits with 20 or more employees and annual revenue in the prior fiscal year in excess of \$1 million institute a whistleblower protection policy. The policy must be distributed to all directors, officers, employees and volunteers and must protect from retaliation any one of them who, in good faith, reports an action or suspected action that is potentially illegal, fraudulent or in violation of any adopted policy of the nonprofit.

Additionally, the policy must include procedures for reporting violations, identification of person responsible for administering the policy and reporting to the audit committee or other committee of independent directors.

- Audit committee and new audit procedures

A designated audit committee is required and must be comprised of “independent directors” responsible for retaining an independent auditor and reviewing the results of the audit.

Audit committee of nonprofits subject to NYS charitable solicitation with greater than \$1 million gross revenues have additional duties relating to the audit including:

1. Review the scope and planning of the audit with the auditor prior to commencement of the audit
2. Discuss significant disagreements between auditor and

management after audit

3. Annually consider performance and independence of auditor

Raised thresholds for financial reports

The Act provides that threshold levels increase on July 1, 2014:

- Gross revenues <\$250,000 (previously \$100,000) — Financial statement (FS): Unaudited F/S signed by CFO and president
- Gross revenues >\$250,000 < \$500,000 (previously \$100,000 \$250,000 respectively) — Financial statement: F/S with CPA's review report
- Gross revenues >\$500,000 (previously \$250,000) — Financial statement: Audited F/S with CPA's audit report

The Act further increases the threshold for the audit requirement for all organizations subject to registration for charitable solicitation in New York to \$750,000 in 2017 and \$1 million in 2021. The threshold for a review report is scheduled to increase up to the audit requirement thresholds.

Streamlining procedures for nonprofit mergers, property sales and corporate dissolutions

- Ability to seek consent of attorney general as opposed to new york supreme court for certain corporate transactions

The Act provides for a simplified process for “charitable” entities, in which the organization can seek the approval of the attorney general instead of initiating a court proceeding for transactions such as dissolution (sale, lease, exchange or other disposition of substantially all assets); merger or consolidation; and change of purposes.

- Lowered approval requirements for real property transactions

The Act lowers the approval requirements for real property transactions. It requires a simple majority of the board to authorize the purchase, sale, lease, exchange or disposal of real property to be acquired or disposed of unless it constitutes all or substantially all of the assets of the nonprofit, approval of two-thirds of the entire board is required (unless 21-plus board members, then a simple majority is required).

The Nonprofit Revitalization Act, assuming it will be signed into law, is set to go into effect on July 1, 2014. Nonprofit organizations will now be able to operate, dissolve and merge more easily; communicate and hold meetings using modern technology; and enter into certain transactions without having to go to court. At the same time, the Act includes critical oversight, and governance restructuring is aimed at preventing fraud and improving public trust.

Raymond J. Jacobi Jr., CPA, is a partner with Mengel, Metzger, Barr & Co. LLP and can be reached at Rjacobi@mmb-co.com.