

Alert

The Nonprofit Revitalization Act of 2013 Takes Effect on July 1, 2014

May 7, 2014

New York nonprofit organizations should review and revise their by-laws and policies to ensure compliance with the New York State Nonprofit Revitalization Act (the “Act”) by July 1, 2014. The Act is the first substantial modification of New York State not-for-profit law in over 40 years.¹ This *Alert* outlines recommendations that nonprofit organization leaders and their trustees and officers should consider.

- *Revise or Adopt a Conflicts-of-Interest Policy.* Pursuant to the Act, all nonprofits and charitable trusts are required to adopt a conflicts-of-interest policy requiring directors, officers, trustees and key employees to act in the nonprofit’s best interest. The conflicts-of-interest policy must include: (1) a definition of the circumstances constituting a conflict of interest; (2) procedures for disclosing conflicts to the Audit Committee or the Board; (3) a requirement that conflicted persons not be present at or participate in Board, trustee, or committee deliberations or vote on the matter giving rise to the conflict; (4) a prohibition against any attempt by a conflicted person to influence deliberations or votes on a matter giving rise to the conflict; (5) a requirement that the existence and resolution of the conflict be documented in the organization’s records; (6) procedures for disclosing, addressing and documenting related party transactions; and (7) a requirement that directors and trustees, before initial election or appointment and annually thereafter, must disclose potential conflicts of interest. Any existing conflicts-of-interest policies must be revised to conform to new statutory definitions of “independent director” and “related party transaction.” Click [here](#) to see a sample conflicts-of-interest policy from Lawyers Alliance for New York.
- *Revise or Adopt a Whistleblower Policy.*² Nonprofits with 20 or more employees and annual revenue in the prior fiscal year in excess of \$1 million must adopt a whistleblower policy. The whistleblower policy must prohibit retaliation against any director, trustee, officer, employee or volunteer reporting in good faith any action or suspected action, taken by or within the organization that is illegal, fraudulent or in violation of any adopted policy. The whistleblower policy must include: (1) provisions for reporting of suspected violations of laws or policies, including procedures for preserving the confidentiality for such reported information; (2) the requirement that a director, trustee, officer or employee be designated to administer the policy and to report to the Audit Committee, another committee of trustees of the Board, or the entire Board; and (3) the requirement that the policy be distributed to all directors, officers,

¹ A summary of the changes to the law can be found in our Oct. 1, 2013 [Alert](#).

² Organizations that have adopted a whistleblower policy if required by federal, state or local laws that is substantially consistent with the policy required by the Act will be deemed in compliance.

employees, and to all volunteers who provide substantial services. Click [here](#) to see a sample whistleblower policy from Lawyers Alliance for New York.

- *Revise By-Laws.* Nonprofits should review and revise their by-laws to comply with various provisions of the Act that are designed to simplify Board operations. Revised by-laws should provide that:
 - Type A, B, C and D classifications are eradicated. Nonprofits will now be classified as either “charitable” or “non-charitable.” If by-laws reference any letter classification, they should be revised;
 - No employee of a nonprofit may serve as Board Chair (effective Jan. 1, 2015). The description of the Board Chair in by-laws should specify that an employee cannot hold the position;
 - Board members may participate in meetings via video conference;
 - Notice of Board and member meetings, waiver of notice and actions by unanimous written consent may be made electronically. By-laws may be amended to include fax and email as an accepted means of communication;
 - References to special and standing committees are eliminated;
 - Authorize the creation of an Audit Committee if oversight will not be provided by the entire Board;
 - New definition of “entire Board” provides that the total number of directors entitled to vote, if there are no vacancies, constitutes the entire Board. If the by-laws provide for a fixed number of directors, that number shall be the entire Board; if the by-laws provide for a range of directors, the entire Board is the number of directors that were elected as of the most recent election;
 - Voting requirements for many routine real estate transactions may be authorized by a simple majority rather than a two-thirds vote, unless the transaction involves all or most of the organization’s assets; and
 - No member, director or officer who may benefit from compensation from the nonprofit may be present at or participate in any Board or committee deliberation or vote concerning their compensation. The Board or a committee thereof may ask an individual who would benefit from compensation to provide information or respond to questions at a meeting prior to the start of the deliberations and voting. The nonprofit should develop procedures to approve compensation without the participation of interested parties. Such procedures may be included in by-laws.
- *Adopt Audit Oversight and Financial Procedures.* All organizations subject to registration for charitable solicitation that have gross revenues in excess of \$500,000 per year and are subject to the requirement to file an independent auditor’s report with the New York State Attorney General must have a designated Audit Committee of the Board comprised of independent directors responsible for retaining an independent auditor and reviewing the results of the audit (or the Board as a whole must do so). Nonprofits with annual gross revenues over \$1 million must also have the Board or Audit Committee hold pre- and post-audit conferences with the auditors. The Act also raises the thresholds for organizations conducting charitable solicitations

in New York that are required to file financial reports with the Attorney General. Nonprofits should review their current audit procedures.

The New York State Attorney General, Charities Bureau is expected to issue guidance on the Act. We will update you at that time.

For additional resources, click [here](#) to see Lawyers Alliance for New York's Governance Checklist for Nonprofit Revitalization Act Compliance. Click [here](#) for sample by-laws for non-membership organizations from Lawyers Alliance showing suggested revisions pursuant to the Act. Upon completion of your amended by-laws, please send a copy to us for our records.

Authored by [Mark E. Brossman](#), [Daniel L. Greenberg](#) and [Donna Lazarus](#).

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication was not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal tax penalties.

This information has been prepared by Schulte Roth & Zabel LLP ("SRZ") for general informational purposes only. It does not constitute legal advice, and is presented without any representation or warranty as to its accuracy, completeness or timeliness. Transmission or receipt of this information does not create an attorney-client relationship with SRZ. Electronic mail or other communications with SRZ cannot be guaranteed to be confidential and will not (without SRZ agreement) create an attorney-client relationship with SRZ. Parties seeking advice should consult with legal counsel familiar with their particular circumstances. The contents of these materials may constitute attorney advertising under the regulations of various jurisdictions.

Schulte Roth&Zabel

New York | Washington DC | London

www.srz.com