

**ALERTS**

## Amendments to the New York Nonprofit Revitalization Act of 2013 Signed into Law

**January 29, 2016**

On Dec. 11, 2015, Governor Andrew Cuomo signed into law a series of amendments to the New York Not-For-Profit Corporation Law; the Estates, Powers and Trusts Law; and the Religious Corporations Law designed to clarify aspects of the Nonprofit Revitalization Act of 2013 (the “2013 Act”). The amendments adopt certain recommendations of the New York State Law Revision Commission and Lawyers Alliance for New York. In addition, the amendments codify certain aspects of the New York State Attorney General’s Charities Bureau Guidance on the 2013 Act.[1] The amendments were effective upon signing of the law. This *Alert* summarizes some of the key provisions of the law.

### Amendments to Definitions

- *Entire Board.* The new law clarifies the definition of “entire board,” explaining that what constitutes the entire board can be determined by establishing a range of maximum and minimum directors in the bylaws and having a majority of the board set a fixed number of directors within that range. If the board has not set a fixed number of directors within that range, then the entire board shall consist of the number of directors within that range that were elected or appointed as of the most recently held election of directors, as well as any directors whose terms have not yet expired.
- *Affiliate.* The definition of “affiliate” has been narrowed to include only entities controlled by, or in control of, the organization in question. Two

entities under common control are no longer included in the definition. By excluding entities under common control, fewer transactions will be deemed to be related party transactions and fewer directors will be disqualified pursuant to the definition of “independent director.”

- *Independent Director.* The revised definition of “independent director” does not include anyone who is or has a relative who is a current owner (whether wholly or partially), director, officer or employee of the organization’s outside auditor or who has worked on the organization’s audit at any time during the past three years.
- The revised definition also clarifies that “payments” do not include dues or fees paid to the organization for services that the organization performs as part of its nonprofit purposes, provided that such services are available to individual members of the public on the same terms. This allows a director to be considered independent if he or she works for a company that purchases routine services from, or pays dues to, the organization.
- *Relative.* The law expands the definition of “relative” to include the domestic partner (as defined in Section 2994-a of the Public Health Law) of an individual’s ancestors, brothers and sisters (whether whole- or half-blood), children (whether natural or adopted), grandchildren and great-grandchildren. In the 2013 Act, only the domestic partner of an individual was included.
- *Related Party.* The revised definition of “related party” includes any person who exercises the powers of directors, officers or key employees over the affairs of the organization or any of its affiliates.
- *Key Employee.* The new law clarifies the definition of “key employee,” explaining that a key employee is any person who is in a position to exercise substantial influence over the affairs of the organization as it relates to the excess benefit/intermediate sanctions rules under federal tax law, but only “to the extent such provisions are applicable.”

## Other Clarifications

- *Approving Board Compensation.* The new law clarifies that a director is not prohibited from deliberations or votes concerning compensation for service on the board that is to be made available or provided to all directors of the organization on the same or substantially similar terms.

This clarification was designed to remedy the 2013 Act's inconsistency with federal tax law.[2]

- *Quorum for Action by the Board.* The new law clarifies that directors who are present at a meeting but not present at the time of a vote due to a conflict of interest or related-party transaction shall be treated as present at the time of the vote for quorum purposes.
- *Participation of Non-Directors on Committees.* The new law clarifies that non-directors may serve on "committees of the corporation."
- *Participation by Interested Persons.* The 2013 Act states that only independent directors (as defined by the 2013 Act) may participate in deliberations and voting on issues related to the auditing of an organization's accounting and finances. Similarly, the 2013 Act provides that related parties (as defined in the 2013 Act) may not participate in deliberations and voting on a related party transaction in which he or she has an interest, and persons with a conflict of interest may not participate in deliberations and voting on matters giving rise to such conflict. However, the new law clarifies that the board or a committee may still request that any of the individuals described above present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting.
- *Disposition of Real Property by Religious Organizations.* The new law clarifies that religious organizations may obtain permission from the Attorney General to sell, mortgage or lease their real property for a term exceeding five years, and are not required to obtain leave of court to do so.

## Conflicts of Interest/Whistleblower Policy Compliance

- *Disclosing Conflicts of Interest.* The 2013 Act requires that any prospective director with a potential conflict of interest submit a disclosure statement to the organizations' secretary. The new law clarifies that the disclosure statement may be submitted either to the secretary or to a designated compliance officer.
- *Distribution of Whistleblower Policy.* The 2013 Act requires certain organizations (those with 20 or more employees and annual revenue over \$1 million) to adopt a whistleblower policy and distribute it to all

directors, officers, employees and volunteers providing substantial services to the organization. The amendments clarify that the distribution requirement may be satisfied by posting the policy on the organization's website or at the organization's offices in a conspicuous location accessible to employees and volunteers.

## Conclusion

Organizations covered by the 2013 Act should review their bylaws and policies to ensure that they are in compliance with both the 2013 Act and the amendments described in this *Alert*.<sup>[3]</sup> Organizations should also review their conflict of interest and whistleblower policies in light of definitional and other changes provided by the new law.

*Authored by Mark E. Brossman and Donna Lazarus.*

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

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[1] See the following guidance documents from the U.S. Attorney General's Charities Bureau: "Audit Committees and the Nonprofit Revitalization Act of 2013," "Conflicts of Interest Policies Under the Nonprofit Revitalization Act of 2013" and "Whistleblower Policies Under the Nonprofit Revitalization Act of 2013."

[2] Internal Revenue Service regulations prohibit directors from approving each other's compensation in the context of excess benefit safe harbor rules.

[3] For further information regarding the 2013 Act, please see our Oct. 1, 2013 *Alert*, "The Nonprofit Revitalization Act of 2013," or our May 7, 2014 *Alert*, "The Nonprofit Revitalization Act of 2013 Takes Effect on July 1, 2014."

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