

## **Key Features of the Nonprofit Revitalization Act that Your Nonprofit Should Know**

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The Nonprofit Revitalization Act represents comprehensive reform of the NYS Not for Profit Corporation Law (NFPCL). The impact of the Act on nonprofit governance and policy-making is significant, and NYCON encourages our members to review their bylaws and policies to ensure compliance with the Act and other provisions of NFPCL. Many of the provisions modernize or clarify legal language, are intended to streamline government procedures, reduce the “types” of nonprofit corporations, and/or enhance the accountability of nonprofits incorporated in the state. The Act also includes reforms designed to facilitate the timely creation of new nonprofits.

This brief outline provides an overview of key reforms that NYCON believes can have a meaningful effect on the general governance and business operations of existing community-based nonprofits. Unless otherwise noted, the changes take effect July 1, 2014. Please note that this outline does not address all the changes or all the details. Also, please be aware that some of these provisions may differ from IRS definitions and regulations, standards required by the Board of Regents, or requirements imposed by the State or New York or the City of New York through contract or licensing.

NYCON’s professional team is assisting our members in ensuring their compliance and best practice operations through webinars, customized trainings, the provision of template documents, and direct technical assistance and consulting. For information or inquiries, contact Doug Sauer, CEO, at [dsauer@nycon.org](mailto:dsauer@nycon.org).

### **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 bylaws or if the bylaws cite a fixed number, then that number. This is important because some provisions of the new law require majority or supermajority vote by the “entire board” as opposed those comprising a simple quorum.
- Allows board and committee meetings by video conference.
- Unanimous written consent can be made by email for board, committee and member action.
- 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 not allowed for board business).
- In using fax or email, the number or address must be what is on the record of the Secretary. They are not valid if the notice cannot be delivered or if the organization is unable to deliver 2 consecutive notices.
- Defines “Committees of the Board” as those that may have the power to bind the board within the limitations of NFPCL. These committees must be comprised solely of board members and have at

least 3. Examples include the executive committee, the audit committee and those that are referred to as Standing Committees. These committees must be appointed or elected by the Board.

- Defines “Committees of the Corporation” as those that cannot bind the board and may include non-board members. These Committees are to be appointed or elected the same as officers as stated in the bylaws.

## Employees on Boards

- Effective July 1, 2015, employees cannot serve the functions of “chair” of the board. Employees can however still be on the board or in another officer position. The functions of the position, not the title (chair, president, etc.) is relevant.

## Conflicts of Interest

### Definitions:

- Defines “independent director” as one who:
  - Is not and has not for the past 3 years been an employee of the corp. or its affiliate, and does not have a relative who has been a key employee for the same.
  - Has not received and does not have a relative who has received, in the past 3 fiscal years more than \$10K in direct compensation from corp. or its affiliate.
  - Is not a current employee or does not have substantial financial interest in, nor a relative who is a current officer or has such interest, in any entity that has made payments, or received payments from the corp./affiliate in the last 3 fiscal years exceeding the lesser of \$25K or 2% of the consolidated gross revenues.
- Broadly defines “relative” as spouse, brothers, sisters (whole or half-blood), children, spouses of brothers, sisters, children, grandchildren, great-grandchildren, and domestic partners.
- Defines “related party” as any director, officer or key employee of corp. /affiliate or any entity where the individual has a 35% or more ownership or interest or for professional corporations/partnerships, more than 5%.
- “Related Party Transaction” means any arrangement in which a related party has a financial interest with the corp. /affiliate.
- “Key employee” is any person in a position to exercise substantial influence over corp. affairs.

### Policies:

- The board *must have written conflict of interest policies* that will govern the independence of directors, officers and employees as well as transactions in which directors, officers, and employees have a financial interest.
  - This policy must cover definition, disclosure procedures, that the person with the conflict not be present for deliberation or vote; and that he or she not improperly influence the

deliberation or voting; and the existence of the conflict and process must be documented in the minutes of any meeting where discussed or acted on.

- There must also be *annually signed disclosure statements* that the Secretary provides to the chair of the audit committee or if there is not one, to the chair of the board.
- The board will need to actively assess and approve transactions between the nonprofit and its directors, officers, and key employees, including their relatives and other organizational affiliations.
- An Interested person will have to *disclose* the material facts of his or her relationship to the transaction to the board and *be absent* from board discussions and votes.
- Board will need to approve and document that the transaction is fair, reasonable, and in the best interests of the nonprofit, and consider alternative options.
- AG will have power to bring action to enjoin or rescind any related party transaction which is determined not to meet the standards.

## Audits

- The required annual gross revenue thresholds required for filing with the AG have been raised, effective the Fiscal Year occurring after July 1, 2014, as follows:
  - Under \$250K, unaudited financial statements.
  - \$250K to \$500K for a “review report” from an independent CPA, to rise to \$500K in 2017 and less than \$1M.
    - The AG’s office may, at their discretion, require an independent audit from nonprofits who submit a Review report within 120 days.
  - Greater than \$500K for an independent certified audit, to rise to \$750K in 2017 and \$1M or more in 2021.
- If required to file a certified audit, the nonprofit must have a board or an authorized committee to be responsible for retaining the outside auditor and review findings.
- If required to file a certified audit, that in the prior fiscal year had or in the current fiscal year reasonably expects to have annual revenue in *excess of \$1M*, the board, or a designated audit committee *comprised solely of independent directors* must:
  - Review with the auditor scope and planning of the audit prior to commencement
  - Upon completion of the audit, review and discuss:
    - any material risks and weaknesses in internal controls identified by the auditor;
    - any restrictions on the scope of the auditor's activities or access to requested 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 through an audit committee, a report on the committee's activities must be made to the board.

- The board or audit committee must oversee the adoption, implementation of, and compliance with any adopted conflict of interest policy or whistleblower policy if this function is not otherwise performed by another committee.
- If the nonprofit controls other corporations, the board or designated audit committee of the board of the controlling corp. may perform the duties required for those corporations.

## Whistleblower and Prevention of Financial Abuse

- Nonprofits with 20 or more employees **and** annual revenue over \$1M must have whistleblower policies.
- 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.

## Certificate Amendments, Mergers or Consolidations and Real Estate

- Process will be streamlined by allowing the AG to approve amendments to Certificates of Incorporation and plans of merger or consolidation or at its discretion, refer to the Supreme Court (which is currently required to be done).
- Education and religious corporations can enter into mergers in the same way as other nonprofits.
- Nonprofits seeking to merge or sell significant property assets will have the option to seek approval from the AG without the need for court approval. The AG though will still have the option to refer to the courts if it chooses to do so and the nonprofit may seek court approval if the AG does not approve.
- For real estate transactions:
  - Small, routine real estate transactions *that is not all or substantially all* of a nonprofits property (selling, mortgaging, leasing, exchanging or otherwise disposing of real property) can be done by a majority vote of the board or an authorized committee (current law requires a two-thirds vote).
  - *If all or substantially all* there must be 2/3rds vote of the entire board to approve or a majority if there are more than 21 directors

## E-Filings with AG

- AG will now be able to accept annual financial reports and other required filings in electronic form