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LEGAL BRIEFING: New York Non-Profit Revitalization Act of 2013  
Additional Compliance to Address Before the July 1, 2014 Deadline

Page 1 of 4

June 24, 2014

This is the second Legal Briefing on the changes to the New York Non-Profit Corporation Law through the Non-Profit Revitalization Act of 2013. The first Legal Briefing in this series, *New York State Non-Profit Revitalization Act of 2013: Are you Prepared?*, focused on changes to the limitations of Boards, the conflict of interest policy and the whistle blower policy. This second Legal Briefing will discuss changes to the audit process, electronic communications, corporate finances, entity identification, and consent requirements for New York not-for-profits. The following requirements, in conjunction with the previous Legal Briefing, require compliance by July 1, 2014:

**Audit Process**

If a charitable organization receives more than \$500,000 in gross revenue and support in any fiscal year, then the organization must file, with the attorney general, an annual written financial report. The financial report must be accompanied by an annual financial statement, which includes an independent certified public accountant's audit report.

The Board, or a designated audit committee comprised solely of independent directors, must:

- o Oversee the accounting and financial reporting processes of the not-for-profit and the audit of the organization's financial statements;
- o Retain or renew an independent certified public accountant to conduct the audit; and
- o Upon completion of the audit, review the results of the audit with the independent auditor.

If the organization received (in the prior fiscal year) or reasonably expects to receive (in the current fiscal year) more than \$1,000,000 then the Board or designated audit committee, in addition to the above listed requirements, must:

- o Review the scope and planning of the audit with the independent auditor prior to the commencement of the audit;
- o Discuss, with the independent auditor: a) any risks and weaknesses in internal controls, b) any restrictions on the auditor's activities, c) any disagreements between the auditor and management, and d) the adequacy of the organization's accounting and financial reporting; and
- o Annually consider the performance of the independent auditor.

If the above mentioned duties are performed by an audit committee, then the committee's performance must also be assessed.

**Electronic Communications**

- o The attorney general may make rules allowing for or requiring electronic communications and submissions to the attorney general.

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Page 2 of 4

- o Notice Required for Meetings of Members
  - Members include any person having membership rights in the organization and membership may be evidenced by signature on the certificate of incorporation, designation in the by-laws, or on a membership certificate card.
  - If members are required or permitted to take any action at a meeting, then notice of any meeting may be given by fax or by e-mail to each member entitled to vote at such meeting.
  - Unless the meeting is an annual meeting, the notice should state at whose direction the meeting is being called, and if it is a special meeting, then the purpose of the meeting must be specified in the notice.
  - Notice must be given not less than 10, nor more than 50 days prior to the date of the meeting. If sent by fax or e-mail, notice is deemed to be given when directed to the member's fax or e-mail address. Fax numbers and e-mail addresses used for notice are the ones appearing on the record of members. However, notice will not be deemed to be given electronically when the organization is unable to deliver 2 consecutive faxes or e-mails, or if the organization becomes aware that notice cannot be delivered electronically.
  - If an organization has more than 500 members, then notice may be given through publication, provided that the organization posts notice of such meeting on any website homepage maintained by the organization until the date of the meeting.
- o Waiver of notice and proxy authorizations may also be given electronically, and votes that require unanimous consent may also be obtained through electronic communication.
- o Additionally, Board members who are not physically present at a meeting of the Board or committee may participate by electronic video screen communication. Electronic video participation will be deemed to be presence at the meeting so long as every person participating in the meeting can hear each other and there are no limitations on the ability to propose, object to, and vote upon a specific action of the Board or committee.

#### **Corporate Finances**

- o **Annual Reporting:** As noted above, if a charitable organization receives more than \$500,000 in gross revenue and support in any fiscal year then the organization must file with the attorney general, an annual written financial report. The financial report must be accompanied by an annual financial statement which includes an independent certified public accountant's audit report. The audit report must contain an opinion that the financial statements

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Additional Compliance to Address Before the July 1, 2014 Deadline

Page 3 of 4

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report. The audit report must contain an opinion that the financial statements are presented fairly in all material respects and in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants that establish accounting principles relevant to not-for-profit organizations.

If a charitable organization receives at least \$250,000, but not more than \$500,000, then the organization must file an annual financial report with the attorney general. The financial report must be accompanied by an annual financial statement, which includes an independent certified public accountant's review report in accordance with statements on standards for accounting and review services issued by the American Institute of Certified Public Accountants.

If a charitable organization receives less than \$250,000 in gross revenue and support, then the organization must file an unaudited financial report with the attorney general.

In July 2017 and July 2021, the gross revenue and support levels required for annual reporting will increase.

### **Compensation**

An independent director means a director who is not, or has not been an employee or affiliate of the organization within the last 3 years, and does not have a relative who has been a key employee (any person who can exercise substantial influence over the affairs of the organization) of the organization or its affiliate within the last 3 years. Independent directors must not have received, and must not have a relative who has received more than \$10,000 in direct compensation from the organization or an affiliate of the organization in any of the last 3 fiscal years. This does not apply to reimbursement for expenses reasonably incurred as a director.

Since an organization may pay compensation in a reasonable amount to members, directors, or officers for services rendered, such person may not participate in any Board or committee deliberation or vote concerning such person's compensation.

### **Real Property**

An organization may not purchase, sell, mortgage, lease, exchange or otherwise dispose of its real property, unless authorized by a majority vote of the Board, or by a majority vote of a committee authorized by the Board. If the property would equal all or substantially all of the organization's assets, then a 2/3 vote of the entire Board is

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Page 4 of 4

required, or if there are 21 or more directors, then the vote of a majority of the entire Board will be sufficient.

**Entity Identification**

Entities were formerly known as Type-A, Type-B, Type-C, and Type-D. The Act replaces the “type” distinction and merely classifies organizations as charitable or non-charitable. Types B, C, and D entities formed for charitable purposes are reclassified as charitable organizations. Type A and all other Type entities are reclassified as non-charitable organizations.

**Consent of the Education Department**

For any organization whose certificate of incorporation includes the operation of a school, college/university, or other entity providing post-secondary education, or for a library, museum or historical society, the organization must seek prior approval of the commissioner of education or written authorization of the Regents. For any other organization whose certificate of incorporation includes a purpose for which the organization might be chartered by the board of regents, the organization must provide a certified copy of the certificate of incorporation to the commissioner of education within 30 business days after the organization received confirmation from the department of state that the certificate has been accepted for filing.

To ensure compliance with these changes, not-for-profit organizations should:

- Review and amend by-laws to reflect changes to:
  - Entity type designation;
  - Committee definitions;
  - Financial review processes; and
  - Electronic communication policies for:
    - Notice of meetings;
    - Waiver of notice and proxy authorizations;
    - Meeting participation by phone and electronic video conference; and
    - Obtaining unanimous consent.
- Have a Board or designated audit committee comprised solely of independent directors in place to oversee the audit process and for financial oversight.

This Legal Briefing is intended for general informational and educational purposes only and should not be considered legal advice or counsel. The substance of this Legal Briefing is not intended to cover all legal issues or developments regarding the matter. Please consult with an attorney to ascertain how these new developments may relate to you or your organization.

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