



December 15, 2016

Amendments to the Non-Profit Revitalization Act of 2013

The Non-Profit Revitalization Act of 2013 (the "Act") was the first comprehensive update of New York's Not-for-Profit Corporation Law (the "N-PCL") since it was enacted nearly fifty years ago. The Act was signed into law on December 18, 2013, and most of the provisions of the Act became effective on July 1, 2014.

Since the Act became effective, there have been several amendments to the Act, including:

- Bill No. S7913-B/A10365-B, signed by the Governor on November 28, 2016, which generally becomes effective on May 27, 2017;
- Bill S5868A/A8118-B, signed by the Governor on December 11, 2015;
- Bill S5738/A7641, signed by the Governor on October 26, 2015; and
- Bill No. S5870, signed by the Governor on September 25, 2015.

Together, these amendments make several amendments to the N-PCL and the Estates, Powers and Trusts Law (underscored is new language). The most substantive provisions of these amendments are summarized below. Please note that this memo summarizes the NPRA amendments cumulatively (some amendments amended prior amendments).

Replace "Key Employee" with "Key Person"

- Deletes the definition of "key employee" and replaces it with "key person" under Section 102(a)(25) of the N-PCL ("Definitions"), which means "any person, other than a director or officer, whether or not an employee of the corporation, who (i) has responsibilities, or exercises power or influence over the corporation as a whole similar to the responsibilities, powers, or influence of directors and officers; (ii) manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation; or (iii) alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget." [Bill No. S7913-B/A10365-B]

Audit Committee

- Amends the definition of "**affiliate**" in Section 102(a)(19) of the N-PCL ("**Definitions**") of a corporation to mean "any entity controlled by, or in control of, such corporation. (Deletes "or under common control with".) [Bill S5868A/A8118-B]
- Amends the definition of "**independent director**" in Section 102(a)(21) of the N-PCL ("**Definitions**"):
 - (1) To include anyone who "(i) is not, and has not been within the last three



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- years, an employee or a key person of the corporation or an affiliate of the corporation, and does not have a relative who is...a key person of the corporation or an affiliate of the corporation". [Bill No. S7913-B/A10365-B]
- (2) To include any person who "(iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has provided payments, property or services to, or received payments, property or services from, the corporation or an affiliate of the corporation if the amount paid by the corporation to the entity or received by the corporation from the entity for such property or services, in any of the last three fiscal years, exceeded the lesser of:
- \$10,000 or 2% of such entity's consolidated gross revenues if the entity's consolidated gross revenue was less than \$500,000;
 - \$25,000 if the entity's consolidated gross revenue was \$500,000 or more but less than \$10 million;
 - \$100,000 if the entity's consolidated gross revenue was \$10 million or more. [Bill No. S7913-B/A10365-B]
- (3) To include a director who "(iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years." [Bill S5868A/A8118-B]
- (4) To define "compensation" in this subparagraph to "not include reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of Section 202 (General and special powers) of this chapter." [Bill No. S7913-B/A10365-B]
- (5) To define "payment" in this subparagraph to exclude any charitable contributions, dues or fees paid to the corporation for services which the corporation performs as part of its nonprofit purposes, or payments made by the corporation at fixed or non-negotiable rates or amounts for services received, provided that such services by and to the corporation are available to individual members of the public on the same terms, and such services received by the corporation are not available from another source. [Bill No. S7913-B/A10365-B and Bill S5868A/A8118-B]
- Amends the definition of "**relative**" in Section 102(a)(22) of the N-PCL ("*Definitions*") of an individual to mean "(i) his or her spouse or domestic partner as defined in Section 2994-A of the Public Health Law; (ii) his or her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren." [Bill S5868A/A8118-B]
 - Adds a proviso to Section 712-a(e) of the N-PCL ("*Audit oversight*") to read: "(e)



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Only independent directors may participate in any board or committee deliberations or voting relating to matters set forth in this section, provided that nothing in this paragraph shall prohibit the board or designated audit committee from requesting that a person with an interest in the matter present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto." [Bill S5868A/A8118-B]

Related Party Transactions

- Amends the definition of **"related party"** in Section 102(a)(23) of the N-PCL ("*Definitions*") to mean "(i) any director, officer or key person of the corporation or any affiliate of the corporation; (ii) any relative of any individual described in clause (i) of this subparagraph; or (iii) "any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent." [Bills No. S7913-B/A10365-B and S5868A/A8118-B]
- Amends the definition of **"related party transaction"** in Section 102(a)(24) of the N-PCL ("*Definitions*") to exclude a transaction if "(i) the transaction or the related party's financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a related party solely as a member of a class of the beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms." [Bill No. S7913-B/A10365-B]
- Amends Section 715 of the N-PCL ("*Related Party Transactions*") as follows:
 - (1) Paragraph (a) is amended to read: "No corporation shall enter into any related party transaction unless the transaction is determined by the board, or an authorized committee thereof, to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer or key person who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest." [Bill No. S7913-B/A10365-B]
 - (2) Paragraph (e) is amended to read: "The fixing of compensation of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws." [Bill S5868A/A8118-B]
 - (3) Re-numbers paragraph (f) (which was duplicated) to paragraph (g), and re-numbers paragraph (g) to paragraph (h). [Bill S5868A/A8118-B]



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- (4) Paragraph (h) is amended to read: "No related party may participate in deliberations or voting relating to a related party transaction in which he or she has an interest; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a related party present information as background or answer questions concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting relating thereto." [Bill S5868A/A8118-B]
- (5) Adds a new paragraph (i) that reads: "In an action by any person or entity other than the attorney general, it shall be a defense to a claim of violation of any provisions of this section that a transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction." [Bill No. S7913-B/A10365-B]
- (6) Adds a new paragraph (j) that reads: "In an action by the attorney general with respect to a related party transaction not approved in accordance with paragraphs (a) or (b) of this section at the time it was entered into, whichever is applicable, it shall be a defense to a claim of violation of any provisions of this section that (1) the transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction and (2) prior to receipt of any request for information by the attorney general regarding the transaction, the board has: (A) ratified the transaction by finding in good faith that it was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction; and, with respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, considered alternative transactions to the extent available, approving the transaction by not less than a majority vote of the directors or committee members present at the meeting; (B) documented in writing the nature of the violation and the basis for the board's or committee's ratification of the transaction; and (C) put into place procedures to ensure that the corporation complies with paragraphs (a) and (b) of this section as to related party transactions in the future." [Bill No. S7913-B/A10365-B]

- Clarifies that the Attorney General may maintain an action or special proceeding "to enjoin, void or rescind any related party transaction, seek damages and other appropriate remedies, in law or equity, in addition to any actions pursuant to Section 715 of the N-PCL ("*Related Party Transactions*")". [Bill No. S5870]

Conflict of Interest and Whistleblower Policies

- Repeals paragraph (c) of Section 712-a of the N-PCL ("*Audit Oversight*") that requires that the Board or Audit Committee oversee the conflict of interest policy or whistleblower policy if not overseen by another committee of the board comprised solely of independent directors. [Bill No. S7913-B/A10365-B]



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- Amends Section 715-a of the N-PCL ("*Conflict of Interest Policy*") as follows:
 - (1) Amends paragraph (a) to read: "(a) Except as provided in paragraph (d) of this section, the board shall adopt, and oversee the implementation of, and compliance with, a conflict of interest policy to ensure that its directors, officers and key persons act in the corporation's best interest and comply with applicable legal requirements, including but not limited to the requirements set forth in section seven hundred fifteen of this article. [Bill No. S7913-B/A10365-B]
 - (2) Amends paragraph (b)(2) to read: ""[The conflict of interest policy shall include...] procedures for disclosing a conflict of interest or possible conflict of interest to the board or to a committee of the board, and procedures for the board or committee to determine whether a conflict exists." [Bill No. S7913-B/A10365-B]
 - (3) Amends paragraph (b)(3) to read: "[The conflict of interest policy shall include...] (3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberations or vote on the matter giving rise to such conflict, provided that nothing in this section shall prohibit the board or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting related thereto;" [Bill S5868A/A8118-B]
 - (4) Amends paragraph (c) to add "or a designated compliance officer" as an alternate to the secretary of the corporation as an administrator of the conflict of interest policy. [Bill No. S5868A/A8118-B]

- Amends Section 715-b of the N-PCL ("*Whistleblower Policy*") as follows:
 - (1) Amends paragraph (a) to read: "(a) Except as provided in paragraph (c) of this section, the board of every corporation that has twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars shall adopt, and oversee the implementation of, and compliance with, a whistleblower policy to protect from retaliation persons who report suspected improper conduct. Such policy shall provide that no director, officer, employee or volunteer of a corporation who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence." [Bill No. S7913-B/A10365-B]
 - (2) Amends paragraph (b)(2) to read: ""(b) The whistleblower policy shall include...] A requirement that an employee, officer or director of the corporation be designated to administer the whistleblower policy and to report to the board or an authorized committee thereof, except that directors who are employees may not participate in any board or



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committee deliberations or voting relating to administration of the whistleblower policy." [Bill No. S7913-B/A10365-B]

- (3) Adds a new paragraph (b)(3) that reads: "[(b) The whistleblower policy shall include...] A requirement that the person who is the subject of a whistleblower complaint not be present at or participate in board or committee deliberations or vote on the matter relating to such complaint, provided that nothing in this subparagraph shall prohibit the board or committee from requesting that the person who is subject to the complaint present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto; and" [Bill No. S7913-B/A10365-B]

Re-numbers paragraph (b)(4) and amends to read: "[(b) The whistleblower policy shall include...] (3) a requirement that a copy of the policy be distributed to all directors, officers, employees and to volunteers who provide substantial services to the corporation. For purposes of this subdivision, posting the policy on the corporation's website or at the corporation's offices in a conspicuous location accessible to employees and volunteers are among the methods a corporation may use to satisfy the distribution requirement." [Bill No. S5868A/A8118-B]

Board of Directors and Officers

- Amends the definition of "**entire board**" in Section 102(a)(6-a) of the N-PCL ("*Definitions*") to mean: "the total number of directors entitled to vote which the corporation would have if there were no vacancies. If the by-laws of the corporation provide that the board shall consist of a fixed number of directors, then the "entire board" shall consist of that number of directors. If the by-laws of any corporation provide that the board may consist of a range between a minimum and maximum number of directors, and the number within that range has not been fixed in accordance with paragraph (a) of Section 702 of this Chapter, then the "entire board" shall consist of the number of directors within such 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." [Bill No. S5868A/A8118-B]
- Adds to Section 515 of the N-PCL ("*Dividends prohibited; certain distributions of cash or property authorized*") to read: "Nothing in this Section or in paragraph (h) of Section 715 of this Chapter shall be construed to prohibit a director from deliberating or voting concerning compensation for service on the board that is to be made available or provided to all directors of the corporation on the same or substantially similar terms." [Bill No. S5868A/A8118-B]
- Adds to Section 708(d) of the N-PCL ("*Action by the board*") for purposes of quorum to read: "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 determined to



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be present at the time of the vote for purposes of this paragraph.” [Bill No. S5868A/A8118-B]

- Amends Section 712(a) of the N-PCL (“*Executive Committee and Other Committees*”) to enable the Board to “appoint the members of such committees of the board, except that in the case of any executive committee or similar committee however denominated, the appointment shall be made by a majority of the entire board, provided that in the case of a board of thirty members or more, the appointment shall be made by at least three-quarters of the directors present at the time of the vote, if a quorum is present at that time. In addition, the by-laws may provide that directors who are the holders of certain positions in the corporation shall be ex-officio members of specific committees. Each such committee shall have the authority of the board to the extent provided in a board resolution or in the certificate of incorporation or by-laws, except that no committee of any kind shall have authority as to the following matters:
 - (1) The submission to members of any action requiring members’ approval under this chapter.
 - (2) The filling of vacancies in the board of directors or in any committee.
 - (3) The fixing of compensation of the directors for serving on the board or on any committee;
 - (4) The amendment or repeal of the by-laws or the adoption of new by-laws.
 - (5) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.
 - (6) The election or removal of officers and directors.
 - (7) The approval of a merger or plan of dissolution.
 - (8) The adoption of a resolution recommending to the members action on the sale, lease, exchange or other disposition of all or substantially all the assets of a corporation or, if there are no members entitled to vote, the authorization of such transaction.
 - (9) The approval of amendments to the certificate of incorporation.” [Bill No. S7913-B/A10365-B]

- Amends Section 712(e) of the N-PCL (“*Executive Committee and Other Committees*”) as follows:
 - (1) To read: “Members of such committees of the corporation, who may be non-directors, shall be elected or appointed in the manner set forth in the by-laws, or if not set forth in the by-laws, in the same manner as officers of the corporation.” [Bill No. S5868A/A8118-B]
 - (2) To delete the sentence “Provisions of this chapter applicable to officers generally shall apply to members of such committees [of the corporation].” [Bill No. S7913-B/A10365-B]

- Amends paragraph (f) of Section 713 of the N-PCL (“*Officers*”) to read “(f) No



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employee of the corporation shall serve as chair of the board or hold any other title with similar responsibilities, unless the board approves such employee serving as chair of the board by a two-thirds vote of the entire board and contemporaneously documents in writing the basis for the board approval; provided, however, that no such employee shall be considered an independent director for the purposes of this chapter." This amendment takes effect on January 1, 2017. [Bill No. S7913-B/A10365-B]

Actions against Directors, Officers and Key Employees/Persons

- Amends Section 720 of the N-PCL ("*Actions against directors, officers and key employees*") as follows:
 - (1) Amends the Section heading to "Actions against directors, officers and key persons".
 - (2) Amends paragraph (a) to refer to "key persons" of a corporation instead of "key employees". [Bill No. S7913-B/A10365-B]

This alert is for general information purposes and should not be construed as legal advice. If you would like information about this alert, please contact one of the firm's attorneys: Deborah Buyer, 212-225-8483 x1, deborah@deborahbuyerlaw.com
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