

## New York Non-Profit Law Reformed - Again New Law Makes Significant Technical Changes

On November 28, 2016, Governor Cuomo signed into law a bill to amend the Not-for-Profit Corporation Law (the “N-PCL”) and the Estates, Powers, and Trusts Law (the “EPTL”), both of which were amended by the Non-Profit Revitalization Act of 2013. The new law makes significant technical changes to a number of key provisions of the N-PCL and EPTL, including, but not limited to, those related to related party transactions, independent directors, conflicts of interest, whistleblowers, and committees.

The key changes are as follows:

### ■ Related Party Transactions.

- The new law relaxes the application of related party transaction rules in certain situations by excluding the following from the “related party transaction” definition:
  - A transaction, or a related party’s financial interest in the transaction, when it is *de minimis*.
  - A transaction that 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.
  - A transaction that constitutes a benefit which is available to the related party as a member of a class of beneficiaries that the corporation intends to benefit, and is made available to all similarly situated individuals of the same class on the same terms.
- The new law allows an authorized committee of the board to approve a related party transaction.

*Action Items: If desired for added flexibility, update Conflict of Interest Policies to account for excluded transactions and allow an authorized committee of the board to approve related party transactions.*

- **Conflict of Interest and Whistleblower Policies.** The new law requires that, in addition to adopting a conflict of interest policy and whistleblower policy (if applicable), the board oversee the implementation of, and compliance with, such policies. Additionally, the new law allows potential conflict and whistleblower disclosures to be reported to the board or an authorized committee of the board, rather than only to the audit committee.

*Action Item: Update Conflict of Interest and Whistleblower Policies to (i) clarify that the board is responsible for overseeing and implementing these policies and, (ii) if desired for added flexibility, allow for reporting to the board or an authorized committee thereof.*

- **Independent Directors and the Audit Committee.** The N-PCL’s definition of independent director excludes individuals who are current employees of, or who have substantial financial interests in, any entity that has engaged in financial transactions with the corporation or an affiliate of the corporation exceeding certain thresholds. To allow for circumstances where the exchange of payments is relatively insignificant, the new law applies a sliding scale threshold based on the entity’s gross revenues. For example, in the case of an individual serving on the board of a non-profit corporation, if that individual is an employee of an entity that receives payments from the non-profit corporation in excess of \$25,000, if the employer entity’s gross

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revenues exceed \$500,000, the individual cannot be an independent director of the non-profit corporation.

The new law also clarifies that an “independent director” is a director who “is not, and has not been within the last three years, an employee or a key person” – as opposed to a key employee – of the corporation or its affiliates.” Key person is defined directly in the statute as opposed to the reference to the Internal Revenue Code for the prior definition of key employee.

*Action Items: Evaluate independent directors in the context of new definition and update any charters or policies with the new definition.*

- **Formation of Committees.** The new law authorizes the board to form all committees, except for the Executive Committee, through normal voting procedures. In most cases, the appointment of the Executive Committee will still require the vote of a majority of the entire board.

*Action Item: If desired for ease of approval, revise bylaws to allow for formation of committees (other than Executive Committee) through normal voting procedures.*

- **Authority of Committees of the Board.** The new law adds several fundamental items to the list of actions reserved to the board, such as approving amendments to the Certificate of Incorporation and the election or removal of officers and directors.

*Action Items: Assess committee charters and bylaws to ensure no committee has powers now specifically reserved to the board and update as needed.*

- **Employee as Chair.** The new law permits an employee of a corporation to serve as chair of the board upon the approval of two-thirds of the entire board. The board must contemporaneously document the basis for its approval in the corporation’s records.

*Action Item: If desired, revise bylaws to allow for an employee to serve as chair if approved by two-thirds of the board.*

If you have any questions regarding the above developments, please contact any member of the Not-for-Profit Organizations Practice Group at (585) 232-6500. ■



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