New York State Makes Further Amendments to Its Not-for-Profit Corporation Law

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In late 2016, New York State enacted another round of amendments (the “2016 Amendments”) to the New York Not-for-Profit Corporation Law (the “NPCL”). This is the latest in a series of changes to the NPCL that began with the Nonprofit Revitalization Act of 2013 (the “NPRA”). The 2016 Amendments are meant to streamline some of the more burdensome requirements of the NPRA and strengthen the operations of New York nonprofits.

Most of the amendments become effective on May 27, 2017. The exception is an amendment to the prohibition of an employee serving as board chair (detailed below), which went into effect on January 1, 2017.

What Should Nonprofits Do Now?

New York nonprofits should have their bylaws, conflict of interest policy, whistleblower policy, and audit committee charter reviewed by legal counsel for compliance with the new law. This includes those nonprofits who previously updated their documents after the 2013 Revitalization Act. Pro Bono Partnership has prepared new model documents and is available to help clients navigate these changes. For assistance, please contact our White Plains office at (914) 328-0674 or the Partnership staff attorney with whom you regularly work.

Summary of the 2016 Amendments

1. Chair of the Board: The NPRA prohibited an employee of a nonprofit from serving as chair or president of the nonprofit’s board. The 2016 Amendments now allow an employee of a nonprofit to serve as board chair or president, if at least two-thirds of the entire board approve and contemporaneously document the basis for their decision in writing.

2. Formation and Power of Board Committees: The 2016 Amendments make two significant changes to the laws regarding board committees.

   a. Creation of Board Committees. The NPRA originally required a majority vote of the entire board to create a board committee. The 2016 Amendments now allow board committees to be established by a majority of the directors present at a board
meeting, provided there is a quorum. The exception is the election of the Executive Committee, which will continue to require the majority approval of the entire board, unless the board has 30 or more members.¹

b. Limitations on the Powers of Board Committees. The 2016 Amendments expand the list of powers that may not be delegated to board committees, including the authority to elect or remove officers and directors; to approve a merger or plan of dissolution; to approve amendments to the certificate of incorporation; and to adopt a resolution recommending to the members a sale of all or substantially all of the assets of a nonprofit, or authorize such a transaction if the nonprofit has no members.

3. Related Party Transactions: The 2016 Amendments make several changes to the provisions of the NPCL governing related party transactions, which are financial transactions involving the nonprofit and a related party. Related parties include directors, officers, "key people" within the organization (defined below), and their relatives.

The NPRA originally prohibited a nonprofit from entering into any related party transaction, regardless of the size or nature of the transaction, unless the transaction was reviewed by the board and determined to be fair, reasonable, and in the nonprofit’s best interest. Many nonprofits found these requirements unnecessarily cumbersome, requiring boards to review routine business transactions and small transactions that would not otherwise have risen to the board’s attention, simply because they involved a related party.

The 2016 Amendments address this problem by narrowing the definition of a related party transaction to exclude the following:

1. Transactions that are considered de minimis or of limited monetary value;²
2. Transactions that would not usually be reviewed by the board in the ordinary course of business and are available to the public on the same or similar terms; and
3. Transactions that would constitute a benefit to a related party solely because the related party is a member of the charitable class of people normally served by the nonprofit as a part of its mission, provided that the benefit is available to other people in the same class on the same terms.

¹ If a board has 30 or more members, elections to the Executive Committee may be approved by ¾ of the directors present at a meeting, provided there is a quorum.

² There is no statutory definition of a de minimis transaction. Nonprofits will need to determine the appropriate thresholds for their particular organizations and draft their policies accordingly.
The 2016 Amendments also allow related party transactions to be reviewed and approved by an authorized committee of the board.

Finally, the 2016 Amendments encourage boards to self-correct any inadvertent failure to vet a related party transaction. Boards that discover they have failed to properly review a related party transaction may self-correct by: (1) reviewing the transaction, (2) ratifying the transaction upon a finding that it was fair, reasonable, and in the nonprofit’s best interest at the time, (3) documenting in writing the reason for the failure and the board or committee’s ratification, and (4) putting in place procedures to ensure that similar oversights do not happen in the future.

**Definition of Key Person and Independent Director:** The NPRA required that certain board functions – in particular, the oversight of the annual audit – could be carried out only by “independent directors.” For purposes of determining who qualified as an independent director (or as a related party, as described above), the NPRA relied in part on the term “key employee.” The definition of a key employee caused significant confusion; among other things, it included individuals who were not actually employees of the nonprofit.

The 2016 Amendments address this problem by replacing the term “key employee” with the term “key person,” focusing on individuals who have significant authority or influence within the nonprofit, regardless of whether or not they are employees. A key person is defined as someone (other than an officer or director) who has responsibilities or exercises powers over the nonprofit in a manner that similar to a director or officer; or who manages the nonprofit; or who manages a substantial portion of the activities, assets, income, or expenses of the nonprofit; or who controls or determines a substantial portion of the nonprofit’s expenditures or budget.

The definition of an “independent director” under the NPRA also excludes individuals who are employed by, or have substantial financial interests in, entities that make payments of a certain level to the nonprofit or receive such payments from the nonprofit. The 2016 Amendments implement a new sliding scale for determining when such payments are significant enough to affect an individual’s qualification as an independent director. The intention here is to expand the universe of financially competent people who may qualify as independent directors and are thus able to serve on the nonprofit’s audit committee.

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3 Having a relative who is employed by, or has a significant financial interest in, such an entity may also exclude an individual from the definition of an independent director.
Conflict of Interest and Whistleblower Provisions: The 2016 Amendments make various changes to the conflict of interest and whistleblower policy requirements added by the NPRA.4

The NPRA required both the conflict of interest and whistleblower policies to be overseen and adopted only by independent directors, as defined above. The 2016 Amendments eliminate this requirement.

Under the 2016 Amendments, an employee who sits on the nonprofit’s board of directors is prohibited from taking part in any board or committee deliberations or vote concerning the administration of the nonprofit’s whistleblower policy. Additionally, the 2016 Amendments state that any person who is the subject of a whistleblower complaint cannot be present at or participate in board or committee deliberations or voting on the matter relating to the complaint, although the board or committee can request that such person present background information or answer questions prior to the commencement of deliberations or voting.

The full text of the 2016 Amendments is available online.

For more information and answers to questions about the 2016 Amendments, please contact the Pro Bono Partnership’s New York office at (914) 328-0674.

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4 The whistleblower policy requirements of the NPRA only apply to those nonprofits with over $1 million in annual revenue and 20 or more employees. The 2016 Amendments did not change this.