

### **Cuomo Signs *Non-Profit Revitalization Act of 2013*: New York Law Reforms Governance Rules for Nonprofits**

Governor Andrew Cuomo signed the Non-Profit Revitalization Act of 2013 into law on December 18. The legislation had been pending in Albany since it was passed by the Legislature in late June.

As explained in this report, the new law is designed to reform the statutory requirements for governance of nonprofit organizations (both not-for-profit corporations and wholly charitable trusts), expand the Attorney General's enforcement powers, and modernize and clarify some of the more mechanical and procedural New York rules applicable to not-for-profit corporations. Most provisions will take effect on July 1, 2014.

Click [here](#) for an Overview of Applicability. Click [here](#) for a Summary of the Act's Governance Requirements.

Click [here](#) for a Summary of the Act's Financial Reporting Rules for Organizations Required to Register to Conduct Charitable Solicitations.

Click [here](#) for Highlights of the Act's Update of the Not-for-Profit Corporation Law and Expansion of the Attorney General's Enforcement Powers.

The Attorney General press release and summary can be viewed by clicking [here](#).

If you would like more information about this report, please contact one of the following attorneys or call your regular Patterson contact.

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## ***Non-Profit Revitalization Act of 2013:*** **Overview of Applicability**

Applicability is a threshold issue for any organization trying to understand the Non-Profit Revitalization Act. This chart shows the architecture of the new law, so that you can identify the portions that apply to your organization.

|                                                                                                                                       |                                                                                                                                                                                                                                            |
|---------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>All Not-for-Profit Corporations</b>                                                                                                | <ul style="list-style-type: none"> <li>→ <a href="#"><u>Compensation: Deliberations and Voting</u></a></li> <li>→ <a href="#"><u>Chair of the Board</u></a></li> </ul>                                                                     |
| <b>All Not-for-Profit Corporations and Wholly Charitable Trusts</b>                                                                   | <ul style="list-style-type: none"> <li>→ <a href="#"><u>Related Party Transaction Rules (Basic)</u></a></li> <li>→ <a href="#"><u>Mandatory Conflict of Interest Policy</u></a></li> <li>→ <a href="#"><u>Defined Terms</u></a></li> </ul> |
| <b>Not-for-Profit Corporations and Wholly Charitable Trusts with 20 or More Employees and Annual Revenue in Excess of \$1,000,000</b> | <ul style="list-style-type: none"> <li>→ <a href="#"><u>Mandatory Whistleblower Policy</u></a></li> </ul>                                                                                                                                  |
| <b>Charitable Corporations and Wholly Charitable Trusts ("Charities")</b>                                                             | <ul style="list-style-type: none"> <li>→ <a href="#"><u>Related Party Transaction Rules (Augmented)</u></a></li> </ul>                                                                                                                     |
| <b>Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$500,000</b>      | <ul style="list-style-type: none"> <li>→ <a href="#"><u>Mandatory Audit Committee or Board Audit Function (Basic Duties)</u></a></li> </ul>                                                                                                |
| <b>Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$1,000,000</b>    | <ul style="list-style-type: none"> <li>→ <a href="#"><u>Mandatory Audit Committee or Board Audit Function (Augmented Duties)</u></a></li> </ul>                                                                                            |

## Non-Profit Revitalization Act of 2013: Summary of the Act's Governance Requirements

| Covered Organizations                                            | Topic                                                                                                            | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| All Not-for-Profit Corporations                                  | Compensation:<br>Deliberations and Voting                                                                        | No person who may benefit from a compensation arrangement may be present at or otherwise participate in any Board or committee deliberation or vote concerning that person's compensation, except that the Board or committee may request that the person present information as background or answer questions at a committee or Board meeting prior to the commencement of deliberations or voting thereon.                                                                                                                                                                                                                                                                                                                                                                                          |
|                                                                  | Chair of the Board                                                                                               | No employee may serve as chair or hold any other title with similar responsibilities.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| All Not-for-Profit Corporations<br>and Wholly Charitable Trusts* | Related Party<br>Transaction Rules<br>(Basic)                                                                    | A covered organization may not enter into a <b>related party transaction</b> unless the Board determines that the transaction is fair, reasonable and in the organization's best interest at the time of determination.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                                  | (See augmented rules<br>below applicable only to<br>Charitable Corporations<br>and Wholly Charitable<br>Trusts.) | <p>A director, officer or <b>key employee</b> who has an interest in a <b>related party transaction</b> must disclose in good faith to the Board or an authorized Board committee the material facts concerning such interest.</p> <p>Additional restrictions and procedures may be set forth in the organization's governing documents or a policy adopted by the Board.</p> <p>No <b>related party</b> with an interest in a <b>related party transaction</b> may participate in deliberations or vote on the <b>related party transaction</b>, except that the Board or an authorized committee may request that such <b>related party</b> present information concerning the transaction at a meeting of the Board or such committee prior to commencement of deliberations or voting thereon.</p> |

New defined terms under the Non-Profit Revitalization Act appear in this summary in bold. A glossary of defined terms appears at the end of the summary.

References to "directors" include trustees of wholly charitable trusts. References to the "Board" refer to a Board of Directors or other governing body of a corporation and to the collective trustees of a wholly charitable trust.

\*Unless otherwise specified, references to "not-for-profit corporations" include both charitable and non-charitable not-for-profit corporations (such as those formed for social, fraternal or political purposes). The Act clearly applies to New York not-for-profit corporations and New York wholly charitable trusts. Non-New York charities that conduct solicitations in New York and have revenue over certain thresholds may be subject to some provisions of the Act, depending on how the Act is interpreted.

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Overview](#)

| Covered Organizations                                                  | Topic                                                                                                                                                                                                                                                                                                                                                                                                                   | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
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| All Not-for-Profit Corporations and Wholly Charitable Trusts* (cont'd) | <p>Mandatory Conflict of Interest Policy</p> <p><i>Note that an organization that has adopted a Conflict of Interest Policy pursuant to federal, state or local laws that is substantially consistent with these new requirements will be deemed in compliance, as will a corporation that is a state or local authority that has complied substantially with Public Authorities Law Sections 2824 and 2825(3).</i></p> | <p>Each covered organization must adopt a Conflict of Interest Policy to ensure that its directors, officers and key employees act in the organization's best interest and comply with applicable laws.</p> <p><u>Contents of the Conflict of Interest Policy</u></p> <p>The Conflict of Interest Policy, at a minimum, must include:</p> <ul style="list-style-type: none"> <li>(a) a definition of the circumstances that constitute a conflict of interest;</li> <li>(b) procedures for disclosing a conflict of interest to the Audit Committee, or if no Audit Committee exists, to the Board;</li> <li>(c) a requirement that the conflicted person not be present at or participate in Board or committee deliberations or vote on the matter;</li> <li>(d) a prohibition of any attempt by the conflicted person to influence improperly the deliberations or voting on the matter;</li> <li>(e) a requirement that the existence and resolution of the conflict be documented in organization records, including minutes of any meeting where the conflict is discussed or voted on; and</li> <li>(f) procedures for disclosing, addressing and documenting <b>related party transactions</b>.</li> </ul> <p>The Policy must also require that, prior to initial election and annually thereafter, each director submit to the secretary a signed written statement identifying, to the best of the director's knowledge, (1) any entity of which the director is an officer, director, trustee, member, owner or employee, with which the organization has a relationship and (2) any transaction in which the organization is a participant and in which the director might have a conflicting interest. The secretary must provide copies of all such statements to the chair of the Audit Committee or, if none, to the chair of the Board.</p> |

| Covered Organizations                                                                                                          | Topic                                                                                                                                                                                                                                                                                                                                                                                                                                              | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
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| Not-for-Profit Corporations and Wholly Charitable Trusts with 20 or More Employees and Annual Revenue in Excess of \$1,000,000 | <p>Mandatory Whistleblower Policy</p> <p><i>Note that an organization that has adopted a Whistleblower Policy pursuant to federal, state or local laws that is substantially consistent with these new requirements will be deemed in compliance, as will a corporation that is a state or local authority that has complied substantially with Public Authorities Law Section 2824 and is subject to Public Authorities Law Section 2857.</i></p> | <p>Each covered organization must adopt a Whistleblower Policy to protect from retaliation persons who report suspected improper conduct.</p> <p><u>Contents of the Whistleblower Policy</u></p> <p>The Whistleblower Policy must provide that no director, officer, employee or volunteer who in good faith reports any action or suspected action taken by or within the organization that is illegal, fraudulent or in violation of any policy of the organization shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequences.</p> <p>The Whistleblower Policy must include:</p> <p>(a) procedures (including confidentiality provisions) for reporting violations or suspected violations of laws or organization policies;</p> <p>(b) a requirement that an employee, officer or director be designated to administer the Policy and report to the Audit Committee, another committee of <b>independent directors</b> or the Board; and</p> <p>(c) a requirement that a copy of the Policy be distributed to all directors, officers, employees, and volunteers who provide substantial services to the organization.</p> |
| Charitable Corporations and Wholly Charitable Trusts ("Charities")                                                             | Related Party Transaction Rules (Augmented)                                                                                                                                                                                                                                                                                                                                                                                                        | <p>If a <b>related party</b> of a covered organization has a substantial financial interest in a <b>related party transaction</b>, the Board or authorized Board committee must:</p> <p>(a) prior to entering into the transaction, consider alternative transactions to the extent available;</p> <p>(b) approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and</p> <p>(c) contemporaneously document in writing the basis for its approval of the transaction, including consideration of any alternative transactions.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

| Covered Organizations                                                                                                                                                                                                                                                                                                                             | Topic                                                                                                                                                                                                                                                                                                                                                                               | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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| <p>Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$500,000</p>                                                                                                                                                                                                                  | <p>Mandatory Audit Committee or Board Audit Function (Basic Duties)</p> <p><i>(See augmented duties below if annual revenue in excess of \$1,000,000.)</i></p> <p><i>Note that a corporation that is a state or local authority and has complied substantially with Public Authorities Law Sections 2802 and 2824 will be deemed in compliance with these new requirements.</i></p> | <p>Either each covered organization must have an Audit Committee consisting of <b>independent directors</b>, or the <b>independent directors</b> on its Board must perform the duties of an Audit Committee.</p> <p><u>Basic Duties of the Audit Committee</u></p> <p>The Audit Committee or the <b>independent directors</b> on the Board must:</p> <ul style="list-style-type: none"> <li>(a) oversee the accounting and financial reporting processes of the organization and the audit of its financial statements;</li> <li>(b) annually retain or renew the retention of an <b>independent auditor</b>;</li> <li>(c) review with the <b>independent auditor</b> the results of the audit (including the management letter); and</li> <li>(d) oversee the adoption and implementation of, and compliance with, any Conflict of Interest Policy or Whistleblower Policy (unless performed by another committee consisting solely of <b>independent directors</b>).</li> </ul> |
| <p>Charities Required to Register to Conduct Charitable Solicitations in New York with Annual Revenue in Excess of \$1,000,000</p> <p><i>Note that this provision is not applicable until January 1, 2015 for any organization that had annual revenue of less than \$10,000,000 in the last fiscal year ending prior to January 1, 2014.</i></p> | <p>Mandatory Audit Committee or Board Audit Function (Augmented Duties)</p>                                                                                                                                                                                                                                                                                                         | <p><u>Augmented Duties of the Audit Committee</u></p> <p>In addition to the basic duties listed above, the Audit Committee or the <b>independent directors</b> on the Board of a covered organization must:</p> <ul style="list-style-type: none"> <li>(a) review with the <b>independent auditor</b> the scope and planning of the audit prior to its commencement;</li> <li>(b) review and discuss with the <b>independent auditor</b> 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 organization's accounting and financial reporting processes;</li> <li>(c) annually consider the performance and independence of the auditor; and</li> <li>(d) if the duties are performed by an Audit Committee, report its activities to the Board.</li> </ul> |

## DEFINED TERMS

|                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| <b>affiliate</b>                 | An entity controlled by an organization, in control of the organization or under common control with the organization.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>independent auditor</b>       | A certified public accountant performing the audit of the financial statements of the organization required by Executive Law Section 172-b(1).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>independent director</b>      | <p>A director who:</p> <p>(a) is not, and in the last three years has not been, an employee of the organization or any <b>affiliate</b> and does not have a <b>relative</b> who is, or in the last three years has been, a <b>key employee</b> of the organization or any <b>affiliate</b>;</p> <p>(b) in each of the last three fiscal years, has not received (and does not have a relative who has received during this period) more than \$10,000 in direct compensation from the organization or any affiliate (other than reimbursement of expenses reasonably incurred as a director or reasonable compensation for services as a director); and</p> <p>(c) is not a current employee of or does not have a substantial financial interest in (and does not have a <b>relative</b> who is a current officer of or has a substantial financial interest in) any entity that made payments to (or received payments from) the organization or any <b>affiliate</b> for property or services in an amount which, in any of the last three fiscal years, exceeded the lesser of \$25,000 or 2% of the entity's consolidated gross revenue.</p> |
| <b>key employee</b>              | Any person who is in a position to exercise substantial influence over the affairs of the organization, as referenced in the U.S. Internal Revenue Code and regulatory provisions governing "excess benefit transactions."                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>related party transaction</b> | Any transaction, agreement or other arrangement in which a <b>related party</b> has a financial interest and in which the organization or an <b>affiliate</b> is a participant.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>related party</b>             | Any director, officer or <b>key employee</b> of an organization or an <b>affiliate</b> ; any <b>relative</b> of any such individual; and any entity in which any such individual or <b>relative</b> has a 35% 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 5%.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>relative</b>                  | An individual's spouse, domestic partner, child, grandchild, great-grandchild, sibling, half-sibling, ancestor, or the spouse of the individual's child, grandchild, great-grandchild, or sibling.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

## ***Non-Profit Revitalization Act of 2013:*** **Summary of the Act's Financial Reporting Rules for Organizations Required to Register to Conduct Charitable Solicitations**

Every charitable organization required to register to conduct charitable solicitations in New York State must file with the Attorney General an annual report and statement. The requirements for these reports and statements are based on gross revenue and support thresholds. In each case where a report is required, the Non-Profit Revitalization Act requires the organization to:

- Include a statement of any changes in the information required to be contained in the organization's registration form.
- Have the report signed by the president or other authorized officer and the chief fiscal officer.
- Pay a filing fee of \$25.

The table below describes the revenue and support thresholds and the additional requirements applicable in each case.

| <b>Effective Dates</b>                   | <b>If the organization's fiscal year gross revenue and support is...</b>                    | <b>Then the organization must...</b>                                                                                                                                                                                                                                                                                                       |
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| July 1, 2014<br>through<br>June 30, 2017 | Less than \$250,000                                                                         | Prepare and file an annual unaudited financial report on forms prescribed by the Attorney General.                                                                                                                                                                                                                                         |
|                                          | At least \$250,000 but not more than \$500,000                                              | Prepare and file an annual GAAP-compliant financial report, accompanied by an annual financial statement that includes an independent CPA's review report.                                                                                                                                                                                 |
|                                          | More than \$500,000                                                                         | Prepare and file an annual GAAP-compliant financial report on forms prescribed by the Attorney general, accompanied by an annual financial statement that includes an independent CPA's review report containing a signed opinion that the financial statements are presented fairly in all material respects and in conformity with GAAP. |
| July 1, 2017<br>through<br>June 30, 2021 | The \$500,000 threshold increases to \$750,000; the \$250,000 threshold remains constant.   | See above for applicable requirements.                                                                                                                                                                                                                                                                                                     |
| July 1, 2021<br>and<br>continuing        | The \$750,000 threshold increases to \$1,000,000; the \$250,000 threshold remains constant. | See above for applicable requirements.                                                                                                                                                                                                                                                                                                     |

## ***Non-Profit Revitalization Act of 2013:*** **Highlights of the Act's Update of the Not-for-Profit Corporation Law and Expansion of the Attorney General's Enforcement Powers**

The Non-Profit Revitalization Act brings about a number of provisions designed to update certain features of the current New York Not-for-Profit Corporation Law and expand the enforcement tools available to the New York Attorney General. These provisions:

- Establish rules for ***conducting certain corporate activities electronically***, including:
  - Email and fax notice and waiver of notice of member meetings;
  - Email waiver of notice of board meetings;
  - Notice of member meetings by website posting, in addition to publication in a newspaper, if a corporation has more than 500 members;
  - Email proxy voting for members and unanimous written consent via email for member, board and committee actions; and
  - Videoconferencing for board and committee meetings.
- Redefine the phrase "***entire board***" so that, if the bylaws provide for a range between a minimum and maximum number of directors, the "entire board" consists of the number of directors elected at the most recently held election of directors.
  - *This amendment eliminates the cumbersome process requiring that members or boards "fix" the number of directors constituting the entire board and the inadvertent existence of "vacancies" or unauthorized seats simply because the number of directors was not "re-fixed" to reflect the election of a lesser or greater number of directors than the number "fixed" under or pursuant to the bylaws.*
- End the requirement for board approval for ***leasing real property from a third party***.
- Permit ***committee authorization of the purchase or disposition of real property***, unless the transaction involves all or substantially all of the corporation's assets, in which case the board's approval would be necessary.

- State that **"committees of the corporation"** (i.e., committees that include non-directors) **may not "have the authority to bind the board."**
  - *This amendment also imposes an affirmative duty on the committee to report promptly to the board concerning any approved purchase or disposition of real property, and in no event after the next regularly scheduled board meeting.*
- End the requirement that private foundations publish notice of availability for **public inspection of Form 990-PF**.
- Confer **discretion on the Attorney General to grant certain approvals that now require a court proceeding**, namely, approvals of "assets" dissolutions; the change, elimination or addition of a purpose or power of a charitable corporation; and the sale, lease, exchange or other disposition of all or substantially all of a corporation's assets.
- Simplify the categories of not-for-profit corporation into **"charitable corporations"** and **"non-charitable corporations."**
  - *Existing types of corporations – known as Types A, B, C and D – will be assigned to one category or the other. Although there will be some nuances for Type D corporations, all existing Type B and C corporations will become charitable corporations under the legislation and all Type A corporations would become non-charitable corporations.*
- Empower the Attorney General to commence proceedings to **enjoin, void or rescind a related party transaction or proposed related party transaction**, including a compensation arrangement with an officer, director, trustee or key employee, if the transaction violates any law or is otherwise not fair, reasonable or in the best interests of the corporation.
- Grant the Attorney General specific authority to seek other relief with regard to related party transactions, such as **damages, restitution, removal and/or an accounting**, including **double damages** in cases of "willful and intentional conduct."

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