

Recent Amendments to the Nonprofit Revitalization Act of 2013

January 29, 2016

On October 26, 2015, and December 11, 2015, Governor Cuomo signed into law certain clarifying amendments (the “Amendments”) to the provisions of the New York Not-For-Profit Corporation Law that were enacted as part of the Nonprofit Revitalization Act of 2013 (the “Revitalization Act”). The Amendments generally clarify certain key definitions and other important provisions of the Revitalization Act, which are summarized below.

Clarification of Key Definitions

- *Independent Director*
 - The definition of the term “independent director” provides that it does not include, among others, any person who is an employee of, or has a substantial interest in, any entity that has made payments to the corporation for property or services in the last three years in excess of \$25,000. The Amendments clarify that a director’s status as an independent director will not be affected by payments made to the not-for-profit corporation by such director’s employer or another entity in which the director has an ownership interest provided that such payments are for dues or in exchange for services that the not-for-profit corporation performs as part of its non-profit purposes and that also are available to the public on the same terms.
 - The Amendments also modify the definition of the term “independent director” to provide that, in addition to the individuals who were excluded from the definition of an independent director under the Revitalization Act, any person who is, or whose relative is, a current owner, director, officer or employee of the corporation’s outside auditor or who has worked on the not-for-profit corporation’s audit in the past three years no longer qualifies as an independent director.
- *Affiliate*. The Amendments narrow the definition of the term “affiliate” to exclude entities under common control. The term affiliate now refers only to entities controlled by, or in control of, the not-for-profit corporation. The term “affiliate” appears in the definitions of the terms “independent director,” “related party” and “related party transaction”. By excluding corporations under common control from the definition of affiliate, the Amendments may reduce the number of transactions that are treated as “related party transactions” and the number of directors who do not qualify as “independent directors”.
- *Entire Board*. The definition of the term “entire board” has been clarified to provide that, in the case of a not-for-profit whose organizational documents provide that the number of board members may consist of a range between a maximum and a minimum number of directors, and the number within that range has not been fixed by a vote of the board, the term “entire board” refers to the number of directors elected or appointed as of the most recently held election of directors, as well as any directors whose terms have not expired.

Governance Matters

- *Board Governance.* The Amendments delay the effective date of the provision of the Revitalization Act that prohibits an employee of the not-for-profit corporation from serving as the chair of the board (or holding another title with similar responsibilities) which was scheduled to go into effect on January 1, 2016. The new effective date is January 1, 2017.
- *Quorum.* The Amendments clarify that any director who is present at the meeting but who is not present at the time of the vote because of a conflict of interest or related party transaction will be considered to present for purposes of determining whether or not a quorum is present.
- *Background Information.* The provisions of the Revitalization Act relating to each of audit oversight, related party transactions, and conflicts of interest were amended to provide that the individuals otherwise prohibited from participating in deliberations or voting with respect to such matters are permitted to present background information and or answer questions upon the request of the board or a committee thereof prior to the commencement of deliberations or voting.
- *Compensation.* Under the Amendments, a director is not prohibited from deliberating or voting on compensation for service on the board provided that such compensation is to be made available to all directors on the same or substantially the same terms.

Whistleblower and Conflicts of Interest Policies

- *Whistleblower Policy.* The Amendment clarifies that a not-for-profit corporation may satisfy the requirement that it distribute a copy of the policy to all employees, directors, trustees, officers, and volunteers by posting the policy on its website or by posting a copy at the not-for-profit corporation's offices in a conspicuous location accessible by employees and volunteers.
- *Conflicts of Interest Policy.* The Amendment further provides that with respect to the not-for-profit corporation's Conflicts of Interest policy, directors may provide their annual and pre-initial election conflicts disclosure statement to either the corporation's secretary or to the corporation's designated compliance officer.

For further information about the Amendments to the Revitalization Act and their impact on your organization, please contact Deirdre Mitacek dmitacek@cullenanddykman.com or Kevin McDonough kmcdonough@cullenanddykman.com.

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