



The New York Nonprofit Revitalization Act... A Practitioner's View

Arts Services Initiative of Western New York, Inc.
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Community Focus ♦ Statewide Impact ♦ National Network



Revitalization

- To make (someone or something) active, healthy, or energetic *again*.
- To give new vitality or vigor.



How the Act is to Help Us Become Revitalized

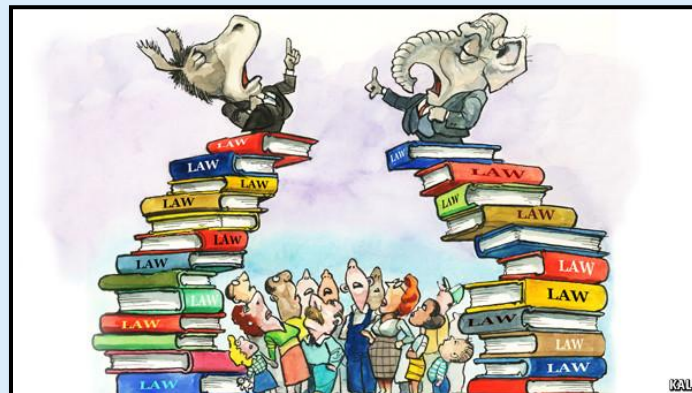
- **Reducing unnecessary and outdated burdens on us**
 - Make it easier & less costly to form nonprofits in NY
 - Allow nonprofits to operate more effectively & efficiently
- **Enhancing governance & oversight to prevent fraud and improve public trust**
 - New governance requirements for boards to proactively oversee audits & conflicts of interest
 - Clearer & stronger power for the AG to curb self-dealing to protect nonprofits & the public

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The Act is Written by Lawyers, for Lawyers





The Background



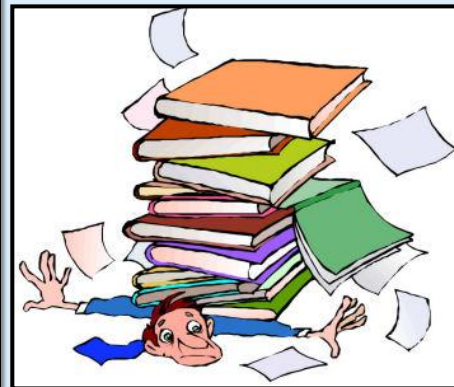
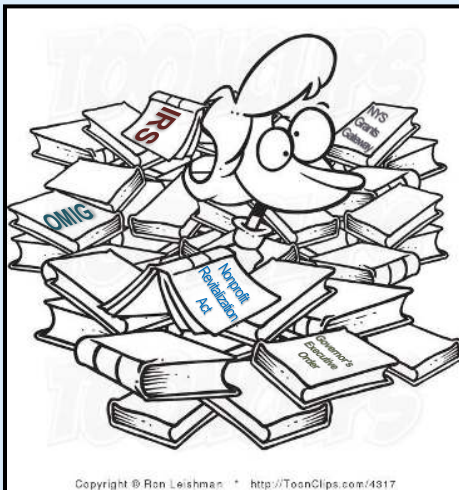
- **2011:** AG convened “Nonprofit Revitalization Leadership Committee” and followed up with report calling for the first major revision in the NFPCL & ETPL in 40 years
- **2012:** AG “Program Bill”, which included Exec. Comp. did not pass
- **2013:** Bill was reintroduced late in the session; there were competitive bills
 - Passed with considerable revisions including no exec. comp.
 - Governor signed in Dec. but cited intent to make corrections
- **2014:** Amended version has been introduced but not yet passed
 - Sponsors are getting lots of amendments for change; including from NYCON, and push to delay implementation until January 2015
 - Prevailing attitude is “Lets wait and see what the unintended consequences are and fix it next session”

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The Act Piles on to OMIG, the Executive Order, Gateway, & Other Requirements



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Key Reforms

Most become effective July 1, 2014

- *Some* electronic age updates for Board, Committee & Membership Meetings and for Filings with AG's Office
- Higher Audit Thresholds & Increase Audit Oversight
- Required Whistleblower Policies (20 or more employees and \$1M)
- Improved processes for Certificate Amendments, Mergers, Dissolutions & Consolidations, Real Estate Sales or Transfers
- Greater Authority for the AG
- Redesigned Committee Structures
- **REQUIRED** Conflict of Interest Policy – New Definitions & Significantly Stronger Requirements

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Meetings

New State Laws

- Allows video conferencing
- Unanimous written consent by email for board or committee action (must have electronic signature)
- In using fax or email, the number or address must be what is on record for the Secretary. Not valid if notice cannot be delivered two consecutive times
- *Remember* – Board members still cannot vote my email or proxy!

The Concept of “Binding”



New Rules on Committees

Committees of the Board

- Can “bind” the Board
- Comprised only Board members (at least 3) and all must be “*independent*”
- Appointed by majority of Board
- Cannot:
 - Fill vacancies
 - Fix comp. on board or board comm.
 - Adopt or amend bylaws
 - Amend or appeal board resolution
- And of course, more details

Committees of the Corp.

- Cannot bind the board
- May include non-board members
- Are to be appointed or elected the same as officers as stated in the bylaws



Know Who is “Independent”

- In the past 3 FYs:
 - Has not been an employee & does not have a *relative* who is a *key employee*
 - Has not received or have a relative who has received \$10K in direct comp.
 - Does not have substantial financial interest in nor a relative who is a current officer or has such interest, in any entity that has made payments or received the lesser of \$25K or 2% of the gross revenue.

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Defining “Key Employee”

- *New State Rule* - Any Person in a position to exercise substantial influence over corporate affairs
- IRS – has total comp. over \$150K and:
 - Has responsibilities, powers, or influence over org. that is similar to those of officers, directors, or trustees;
 - Manages discrete segment or activity that is 10% or more of the activities, assets, income, or expenses of the org; or
 - Has or shares authority to control or determine 10% or more of the organization's capital expenditures, operating budget, or compensation for employees



Know Who is a “Key Employee” & “Relative”

Key Employee

- Any person in a position to exercise substantial influence over corporate affairs (*differs from IRS & who is reported on 990*)

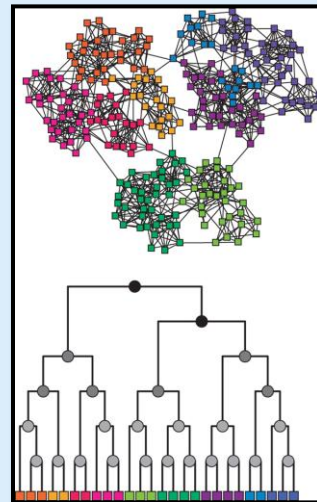
Relative

- Spouse
- Domestic partners
- Brothers/sisters (whole or “half blood”) & their spouses
- Children & their spouses
- Grand children, great-grand children & their spouses

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So, Get Ready to be in the Genealogy Business





And, Pry into the Personal Lives of Board Members



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Audit New State Laws

- With over \$500K, board or committee must retain auditor (was \$250,000)
- Must have the board or a designated audit committee comprised solely of independent directors oversee the accounting, financial reporting processes and audit (including reviewing results and management letter)



If Over \$1M (Consider a Best Practice)

The board or audit committee must:

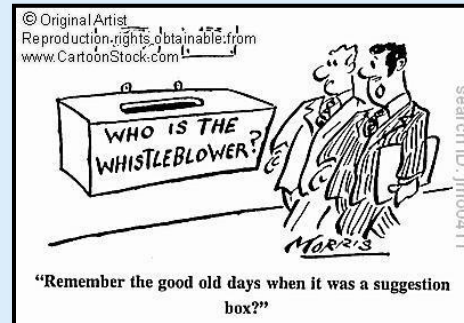
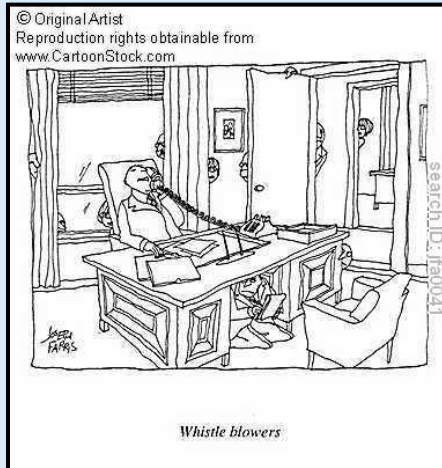
- Review with auditor the scope & plan prior to start
- Upon completion:
 - Annual review of performance & independence
 - If committee – report on board’s activities
- Oversee conflict of interest & whistleblower policy (if not another committee)



New Definitions & Rules Conflicts of Interest

- **“Related Party Transaction”** - *any arrangement* in which a *related party* has a financial interest with the corporation/affiliate
- **“Related Party”** is:
 - Any director, officer or key employee of corporation/affiliate; or
 - Any entity where individual has 35% or more ownership/interest; 5% or more for professional corporations/partnerships
- **Employees can’t serve as board chair**
- **Person with conflict:**
 - Must disclose material facts
 - Cannot be present/participate in deliberations or vote
 - Cannot make any attempt to improperly influence
- **Must consider alternatives; show it is fair, reasonable & best interest**
- **Must Document**
 - Disclosure, deliberations, reasons & resolution in minutes
 - Sign annual *disclosures (from Secretary to board chair or audit committee chair)*

New Definitions & Rules Whistleblower



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Whistleblower Policies (Consider a Best Practice)

- Required if with 20 employees + *and* over \$1M
- Policy must:
 - Have procedures for reporting suspected violations & preserving confidentiality
 - Designate an employee or, officer directors to administer and report to board or committee with independent directors
 - Be distributed to all directors/trustees, officers, employees and volunteers providing “substantial services”



Unintended or Perhaps Intended Consequence



So, Getting that Revitalized Vibe Yet? Loving the Kool-Aid?





NYCON Recommends “Vim and Vigor” for the Revitalization Blues



Questions & Comments?

