The New York Nonprofit Revitalization Act…
A Practitioner’s View

Arts Services Initiative of Western New York, Inc.
April 12, 2014

Presented by
Andrew Marietta, Regional Manager, New York Council of Nonprofits, Inc.
www.nycon.org | 800.515.5012 | amarietta@nycon.org

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- Reducing unnecessary and outdated burdens on us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

(c) 2014 NYCON, Inc., Copyright, All Rights Reserved
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 “Let’s wait and see what the unintended consequences are and fix it next session”

(c) 2014 NYCON, Inc., Copyright, All Rights Reserved

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

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”

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

(c) 2014 NYCON, Inc., Copyright, All Rights Reserved
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.

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
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
And, Pry into the Personal Lives of Board Members

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)
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

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?

(c) 2014 NYCON, Inc., Copyright, All Rights Reserved