



**To Today's "Lunch & Learn" Webinar  
Hosted by NYCON**

**Nonprofit Revitalization Act Part I:  
Compliance Steps "The Overview"**

**Thursday April 24<sup>th</sup>, 2014 11:00am to 12:30pm EST**

**PLEASE NOTE:** *Streaming audio is available through your computer only.*

# **Nonprofit Revitalization Act**

## **Part I: Compliance Steps**

### **“The Overview”**

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# NYS Nonprofit Revitalization Act

## Today's Session Will Include:

- background Information on the NYS Nonprofit Revitalization Act
- overview on required reforms impacting your organization
  - understand new definitions & policies needed for compliance
- distribution of NYCON Summary: *“Key Features of the Nonprofit Revitalization Act that Your organization Should Understand”*
- contact information for NYCON's Nonprofit Revitalization Act *Specialists (All NYCON Members qualify to receive NYS Nonprofit Revitalization Act assistance at a discounted rate!)*

## NYS Nonprofit Revitalization Act

- Passed Legislature in June 2013, beginning as a program bill of the NYS Office of the Attorney General (“AG”)
- Governor signed & approved the Act in December of 2013
- First major revision of NYS Not-for-Profit Corporation Law (“NPCL”) in over 40 years
- Most provisions become effective July 1, 2014

***We encourage all of our members to obtain qualified legal counsel & financial assistance in order to specifically identify what recent changes in legislation mean for your organization***

# Key Reforms

## Key Reforms Impact:

- enhanced AG nonprofit oversight
- meetings of Memberships, Board of Directors & Committees
- conflicts of interest
- whistleblower protections
- audit oversight & response
- filings with NYS Courts & the AG's Office



# Broadened Attorney General Oversight

- The AG's Office will have greater ability to bring actions against nonprofits soliciting donations within NYS without proper CHAR filings
- The AG can now more easily bring action:
  - to enjoin, void or rescind a Related Party Transaction, or one that is otherwise unreasonable or in the best interests of the nonprofit
  - seek restitution, & the removal of Officers or Directors; &/or,
  - require any party receiving an undue benefit as a consequence of the transaction to account for their undue profits, pay back or replace anything of value to the nonprofit, &, in the case of willful & intentional misconduct, pay up to double the amount of the undue benefit.
- Key Employees can now be named in actions brought by the AG
- Financial reports & other filings will now be accepted electronically

# New Corporate Types

- The Act substantively changes the definitions of nonprofits breaking them into two categories versus four
- **Charitable Corporations** — Nonprofits currently classified as Type B, C or D Corporations
  - All Charitable Corporations are permitted to have a self-perpetuating Board of Directors & need not have a Membership
- **Non-charitable Corporations** — Nonprofits currently classified as are Type A Corporations, commonly civic, patriotic, social, fraternal organizations
- Consider adopting a by-law amendment to confirm your proper corporate form



# New Membership Meeting Rules

- Meeting notices may now be sent via facsimile or e-mail, provided there is reasonable certainty that the destination is correct
  - fax number/e-mail address must be recorded with the Secretary
  - fax/e-mail notice invalid if undeliverable or if 2 consecutive notices aren't delivered to the recorded number/address
- Membership organizations with 500+ Members can now post meeting notices on their websites, instead of publication
- Proxy Ballots, Waivers of Notice & Actions on Unanimous Written Consent may also be sent by facsimile or e-mail
  - **Note:** Boards of Directors still cannot vote via means of proxy
- Members must now annually receive a Balance Sheet, Profit-and-Loss Statement or similar financials



# New Governance Definitions

- **“Entire board”**—the number of Directors most recently elected within the range of seats available in the by-laws, or if fixed number is cited, that number, or where there’s a range, the number in the middle
  - some provisions of the new law require majority or supermajority vote by the “entire board,” as opposed to a simple quorum.
  - minimum number of Directors remains 3, but a range is preferred
- **“Committees of the Corporation”**—Committees that cannot bind the Board, may include non-Directors & are formed, & members are appointed, at the discretion of the Board pursuant to the by-laws
  - commonly know as “Ad Hoc Committees”

# New Governance Definitions

- **“Committees of the Board”**—Committees that may have the power to bind the Board within statutory limitations, comprised solely of Directors, have, at least, 3 members, & are charged, & members are appointed, by the Board
- Examples include:
  - Executive Committees
  - Audit & Finance Committees
  - Corporate Compliance (conflicts of interest) Committees
- Commonly referred to as “Standing Committees”



# New Board Meeting Considerations

- Boards of Directors & Committee meetings can now be conducted via use of video or teleconference communications
- Notices & Waivers of Notice for meetings of the Boards of Directors or Committees meetings may now be sent via facsimile or e-mail, provided there is reasonable certainty that the destination is correct
  - fax number/e-mail address must be recorded with the Secretary
  - fax/e-mail notice invalid if undeliverable or if 2 consecutive notices aren't delivered to the recorded number/address
- Unanimous Written Consent may also be sent by facsimile or e-mail
  - You can essentially vote by e-mail, but only if the “Entire Board” responds in favor of the given proposition
  - Boards still cannot vote via means of proxy

# Employees on Boards

- Effective July 1, 2015 (not 2014), nonprofit employees will no longer be permitted serve in the office that is the functional equivalent of “Chair” of their respective Boards of Directors.
- ***Loopholes:*** Staff can still serve as:
  - other Officers, including Executive Committee Chairs
  - Directors
  - Officers or Directors of a parent or subsidiary (“affiliate”) corporation
- In assessing potential prohibitions, the functions of the position are key (ability sign documents on the organization’s behalf, call meetings to order, etc.), not just title (i.e., Chair, President . . . ).

# Related Party Transactions

- The Board must act cautiously with any Related Party Transaction
- The Board can only authorize a Related Party Transaction if it is fair, reasonable & in the best interests of the nonprofit
- If the Transaction is one where a Related Party has a substantial financial interest, the Board must:
  1. Consider alternate options prior to entering into the transaction
  2. Approve the Transaction by, at least, a majority vote, &
  3. Contemporaneously document the basis for its decision
- Statute requires a Related Party to disclose the material facts of his/her relationship to the transaction to the Board & to refrain from attending or attempting to influence deliberations &/or voting

# Key Conflicts Definitions

- **“Related Party”** — any Officer, Director or Key Employee of the nonprofit, or an affiliate corporation, or any entity where that individual has a 35%, or more, ownership interest, or, for professional corporations/partnerships, more than a 5% interest.
- **“Related Party Transaction”** — any arrangement in which a Related Party has a financial interest with the nonprofit or its affiliate
- **“Key Employee”** — any person in a position to exercise substantial influence over a nonprofit’s affairs
- **“Relative”** — spouses, siblings (whole or half), children, spouses of siblings or children, grandchildren, great-grandchildren, & domestic partners.

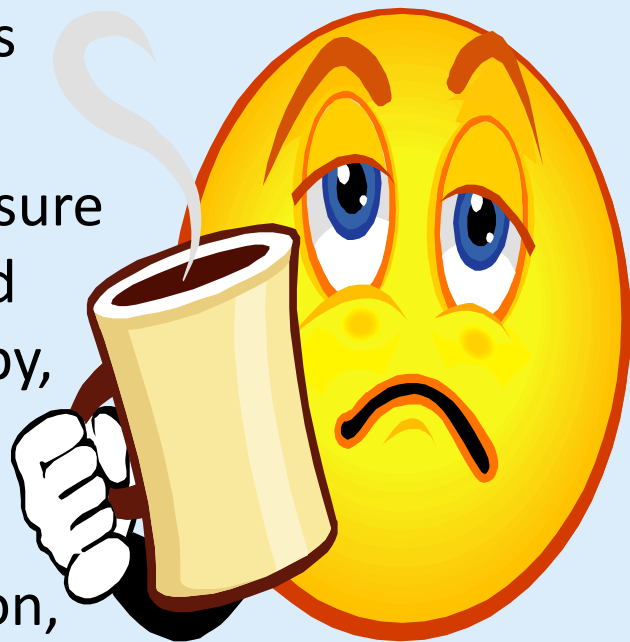
# Conflicts of Interest Policies

- Written conflicts of interest policies are now required, contents must:
  1. define circumstances that constitute a conflict,
  2. establish procedures for disclosing a conflict to the Audit Committee or the Board,
  3. prohibit conflicted Directors from being present during, or participating in, deliberations &/or voting on the matter
  4. restrict conflicted Directors from attempting to influence deliberations,
  5. set documentation procedures specific to conflicts
  6. enact procedures for disclosing and addressing related Party Transactions
- Annual Director disclosure of real/potential conflicts is also required & must be reported to the Audit Committee



# Responding to Change

- Most nonprofits will either need to adopt or revise conflicts of interest policies & conflicts disclosure forms
- Procedures will need to be established to assure that disclosures of conflicts (both annual and issue specific) are submitted to, & received by, all necessary parties
- Consider adopting a provisions that would expressly give the Board , at its sole discretion, the authority to render any Related Party Transaction approved in a manner inconsistent with the nonprofits conflicts of interest policy to be void or voidable



# Whistleblower Considerations

- The Act requires nonprofits to protect Directors, Officers, employees & volunteers who, in good faith, report suspected acts that they reasonably, & in good-faith, consider to be illegal, fraudulent, improper, unethical, immoral &/or in violation of any adopted policies/procedures.
- Whistleblowers cannot be subjected to intimidation, harassment or other retaliation as a consequence disclosure, even if their allegations are subsequently found erroneous.



# Whistleblower Policies

Written policies addressing procedures & protections for “whistleblowers” are now required for nonprofits with:

- 20 + employees (full or part-time), &
- \$1M + in annual revenue

Required whistleblower policies must:

- address procedures for reporting suspected violations, preserving confidentiality & protecting whistleblowers from retaliation
- designate employees (NYCON suggests “Key Employees”), Officers &/or Directors responsible for receiving reported violations , administering policy & informing all necessary committees &/or the Board
- be distributed to all Directors, Officers, employees and volunteers who provide substantial services to the corporation

# Financial Reporting

## New Financial Reporting Requirements By Year & Annual Revenue

Required Filing	7/1/14 — 6/30/17	7/1/17 — 6/30/21	7/1/21 — TBD
Independent Audit	\$500K +	\$750K +	\$1M +
Independent Review	\$250K - \$500K	\$250K - \$750K	\$250K - \$1M
Unaudited Financials	> \$250K	> \$250K	> \$250K



# Financial Reporting

## “The Millionaires Club”

Nonprofits with \$1M+ in annual revenue in their prior fiscal year, or reasonably expecting \$1M+ in revenue for the current year, must have their boards of directors, or (preferably) a designated audit committee, comprised solely of “Independent Directors:”

- prior to commencement, review with the auditor its scope & planning
- upon completion, review & discuss with the Board any material identified risks or weaknesses:
  - restrictions on auditor's scope of activities or access to requested information;
  - any significant disagreements between the auditor & management; &/or
  - the adequacy of the accounting and financial re-ported processes
- annually consider auditor performance & independence

If these responsibilities are addressed by a Committee, a report on the Committee's activities must be made to the Board

# New Definitions in Financial Reporting

- **“Independent Director”** is a Director who:
  - has not, for the past 3-years been an employee of the nonprofit, or an affiliate, & does not have a Relative who has been a Key Employee during the same time period;
  - has not received, & does not have a Relative who has received, in the past 3-years, more than \$10K in direct compensation from the nonprofit or an affiliate; &
  - is not a current employee of, & does not have substantial financial interest in, or a Relative who is a current Officer, or has a substantial interest in, any entity that has made payments or, or received payments from, the nonprofit, or an affiliate, during the last 3-years, exceeding the lesser of \$25K or 2% of the nonprofit’s consolidated gross revenue

# Financial Reporting

## “Other Considerations”



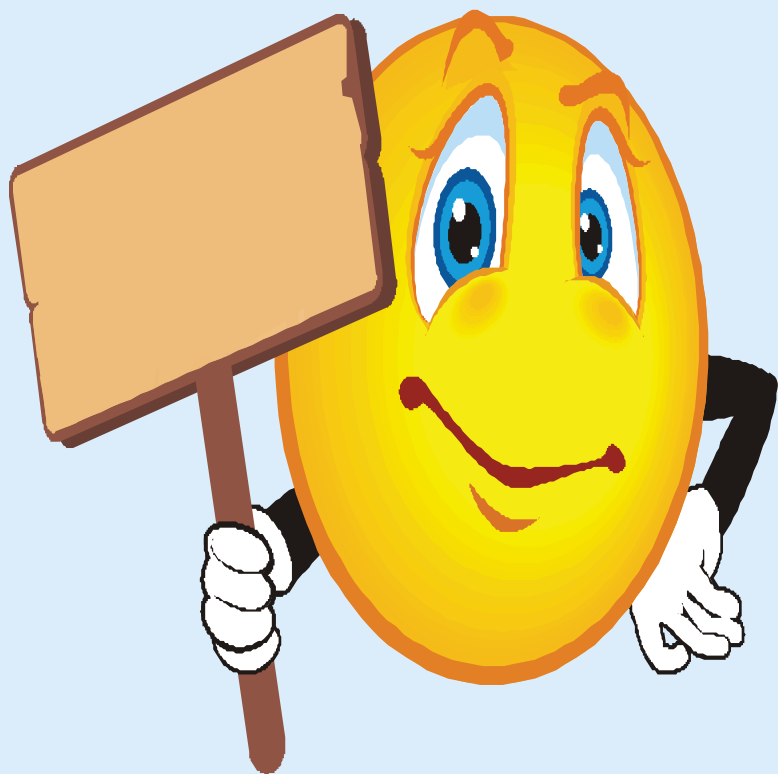
- If your nonprofit controls other corporations (“affiliates”/“subsidiaries”), the Board, or a designated Audit Committee, may perform the duties otherwise required to be performed directly by required for those corporations
- Within 120 days of receipt of financial information returns (“the CHAR 500”), the AG’s Office may, at its sole discretion, require an Independent Audit from nonprofits who submit a Review report, regardless of annual revenue



# Fundamental Corporate Change

- The AG's Office will now be empowered to directly approve most Certificate of Incorporation Amendments, Mergers, Consolidation & Dissolutions without need for additional court approval
  - The Courts may still be involved in such transactions if referred by the AG's Office, or if requested by the nonprofit applicant
- Application requirements for Mergers, Consolidations & Dissolution have been simplified by minimizing requirements for producing excessive supporting financial information
- Chartered educational institutions & Religious Corporations can now restructure in the same manner as Not-for-Profit Corporation
- The Department of State will now be permitted to utilize electronic communication in order to quickly file documents

# Real Estate Transactions



- The AG's Office will now be empowered to directly approve most real estate transactions without need for additional court approval
  - Court approval is still required if the nonprofit is insolvent or the transaction would render the nonprofit insolvent
  - Judicial approval can still be sought for others transactions if referred by the AG's Office, or if requested by the nonprofit

# Transaction Authorizations

- Minor, routine real estate transactions that do not constitute all, or substantially all, of a nonprofit's property (selling, mortgaging, leasing, exchanging or otherwise disposing of real property) will now be authorized by a majority vote of the Entire Board, or an authorized committee (current law requires a two-thirds majority vote)
- If the transaction would constitute all, or substantially all, of the nonprofit's property, it must be approved by a two-thirds majority vote of the Entire Board, unless there are more than 21 Directors, in which case a simple majority would suffice



Our Bottom Line is a Better Community.

# The End



# Questions?

Community Focus | Statewide Impact | National Network

# Upcoming Webinars

## Part 1: New York Nonprofit Revitalization Act Part- Steps To Compliance - An Overview

A comprehensive overview of the Act to take place with a plenary Q/A portion to be held again in **April & June**. This offering will provide you with an overview and a practical set of actions to take to amend your bylaws to meet the new standards of the Act.

**Dates:** April 24<sup>th</sup> and June 26<sup>th</sup>

**Cost:** FREE for current NYCON Nonprofit Members; \$79 for Non-Members

*All webinars are from 11:00am to 12:30pm.*

## Part 2: New York Nonprofit Revitalization Act: Implementing Your Compliance Checklist - Whistleblower, Conflict of Interest, Committees & Executive Compensation:

These webinars will be held In **March and May** will be a more detailed and focused on the various topics included in the Act that are new and have implications on Board governance in general and your operations specifically. Click here to register.

**Dates:** March 25<sup>th</sup> and May 20<sup>th</sup>

**Cost:** FREE for current NYCON Nonprofit Members; \$79 for Non-Members

*All webinars are from 11:00am to 12:30pm.*

*\*Webinar attendees will have access to a recording of the event and the webinar slides for six months.*

# Ask Our Specialists!

- **Additional Documents, Tools & Phone Assistance Will be Available to NYCON Members as follows:**
  - Documents, Tools & Templates** produced by the NYCON Legal Department will be available to members for **\$79**
  - Documents, Tools & Templates plus additional Assistance via Phone** to help with implementation can be purchased for **\$259** (includes two hours of phone assistance.)



# Contact Us

800.515.5012

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