



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

**Nonprofit Revitalization Act Part II: Compliance Steps
"The Specifics"**

Tuesday May 20, 2014 11:00am to 12:30pm EST

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



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1. **Scroll to the bottom of the invite.**
2. Enter your name and email address.

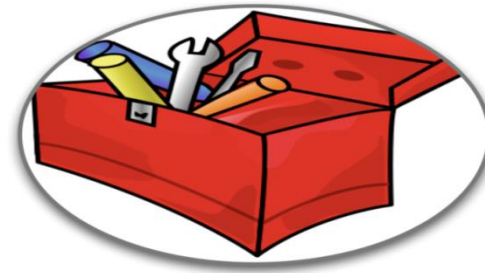
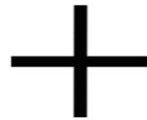
To Ask Questions...

As noted, all audio will be via the computer today.

Please use the "Chat Bar" on the left side of your screen to submit your questions. Questions will remain confidential, no names will be used when providing an answer.

What if I Miss Something?

Today's **webinar is being recorded** and will be available to members for six months. You will also **receive a copy of the slides** from today's webinar via email at the close of the event.



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Thank You!

Nonprofit Revitalization Act Part II: Compliance Steps “The Specifics”

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NYS Nonprofit Revitalization Act

Today's Session Will Include:

- Specific Information on certain provisions of the NYS Nonprofit Revitalization Act
- Overview of required reforms directly impacting your organization
 - understand new definitions & policies needed for compliance
- 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 Impact:

- Independent Directors
- Unanimous Written or Email Consent in Lieu of a Meeting of the Board or Membership
- Conflicts of Interest
- Whistleblower Protections
- Audit Committees and other Committees of the Board



Who Are Independent Directors

- **“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

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
 - Conflicts of Interest and Whistleblower Committees
- Previously referred to as “Standing Committees”



Unanimous Written Consent

- Unanimous Written Consent may now 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 or e-mail unless it is upon unanimous written consent
- Any resolution adopted on Unanimous Written Consent should be filed with the applicable Board or Committee minutes

§ 708. ACTION BY THE BOARD. (EMPHASIS ADDED)

(b) Unless otherwise restricted by the certificate of incorporation or the by-laws, **any action** required or permitted to be taken by the board or any committee thereof may be taken without a meeting **if all members** of the board or the committee consent to the adoption of a resolution authorizing the action. Such consent may be written or electronic. If written, the consent must be executed by the director by signing such consent or causing his or her signature to be affixed to such consent by any reasonable means including, but not limited to, facsimile signature. If electronic, the transmission of the consent must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the director. The resolution and the written consents thereto by the members of the board or committee shall be filed with the minutes of the proceedings of the board or committee.

Employees on Boards

- Effective January 1, 2015 (not July 1, 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

Section 715: Related Party Transactions

§ 715. RELATED PARTY TRANSACTIONS. (EMPHASIS ADDED)

(a) No corporation shall enter into any related party transaction unless the transaction is determined by the board to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer or key employee who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.

(b) With respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, the board of such corporation, or an authorized committee thereof, shall:

- (1) Prior to entering into the transaction, consider alternative transactions to the extent available;**
- (2) Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and**
- (3) Contemporaneously document in writing the basis for the board or authorized committee's approval, including its consideration of any alternative transactions.**

Section 715, Cont'd

§ 715. RELATED PARTY TRANSACTIONS. (EMPHASIS ADDED)

(c) The certificate of incorporation, by-laws or any policy adopted by the board **may contain additional restrictions** on related party transactions and additional procedures necessary for the review and approval of such transactions, or provide that any transaction in violation of such restrictions shall be void or voidable.

(e) The fixing of salaries of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the **entire** board unless a higher proportion is set by the certificate of incorporation or by-laws.

(g) No related party may participate in deliberations or voting relating to matters set forth in this section; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a related party present information concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting relating thereto.

New Section 715 and the Office of the Attorney General

§ 715. RELATED PARTY TRANSACTIONS. (EMPHASIS ADDED)

(f)(i) The attorney general may bring an action to enjoin, void or rescind **any** related party transaction or proposed related party transaction that violates any provision of this chapter **or was otherwise not reasonable or in the best interests of the corporation** at the time the transaction was approved, or to seek restitution, and the removal of directors or officers, or seek to require any person or entity to:

- (1) Account for any profits made from such transaction, and pay them to the corporation;
- (2) Pay the corporation the value of the use of any of its property or other assets used in such transaction;
- (3) Return or replace any property or other assets lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate; and
- (4) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.

(f)(ii) The powers of the attorney general provided in this section are in addition to all other powers the attorney general may have under this chapter or any other law.

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

New § 715-A: Conflict of Interest

§ 715-A. CONFLICT OF INTEREST POLICY. (EMPHASIS ADDED)

(a) Except as provided in paragraph (d) of this section, **every** corporation **shall** adopt a conflict of interest policy to ensure that its **directors, officers and key employees act in the corporation's best interest** and comply with applicable legal requirements, including but not limited to the requirements set forth in section seven hundred fifteen of this article.

(c) The conflict of interest policy shall require that prior to the initial election of any director, and annually thereafter, such director shall complete, sign and submit to the secretary of the corporation a written statement identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director **annually resubmit such written statement**. The secretary of the corporation shall provide a copy of all completed statements to the chair of the audit committee or, if there is no audit committee, to the chair of the board.

(d) A corporation that has adopted and possesses a conflict of interest policy pursuant to federal, state or local laws that is substantially consistent with the provisions of paragraph (b) of this section shall be deemed in compliance with provisions of this section. In addition, any corporation that is a state authority or a local authority as defined in section two of the public authorities law, and that has complied substantially with section twenty-eight hundred twenty-four and subdivision three of section twenty-eight hundred twenty-five of such law, shall be deemed in compliance with this section.

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

New § 715-B: Whistleblower Policy

SECTION 715-B OF NEW YORK STATE'S NON PROFIT LAW WHISTLEBLOWER POLICY

(a) Except as provided in paragraph (c) of this section, every corporation that has **twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars** shall adopt a whistleblower policy to **protect** from retaliation **persons who report suspected improper conduct**. Such policy shall provide that no **director, officer, employee or volunteer** of a corporation who in **good faith** reports **any action or suspected action** taken by or within the corporation **that is illegal, fraudulent or in violation of any adopted policy** of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence.

(c) A corporation that has adopted and possesses a whistleblower policy pursuant to federal, state or local laws that is substantially consistent with the provisions of paragraph (b) of this section shall be deemed in compliance with provisions of this section. In addition, any corporation that is a state authority or local authority as defined in section two of the public authorities law, and that has complied substantially with section twenty-eight hundred twenty-four of such law and is subject to the provisions of section twenty-eight hundred fifty-seven of such law, shall be deemed in compliance with the provisions of this section.

An Independent Director Audit Committee

§ 712-A. AUDIT OVERSIGHT. (EMPHASIS ADDED)

(a) The board, **or** a designated audit committee of the board **comprised solely of independent directors**, of any corporation required to file an independent certified public accountant's audit report with the attorney general pursuant to subdivision one of section one hundred seventy-two-b of the executive law shall oversee the accounting and financial reporting processes of the corporation and the audit of the corporation's financial statements. The board or designated audit committee shall annually retain or renew the retention of an independent auditor to conduct the audit and, upon completion thereof, review the results of the audit and any related management letter with the independent auditor.

** Remember: Ex-officio, non-voting Members of the Committee may contribute and deliberate.*

Other Than Audit Committees Comprised of Independent Directors

§ 712-A. AUDIT OVERSIGHT. (EMPHASIS ADDED)

(c) The board or designated audit committee of the board shall oversee the adoption, implementation of, and compliance with any conflict of interest policy or whistleblower policy adopted by the corporation if this function is **not** otherwise performed by another committee of the board comprised solely of independent directors.

(d) If a corporation controls a group of corporations, the board or designated audit committee of the board of the controlling corporation **may** perform the duties required by this section for one or more of the controlled corporations.

(e) Only independent directors may participate in any board or committee deliberations or voting relating to matters set forth in this section.

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

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



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Upcoming Webinars

Part 1: New York Nonprofit Revitalization Act Part

One: 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 **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: June 26th

Cost: FREE for current Nonprofit Members **only**.

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



How Can We Help You?



Additional Documents, Tools & Phone Assistance Will be Available to NYCON Members as follows:

- ✓ **Policy Templates** produced by the NYCON Legal Department will be available to members for **\$79, plus a 10% Administrative Fee.**
- ✓ **Policy Templates plus additional Assistance via Phone** to help with implementation can be purchased for **\$259 , plus a 10% Administrative Fee.** (*includes two hours of phone assistance.*)
- ✓ **Full Bylaw and/or Corporate Document Review** (*pricing will vary*)
- ✓ **[CLICK HERE TO GET STARTED:](http://www.nycon.org)**
www.nycon.org

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