Not-for-Profit Law Amended

New Oversight & Other Requirements

On July 1, 2014, New York's laws governing not-for-profit entities (NFPs) will change dramatically when the Nonprofit Revitalization Act of 2013 takes effect. Non-profit hospitals, health insurers, nursing homes, home health agencies and numerous other NFPs will likely have to alter some of their policies, practices and procedures in order to be in compliance with the new law.

One of the major changes that will occur once the new law goes into effect is that the classification of NFPs will be simplified. Currently, there are four categories of NFPs which overlap and can be confusing. However, the new law provides that all NFPs formed on or after July 1, 2014 will be categorized as either “charitable” or “non-charitable”. Charitable NFPs will be those having purposes such as education, science, or preventing cruelty to children or animals. All other NFPs will be considered non-charitable. Pre-existing NFPs will be re-categorized as falling into one of the two new categories (i.e. charitable or non-charitable).

There will also be many changes to the law as it relates to NFP governance. For example, once the new law goes into effect, corporate actions such as mergers and dissolutions and transfers of all or substantially all of a NFP’s assets will be able to be approved solely by the Attorney General, while the current law requires both Attorney General and court approval. Also, a NFP will be able to buy, sell, mortgage, lease or exchange real property with a simple majority vote of its board or authorized committee regardless of the size of the board of directors (instead of the current requirement that there be a two-thirds majority for a board that has 20 or fewer members), unless the transaction would involve most or all of its assets, in which case a two-thirds majority vote would be required if the NFP has 20 or fewer directors. Other changes affecting governance include eliminating any distinction between standing and special committees, and permitting board member notices, participation and/or voting by electronic means. Also, beginning July 1, 2015, no NFP employee will be permitted to serve as chair of the board (or its equivalent).

The Revitalization Act also requires NFPs to develop conflict of interest policies if they do not already have them. The law will require every director to sign and submit to the NFP’s Secretary a written declaration disclosing any entities having relationships with the NFP in which he/she has any role (such as being a director, officer, owner or employee), and any transactions affecting the NFP in which he/she may have a conflicting interest.

Every NFP conflict of interest policy, at a minimum, must define what constitutes a "conflict of interest", provide procedures for disclosing a conflict of interest and prohibit anyone with a conflict of interest from attempting to influence the board's debate or decision on how to handle the conflicted manner (including a requirement that the individual with the conflict of interest not be present at the board's meeting when discussing that matter).

In addition to the requirement that every NFP adopt a conflict of interest policy, the new law expands the definition of who is considered a "related party" and authorizes the NFP to include in its board policies or bylaws provisions that place additional restrictions on related party transactions, prescribe procedures for appropriate review and approval of related party transactions and a requirement that any transaction that violates these provisions will be void or voidable. The Attorney General is also authorized to take action to void or rescind any related party transactions that are in violation of the law or were not in the best interests of the NFP at the time of approval of the transaction, seek restitution and seek removal of the NFP's officers and/or directors. The law also includes a number of financial penalties that the Attorney General can seek to recover from both entities and people who profited from the related party transaction.

The new law also requires that any NFP that employs at least 20 people and generates $1 million or more in revenue must have a whistleblower policy. The Revitalization Act includes specifics provisions that must be included in the whistleblower policy.

Finally, NFPs required to complete independent audits will face new requirements. The board or an audit committee must oversee the NFP's audit, retain or review the retention of an independent auditor, and once the audit is finished, consult with the independent auditor about his/her findings. Any NFP that is required to file its independent audit report with the Attorney General and generates annual revenue exceeding $1 million must also take other actions, such as reviewing the scope of the audit prior to its commencement, and, upon completion of the audit, reviewing with the auditor any problems he/she identifies with the NFP's internal controls, any restrictions on the auditor's access to information requested from the NFP while conducting the audit, any significant disagreements between the NFP's management and the auditor, and whether the NFP's accounting and financial reporting processes are accurate. The board must also annually consider the independence and performance of the independent auditor. In addition, the annual revenue threshold requirement for filing a financial report and audited financial statements with the Attorney General will be raised from its current $250,000 level to $500,000 on July 1, 2014, $750,000 on July 1, 2017, and $1 million on July 1, 2021.

NFPs are advised to review their current bylaws and policies to determine if any changes will be necessary in order to comply with the new law. They should also educate their boards and leadership on the changes.

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