

## Potential Amendments to the Nonprofit Revitalization Act of 2013: Summary of Potential Amendments Other Than the Changes to the Related Party Transaction Rules

On June 16, 2016, the New York State Legislature adopted Senate Bill No. S07913B (the "Bill") modifying the Nonprofit Revitalization Act of 2013 (the "NPRA"). The following is a brief summary of the Bill's provisions that impact (1) the definition of interested directors; (2) the formation, composition and authority of committees; (3) the role of audit committees; (4) certain procedural aspects of conflict of interest and whistleblower policies; and (5) the ability of a corporation's employee to serve as chair of the corporation's board. This summary serves as an addendum to our memorandum detailing the changes the Bill would make to the related party transaction rules under the NPRA, which can be found [here](#).

### A. Definition of Interested Directors

1. The current definition of "independent director" under Not-for-Profit Corporation Law ("NPCL"), §102(a)(21), provides that employees of a corporation or its affiliates do not qualify as independent directors; this would be expanded to include "key persons" of a corporation or its affiliates.
2. Currently, a director cannot qualify as an independent director of a corporation if that director is an employee of, or has a substantial financial interest in, an entity that has made payments to or received payments from the corporation or an affiliate that exceeded the lesser of \$25,000 or 2% of the entity's consolidated gross revenues. The Bill would replace the \$25,000 or 2% thresholds with the following sliding scale based on the consolidated gross revenues of the entity of which the director is an employee or in which the director has a substantial financial interest:
  - In the case of an entity with consolidated gross revenues of less than \$500,000, payments in any of the last three fiscal years cannot exceed the lesser of \$10,000 or 2% of the entity's consolidated gross revenues;
  - The dollar threshold would be raised to \$25,000 for entities with revenues of at least \$500,000 but less than \$10,000,000; and
  - The dollar threshold would be raised to \$100,000 for entities with revenues of over \$10,000,000.
3. The Bill would also clarify the terms "payment" and "compensation" as they are used in the independent director definition.
  - In addition to excluding charitable contributions and dues or fees paid to the corporation for services performed by the corporation as part of its nonprofit purpose, the term "payment" would exclude "payments made by the corporation at fixed or non-negotiable rates or amounts for services received, provided that such services by and to the corporation are available to individual members of the public on the same terms, and such services received by the corporation are not available from another source."
  - The term "compensation" would expressly exclude "reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of section 202" of the NPCL.

### B. Formation, Composition, and Authority of Committees

1. The Bill would make the following revisions to NPCL §712(a) with respect to the formation and composition of committees:
  - It would change the standard for creating a Committee of the Board, which currently requires the vote of a majority of the entire board, by allowing such a Committee to be established by a majority of directors present at a meeting at which a quorum is present.
  - It would require that a majority of the entire board appoint members of the executive committee (or any similar committee, however denominated), unless the board has 30 or more members, in which case the requisite vote would be reduced to at least three-quarters of the directors present at the time of the vote, provided that a quorum is present at that time.
  - It would expressly allow for a corporation's bylaws to provide that directors who hold certain positions in the corporation are ex-officio members of specific committees.
2. The Bill would expand the list of specific actions set forth in NPCL §712(a) that no committee has authority to undertake by adding the

following prohibited actions to the list:

- The election or removal of officers and directors;
- The approval of a merger or a plan of dissolution;
- The adoption of a resolution recommending to the members action on the sale, lease, exchange, or other disposition of all or substantially all the assets of a corporation or, if there are no members entitled to vote, the authorization of such transaction; and
- The approval of amendments to the certificate of incorporation.

### C. Audit Committee Composition and Duties; Conflict of Interest and Whistleblower Policies Procedural Changes

1. Under the NPCL, any corporation required to register to conduct charitable solicitations in New York with annual revenue in excess of \$500,000 must have an audit committee composed solely of independent directors. Additionally, the NPCL requires all corporations to have a Conflict of Interest Policy, and corporations with 20 or more employees and annual revenues in excess of \$1,000,000 to have a Whistleblower Policy, each of which must be administered by the audit committee or other committee of independent trustees, or by the full board. The Bill would remove the requirement that the audit committee or a committee composed solely of independent directors oversee the implementation of and compliance with a corporation's conflict of interest and whistleblower policies.
2. Similarly, the Bill would require reports under whistleblower policies to be made to the board or an authorized committee of the board, and it provides that directors who are employees would not be allowed to participate in board or committee deliberations or voting relating to administration of the whistleblower policy.
3. Additionally, the Bill would expressly provide that any person who is the subject of a whistleblower complaint would not be permitted to be present at or participate in board or committee deliberations or voting on the matter relating to the complaint, provided that the board or committee would be allowed to request that person present background information or answer questions at a meeting prior to the commencement of deliberations or voting.

### D. Employees as Board Chairs

The NPRA added a provision to the NPCL prohibiting any employee of a not-for-profit corporation from serving as the chair of the board of that corporation or in any other position with similar responsibilities. The Bill would remove this strict prohibition by allowing an employee to serve as board chair if the board approves the appointment by a two-thirds vote of the entire board and contemporaneously documents in writing the basis for its approval.

If you have any questions about this Information Memo, please contact [Frank J. Patyi, Practice Group Chair](#), [Scott R. Leuenberger](#), any of the [attorneys](#) in our [Exempt Organizations Practice](#), or the attorney in the firm with whom you are regularly in contact.



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