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NONPROFIT GOVERNANCE & TAX-EXEMPT ORGANIZATIONS LAW ALERT

New York Nonprofit Revitalization Act Amended

Legislation Signed at the End of 2016 Modifies Key Definitions Under the New York Not-For-Profit Corporation Law

In order to comply with the Nonprofit Revitalization Act of 2013, most New York nonprofits have gone through the process of revising their bylaws and conflict of interest policies to satisfy the requirements that became effective in December of 2014. In large measure, these changes were aimed at preserving the independence of certain board activities and ensuring that transactions entered into by nonprofits were in the corporation's best interest and not unduly influenced by interested or "related parties." Legislation signed by Governor Cuomo in November of 2016 modified key definitions and rules under the Not-for-Profit Corporation Law and nonprofits, once again, should reexamine their bylaws and polices to bring them up to date.

Changes in Definitions

The following definitions have been revised, and take effect on May 27, 2017. These revised definitions greatly reduce the burden imposed on nonprofits by the Nonprofit Revitalization Act.

Related Party Transaction. Related Party Transactions now exclude transactions:

1. where the transaction itself or the related party's financial interest in the transaction is *de minimis*,
2. that would not customarily be reviewed by the board or boards of similar organizations and are available to others on the same or similar terms, or
3. that constitute a benefit provided to a related party only as a member of a class of the beneficiaries that the corporation intends to benefit as a part of its mission, as long as the benefit is available to similarly situated members of the same class on the same terms.

Key Person. Within the definition of "Related Party," the term "Key Employee" is now "Key Person." A Key Person is one who:

1. has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities, powers, or influence of directors and officers,
2. manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation, or
3. alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget.

Independent Director. The definition of "Independent Director" now includes a sliding scale financial threshold. In other words, a director may still be independent even if employed by or has a financial interest in another entity, as long as the amount paid or received during each of the past three fiscal years:

1. is less than $10,000 or 2% of the nonprofit's consolidated gross revenues, if the consolidated gross revenues are less than $500,000,
2. is less than $25,000 for nonprofits with consolidated gross revenues falling between $500,000 and $10,000,000; and

3. is less than $100,000 for nonprofits with consolidated gross revenues of $10,000,000 or more.

Compensation: The definition of "compensation" no longer includes reimbursement for expenses reasonably incurred as a director or compensation for service as a director.

Additional Adjustments to the Law

In addition to revising certain definitions in response to comments from New York nonprofits, these amendments soften some of the stricter aspects of the Nonprofit Revitalization Act.

Chair of the Board: The law now permits an employee to serve as chair of the board as long as:

1. the board approves the election by a two-thirds vote of the entire board; and
2. contemporaneously documents, in writing, the basis for the board approval.

This change took effect on January 1, 2017.

Committee Formation and Operational Provisions: Using its normal procedures, a governing board may now create committees, other than an executive committee. Previously, a majority vote of the Entire Board, a term of art under the law, was required to create a committee. This higher burden still survives for the creation of an executive committee except in certain rare circumstances. In addition, the law clarified which powers the board may not delegate to committees: the authority to elect or remove officers and directors, to approve a merger or plan of dissolution, to adopt a resolution recommending to the members a sale of all or substantially all of the assets of a corporation or authorizing such transaction if the corporation has no members, and to approve amendments to the certificate of incorporation. By contrast, the board may now authorize a committee to approve related party transactions.

Conflict of Interest and Whistleblower Provisions: Any person who is the subject of a whistleblower complaint may not be present at or participate in board or committee deliberations or voting on the matter relating to the complaint (although the board or committee may request that this person present background information or answer questions prior to the commencement of deliberations or voting).

An official copy of all the amendments can be found here.

Please visit our Nonprofit Governance and Tax-Exempt Organizations Practice webpage to learn more about the legal services we can provide this area. Contact one of our attorneys identified below if you would like more information on this issue.

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