

The Nonprofit Revitalization Act of 2013

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Welcome

We are pleased to welcome you to today's webcast.

In order to qualify for your CPE Certificate, you will need to:

- Remain logged on for at least 50 minutes
- Respond to at least 3 of the 4 polling questions that will be presented

We would appreciate if you would complete the evaluation survey following the event. A link to the survey will be emailed to you automatically within the hour following the webinar.

You may submit questions and we will try to address them during the program. However, if time does not permit us to answer a question posed during the webcast, it will be answered offline after the event.

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Speakers



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Agenda

Key Components of the Act

Impact to Governance and Oversight

Updated Legislative Matters

Amendments and Guidance

KEY COMPONENTS OF THE ACT

Why Was the Act Needed?

New York law had:

- Antiquated requirements
- Unnecessary costs and delays
- Little formal guidance on fiduciary responsibility

Legislative Objectives

- Reduce **burdens** on nonprofits
 - Modernize statutory requirements
- Increase **public trust** in the nonprofit sector
 - Strengthen board governance
 - Enhance AG enforcement powers

Fundamentals of the Act

- Effective Date
 - The Act generally took effect as of **July 1, 2014**.
 - Certain provisions of the Act will take effect at later dates.
- Applicability
 - The Act applies to **New York nonprofit corporations** and, in certain cases, to **New York charitable trusts, New York education corporations, and New York religious corporations**.
 - Certain provisions of the Act apply to corporations and trusts **registered with the attorney general to solicit contributions** in the State of New York.
 - The applicability of the Act to **foreign corporations** is unclear.
- Impact
 - The Act will require updates to organizations' **governing documents and policies and procedures**.

Elimination of “Types”

- The Act replaced the prior four “types” (A, B, C, and D) with two categories: charitable and non-charitable.
- The new structure is aimed at making the incorporation process easier.
- Non-profit corporations formed before July 1, 2014 are automatically re-classified as charitable or non-charitable.

Applicability to Foreign Corporations

The Act is not explicit regarding its applicability to “foreign corporations”:

- A “foreign corporation” is incorporated outside of New York.
- Various provisions of the Act apply to all entities registered to solicit contributions.
- Foreign corporations may wish to comply whether mandated or not.

Polling Question #1

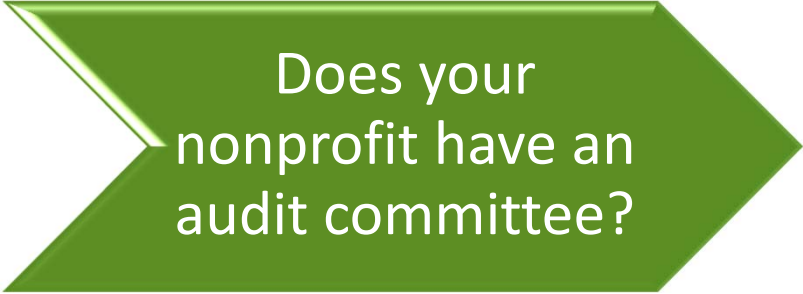
- The Act primarily went into effect on what date?
 - a. December 31, 2010
 - b. December 31, 2013
 - c. July 1, 2014
 - d. Not yet

**IMPACT TO GOVERNANCE
AND
OVERSIGHT**

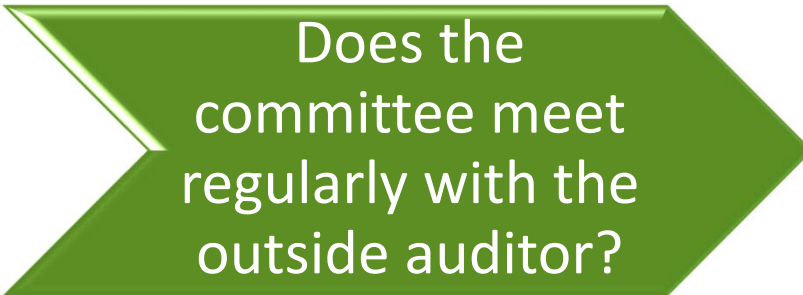
Strengthening Board Governance

- Audit Oversight
- Related-Party Transactions
- Conflict of Interest Policies
- Whistleblower Policies
- Independent Board Leadership

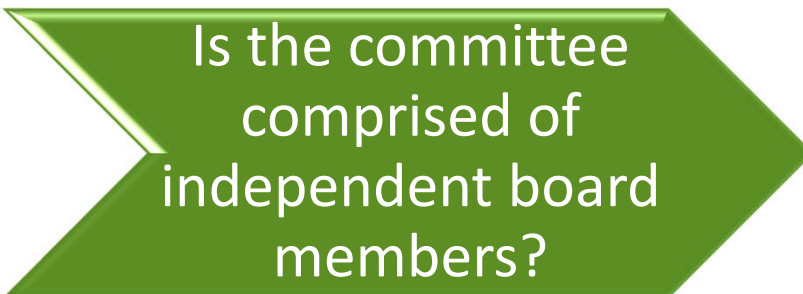
Current Audit Oversight Practices

A green arrow pointing to the right, containing the text:

Does your nonprofit have an audit committee?

A green arrow pointing to the right, containing the text:

Does the committee meet regularly with the outside auditor?

A green arrow pointing to the right, containing the text:

Is the committee comprised of independent board members?

Current Audit Oversight Practices

Does the committee discuss with auditor:

- Audit approach
- Audit results
- Internal controls
- Management letter
- Competence of the financial systems (including personnel)

New Audit Oversight Requirements

The Nonprofit Revitalization Act requires that the board or the audit committee perform certain **audit oversight** responsibilities

Polling Question #2

- The Act established how many categories of exempt organizations?
 - a. Four
 - b. Three
 - c. Two
 - d. One

New Audit Oversight Requirements

New requirements apply to nonprofits **registered** (or required to be registered) with the Attorney General to solicit charitable donations

- Annual revenues of over \$500,000 (effective July 1, 2014) are subject
- Threshold increases over time

New Audit Oversight Requirements

- Religious organizations generally exempted
- Generally does not apply to education organizations

New Audit Oversight Requirements

Board or audit committee must:

- Oversee accounting & financial reporting processes
- Oversee the audit process, including:
 - Annually retain or renew auditor
 - Review results of audit and management letter with auditor

New Audit Oversight Requirements

Nonprofits with more than \$1 million in annual revenue must engage in additional review and discussions with the outside auditor

New Audit Oversight Requirements

Additional discussion and review:

- Scope and planning of audit
- Material risks and weaknesses in internal controls
- Restrictions on scope or access to information
- Significant disagreements with management
- Adequacy of accounting and financial processes

New Audit Oversight Requirements

The board or audit committee is also responsible for overseeing conflict-of-interest and whistleblower policies (if not handled by another committee of independent directors)

New Audit Oversight Requirements

Audit Committee must be comprised solely of independent directors of the board discussion and review:

- If Board performs function, only independent directors can participate in deliberations and voting

Effective Dates

7/1/2014: Greater than \$10 million in revenue

1/1/2015: Less than \$10 million in revenue

Calculated as of last fiscal-year ending prior to 1/1/2014

Practical Application

What does this
all mean?

- Relationship between those charged with governance (the Board) and the independent auditor is now explicitly in the law!
- Audit committee should review and approve audit engagement letter annually
- Conversations and decisions should be documented in minutes

Practical Application

- Meetings can be in person or through electronic means (including Skype), although by-laws might need to be amended
- Audit committee charter should be adopted
- Financial expertise isn't mandated but is a good idea

Related Party Transactions

The board or a board committee is required to review and approve “related party transactions”

- A “related party” is:
 - any **director, trustee, officer, or key employee** of the non-profit corporation or charitable trust (or any affiliate)
 - any of their respective **relatives**; or

Related Party Transactions

interest, or, in the case of a partners any entity in which any individual described above has a 35% or greater **ownership or beneficial** or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of 5%.

- Any transaction, agreement or other arrangement in which a related party has a financial interest and in which the nonprofit (or an affiliate) is a participant
- Level of review depends on type and size of organization

Related Party Transactions

The board or a board committee must determine that a related party transaction is fair, reasonable and in the best interest of the organization

- Applies to **all** nonprofits

Related Party Transactions

Additional requirements apply only to transactions involving charitable organizations in which a related party has a substantial financial interest.

The board must:

- Consider alternative transactions
- Approve transaction by majority vote
- Document basis for approval

Related Party Transactions

Procedural Requirements

- Related parties cannot participate in deliberations or voting on related party matters.
 - **must disclose the material facts** concerning such interest in good faith to the board or authorized committee.
 - **may provide information** concerning a related party transaction prior to the commencement of deliberations or voting on the related party transaction upon request.

Enhanced AG Enforcement Powers

The Attorney General will have new powers to remedy improper related party transactions that:

- Violate law
- Are not reasonable or in the best interests of the nonprofit

Enhanced AG Enforcement Powers

The AG can bring actions to:

- Unwind related party transactions
- Remove directors
- Obtain financial restitution and replacement of property
- Obtain double damages for willful misconduct

Conflict of Interest Policies

- **All** nonprofits are required to adopt **conflict of interest policies**

Conflict of Interest Policies

The conflict of interest policy must cover:

- Definition of a conflict
- Disclosure procedures (to audit committee or board)
- Recusal from deliberating and voting
- Documentation of existence and resolution of conflict
- Prohibition against attempts to influence deliberation and voting on conflict
- Procedures for related party transactions

Conflict of Interest Policies

Directors will also be required to sign and submit an annual conflicts of interest disclosure statement

- New directors will have to submit statement prior to joining the board

Whistleblower Policies

The Act requires certain nonprofit corporations and charitable trusts to adopt whistleblower policies.

- Whistleblower policies are required for nonprofit corporations and charitable trusts with:
 - **20 or more employees**; and
 - **At least \$ 1 million in annual revenue.**

Whistleblower Policies

Contents

Whistleblower policy must:

- include **procedures for reporting** violations of laws or policies and **procedures to protect confidentiality**;
- designate a person to **administer the policy and report** to the board, the audit committee or another committee comprised solely of independent directors or trustees; and
- require that a copy of the **policy be distributed** to all directors, trustees, officers, employees, and to **volunteers** who provide substantial services to the non-profit corporation or charitable trust

Independent Board Chair

The board chair cannot be the CEO, Executive Director or any other employee of the nonprofit.

This provision is deferred until 1/1/16.

Polling Question #3

- Does your current Whistleblower Policy get distributed to volunteers?
 - a. Yes
 - b. No

**UPDATED
LEGISLATIVE
MATTERS**

Practical Matters

- Updated technology referenced:
 - Electronic transmission (**fax or e-mail**) is permitted for board and membership:
 - meeting notices;
 - waivers of notice; and
 - unanimous consents in lieu of actions at meetings.
 - Board and committee meetings may be attended by **electronic video screen communication** (as long as all persons participating can hear each other at the same time and each director can participate in all matters before the board or committee).

Approval of Significant Transactions

- Simplified approval processes for significant transactions by certain nonprofit:
 - Only **attorney general approval** is required for:
 - any **sale, lease, exchange, or other disposition of all or substantially all of the assets** of a charitable corporation;
 - any **merger or consolidation** by a charitable corporation; and
 - any **dissolution** by a charitable corporation or a non-charitable corporation that holds assets legally restricted for a particular purpose.
 - **Court review** is available, including where the attorney general does not approve of the transaction

Financial Reporting Thresholds

- The Act gradually increases the thresholds for required financial reporting applicable to charitable corporations and charitable trusts registered to solicit contributions.

Type of Financial Reporting Required by Annual Gross Revenue and Support

	Audit Report	Review Report	Unaudited Financial Report
Until June 30, 2014	>\$250,000	\$100,000-\$250,000	<\$100,000
July 1, 2014-June 30, 2017	>\$500,000	\$250,000-\$500,000	<\$250,000
July 1, 2017-June 30, 2021	>\$750,000	\$250,000-\$750,000	<\$250,000
Beginning July 1, 2021	>\$1 million	\$250,000-\$1 million	<\$250,000

Polling Question #4

- Are you happy with the increasing thresholds for the audit requirement?
 - a. Yes
 - b. No

**AMENDMENTS
AND
GUIDANCE**

Updates: Amendments

- Certain “technical corrections” to the Act were adopted prior to its effectiveness.
 - A9117/S6249
- The effective date of the prohibition on an employee serving as board chair was further extended to January 1, 2016.
 - A10027/S7799
- A pending Senate bill would (i) repeal the prohibition on an employee serving as board chair, and (ii) amend the definitions of “independent director” and “related party transaction”
 - S7838

Updates: Guidance

- The Charities Bureau has released the following guidance:
 - “Guidance on Provisions of the Nonprofit Revitalization Act of 2013: Revised CPA Review and Audit Thresholds and Annual Filing Fees for 7A or DUAL Filers”
 - “A Guide to Mergers and Consolidations of Not-for-Profit Corporations Under Article 9 of the New York Not-for-Profit Corporation Law”
 - “A Guide to Sales and Other Dispositions of Assets Pursuant to Not-for-Profit Corporation Law §§ 510-511 and Religious Corporations Law § 12”
 - “Voluntary Dissolution of Not-for-Profit Corporations With Assets to Distribute”
 - “Procedures for the Dissolution of a Not-for-Profit Corporation Without Assets”

Questions





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