

Conflicts of Interest, Board Minutes and New York's Nonprofit Revitalization Act

New York's Nonprofit Revitalization Act of 2013 (NPRO) has codified governance requirements for what earlier may have been simply a board's "best practice" as it pertains to conflicts of interest. The NPRO amends the Not-for-Profit Corporation Law (N-PCL).

Many nonprofit boards have already adopted conflict of interest policies. 501(c)(3) organizations are required by the Internal Revenue Service to have such a policy, and it has provided sample conflict of interest policies that complied with its requirement. However, the NPRO requires **all** New York nonprofits to have a policy, and the sample IRS policy **does not** fulfill NPRO requirements. The New York law is much more detailed and specific.

First, it is important to know who a conflict of interest can involve. It includes a:

- director
- officer
- key employee
- related party
- relative.

Those individuals are defined—some, such as "relative," defined very broadly—in section 102 (a) of the N-PCL.

The purpose of such a conflict of interest policy is to ensure that a nonprofit's directors, officers and key employees act in the nonprofit's best interest and comply with applicable legal requirements. N-PCL section 715 details the components and requirements of a conflict of interest policy. The policy must cover "related party transactions," which are transactions, agreements or arrangements in which the related party has a financial interest and in which the nonprofit or an affiliate is a participant.

Under the law, all nonprofits must have procedures for the disclosure of conflicts of interest, and that the individual with the conflict — at a minimum — cannot be present at, or participate in, board or committee deliberations or votes. New directors must identify all potential conflicts, and all directors must update these potential conflicts at least on an annual basis. Officers and key employees must also make annual disclosures.

What may come as a surprise to some nonprofit boards is the documentation obligations that accompany the disclosure of a conflict. Section 715 (a) 5 **requires that the existence and resolution of the conflict be documented in the corporation's records, including the minutes of any meeting at which the conflict was discussed or voted on.**

Clearly, conflicts of interest get a lot of attention under the new law, and boards must pay close attention to its requirements. However, it is not enough that boards review conflicts of interests. The corporate records and corporate minutes must document the review and that all necessary actions have taken place.

Additional Resource

http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf

New York Attorney General Guidance Document 2015 - 4, V. 1.0

“Conflicts of Interest Policies Under the Nonprofit Revitalization Act of 2013”

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Not-for-Profit Corporation Law Sections Cited:

Section 102

(a) As used in this chapter, unless the context otherwise requires, the term: (1) "Bonds" includes secured and unsecured bonds, debentures, and notes. (2) "By-laws" means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated. (3) "Certificate of incorporation" includes (A) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or (B) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated. (4) "Conducting of activities" of a corporation means the operations for the conduct of which such corporation is formed and may constitute "doing of business" or "transaction of business" as those terms are used in the statutes of this state. (5) "Corporation" or "domestic corporation" means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute. (6) "Director" means any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term "board" means "board of directors". (7) "Foreign corporation" means a corporation formed under laws other than the statutes of this state, which, if formed under the statutes of this state, would be within the term "corporation or domestic corporation" as herein defined. "Authorized", when used with respect to a foreign corporation, means having authority under Article 13 (Foreign Corporations) to conduct activities of the corporation in this state. (7-a) "Infant" or "minor" means any person who has not attained the age of eighteen years. (8) "Insolvent" means being unable to pay debts as they become due in the usual course of the debtor's business. (9) "Member" means one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws. (10) "Not-for-profit corporation" means a corporation as defined in subparagraph (5). (11) "Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where activities are conducted by such corporation. (12) "Process" means judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation in

any action or proceeding, civil or criminal, whether judicial, administrative, arbitrative or otherwise, in this state or in the federal courts sitting in or for this state. (13) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the corporation on a current basis under the specific terms of all applicable gift instruments. (14) "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, court order, writing or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or acquired by a corporation as an institutional fund. (15) "Governing board" means the body responsible for the management of a corporation or of an institutional fund. (16) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the corporation is conclusive. (17) "Institutional fund" means a fund for the exclusive use, benefit or purposes of a corporation, held either by the corporation itself or on behalf of the corporation by a person or entity whose sole authority with respect to the fund has been delegated by the corporation pursuant to section 514 (Delegation of investment management), but does not include (i) a fund held for a corporation by a trustee that is not a not-for-profit corporation (other than a trustee whose sole authority with respect to the fund has been delegated by the corporation pursuant to section 514), or (ii) a fund in which a beneficiary that is not a not-for-profit corporation has an interest (other than possible rights that could arise upon violation or failure of the purposes of the fund). (18) "Authorized person" means a person, whether or not a member, officer, or director, who is authorized to act on behalf of a corporation or foreign corporation. - See more at: <http://codes.lp.findlaw.com/nycode/NPC/1/102#sthash.HIoF84QU.dpuf>

Section 715

(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. (b) The conflict of interest policy shall include, at a minimum, the following provisions: (1) a definition of the circumstances that constitute a conflict of interest; (2) procedures for disclosing a conflict of interest to the audit committee or, if there is no audit committee, to the board; (3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict; (4) a prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict; (5) a requirement that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and (6) procedures for disclosing, addressing, and documenting related party transactions in accordance with 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. (e) Nothing in this section shall be interpreted to require a corporation to adopt any specific conflict of interest policy not otherwise required by this section or any other law or rule, or to supersede or limit any requirement or duty governing conflicts of interest required by any other law or rule.

* NB Effective July 1, 2014