

## CLIENT UPDATE

# “NEW YEAR’S RESOLUTIONS” FOR NEW YORK NON-PROFITS: THE NEW YORK NON-PROFIT REVITALIZATION ACT OF 2013

### NEW YORK

Sarah A. W. Fitts  
sawfitts@debevoise.com

Craig A. Bowman  
cabowman@debevoise.com

Wolcott B. Dunham, Jr.  
wbdunham@debevoise.com

Elizabeth W. Whiston  
ewwhiston@debevoise.com

Chantal Tortoroli  
ctortoroli@debevoise.com

New York’s Governor Andrew Cuomo signed into law the Non-Profit Revitalization Act of 2013 (the “Act”) on December 18, 2013. The Act is the first substantial revision of New York State’s non-profit law in over 40 years.

The Act has an effective date of July 1, 2014, and applies to all New York non-profit corporations (both charitable and non-charitable). Certain provisions also apply to New York charitable trusts, education corporations and religious corporations. Non-profit organizations incorporated in New York should resolve to begin early to review their internal policies and governing documents to be prepared for the start of the Act’s new requirements, well in advance of the July 1 effective date, since many non-profit organizations may want to amend their by-laws to reflect the Act and may need to adopt new policies or change long-standing board practices.

In keeping with the season, we offer four New Year’s resolutions to help you plan and prepare for the coming changes for New York non-profit organizations.

### **RESOLUTION 1: MAINTAIN SOUND OVERSIGHT POLICIES**

Good practice has always called for appropriate policies in dealing with conflicts of interest. The Act imposes specific requirements for such policies. Consider whether your organization needs to adopt the following new (or updated) policies:

- **Conflict of interest policy.** All New York non-profit corporations must adopt a conflict of interest policy. Check that your existing policy is compliant or adopt one if you don't have one. The policy you adopt must, among other things, define a conflict of interest, require that conflicts of interest be disclosed to the board or other decision maker, and prohibit the conflicted person from participating in decisions related to the conflict. Each director must annually submit a statement certifying to the absence of conflicts.
- **Related party transactions policy.** All New York non-profit corporations must have a specific approval process for related party transactions. This may require a new policy or simply updating the related provisions in your corporation's by-laws (see Resolution 2 below for other suggested changes to organizational documents). The Act gives the Attorney General new enforcement powers to enjoin and rescind improper related party transactions and to seek restitution from directors and officers who were involved in such decisions.
- **Whistleblower policy.** An organization with more than 20 employees and annual revenues of over \$1 million must have a whistleblower policy. The policy must establish procedures for reporting violations or suspected violations of laws by the organization or its representatives and designate an individual to administer the policy. Retaliation against whistleblowers is prohibited.

## RESOLUTION 2: UPDATE GOVERNING DOCUMENTS

Many of the Act's new requirements apply automatically, trumping any conflicting provision of your corporation's certificate of incorporation and by-laws. However, by-laws are a convenient reference for everyone in the corporation, without the need to look up the law, and it is good practice to amend the by-laws to reflect the new requirements. Furthermore, if your by-laws contain requirements taken from the old law that are stricter than the new law, you may well be bound by your by-laws, so review your by-laws and other governing documents, including for the following:

- **Board and committee composition.**
  - Update the definition of "independent director" – a director eligible to serve on the audit committee – in your by-laws (including your audit committee charter). The Act provides that any director employed by the organization or any affiliate or who had an interest in defined material transactions with the non-profit corporation within the last three years will not qualify as independent.
  - Review your quorum requirements. Following existing New York law, most by-laws base the quorum for a board meeting on the number of directors constituting

the “entire board,” and, if the size of the board changed, the board had to remember to vote to change the size of the “entire board.” The Act provides that if the by-laws fix the board size, the “entire board” means that number but, if a range is provided, the “entire board” means the number of directors elected as of the most recent election.

- You can delete any distinction between standing and special committees.
- **New technology.** For convenient reference, your by-laws should include language that allows your board to conduct meetings via videoconferencing (*e.g.*, Skype) and conference telephone communications, and allows notices, consents and electronic signatures sent via email. The new law confirms that corporations may join the 21<sup>st</sup> century!
- **Types.** If you are amending your certificate of incorporation after July 1, delete those confusing references to Type A, B, C or D. Any by-laws reference to type should also be deleted in the next amendment of your by-laws. Since 1970, a New York non-profit corporation has been formed by filing a certificate of incorporation that designated it as a Type A, B, C or D corporation. Effective July 1, these types will have no significance, and all existing New York non-profit corporations will automatically be either charitable or non-charitable non-profit corporations. If your corporation was formed with both charitable and non-charitable purposes it will be deemed a charitable corporation.

### RESOLUTION 3: REAFFIRM GOOD HABITS

Ensure your board and employees are aware of changes that might affect how decisions are made and records are kept:

- **Compensation.** Reaffirming long-standing good practice, the Act prohibits individuals compensated by a non-profit corporation from participating in deliberations and voting on their own compensation. The employee may be present to provide background information, but ask the employee to leave the board or committee meeting before compensation decisions are discussed or made.
- **Board Chair.** Effective as of January 1, 2015 (July 1, 2014 for non-profit corporations with annual revenues of \$10 million or more), the Act prohibits employees from serving as chair of the board. If the current chair is an employee, the board will need to elect as chair a director who is not an employee.
- **Financial Reporting and Audit Procedures.** The Act raises the thresholds triggering financial reporting requirements that apply to non-profit organizations, whether incorporated in New York or elsewhere, that register with the New York Attorney

General to solicit donations. (Religious corporations are exempt from such registration and reporting.)

- **If your organization has gross revenues of \$250,000-\$500,000**, financials *reviewed* by an independent certified public accountant will need to be filed and a more expensive *audit* is not needed unless requested by the Attorney General after submission of the review report.
- **If your organization has gross revenues over \$500,000**, however, you will still need to file financials together with an auditor’s report. The Act also requires that you have a designated audit committee of independent directors oversee the audit.
- **If your organization has gross revenues over \$1,000,000**, the audit committee’s duties increase and include planning the audit process and scope, reviewing the results of the audit once completed (including any material risks), and evaluating the independent auditor annually.

**RESOLUTION 4: REORGANIZING YOUR ORGANIZATION (OPTIONAL)**

If your New Year’s resolutions include a major change to your organization, like a merger, sale of real estate or other assets, then you should know how the Act simplifies the process and you may consider making preparations now to carry out the transaction after the July 1 effective date of the Act:

- The Attorney General will have the authority to grant approvals for major transactions without additional court approval, as is required under the current law, such as:
  - mergers or consolidations;
  - changes in corporate purposes; and
  - major sales of real estate or other assets.
- If the Attorney General does not approve the transaction, you can then petition the court for approval.
- Routine real estate transactions will also now be easier to approve. So long as the transaction does not involve all or substantially all of the assets of the organization, the Act requires majority board approval, instead of a two-thirds vote as was required under the old law.

These key resolutions inspired by the Act and described in this Client Update are a starting point for review. The Act also contains a number of other important provisions not discussed in this Client Update that might be relevant to your organization. If you are

interested in reviewing the Act in its entirety, it can be found at:  
<http://open.nysenate.gov/legislation/bill/A8072-2013>.

\* \* \*

Please let us know if we can be of service to you and your organization in 2014. Happy New Year!

January 7, 2014