NEW YORK “NONPROFIT REVITALIZATION ACT” CLEARS LEGISLATURE

The “Nonprofit Revitalization Act of 2013” passed both houses of the New York State Legislature at the end of June with solid bipartisan support. The Act was introduced at the request of the New York State Attorney General, who regulates nonprofits in New York through the Charities Bureau. If signed into law by Governor Cuomo, the Act will constitute the first major overhaul of the laws governing New York nonprofits in over 40 years.

The Act aims to streamline and update New York’s Not-for-Profit Corporation Law (the “N-PCL”) and other applicable nonprofit laws, while at the same time improving nonprofit governance and enhancing oversight and accountability of nonprofits. Most of the changes would take effect as of July 1, 2014.

The following report highlights the most significant changes that will go into effect if the Act becomes law.

SIMPLIFIED INCORPORATION PROCEDURES

The Act intends to simplify the process of forming a New York nonprofit corporation in several ways.

- First, the Act would eliminate the existing (and often confusing) distinctions between Type A, B, C and D corporations. Instead, under the Act, there would be only two types of nonprofit corporations: charitable and noncharitable. Existing nonprofits would not be required to file additional paperwork or amend contracts to reflect the new types.
• Second, the Act would clarify that certificates of incorporation need to set forth corporate purposes only, not specific planned activities.

• Third, the Act would require the Division of Corporations of the New York Department of State to review nonprofit filings solely on the basis of compliance with N-PCL requirements and would eliminate the need for refiling under certain circumstances by permitting the agency to make corrections with the consent of the filer.

• Fourth, the Act would eliminate the requirement of advance Department of Education consent or waiver of jurisdiction for corporations whose certificates of incorporation refer to “educational” purposes (e.g., references to “charitable” and “educational” purposes within the meaning of section 501(c)(3) of the Internal Revenue Code). Educational institutions such as schools, colleges, universities, libraries, museums, and historical societies would continue to be regulated by the Board of Regents, but nonprofits with educational purposes in a general sense would need to notify the Department of Education of their incorporation only after the fact.

• Finally, the Act would eliminate the need for the approval of a certificate of incorporation by other state agencies if it included language disclaiming the intent to engage in activities regulated by such agencies.

These reforms are meant to simplify and expedite the process of forming a nonprofit corporation in New York, thereby bringing it in line with practices and procedures in other states. By enabling a nonprofit to incorporate more easily and quickly than in the past, the new provisions are intended to enable New York to compete more effectively with other states in attracting nonprofit enterprises to the State.

ENHANCEMENT OF OPERATIONAL EFFICIENCY

The Act is also intended to facilitate operational efficiency for nonprofits by streamlining regulatory approvals for mergers, consolidations, changes of purpose, dissolutions and significant dispositions of assets. Currently, many such transactions require the approval of a local court as well as the Attorney General, a time-consuming and duplicative process. The Act would give the Attorney General authority to grant approvals without judicial proceedings, while preserving the right of nonprofits to seek court approval if they choose to do so.

In addition, the Act would promote the delegation of authority within nonprofits by permitting the approval of routine real estate transactions at the committee level or by vote of a simple majority of the board.

The Act is also intended to simplify nonprofit administration by conforming the terminology of New York law more closely to the U.S. tax laws, regulations and forms, including the IRS Form 990 (the annual information return for charities). These reforms are aimed at reducing the burden and confusion of inconsistencies in the language of state and federal regulations.

Finally, the Act would permit nonprofits to take advantage of current technologies by permitting (i) electronic filings with the Attorney General’s Charities Bureau, (ii) meeting notices by email and fax, (iii) electronic waivers of notice and (iv) electronic signatures to written consents. The Act would also allow board members to participate in meetings by videoconference, including the use of Skype.
CORPORATE GOVERNANCE, OVERSIGHT AND ACCOUNTABILITY

The Act contains a separate set of provisions intended to improve nonprofit governance, transparency and accountability. For example, the Act would require all nonprofits (including wholly charitable trusts) to adopt a conflict of interest policy. The Act stipulates that such policies must, at a minimum, (i) define what constitutes a conflict of interest, (ii) set forth procedures for disclosing and evaluating conflicts, (iii) prohibit interested persons from being present at deliberations or votes or otherwise influencing deliberations or votes, (iv) mandate documentation of the resolution of any conflict of interest and (v) contain procedures for disclosing, evaluating and documenting related-party transactions. Any nonprofit corporation or wholly charitable trust currently operating without a written conflict of interest policy would be required to adopt a policy to comply with the Act.

The Act seeks to eliminate self-dealing by delineating rules to be used in connection with related-party transactions and requiring directors to complete a conflict disclosure before taking office and annually thereafter. With regard to compensation decisions, the Act specifically provides that no employee, officer or director may be present at, vote or otherwise participate in, any deliberation or vote on his or her compensation. The board or committee may however request him or her to provide information or answer questions in advance of its deliberations or vote. The Act also prohibits paid employees from serving as the chair of a nonprofit board.

In addition, the Act requires a nonprofit to enact a whistleblower policy if it has 20 or more employees and annual revenues of more than $1,000,000. The whistleblower policy must set forth confidential procedures for reporting a violation or suspected violation of law or policy. The policy must also require an employee, officer or director to be designated to administer the policy and report to the nonprofit’s audit committee or another independent committee. These reforms are intended to establish a clear system of accountability and independent board leadership. If the Act becomes law, all nonprofit corporations and charitable trusts of the stipulated size will be legally obligated to have a whistleblower policy in place.

The Act’s goals of enhancing nonprofit governance and accountability would be given effect by authorizing the Attorney General to enjoin, void or rescind a proposed or existing related-party transaction. The Act would also give the Attorney General authority to seek other relief, including damages, restitution, removal from office and compulsory accounting. The Act provides for double damages in cases of “willful and intentional conduct.” In addition, the Act would expand the class of parties against whom the Attorney General may seek relief to include “key employees” of nonprofits and makes it clear that they are subject to the jurisdiction of New York.

Under the Act, an annual independent audit would only be required of nonprofits registered under the New York charitable solicitations law whose annual revenues meet or exceed specified thresholds (increased from $250,000 to $500,000 until 2017, then $750,000 until 2021 and $1,000,000 thereafter). The Act would require the results of such audit be reviewed by independent board members or audit committees. (Nonprofits registered under the New York charitable solicitations law with annual revenues below the thresholds are exempt from an annual independent audit.) If a nonprofit’s annual revenues are $1,000,000 or more, the Act would also require the board or the audit committee to review the scope, planning and results of the audit with the auditors, including management shortcomings, and annually consider the auditor’s performance and independence.
REDUCTION OF OTHER REGULATORY REQUIREMENTS

The following provisions of the Act are intended to reduce other regulatory burdens.

• Exempting grant writers from professional fundraising registration requirements;
• Permitting corporate bylaws to state the number of directors as a range (under current law, this option is not available to nonprofits without corporate members);
• Enhancing the privacy rights of officers and directors by eliminating the requirement that they provide home addresses in response to informational requests; and
• Eliminating the requirement that private foundations publish notice that their IRS Form 990-PF is available for public inspection.

The full text of the Act is available at:

http://assembly.state.ny.us/leg/?default_fld=&bn=A08072&term=&Summary=Y&Actions=Y&Text=Y

NEW YORK ATTORNEY GENERAL ISSUES NEW REGULATIONS MANDATING DISCLOSURE OF ELECTIONEERING ACTIVITIES BY NONPROFITS

At the beginning of June, Attorney General Schneiderman announced the adoption of new regulations mandating the disclosure of certain election related activities by nonprofits that are (i) required to be registered with his office and (ii) not prohibited from “participating in, or intervening in, any political campaign on behalf of, or in opposition to, any candidate for public office” under section 501(c) of the Code. In other words, the new regulations apply to nonprofits exempt from income tax under section 501(c)(4) or section 501(c)(6) of the Code (such as, “social welfare organizations” and “business leagues,” respectively). The new regulations do not apply to charities, which are expressly prohibited by section 501(c)(3) from engaging in the political campaign activities. The new regulations went into effect immediately.

Nonprofits subject to the regulations are required to file an annual “Electioneering Disclosure Schedule” (an “EDS”) with the Attorney General. The EDS discloses the aggregate amount of “election related expenditures” made by the organization in connection with “any general, special, or primary election for federal, state or local office, or at which any proposition, referendum or other question is submitted to the voters in any state or any [U.S.] locality.” The EDS also discloses the proportion that the aggregate expenditures bear to the organization’s total expenses for the year.

“Election related expenditures” include expenditures made, liabilities incurred and contributions given for either “express election advocacy” or “election targeted issue advocacy.” They also include any transfer of funds, assets, services or anything of value to any individual, group, association, corporation, labor union, political committee, political action committee or other entity for the purpose of supporting or engaging in either “express election advocacy” or “election targeted issue advocacy.”

“Express election advocacy” is defined to include (i) any communication including words such as “vote,” “oppose,” “support,” “elect,” “defeat,” or “reject,” calling for the nomination, election or defeat of one or more clearly identified candidates or political parties or the passage or defeat of one or more constitutional amendments, propositions, referenda or other questions submitted to voters in any election and (ii) any communication referring to or depicting one or more clearly identified candidates, political parties, constitutional amendments, propositions, referenda or other questions submitted to voters in any election which are susceptible of no other reasonable interpretation.
“Election targeted issue advocacy” includes communications other than “express election advocacy” made within 45 days of a primary election or 90 days of a general election and that (i) refer to one or more clearly identified candidates in the election, (ii) depict the name, image or likeness of one or more candidates or (iii) refer to any clearly identified political party, constitutional amendment, proposition, referenda or other question submitted to voters in such election. The regulations specifically exclude communications to individuals (i) who have affirmatively consented to become members of the organization, (ii) who contribute funds to the organization or (iii) who have the right to vote for the organization’s officers or directors, on changes to the organization’s bylaws, on the disposition of substantially all of the organization’s assets or on the merger or dissolution of the organization. The regulations also exclude communications promoting or staging a debate, town hall meeting or similar forum to which at least two candidates for the same office or at least two proponents of differing positions on a referendum or question submitted to voters have been invited and which does not promote one candidate or position over another.

The regulations define the term “communication” broadly to include (i) paid advertisements broadcast over radio, television, cable or satellite, (ii) paid content on the Internet or other electronic communication network, (iii) paid advertisements published in a periodical or placed on a billboard, (iv) paid telephone communications to 1,000 or more households, (v) mailings to 5,000 or more recipients and (vi) printed materials of more than 5,000 copies.

In addition, if an organization spends more than $10,000 on “New York Election related expenditures,” the organization must also provide an itemized schedule detailing expenditures in excess of $50, subject to limited exceptions. Such organizations also are required to disclose specific information relating to donors who have contributed $1,000 or more in covered donations to the organization during the reporting period, including the identity of the donor’s employer, if known, and the date and amount of each covered donation. If the organization sets up a segregated account for New York Election related expenditures, then the additional disclosure requirements apply only to the donations deposited into the segregated account. In other words, if an organization engages in New York election communications and wishes to protect the privacy of its donors whose donations are not used for such communications, it must set up a segregated account in compliance with the regulations.

Exemption from the regulations may be granted upon a showing that the mandated disclosure could cause undue harm, threats, harassment or reprisals to any person or organization. Application for the exemption must be made to the Attorney General within 45 days of the due date for the annual filing.

Additional guidance, including examples illustrating the regulations, is available from the office of the Attorney General at:


The EDS may be completed online at http://www.charitiesnys.com/ele/charity_disclosure.jsp.

If you have questions about the Nonprofit Revitalization Act or the Attorney General’s new electoral regulations or require assistance with compliance, please contact your Milbank attorney or any member of Milbank’s Exempt Organizations Practice.
Key Contacts

To discuss our Exempt Organizations capabilities, please contact any of the attorneys listed on this page or visit our website at www.milbank.com.

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