



Connecting lawyers, nonprofits, and communities

Dated as of January 16, 2014

Nonprofit Revitalization Act Frequently Asked Questions

Audit Oversight

Question: If we're not required to have an audit, but we do have an audit, do these same requirements apply?

Answer: The provisions related to the Audit Committee are specifically tied to revenue thresholds (\$500,000 & over, and \$1,000,000 & over). If your organization has less than \$500,000 in revenue and chooses to complete an audit it does not have to comply with the requirements of the Nonprofit Revitalization Act. Having said that, the requirement that the Board participate in the selection of the Auditor, sets the scope of the audit and speaks with the auditor after would be considered best practices and is advisable.

Question: How does the nonprofit demonstrate that board or audit committee have reviewed. Email sign off?

Answer: Assuming that your question is how the board or audit committee demonstrates that it has signed off on the selection of the auditor, the scope of the audit and the final audit report, the best way to memorialize this review is to note it in the minutes of a board meeting or in the minutes of a committee meeting. The email approval would be appropriate if it was in the form of a unanimous written consent. For example, if the audit committee was not meeting in person or by phone and you wanted to circulate the auditor's engagement letter to the committee for approval and they were going to approve it through unanimous written consent then the email sign off would be fine as long as each member emails their consent.

Question: Can Finance Committee engage auditors if you don't have an Audit Committee?

Answer: If an organization is required to file audited financial statements the retention of the auditors and review of the audit results and any management letter must be approved by the Board of Directors or an Audit Committee comprised of Independent Directors. If the organization has a Finance but not an Audit Committee consideration should be given to change the committee's name and expanding the scope of the Finance Committee's authority to include audit oversight.

Question: May the executive committee - comprised of the officers of the corp - also serve as the audit committee?

Answer: If the members of the Executive Committee are all Independent Directors and the name of the committee were changed to the Executive and Audit Committee and the

authority of the committee were expanded to include those of an audit committee then the Executive Committee can serve this function.

Question: Does the "audit committee" have to be called an audit committee, or can this fall under a "finance committee"?

Answer: The Nonprofit Revitalization Act provides that “The Board, or a designated Audit Committee of the Board comprised of Independent Directors ... shall oversee the accounting and financial reporting” Therefore, a Finance Committee should be renamed a Finance/Audit Committee and its charter amended to include the Audit Committee functions.

Question: Are we required to change auditors, if so how often do we need to do so?

Answer: New York law does not require an organization to change auditors. There is not a clear consensus among nonprofit leaders about whether or how often it is necessary to change auditors. The decision should be informed by the auditors’ performance.

Question: Does the auditor need to present to the entire board or just a smaller committee of the Board?

Answer: If the organization has annual revenue of \$1,000,000 or more and Board has delegated authority to the Audit Committee to oversee the audit process then the auditors only need to meet with the Audit Committee. If the corporation does not have an Audit Committee the auditors will have to meet with the Board.

Question: What would be an example of a suitable independent director in relation to the continuing auditor relationship?

Answer: A suitable example of an Independent Director would be a volunteer member of the Board of Directors who does not receive any compensation from the corporation or have a business relationship with the corporation and is not a relative of a staff member or someone who has a business relationship with the corporation.

Question: “Boards of Directors of organizations with annual revenue of \$500,000 or more will have to oversee specific aspects of the audit process.” What exactly does this mean?

Answer: The new law increases the threshold amounts for requiring a CPA audit.

Additionally, as of January 1, 2015, either the board or an audit committee comprised *solely of independent directors* must oversee the corporation’s accounting and financial reporting processes and audit. The oversight must include the following:

1. Before the audit, review the scope and planning of the audit with the auditor.
2. After the audit, review and discuss additional items with the auditor.
3. Annually consider the auditor’s performance and independence.

4. Report on the audit committee's activities to the board (if these duties are performed by an audit committee instead of the full board).

Audit Thresholds

Question: If a nonprofit that is required to have an audit because its revenue exceeds the financial threshold and it has an affiliated entity that is a nonprofit and whose revenue is lower than \$500,000, does the related entity need to have an audit or is a fiscal review acceptable?

Answer: If the affiliated entity is separately incorporated and separately files Form 990s and Char 500s then the affiliate is not required to completed audited financial statements and can file an independent certified public accountant's review report if the revenue is between \$250,000 and \$500,000.

Question: Which audit threshold will apply to a 2013 financial report, filed in 2014 after the act becomes effective, due to an extension?

Answer: The new audit thresholds apply to fiscal years beginning on or after July 1, 2014. Organizations whose fiscal years begin on or after July 1 can adhere to the new audit thresholds for the FYE 15 fiscal year. Organizations whose fiscal years begin on or after January 1 can adhere to the new audit thresholds beginning the 2015 calendar year.

Committees

Question: What are the limits of what a committee of the board can bind the corporation on?

Answer: (a) The submission to the Member of any action requiring the Member's consent under the New York Not-for-Profit Corporation Law and any successor provisions or amendments thereto (the "N-PCL");

(b) The filling of vacancies in the Board or in any committee;

(c) The fixing of compensation of the Directors for serving on the Board or on any committee;

(d) The amendment or repeal of these by-laws or the adoption of new by-laws;

(e) The amendment or repeal of any resolution of the Board that by its terms shall not be so amendable or repealable;

Question: Can any committee bind the corporation or only a committee authorized to bind the corporation by its bylaws?

Answer: Only a Committee of the Board (consisting of 3 or more board members) and authorized by the Board can bind the corporation.

Question: Does every bylaw that refers to “standing” committee need to be revised, and replaced with a specific designation of committees as either “of the corporation” or “of the board”?

Answer: If the Board does not want to change the composition or role of a Committee it is not necessary to immediately revise bylaws to eliminate the terms “standing” or “special” committee. However, at the time of the next bylaw amendment it would be appropriate to re-characterize committees as Committees of the Board and Committees of the Corporation.

Conflict of Interest Policy

Question: Does the sample IRS conflicts policy fulfill the new N-PCL requirements?

Answer: No, the sample IRS conflicts policy does not fulfill the NPCL requirements.

Question: If you adopted the conflicts of interest policy before being required to do so are you safe?

Answer: Unless your organization adopted a conflict of interest policy as *required* by another federal, state or local law the conflict of interest policy will have to be updated for compliance with the Not-for-Profit Corporation Law.

Entire Board

Question: How you determine what is the “entire board” if you have a range in your bylaws and if you elect directors in classes, each year electing 1/3 board?

Answer: The entire board would include those elected at the last election as well as those serving out the remainder of their term.

Incorporation Process

Question: Is this simplified process limited to the incorporation process itself, or does it also apply after the certificate has been accepted for filing?

Answer: The ability of the Department of State to correct a Certificate of Incorporation or other filing is only available prior to the filing of the document. After a document is accepted for filing it can be corrected by filing a Certificate of Change.

Independent Directors

Question: Can an ED retire and be appointed a Board Emeritus position after retiring - seems like not for 3 years?

Answer: The answer is yes, the ED could be appointed to a Board Emeritus position after retiring but if they are a board member with full voting rights they would not be considered an "independent director" until after the 3 year mark.

Participation in Board Meetings

Question: Can board members participate in board meetings by teleconference (not videoconference) and count toward quorum?

Answer: The answer is yes, teleconference as previously authorized but an amendment to the NPCL and it continues to be a valid method of participation as long as the board member can hear and be heard.

Proxy Voting

Question: Assuming your reference to electronic proxy voting by members is only for membership corps?

Answer: The answer is yes, under the Not-for-Profit Corporation Law in its current form and as amended by the Nonprofit Revitalization Act, board members can not authorize proxy votes.

Related Party Transactions

Question: Can the Board Chairperson receive non-employee compensation from the Corporation?

Answer: The answer is yes, however, this will be considered a related party transaction for purposes of both State and Federal Law. The Board Chairperson would not be an Independent Director within the meaning of the Nonprofit Revitalization Act and would lose the protections extended to volunteer members of nonprofit boards.

Question: Is it a conflict if the executive director who is a principal owner of a For-profit business company receives payment for a business venture he is trying to introduce to the not for profit organization to which he is employed?

Answer: Yes, it would be a related party transaction under existing federal and state law (as well as the amended NPCL when it goes effective) creating a conflict of interest and requiring:

1. Disclosure to the board;
2. A determination of whether the transaction was in the best interests of the corporation & for a fair and reasonable price;
3. A vote of the board without the ED's participation if they are a board member; and
4. Documenting this in the minutes.

Question: Related party transactions: for charitable nonprofits, what is a “substantial” transaction?

Answer: “Substantial” is not defined in the Nonprofit Revitalization Act so the transaction should be evaluated based upon the facts and circumstances of the organization.

Timing

Question: What would you recommend for new organizations currently drafting their bylaws -- should they be prepared to amend or restate come July or put the new provisions into the bylaws right now with a trigger date for effectiveness?

Answer: An organization that is in the process of amending its bylaws prior to July 2014 can adopt some changes now (e.g., heightened oversight by the Audit Committee, Conflict of Interests) consistent with the Not-for-Profit Corporation Law. As to changes that are authorized by the Nonprofit Revitalization Act but not consistent with the current NPCL (e.g. email consents, videoconferencing), we recommend including those amendments but include a trigger date for effectiveness.

Question: If forming a NY nonprofit organization prior to July 1, 2014, is there guidance as to how to set up the corporate governance documents?

Answer: If forming a New York nonprofit corporation prior to July 1, 2014, the Certificate of Incorporation will have to comply with the current Not-for-Profit Corporation Law. As to the bylaws some provision can be included now (e.g., heightened oversight by the Audit Committee, Conflict of Interests) consistent with the Not-for-Profit Corporation Law. As to changes that are authorized by the Nonprofit Revitalization Act but not consistent with the current NPCL (e.g. email consents, videoconferencing), we recommend including those provisions but include a trigger date for effectiveness.

Type of Corporation

Question: Will HDFCs formed to own low income housing automatically be deemed charitable?

Answer: Yes, section 13-a(2) of the Private Housing Finance Law was amended to provide that HDFC’s governed by the Not-for-Profit Corporation Law will be considered charitable.

Question: If a Type C corporation's Certificate of Incorporation does not require members, then is amendment of by-laws to specify that there will be no members going forward sufficient to convert the corporation to a non-membership corporation?

Answer: Yes, after July 1, 2014, only a bylaw amendment would be required to convert the corporation from a membership to a non-membership corporation.

Question: If a corporation is converting from a membership corp to non-membership corp - aside from new by-laws and a member vote to dissolve their own class, is an amendment to the cert of incorp necessary and are there other required legal steps?

Answer: An amendment to the certificate of incorporation is only necessary if the membership structure is codified in the Certificate. The only other step would be to disclose the change in governance structure in the next 990.

Lawyers Alliance for New York is eager to hear your comments/questions/experiences as the nonprofit community works to comply with the Act. For a more in-depth summary, visit www.lawyersalliance.org/pdfs/Summary_Nonprofit_Revitalization_Act_9-11-2013.pdf.

This alert is meant to provide general information only, not legal advice. Please contact Linda Manley at Lawyers Alliance for New York at (212) 219-1800 x 239 or lmanley@lawyersalliance.org, or visit our website www.lawyersalliance.org for further information.

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