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## The New York Non-Profit Revitalization Act of 2013 – Important Changes Affecting New York Nonprofit Entities and Charitable Trusts

On December 18, 2013, New York adopted the Non-Profit Revitalization Act of 2013, which dramatically changed and updated New York laws affecting governance, oversight, formation and administration of nonprofit organizations incorporated, authorized to do business, or soliciting charitable contributions in the state of New York. The act is intended to simplify certain archaic procedures of administering nonprofits in New York and to streamline and strengthen the oversight and governance processes of such organizations.

Most of the act's provisions come into effect on July 1, 2014. As the most drastic and broad revision to New York's nonprofit laws in a few decades, the act's massive reach calls for a review of existing bylaws, internal controls and policies by all nonprofit organizations affected by the act, including public charities, private foundations and charitable trusts. Following is an overview of the act's major changes to New York nonprofit laws.

### Changes Strengthening Internal Controls of Nonprofits

Conflict-of-interest policy: All nonprofit corporations and charitable trusts in New York must now adopt a conflict-of-interest policy. The policy must include, among other provisions: (1) a clearly delineated description of what constitutes a conflict of interest; (2) detailed procedures for disclosing conflicts to the audit committee or a board of trustees and documenting the existence and resolution of a conflict; and (3) a prohibition against participation in the deliberations on conflict matters by any interested person.

Whistleblower policy: All corporations and charitable trusts with 20 or more employees and revenue of more than \$1 million must adopt a whistleblower policy. Such policy must: (1) prohibit retaliation for whistleblowing, (2) delineate procedures for reporting any suspected misconduct, and (3) appoint a person responsible for maintaining the policy.

Executive compensation restrictions: The act prohibits anyone from participating in—or even being present during—any deliberations of his or her own compensation.

Restrictions imposed upon the board chair office: As of January 1, 2015, any employee of a nonprofit organization will be prohibited from serving as its board chair. This may require restructuring of boards and officer positions to ensure that no compensated individual is acting as chair of the board or in an equivalent capacity.

Related-party transactions: To further combat self-dealing, the act heightens restrictions on related-party transactions and imposes requirements for reviewing, disclosing and allowing such transactions on all nonprofit corporations and charitable trusts and gives the New York State Office of the Attorney General enforcement powers with respect to related-party transactions.

## Annual Reporting Requirements and Financial Oversight

**Annual reporting:** Currently, all charitable organizations and charitable trusts that intend to solicit contributions in New York state must register with and file annual reports with the state attorney general's office. The level of reporting required (either a simple unaudited financial statement, a reviewed statement or an audited report) depends on the organization's level of revenue. The act raises the thresholds for annual nonprofit reporting over time as follows:

Filing Requirement With Attorney General's Office	Current Law	The Act as Effective July 1, 2014	The Act as Effective July 1, 2017	The Act as Effective July 1, 2021
Financial Report on Attorney General's Form	Less than \$100,000	Less than \$250,000	Less than \$250,000	Less than \$250,000
Independent Certified Public Accountant (CPA) Review Report	Between \$100,000 and \$250,000	Between \$250,000 and \$500,000	Between \$250,000 and \$750,000	Between \$250,000 and \$1 million
Independent CPA Audit Report	Greater than \$250,000	Greater than \$500,000	Greater than \$750,000	Greater than \$1 million

**Financial oversight of charitable corporations and trusts:** The act places significant heightened audit oversight responsibilities upon the boards or designated audit committees of nonprofits required to submit audited financial statements annually to the attorney general's office. For example, a board or an audit committee, if such is designated, must oversee and administer all financial reporting processes and the audit of the financial statements. The boards or audit committees of nonprofits with revenue of more than \$1 million, among other things, must: (1) review the scope of the audit prior to the audit's commencement; (2) annually review the performance and the degree of independence of the auditing firm; and (3) upon completion of the audit, review and discuss the adequacy, efficiency and effectiveness of internal controls with the independent auditor. The effect of these audit rules is heightened attorney general scrutiny and enforcement powers.

## Changes Affecting Administration and Management of Assets

**Incorporating electronic communications:** The act allows electronic delivery of notices of meetings to members, consents to corporate actions by members, waivers of notices by members, members' proxies, and financial statements. It also allows nonprofits to conduct board meetings via various videoconferencing methods and media.

**Voting requirements on real property transactions:** The act changes voting requirements for approval of real property transactions depending on the number of directors and whether such real properties constitute all or substantially all of the nonprofit organization's assets. The changes are intended to reduce administrative burdens on routine transactions while preserving stricter requirements for more significant transactions. Organizations should review their bylaws to determine whether changes need to be made to conform with or override the new statutory requirements.

**Approval of major corporate transactions:** Approval of major corporate transactions—such as dissolutions, mergers, consolidations, changes to corporate purposes, and disposition of all or substantially all of a nonprofit's assets—may now be sought directly from the attorney general's office without the requirement of court approval. However, the law does not prevent an organization from seeking judicial relief if the attorney general denies its application.

## Changes Simplifying Formation of Nonprofits

**Simplification of corporate types:** The act reduces distinctions between types of nonprofit corporations and now requires that each nonprofit corporation identify as either charitable or noncharitable. "Charitable organizations" include those formed for charitable, educational, religious, scientific, literary or cultural purposes, or for the prevention of cruelty to children or animals. All other nonprofit organizations formed in New York are noncharitable. This new categorization goes into effect on July 1, 2014. All corporations formed prior to July 1, 2014, under the current law and which need to

choose among four types (A, B, C or D) will be reclassified as either “noncharitable” (all former Type A and some Type D organizations) or “charitable” (all former Type B and C and some Type D organizations).

Simplified formation requirements: The act also simplifies the formation procedures for those nonprofit organizations that include elements of education in their purposes. The act clarifies that the approval of the certificate of incorporation by the New York Commissioner of Education will be required only for corporations that plan to operate a school, college or university, or other entity providing post-secondary education; a museum or historical society; or a library. Any other nonprofit organization having among its purposes elements of education will not be required to obtain approval from the New York state education commissioner so long as the certificate of incorporation specifically includes a statement that the corporation’s purposes do not include the operation of a school, college or university, or other entity providing post-secondary education; a museum or historical society; or a library.

If you are involved in the administration or governance of a nonprofit organization operating or created in New York, now is the time to review the policies and procedures of the organization to ensure timely compliance when the act’s various provisions come into effect.

For more detailed information on any of the act’s provisions, application of the act to your specific entity, and/or more general information on Katten’s Private Client Services practice, please contact any of the attorneys listed below.

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