

July 1, 2014

**Non-Profit Revitalization Act of 2013  
Mandates Implementation of Conflict of Interest and  
Whistleblower Policies**

The Non-Profit Revitalization Act of 2013 (the “Act”), signed into law on December 18, 2013 by New York State Governor Andrew Cuomo, generally goes into effect on July 1, 2014. Although the Act contains a number of provisions addressing a variety of procedural and non-procedural requirements, this advisory focuses on the portions of the Act which affect the labor and employment practices of our New York non-profit clients.<sup>1</sup>

With limited exceptions, all not-for-profit corporations must adopt a conflict of interest policy ensuring that its directors, officers, and key employees (as defined in the Act) act in the corporation’s best interests and in compliance with applicable legal requirements. At a minimum, the conflicts of interest policy must:

1. Detail what constitutes a conflict of interest;
2. State the procedures for disclosing a conflict of interest to the Audit Committee, or if there is none, to the Board of Directors;
3. Prohibit the individual with the conflict from being present at or participating in Board or Committee deliberations or voting on the matter giving rise to the conflict;
4. Prohibit the conflicted individual from attempting to influence such deliberations or voting;

<sup>1</sup> Although certain portions of the Act pertain to non-profit corporations that are registered with the Attorney General to solicit contributions in New York, these provisions generally fall outside the scope of this alert.

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5. Require that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting in which the conflict was discussed or voted upon;
6. Describe the procedures for disclosing, addressing, and documenting "related party transactions" (as defined below); and
7. Require that each director annually, and prior to initial election, complete, sign, and submit to the Corporation's Secretary, a written statement identifying, to the best of the director's knowledge,
  - (a) any entity of which the director is an officer, director, trustee, member, owner, or employee and with which the corporation has a relationship, and
  - (b) any transaction in which the corporation is a participant and in which the director may have a conflicting interest.

The Secretary will present these statements to the chair of the Audit Committee, or if there is no such Committee, to the Chair of the Board.

As discussed in item 6, "related party transactions" are defined under the Act as any transaction, agreement, or other arrangement in which a related party has a financial interest and in which the corporation or any of its affiliates is a participant. A "related party" is (a) any director, officer, or key employee of the corporation or any affiliate; (b) any relative (as defined in the Act) of any of these individuals; or (c) any entity in which any of these aforementioned individuals has a 35% or more ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest exceeding 5%.

Similarly, and with limited exceptions, every not-for-profit corporation with twenty or more employees and with annual revenue in excess of \$1 million in the prior fiscal year must adopt a whistleblower policy to protect individuals who report suspected improper conduct from retaliation. The whistleblower policy must provide that no director, officer, employee, or volunteer who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent, or in violation of any of the corporation's policies shall suffer intimidation, harassment,

discrimination, retaliation, or, in the case of employees, an adverse employment consequence. The whistleblower policy must also contain procedures for reporting actual or suspected violations, as well as procedures for preserving the confidentiality of reported information. The policy must require that an employee, officer, or director of the corporation be designated to administer the whistleblower policy and to report to the Audit Committee (or other committee of independent directors, or to the Board if there are no such committees). Finally, the policy must require that a copy be distributed to all directors, officers, employees, and to volunteers who provide substantial services to the corporation.

A committee of independent directors, the Board, or the Audit Committee must oversee the adoption, implementation of, and compliance with the conflict of interest and/or whistleblower policies. Independent directors must fulfill three criteria. First, they are not, and have not been within the last three years, employees of the corporation or of any affiliate of the corporation and do not have any relatives who are, or have been within the last three years, a key employee of the corporation or an affiliate. Second, within any of the last three fiscal years, they or their relative(s) cannot have received more than \$10,000 in direct compensation from the corporation or an affiliate. Finally, the independent directors cannot be a current employee of, have a substantial financial interest in, or have a relative who is a current officer or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation or an affiliate, for property or services which, in any of the last three fiscal years, exceeds the lesser of \$25,000 or 2% of such entity's consolidated gross revenues.

The requirement to create whistleblower and conflict of interest policies also applies, with some distinctions, to trusts created solely for charitable purposes or that continue solely for charitable purposes after all non-charitable interests have terminated. A charitable purpose for a trust means any religious, charitable, educational, or benevolent purpose.

Finally, although not-for-profit corporations may reasonably compensate their members, directors, or officers for services rendered, the Act prohibits the individual who may benefit from such compensation from being present at or participating in any board or committee deliberation or vote concerning that person's compensation. This person may, however, present background information or answer questions at such a meeting prior to deliberations and voting, at the request of the board or committee.

In recognition of these new requirements, which take effect July 1, not-for-profit corporations and charitable trusts should review their policies and procedures, especially their conflict of interest and whistleblower policies, for compliance with the Act.

If you have any questions about the Act or would like detailed information about the employment law components of the Act to ensure your business complies with this law, please contact Tina Grimshaw at (212) 758-7792 or any other attorney at the Firm.

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