

New York Nonprofit Revitalization Act Signed Into Law

Reforms May Have Implications for New York Land Trusts

Background:

As you may know, on December 18, 2013, Governor Cuomo signed into law the New York Nonprofit Revitalization Act of 2013, which makes significant changes to the New York Not-for-Profit Corporation Law, the Estates Powers & Trusts Law, and Article 7-A of the Executive Law, among others. The Act is the first substantial overhaul of New York's nonprofit laws in more than 40 years.

The new law, which was designed to stimulate New York's not-for-profit industry, will have a sizable impact on nonprofit corporations and charitable trusts. It is intended to simplify and improve the efficiency of administrative procedures for nonprofit organizations while strengthening nonprofit governance and oversight. Most of its provisions take effect July 1, 2014.

The Act applies to any nonprofit organization that is incorporated in New York or operates or solicits charitable contributions in New York.

The text of the Act is based on recommendations made by the Leadership Committee for Nonprofit Revitalization convened by the Office of the New York Attorney General after gathering input from nonprofit leaders, legal and accounting practitioners, and government officials, with critical consideration of a number of antiquated provisions and procedures.

From NY Attorney General Schneiderman's official press release [emphasis added]

"Nonprofit organizations operating in New York generate hundreds of billions of dollars in annual revenue – more than any other state in the nation – and are responsible for one in seven jobs in New York State. Yet the lingering recession and slow economic recovery present unprecedented strategic challenges for nonprofits.

The public's trust in the nonprofit sector has also been tested, as stories of public officials and others abusing charities have emerged. *The Attorney General's bill will make New York competitive with other states in continuing to attract and nurture the most vibrant nonprofits in the world, and it will make New York a model for nonprofit governance and oversight.*"

<http://www.ag.ny.gov/press-release/ag-schneidermans-nonprofit-revitalization-act-signed-law>

Enacted Bill Language:

<http://open.nysenate.gov/legislation/bill/A8072-2013>

Selected References:

The Alliance cannot provide legal counsel or financial guidance.

Below, for your reference, are several detailed summaries from leading New York law firms & non-profit experts. Land trusts are advised to seek their own independent legal counsel.

New York Council of Nonprofits:

<http://www.nycon.org/news/newsDetails.asp?newsid=461>

Association of Fundraising Professionals (AFP):

<http://www.nycafp.org/news/04-03-2014/summary-2013-new-york-state-nonprofit-revitalization-act>

Nixon Peabody:

http://www.nixonpeabody.com/Nonprofit_Revitalization_Act_of_2013

Sullivan & Cromwell:

http://www.sullcrom.com/siteFiles/Publications/SC_Publication_The_New_York_Nonprofit_Revitalization.pdf

Bryan Cave LLP:

http://www.bryancave.com/files/Publication/6fa3a7f6-b7ad-4385-99c9-ac4420a4b6ff/Presentation/PublicationAttachment/820cbad2-191a-4b7e-9d07-b822a0ec6ebf/Non-Profit_Alert_4-1-14.pdf

Skadden, Arps, Slate, Meagher & Flom LLP:

<https://www.skadden.com/insights/exempt-and-nonprofit-organizations-alert-new-york-non-profit-revitalization-act>

New York Nonprofit Revitalization Act - Summary of Key Provisions

The new reforms will affect land trust implementation of Land Trust Standards and Practices, including Standard 1 (Mission); Standard 2 (Compliance with Laws); Standard 3 (Board Accountability); Standard 4 (Conflicts of Interest); Standard 5 (Fundraising); Standard 6 (Financial & Asset Management); and Standard 7 (Volunteers, Staff and Consultants).

Accredited land trusts and applicant land trusts should continue to rely on published requirements from the [Land Trust Accreditation Commission](#) when preparing accreditation application materials. Land trusts are welcome to contact the Commission with any questions related to the new requirements.

Key provisions of the Nonprofit Revitalization Act and the Executive Compensation Reform Act are summarized below. [Source: <http://www.natlawreview.com/article/transforming-not-profit-governance-and-oversight-new-york-nonprofit-revitalization-a>]

- **Internal Controls.** With the economic downturn, reductions in staff and budgeting have no doubt led to greater incidents of fraud, theft, and other corporate misconduct than before. The likelihood of such transgressions is often exacerbated in the nonprofit industry, which historically has lacked effective internal controls. According to the AG, one of the goals of the proposed legislation is “to revitalize New York’s charitable organizations and, at the same time, put a stop to the financial abuses that have come to light.”

Some of the proposed changes to the N-PCL intended to address these concerns include:

- **Board Chair.** In order to ensure proper oversight of and independent leadership in nonprofit management, the law will prohibit any employee of the organization from also serving as Chair of the organization’s Board of Directors.
- **Related-Party Transactions.** If a related party — defined as any director, trustee, officer, or “key employee” of the organization, or any of their respective relatives, or any entity in which they have a 35% or greater ownership or beneficial interest of an organization — has a financial interest in a transaction (a “related party transaction”), the Board will have to consider alternative transactions, affirmatively determine that any alternative transaction would not be more advantageous to the organization, approve the transaction by a majority vote of the Board, and contemporaneously document the decision. The AG may bring an action to void a related party transaction.

- **Mandatory Auditing.** The N-PCL will require that each organization designate an audit committee of the Board, consisting of independent directors, or require independent directors of the Board to perform auditing functions. Some of these responsibilities include the requirement to annually retain an independent auditor, review and discuss with the independent auditor results of the audit, and oversee the implementation of the conflict-of-interest and whistleblower policies that the new provisions of the N-PCL will require.
- **Mandatory Conflicts of Interest Policy.** Each nonprofit organization must adopt a conflict of interest policy that includes a description of what constitutes a conflict of interest, and procedures for disclosing and documenting the resolution of conflicts and related party transactions. The policy also must prohibit a conflicted director from attending or participating in deliberations, from voting on the matter, and from otherwise influencing the vote. The policy must indicate that directors, prior to election and annually thereafter, must complete disclosure statements identifying entities in which the director is affiliated (either as an officer, director, trustee, member, owner or employee) and with which the corporation has a relationship, and any transaction of the corporation in which the director may have a conflicting interest.
- **Mandatory Whistleblower Policy.** Organizations with 20 or more employees and annual revenue in excess of \$1 million must adopt a whistleblower policy to protect against retaliation for persons who in good faith report suspected improper conduct, including fraud, illegal conduct or violations of company policy. The policy must include procedures for reporting suspected misconduct, a designee to administer the policy, and a requirement that the policy be distributed to all officers, directors, employees and volunteers.
- **Administrative Changes.** In addition to the internal governance provisions summarized above, the law will make several significant administrative modifications intended to alleviate some of the procedural hurdles associated with corporate changes and decision making.
 - **Corporate Transactions.** Chief among the administrative changes intended to reduce red tape is the elimination of the two-step approval process for nonprofit mergers, acquisitions and certain other transactions. Specifically, the new law will permit such matters to proceed with Attorney General approval as an alternative, rather than in addition, to Supreme Court approval. The same rule would apply to other current two-step approval requirements such as material amendments to an organization's certificate of incorporation, the sale or purchase of real property, the sale of all or substantially all of the organization's assets, and dissolution.

- **Authorizations of Real Estate Transactions.** The new law will lower the threshold required for Board approval of routine real estate transactions to a majority, rather than two-thirds, of the directors or a committee authorized by the Board. (The two-thirds voting requirement is maintained, however, for transactions involving property that constitutes all or substantially all of the organization’s assets.)
- **Notice to the Education Department in Lieu of Consent.** Currently, many not-for-profit corporations are required to obtain the advance approval of the State Education Department prior to incorporation. Instead, most of these organizations will only be required to provide notice to the Department within 10 days of incorporation, and only schools, libraries, museums, and historical societies will be required to obtain approval prior to incorporation.
- **Elimination of Types.** Rather than having the four “letter types” of not-for-profit corporations— Types A, B, C, and D — the law will be simplified to have two categories of nonprofits: charitable and non-charitable. Organizations formed with both charitable and non-charitable purposes will be deemed charitable corporations.
- **Electronic Technology.** Finally catching up with the laws governing general business corporations and other corporate entities, nonprofit organizations will be permitted to transmit notices, waivers and other communications via facsimile and electronic mail, and to participate in meetings via videoconference and other electronic modalities.
- **Audited Financial Thresholds.** The new law will raise the gross revenue threshold that triggers the requirement to obtain an independent CPA audit from \$250,000 to \$500,000.

A Note on Implementation

Accredited land trusts and applicant land trusts should continue to rely on published requirements from the [Land Trust Accreditation Commission](#) when preparing accreditation application materials, and are welcome to contact the Commission with any questions related to its requirements.

While many of the legislative changes made by the Act streamline, clarify or reaffirm existing obligations of nonprofits, land trusts may want to use the Act’s enactment as an opportunity to reassess policies and processes in light of the Act’s requirements and best practices. These actions may include reviewing existing conflict of interest and whistleblower policies, reviewing policies on related party transactions, coordinating with fiscal staff regarding the status of required state filings, and updating corporate bylaws.