

New York Legislature Passes Nonprofit Revitalization Act:

Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon

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Background

- **The New York Nonprofit Revitalization Act**
 - Passed New York State Legislature in June 2013
 - First major revision to the New York Not-for-Profit Corporation Law in over 40 years
 - If signed by Governor Cuomo, most parts would become effective on July 1, 2014

- **Proposed Executive Compensation Reform Act – NOT YET ENACTED**

- **Executive Order No. 38, Limits on State-Funded Administrative Costs and Executive Compensation**
 - Signed by Governor Cuomo in January 2012
 - Preliminary Guidance issued in June 2013



Topics for Discussion

- **Modernization and Streamlining of Procedures**

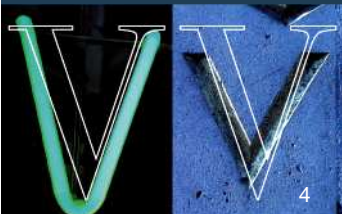
- **Changed Governance Requirements**
 - Audit Procedures
 - Related Party Transactions
 - Conflict of Interest Policy
 - Whistleblower Policy
 - Approval of Real Estate Transactions

- **Executive Compensation**



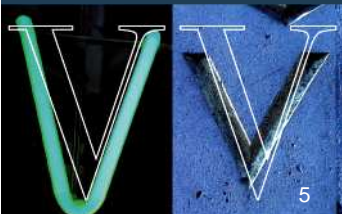
Non-Profit Revitalization Act

- **Applicability**
 - Generally applies only to not-for-profit corporations (and trusts) that are incorporated in New York
- **Exception:**
 - Audit committee provisions
 - Submission of annual financial reports (both apply to charities soliciting in New York)
- **Charities vs. Non-Charities**
 - Charitable – formed for charitable purposes (charitable, educational, religious, scientific, literary, cultural, or for the prevention of cruelty to children or animals)
 - Non-charitable – formed for any other purpose
 - Most changes apply to both charities and non-charities



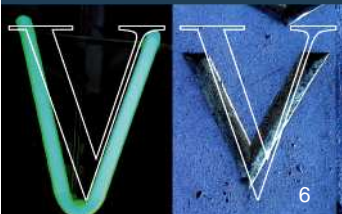
Modernization and Streamlining

- **Improved Incorporation Process**
 - Eliminates Corporate “Types”
 - Minimizes Agency Pre-Approvals for Some Organizations
- **Privacy Concerns for Reporting**
 - Previously needed to provide residential addresses of officers and directors to members upon request, now do not need addresses



Modernization and Streamlining

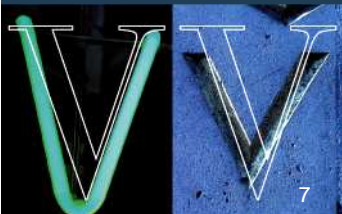
- **Modernized Communications of Organization with Board and Members**
 - Email – Meeting Notice, Waiver of Notice, Unanimous Consent (Members and Directors)
 - Video Conferencing (Directors)
- **Attorney General Option for Merger, Dissolution, and Fundamental Transactions**



Modernization and Streamlining

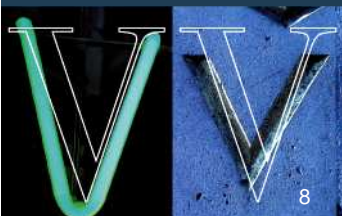
- **Recommendations:**

- If new incorporation, check the purposes clause
- Solicit emails from members and directors with express stated purpose of using for notice
- Check articles of incorporation and bylaws to make sure not overly restrictive on submission of unanimous written consent by directors electronically or directors' participation in meeting via electronic communication
- If contemplating a fundamental transaction, consider seeking approval of Attorney General



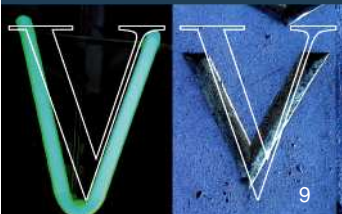
Governance: Audit Procedures

- **New Thresholds for Financial Reports under Charitable Solicitation Law**
 - **July 1, 2014**
 - **Gross Revenue <\$250,000** – unaudited financial statements signed by chief financial officer and president under penalties of perjury
 - **Gross Revenues between \$250,000 and \$500,000** – annual financial reports accompanied by independent certified accountant's review report
 - **Gross Revenues >\$500,000** – annual financial statement accompanied by an independent certified public accountant's audit report with opinion that financial statement and balance sheet fairly present the financial operation and position of the organization
 - **July 1, 2017** – thresholds change to <\$250,000 (unaudited); \$250,000-\$750,000 (review report); >\$750,000 (audit report)
 - **July 1, 2021** – thresholds change to <\$250,000 (unaudited); \$250,000-\$1,000,000 (review report); >\$1,000,000 (audit report)



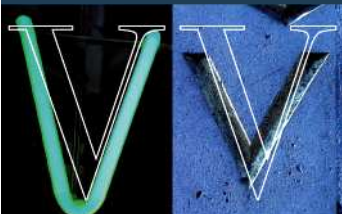
Governance: Audit Procedures

- **Mandatory Audit Committee**
 - For nonprofits required to submit independent auditor report under charitable solicitations law (NY Exec. Law 172-b)
 - Independent auditor's report requirement – gross revenue above \$500,000 (2014); \$750,000 (2017); \$1 million (2021)
- **Audit committee must be comprised of “independent directors”**
- **Responsible for:**
 - Retaining an independent auditor
 - Reviewing the results of the audit
- **Additional responsibilities for audit committee of organizations with revenues over \$1 million**



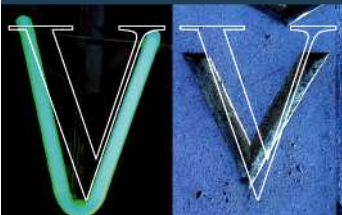
Governance: Board Independence

- **Independent Directors:**
 - Has not been an **employee of**, or does not have a relative that was a **key employee of**, the corporation or an affiliate of the corporation in past **three** years;
 - Has not received **\$10,000** or more in **direct compensation** from the corporation or an affiliate in the last three years (other than expense reimbursement or reasonable compensation as a director);
 - Is not a current employee of or does not have substantial financial interest in an entity that **made or received payments** from the corporation or an affiliate of more than **\$25,000 or 2%** of the corporation's gross revenue (whichever is less) in the last three years (excluding charitable payments); and
 - Does not have a **relative** who is a **current officer** of or has a substantial interest in an entity making or receiving payments of a similar amount to the organization in the past three years.



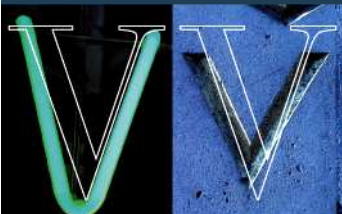
Governance: Board Independence

- The Act exempts payments of charitable contributions from the definition of payment
- Does not contain an exemption for membership dues, which could trigger the "\$25,000 or 2%" definition of independence
- Should be noted by an organization whose board consists of employees of member entities



Governance: Board Independence

- **Theme:** strengthen governance through compliance with best practices
 - Board Independence
 - Lines of accountability between management and the Board
- Prohibits employees from serving as chair of the board or in an officer position with similar responsibilities
 - Effective July 1, 2015

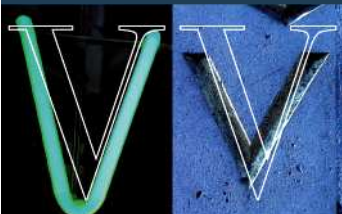


Governance: Related Party Transactions

- **Related Party Transaction:**

Related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant

- (1) any **director, officer, or key employee** of the corporation or any **affiliate** of the corporation;
- (2) any **relative** of any director, officer, or key employee of the corporation or any affiliate of the corporation; or
- (3) any entity in which any individual described in (1) or (2) has a **35% or greater ownership or beneficial interest** or, in the case of a partnership or professional corporation, a **direct or indirect ownership interest in excess of 5%**.



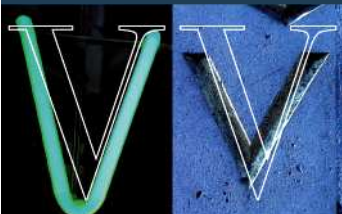
Governance: Related Party Transactions

- **Requirements:**

- Fair, reasonable, and in the nonprofit's best interest
- Directors and officers who have a direct or indirect interest in a related-party transaction disclose such interest to the board

- **Charitable organizations:**

- Board must consider alternative transactions to the extent available, and
- Approve the transaction by not less than a **majority vote** of the directors or committee members present at the meeting

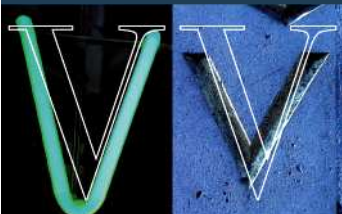


Governance: Conflict of Interest Policy

Act requires **all** nonprofits to adopt a conflict of interest policy covering directors, officers, and key employees

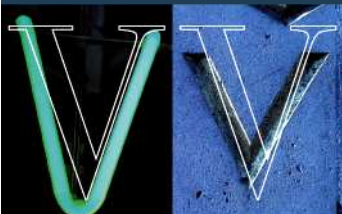
Must include:

- (1) A **definition** of circumstances that constitute a conflict of interest
- (2) Procedures for **disclosing** a conflict to the audit committee or the board
- (3) A requirement that the person with a conflict of interest **not be present at or participate in** board or committee deliberations or voting on the matter giving rise to the conflict
- (4) A prohibition on any attempt by a conflicted person to **influence board deliberations**
- (5) **Documentation procedures** for detailing the existence and resolution of the conflict, and
- (6) Procedures for **disclosing and addressing** related-party transactions



Governance: Conflict of Interest Policy

- The Act provides that, **prior to the initial election of any director**, and **annually** thereafter, directors must:
 - Complete, sign, and submit a written statement identifying any potential conflict
- The **board** or designated **audit committee** of the board must oversee the adoption, implementation of, and compliance with any conflict of interest policy



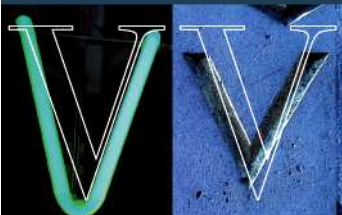
Governance: Whistleblower Policy

- **Required for nonprofits having:**
 - 20 or more employees **and**
 - Annual revenue in excess of \$1 million in the prior fiscal year
- **The whistleblower policy shall include the following provisions:**
 - (1) Procedures for the reporting of violations or suspected violations of laws or corporate policies, including procedures for preserving the confidentiality of reported information;
 - (2) A requirement 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, if there are no such committees, to the board; and
 - (3) A requirement that a copy of the policy be distributed to all directors, officers, employees, and volunteers who provide substantial services to the corporation.



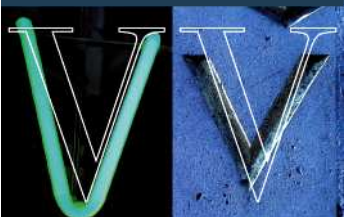
Governance

- Recommendations:
 - Pull policies and compare to detailed provisions of the Act
 - Develop plan for having steady group of independent directors



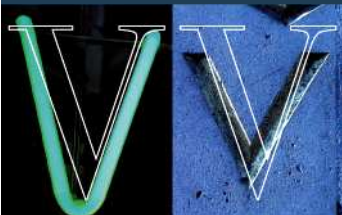
Real Estate Transactions: Current Law

- **Purchase, sale, mortgage, or lease**
 - For small boards: two-thirds vote of entire board
 - For large boards: majority of entire board
 - Size: large board if 21 or more members
 - Delegation to committee not permitted
 - Counting “entire board”
- **Sale, lease, exchange, or other disposition of “all or substantially all assets”**
 - If there are members entitled to vote: two-thirds vote of members, after vote and recommendation by board
- **For Type B or C – if “all or substantially all”**
 - Review by NY State Attorney General’s Office
 - Court approval



Real Estate Transactions: The Act

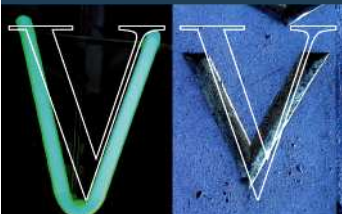
- **Purchase, sale, mortgage, lease, exchange, or disposal of real property –**
- **Small or routine transactions – not “all or substantially all” of assets**
 - Majority of board
 - Delegation to committee is allowed
 - Committee must report back to board



Real Estate Transactions: The Act

- **If “all or substantially all” of assets**
 - For small boards: two-thirds vote of entire board
 - For large boards: majority of entire board
 - Size: large board if 21 or more members
 - Counting “entire board” clarified
 - Delegation to committee not permitted
 - For a disposition: If there are members entitled to vote: two-thirds vote of members, after vote and recommendation by board

- **For charitable corporations, disposition of “all or substantially all” of assets**
 - Approval by NY State Attorney General’s Office
or
 - Court approval



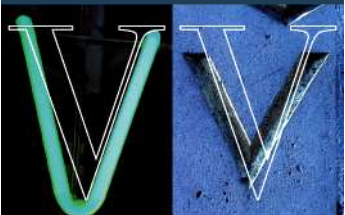
Real Estate Transactions

- **Recommendations:**

- Review by-laws – may contain greater requirements
- Ascertain value of real property and consideration; must be disclosed if Attorney General and/or Court approval required

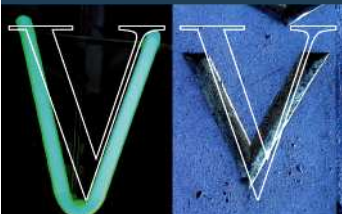
- **Things to Consider:**

- Terms of transaction must be fair and reasonable
- Transaction must be in furtherance of corporate purposes and interests of members



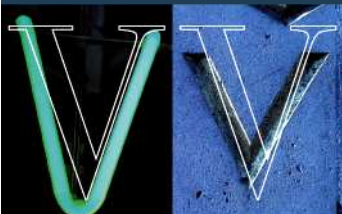
Executive Compensation: The Act

- **Provisions that were included in final bill**
 - Person who will benefit from compensation decision may not be present at or otherwise participate in board or committee deliberation or vote
 - Exception: board or committee may request information, background, or response to questions prior to beginning deliberations or voting
 - Covers compensation to directors, officers, and employees



Executive Compensation: Reform Act

- **Introduced but not passed in 2013**
- **Key requirements**
 - Compensation must be fair and reasonable and commensurate with services performed
 - Board or committee of independent directors must approve compensation paid to principal executive
- **For corporations registered to solicit contributions with annual revenue over \$2M**
 - Board or committee must approve compensation of five highest paid officers/key employees over \$150,000
 - Consider relevant data on market compensation; review independence and qualifications of any consultant who provides this data
 - Keep written records



Executive Compensation: E.O. 38

- **Applies to administration costs and executive compensation eligible for State reimbursement**
 - State financial assistance or payments to service providers
 - Failure to comply can result in termination/non-renewal
 - Not covered if receive less than \$500,000/year or less than 30% of total revenues from within New York State
- **Reimbursement limits**
 - Compensation reimbursement limit: \$199,000/year (may be adjusted annually)
 - Administrative cost reimbursement limit: 25% (current) and 15% (by 2015)
- **Regulations effective July 1, 2013; Guidance issued June 2013**



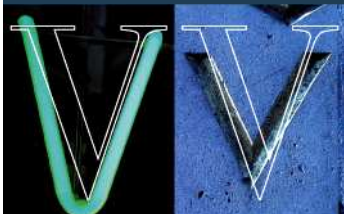
Executive Compensation

- **Things to Consider:**

- Hot topic: expect requirements to be enacted soon
- IRS focus on compensation; Form 990 disclosure
- Donors and members also ask
- Compensation includes benefits and bonus, etc.
- Carefully select data for comparison: compensation varies by location, size/budget, type of organization/work, etc.
- Compensation policy/compensation committee

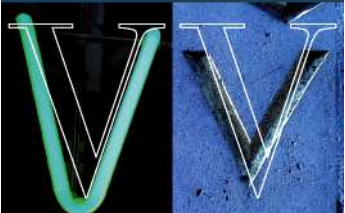
- **Recommendations:**

- Review data on comparable non-profit compensation – IRS Form 990, Charity Navigator, GuideStar, consultants
- Determination by independent board members
- Keep contemporaneous records of data reviewed, factors considered and process followed



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Questions?



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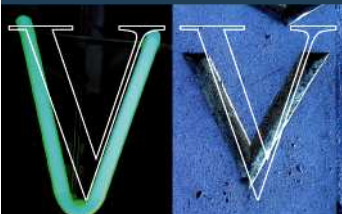
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