



New York's Non-Profit Revitalization Act of 2013 Changes the Governance of Private Colleges, Universities and Schools

Effective July 1, 2014, New York's Non-Profit Revitalization Act, (the Act) fundamentally changes the governance of non-profit private colleges, universities and schools and other charitable organizations. New York, which labored under cumbersome and antiquated regulatory statutes, has created a simpler method of creating new non-profit entities. It has also adopted many of the best governance practices already employed by private schools in New York State and many other reforms long sought by charitable enterprises and their counsel. Non-profit organizations can now incorporate, dissolve and merge more easily. Boards are permitted to use modern technology like Skype and videoconferencing to communicate and hold meetings and may enter into significant transactions without court approval. The Act also provides critical oversight and governance reforms to prevent fraud and improve the public trust, including stricter oversight of insider deals, more substantial financial oversight requirements, conflict-of-interest policies, and whistleblower policies.

New York Changes Its Approval Requirements for New Schools

For those seeking to establish a new non-profit school in New York, whether for nursery, K-12 or post-secondary, they must comply with requirements contained in both New York Education Law and New York's Not-for-Profit Corporation Law. This bifurcation requires lawyers to go back and forth between these laws and to navigate the exceptions carved out for educational institutions. New York has not cured the need to analyze both the Education Law and the Not-for-Profit Law, but it has made things simpler for new schools.

Previously, a new school had to decide what “letter type” it fell under as New York had four different, though related, charitable categories: A, B, C and D. While most schools fell under category B, New York has eliminated all categories. Now, all schools will fall under the broad definition of “charitable” organizations.

Most importantly, approvals for new schools have changed. Under the prior regulatory scheme, colleges, universities, other schools providing post-secondary education, pre-K and K-12 private, non-profit schools had to obtain approval from the Commissioner of Education before incorporating. Now, effective July 1, 2014, the Commissioner’s consent is required only for corporate documents (certificate of incorporation, certificate of amendment, certificate of merger/consolidation, certificate of dissolution, or applications for authority to do business) from entities operating a school, college, university or other entity providing post-secondary education; a library, museum or historical society; or using the terms “college,” or “university” or implying or stating it operates a school for the training of New York’s recognized professions; or using “museum” or “arboretum” in its name or descriptive materials; or using any of the following terms in its name or assumed name through an entity subject to the Business Corporation Law, the Limited Liability Company Law or the Partnership Law: school, education, elementary, secondary, kindergarten, pre-kindergarten, preschool, nursery school, museum, history, historical, historical society, arboretum, library, college, university or other restricted terms in Education Law § 224, conservatory, academy or institute. Those organizations that do not require the Commissioner’s consent, but are educational in nature, must provide a certified copy of its corporate document to the Commissioner, within 30 business days (10 business days for applications for authority) after receiving confirmation of filing acceptance by the Secretary of State.

Regulation of Significant Events and Real Estate Transactions Has Also Changed

Under prior law, not only was action by the school’s board necessary to effectuate significant transactions, such as the sale, lease or disposition of all or substantially all of a school’s assets, but approval of the New York State Education Department and the New York State Attorney General as well as the New York Supreme Court (the general trial court) was required. The Act maintains the requirement that the sale, lease, exchange or other disposition of all or substantially all of a school’s assets purchase of real property must be authorized by the vote of two-thirds of the entire Board where there are fewer than 21 board members. Now, however, except in certain limited circumstances, only the approval of the Attorney General or the New York State Supreme Court, not both, are required. If a petition is filed, proper notice must be given to the Attorney General and the Commissioner of Education.

It is important to remember that the New York Attorney General’s office and the courts have taken the position that the sale of “all or substantially all” of the assets of a charitable organization is not a strictly arithmetic test. Even if the asset is a small percentage of the school’s total assets, if the transaction will affect the ability of the school to operate as a school or is the sale of the school’s main premises, it is considered to be substantial and approval of the Attorney General or the New York State Supreme Court should be obtained. When in doubt, the Charities Bureau can be contacted to discuss the necessity of such approval in any particular case.

For religious schools, care must be taken to make sure the requirements of Section 12 of the New York Religious Corporation Law are fulfilled as well. Whether the sale is in the best interests of the religious school is often the key variable and many cases turn on this issue.

New York Adopts Best Industry Practices

Most established New York private schools have voluntarily adopted most of the best industry governance practices that New York has now made law. For these schools, little if anything need change. However, a close examination of existing governance rules should be undertaken so as not to violate the new statute.

For schools with annual revenues exceeding \$500,000, they must file annual financial and audit reports issued by an independent certified public accountant, according to generally accepted accounting principles. There are also financial reporting requirements for smaller entities.

Many boards have already adopted by-laws allowing for participation by video and teleconferences and notices by electronic mail. New York law now expressly allows for such modern conveniences.

Where whistleblower policies were voluntarily adopted at many schools, they are now mandatory for schools with 20 or more employees or annual revenues of greater than \$1 million. Conflict of Interest policies are also mandatory. An important wrinkle is that this obligation covers both New York entities and those transacting business in New York, which should include fund raising activities. However, there is an exception for policies that already comply with other state laws. Board members must complete an annual disclosure of conflicts of interest.

Related party transactions are also regulated by the Act. Under the prior law, a related party transaction needed to be fair, reasonable and in the best interests of the school. These criteria are still applicable. Now, "key employees" must also act in good faith. Boards must also consider alternatives to related party transactions, document approval by a majority vote and state the basis expressed by the majority justifying the related party transaction.

Starting July 1, 2015, a Board Chair may no longer simultaneously serve as Chair and a senior officer/executive.

Compensation of senior officers is largely left intact. However, Board deliberations on officer compensation may not include the officer and he/she may not vote for their own compensation.

Conclusion

The Act appears to provide efficiencies for new and existing schools. It is easier to establish new schools, but this comes with greater regulation of schools through the adoption of what is already considered best industry practices. For most established schools, an analysis needs to be made to determine whether the current practices conform to the Act. As with all new statutes, there remain some uncertainties. GT's Education Law and Non-Profit practice groups are ready to assist you in complying with the new requirements.

Summary of the Non-Profit Revitalization Act of 2013¹

The Non-Profit Revitalization Act brings reform in two main areas:

1. Enhancing non-profit governance and oversight to prevent fraud and improve public trust; and
2. Reducing unnecessary and outdated burdens on non-profits.

The **Non-Profit Revitalization Act** gives New York the strongest non-profit governance regime in the country. The law:

- > **Ensures sound financial management** by requiring that charities' boards perform active oversight of financial audits. Boards will be responsible for retaining independent auditors and reviewing results of the audit. At larger charities (over \$1 million in annual revenue), the board or audit committee will be required to follow additional oversight procedures.
- > **Prevents conflicts of interest** by requiring that transactions between a non-profit and insiders who stand to benefit be fully disclosed and that non-profit boards determine they are fair, reasonable, and in the organizations' best interests. When a charity engages in a substantial transaction with an insider, the board will have to consider alternatives and document its basis for choosing the insider transaction.
- > **Strengthens the Attorney General's power** to police fraud and abuse by granting clear power to bring judicial proceedings to unwind interested-party transactions.
- > **Ensures board independence** by prohibiting any employee of a non-profit from also serving as chair of its board.
- > **Promotes good governance** by requiring all non-profits to adopt conflict of interest policies and those with over \$1 million in annual revenue and 20 or more employees to adopt whistleblower policies.
- > **Attorney General Schneiderman's Non-Profit Revitalization Act** also streamlines and modernizes New York law to remove unnecessary burdens, save taxpayer dollars, and help Non-profits focus resources on providing services by:
 - **Streamlining procedures for non-profit mergers, property sales and corporate dissolutions**, so that funds needed for ongoing charitable programs are not wasted on unnecessary red tape;
 - **Modernizing laws to allow non-profits to conduct their affairs more efficiently**, such as permitting non-profits to use email and video technology for meetings and allowing boards to delegate the approval of small transactions to committees; and
 - **Eliminating unnecessary and costly requirements for non-profits forming in New York**, saving non-profits money and time and allowing them to commence charitable programs more quickly.

¹ Summary provided by the New York State Department of Law: <http://www.ag.ny.gov/press-release/ag-schneidermans-nonprofit-revitalization-act-signed-law>.

This *GT Alert* was prepared by **Stephen A. Mendelsohn**, **Laura S. Norman** and **Pamela A. Madeiros**. Questions about this information can be directed to:

- > [Stephen A. Mendelsohn](#) | +1 561.955.7629 | mendelsohns@gtlaw.com
- > [Laura S. Norman](#) | +1 212.801.9259 | normanl@gtlaw.com
- > [Pamela A. Madeiros](#) | +1 518.689.1412 | madeirosp@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

Albany +1 518.689.1400	Denver +1 303.572.6500	New York +1 212.801.9200	Shanghai +86 (0) 21 6391 6633
Amsterdam +31 (0) 20 301 7300	Fort Lauderdale +1 954.765.0500	Northern Virginia +1 703.749.1300	Silicon Valley +1 650.328.8500
Atlanta +1 678.553.2100	Houston +1 713.374.3500	Orange County +1 949.732.6500	Tallahassee +1 850.222.6891
Austin +1 512.320.7200	Las Vegas +1 702.792.3773	Orlando +1 407.420.1000	Tampa +1 813.318.5700
Boca Raton +1 561.955.7600	London* +44 (0) 203 349 8700	Philadelphia +1 215.988.7800	Tel Aviv^ +972 (0) 3 636 6000
Boston +1 617.310.6000	Los Angeles +1 310.586.7700	Phoenix +1 602.445.8000	Warsaw~ +48 22 690 6100
Chicago +1 312.456.8400	Mexico City+ +52 (1) 55 5029 0000	Sacramento +1 916.442.1111	Washington, D.C. +1 202.331.3100
Dallas +1 214.665.3600	Miami +1 305.579.0500	San Francisco +1 415.655.1300	Westchester County +1 914.286.2900
Delaware +1 302.661.7000	New Jersey +1 973.360.7900	Seoul∞ +82 (0) 2 369 1000	West Palm Beach +1 561.650.7900

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. *Operates as Greenberg Traurig Maher LLP. **Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2014 Greenberg Traurig, LLP. All rights reserved.*