

# STATE OF NEW YORK

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7338

2013-2014 Regular Sessions

## IN ASSEMBLY

May 10, 2013

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Introduced by M. of A. ENGLEBRIGHT, BRENNAN -- (at request of the Department of Law) -- read once and referred to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the not-for-profit corporation law, in relation to executive compensation oversight; and to amend the estates, powers and trusts law, in relation to trust governance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subparagraph 6 of paragraph (a) of section 102 of the not-  
2 for-profit corporation law is amended, and five new subparagraphs 19,  
3 20, 21, 22 and 23, are added to read as follows:

4 (6) "Director" means any member of the governing board of a corpo-  
5 ration, whether designated as director, trustee, manager, governor, or  
6 by any other title. The term "board" means "board of directors" or any  
7 other body constituting a "governing board" as defined in this section.

8 (19) An "affiliate" of a corporation means any entity controlled by,  
9 in control of, or under common control with such corporation.

10 (20) "Independent director" means a director who: (i) is not, and has  
11 not been within the last three years, an employee of the corporation or  
12 an affiliate of the corporation, and does not have a relative who is, or  
13 has been within the last three years, a key employee of the corporation  
14 or an affiliate of the corporation; (ii) has not received, and does not  
15 have a relative who has received, in any of the last three fiscal years,  
16 more than ten thousand dollars in direct compensation from the corpo-  
17 ration or an affiliate of the corporation (other than reimbursement for  
18 expenses reasonably incurred as a director or reasonable compensation  
19 for service as a director as permitted by paragraph (a) of section 202  
20 (General and special powers)); and (iii) is not a current employee of or  
21 have a substantial financial interest in, and does not have a relative  
22 who is a current officer of or has a substantial financial interest in,  
23 any entity that has made payments to, or received payments from, the

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

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1 corporation or an affiliate of the corporation for property or services  
2 in an amount which, in any of the last three fiscal years, exceeds the  
3 lesser of twenty-five thousand dollars or two percent of such entity's  
4 consolidated gross revenues. For purposes of this subparagraph,  
5 "payment" does not include charitable contributions.

6 (21) "Relative" of an individual means the (i) spouse, domestic part-  
7 ner as defined by section twenty-eight hundred five-q of the public  
8 health law, child, grandchild, brother or sister (whether by the whole-  
9 or half-blood) of the individual; and (ii) the spouse or domestic part-  
10 ner of a child, grandchild, brother or sister (whether by the whole- or  
11 half-blood) of the individual.

12 (22) "Key employee" means any person who is in a position to exercise  
13 substantial influence over the affairs of the corporation, as referenced  
14 in 26 U.S.C. §4958(f)(1)(A) and further specified in 26 CFR §  
15 53.4958-3(c) and (d), or succeeding provisions.

16 (23) "Total compensation" means: (i) any compensation, whether paid or  
17 accrued, by or on behalf of the corporation or any affiliate of the  
18 corporation for services rendered to, on behalf of, or at the request of  
19 the corporation, including but not limited to salary, bonus, and  
20 deferred compensation; and (ii) any benefit having monetary value  
21 provided by or on behalf of the corporation or any affiliate of the  
22 corporation, including but not limited to housing allowances, living  
23 expenses, perquisites, fringe benefits, employer contributions to  
24 defined contribution retirement plans and other retirement benefits.

25 § 2. The not-for-profit corporation law is amended by adding a new  
26 section 712-a to read as follows:

27 § 712-a. Executive compensation oversight.

28 (a) No corporation shall pay total compensation to any employee in  
29 excess of that which is fair, reasonable and commensurate with services  
30 provided to the corporation.

31 (b) The board or a designated compensation committee of the board  
32 comprised solely of independent directors of any corporation that is  
33 required to register with the attorney general under article seven-A of  
34 the executive law shall review and approve the total compensation paid  
35 to the principal executive officer of the corporation, and determine  
36 that such compensation is not in excess of that which is fair, reason-  
37 able and commensurate with services provided to the corporation.

38 (c) If, in the prior fiscal year, any corporation that is required to  
39 register with the attorney general under article seven-A of the execu-  
40 tive law had, or in the current fiscal year reasonably expects to have,  
41 annual revenues in excess of two million dollars, the board or desig-  
42 nated compensation committee of the board comprised solely of independ-  
43 ent directors shall, in addition to those duties set forth in paragraph  
44 (b) of this section:

45 (1) Review the total compensation paid to the corporation's top five  
46 highest compensated employees who are officers or key employees and  
47 whose compensation exceeds one hundred fifty thousand dollars, or such  
48 greater amount as the attorney general may set by regulation;

49 (2) Determine that the total compensation paid to any such employee is  
50 not in excess of that which is fair, reasonable and commensurate with  
51 services provided to the corporation. In making this determination, the  
52 board, or compensation committee, shall at a minimum consider the  
53 following factors: (i) the total compensation provided to the employee  
54 by the corporation and all affiliates of the corporation; (ii) relevant  
55 data on the total compensation paid to individuals serving in similar  
56 positions at corporations of similar size, type, purpose, and scope;

1 (iii) the employee's qualifications and performance; and (iv) the over-  
2 all financial condition of the corporation;

3 (3) Make and keep a contemporaneous written record describing the  
4 basis for such determination; and

5 (4) Approve by not less than a majority vote the total compensation  
6 paid to each such employee.

7 (d) Any review and approval required by paragraphs (b) and (c) of this  
8 section shall occur whenever the term of employment, if any, of the  
9 employee is renewed or extended, and whenever such compensation is mate-  
10 rially changed. If a corporation controls one or more corporations, the  
11 board or compensation committee of the controlling corporation may  
12 conduct such review and approval on behalf of any controlled corpo-  
13 ration.

14 (e) If the board or compensation committee retains a compensation  
15 consultant to assist in the performance of its responsibilities, such  
16 consultant shall report directly to the board or compensation committee.  
17 The board or compensation committee shall be directly responsible for  
18 the appointment, compensation and oversight of the work of such consult-  
19 ant, and shall approve the compensation peer group that the compensation  
20 consultant recommends be used to develop comparable data.

21 (1) Prior to retaining any such consultant, the board or compensation  
22 committee shall determine that the consultant is independent and quali-  
23 fied to render advice concerning compensation; provided that no consult-  
24 ant may be determined independent if such consultant or any firm that  
25 employs such consultant has (A) received directly or indirectly any  
26 payment, fee or other compensation from the corporation or any affiliate  
27 of the corporation within the preceding two years, other than reasonable  
28 amounts paid for compensation consulting services, or (B) any business  
29 or personal relationship with the corporation or any affiliate of the  
30 corporation, or any of their officers, directors, trustees, or employ-  
31 ees, that may interfere with the ability of the consultant to provide  
32 objective advice to the board or compensation committee.

33 (2) Nothing in this paragraph shall be construed to require the board  
34 or compensation committee to implement or act consistently with any  
35 recommendations provided by the compensation consultant; or affect the  
36 ability or obligation of members of the board or compensation committee  
37 to exercise their own judgment in fulfillment of their duties to the  
38 corporation, including those duties prescribed by section 717 (Duty of  
39 directors and officers).

40 (f) Only independent directors may participate in deliberations or  
41 voting relating to matters set forth in this section.

42 § 3. The estates, powers and trusts law is amended by adding a new  
43 section 8-1.9 to read as follows:

44 § 8-1.9 Trust governance

45 (a) For purposes of this section:

46 (1) A "trust" means a trust created solely for charitable purposes, or  
47 a trust that continues solely for such purposes after all non-charitable  
48 interests have terminated.

49 (2) "Charitable purpose" means any religious, charitable, educational  
50 or benevolent purpose.

51 (3) "Key employee" means any person who has responsibilities, powers  
52 or influence over the trust similar to those of an officer of a not-for-  
53 profit corporation, or is otherwise in a position to exercise substan-  
54 tial influence over the affairs of the trust, as referenced in 26 U.S.C.  
55 §4958(f) (1) (A) and further specified in 26 CFR §53.4958-3(c) and (d), or  
56 succeeding provisions.

1 (4) An "affiliate" of a trust means any entity controlled by, in  
2 control of, or under common control with such trust.

3 (5) "Independent trustee" means a trustee who: (i) is not, and has not  
4 been within the last three years, an employee of the trust or an affil-  
5 iate of the trust, and does not have a relative who is, or has been  
6 within the last three years, a key employee of the trust or an affiliate  
7 of the trust; (ii) has not received, and does not have a relative who  
8 has received, in any of the last three fiscal years, more than ten thou-  
9 sand dollars in direct compensation from the trust or an affiliate of  
10 the trust (other than reimbursement for expenses or the payment of trus-  
11 tee commissions as permitted by law and the governing instrument); and  
12 (iii) is not a current employee of or have a substantial financial  
13 interest in, and does not have a relative who is a current officer of or  
14 have a substantial financial interest in, any entity that has made  
15 payments to, or received payments from, the trust or an affiliate of the  
16 trust for property or services in an amount which, in any of the last  
17 three fiscal years, exceeds the lesser of twenty-five thousand dollars  
18 or two percent of such entity's consolidated gross revenues. For  
19 purposes of this subparagraph, "payment" does not include charitable  
20 contributions.

21 (b) (1) For purposes of this paragraph, "total compensation" means:  
22 (A) any compensation, whether paid or accrued, by or on behalf of the  
23 trust or any affiliate of the trust for services rendered to, on behalf  
24 of, or at the request of the trust or an affiliate of the trust, includ-  
25 ing but not limited to salary, bonus, and deferred compensation; and (B)  
26 any benefit having monetary value provided by or on behalf of the trust  
27 or any affiliate of the trust, including but not limited to housing or  
28 vehicle allowances, living expenses, perquisites, fringe benefits,  
29 employer contributions to defined contribution retirement plans and  
30 other retirement benefits.

31 (2) No trust shall pay total compensation to any employee in excess of  
32 that which is fair, reasonable and commensurate with services provided  
33 to the trust.

34 (3) The trustees or a designated compensation committee consisting of  
35 one or more independent trustees of any trust that is required to regis-  
36 ter with the attorney general under article seven-A of the executive law  
37 shall review and approve the total compensation paid to the principal  
38 executive officer of the trust, and determine that such compensation is  
39 not in excess of that which is fair, reasonable and commensurate with  
40 services provided to the trust.

41 (4) If, in the prior fiscal year, any trust that is required to regis-  
42 ter with the attorney general under article seven-A of the executive law  
43 had, or in the current fiscal year reasonably expects to have, annual  
44 revenues in excess of two million dollars, the trustees or designated  
45 compensation committee consisting of one or more independent trustees  
46 shall, in addition to those duties set forth in subparagraph three of  
47 this paragraph:

48 (A) Review the total compensation paid to the trust's top five highest  
49 compensated employees who are officers or key employees and whose  
50 compensation exceeds one hundred fifty thousand dollars, or such greater  
51 amount as the attorney general may set by regulation;

52 (B) Determine that the total compensation paid to any such employee is  
53 not in excess of that which is fair, reasonable and commensurate with  
54 services provided to the trust. In making this determination, the trus-  
55 tees or compensation committee shall at a minimum consider the following  
56 factors: (i) the total compensation provided to the employee by the

1 trust and all affiliates of the trust; (ii) relevant data on the total  
2 compensation paid to individuals serving in similar positions at trusts  
3 or corporations of similar size, type, purpose and scope; (iii) the  
4 employee's qualifications and performance; and (iv) the overall finan-  
5 cial condition of the trust;

6 (C) Make and keep a contemporaneous written record describing the  
7 basis for such determination; and

8 (D) Approve by not less than a majority vote the total compensation  
9 paid to each such employee.

10 (5) Any review and approval required by subparagraphs three and four  
11 of this paragraph shall occur whenever the term of employment, if any,  
12 of the employee is renewed or extended, and whenever such compensation  
13 is materially changed. If a trust is under the control of another trust  
14 or a corporation, the trustees or compensation committee of the control-  
15 ling trust, or the board or designated compensation committee of the  
16 board of the controlling corporation, may perform the duties required by  
17 this paragraph.

18 (6) If a compensation consultant is retained by the trustees or  
19 compensation committee to assist in the performance of their responsi-  
20 bilities, such consultant shall report directly to the trustees or  
21 compensation committee. The trustees or compensation committee shall be  
22 directly responsible for the appointment, compensation and oversight of  
23 the work of such consultant, and shall approve the compensation peer  
24 group that the compensation consultant recommends be used to develop  
25 comparable data.

26 (A) Prior to retaining any such consultant, the trustees or compen-  
27 sation committee shall determine that the consultant is independent and  
28 qualified to render advice concerning compensation; provided that no  
29 consultant may be determined independent if such consultant or any firm  
30 that employs such consultant has (i) received directly or indirectly any  
31 payment, fee or other compensation from the trust or any affiliate of  
32 the trust within the preceding two years, other than reasonable amounts  
33 paid for compensation consulting services, or (ii) any business or  
34 personal relationship with the trust or any affiliate of the trust, or  
35 any of their officers, directors, trustees or employees, that may inter-  
36 fere with the ability of the consultant to provide objective advice to  
37 the trustees or compensation committee.

38 (B) Nothing in this subparagraph shall be construed to require the  
39 trustees or compensation committee to implement or act consistently with  
40 any recommendations provided by the compensation consultant; or affect  
41 the ability or obligation of the trustees to exercise their own judgment  
42 in fulfillment of their duties to the trust and its beneficiaries.

43 (7) Only independent trustees may participate in deliberations or  
44 voting relating to matters set forth in this section.

45 § 4. This act shall take effect January 1, 2014, provided that section  
46 two of this act and paragraph (b) of section 8-1.9 of the estates,  
47 powers and trusts law as added by section three of this act shall not be  
48 applicable until January 1, 2015 for any corporation or trust that had  
49 annual revenues of less than 10,000,000 dollars in the last fiscal year  
50 ending prior to January 1, 2014.