

Charities Symposium

Doing Well While Doing Good



Office of the New York State Attorney General
Charities Bureau
28 Liberty Street
New York, NY 10005

www.charitiesnys.com



Office of the New York State Attorney General

Charities Bureau Guidance

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Section I.

Right from the Start:

**Responsibilities of Directors of
Not for Profit Corporations**



RIGHT FROM THE START: RESPONSIBILITIES of DIRECTORS of NOT-FOR-PROFIT CORPORATIONS

**Office of the NYS Attorney General
Charities Bureau
www.charitiesnys.com**

**Guidance Document 2015 - 6, V. 1.0
Issue date: May 15, 2015**

The Charities Bureau of the Office of the New York State Attorney General drafted this guidance to assist current and future boards of directors of not-for-profit corporations and trustees of charitable trusts to understand and carry out their fiduciary responsibilities to the organizations they serve. The information in this booklet reflects changes to the Not-for-Profit Corporation Law that were included in the Nonprofit Revitalization Act of 2013.

Charitable organizations contribute enormously to our society. They educate our children, care for the sick, find cures for disease, preserve our literature, art and music for us and future generations, house the homeless, protect the environment and much more. The fiduciaries of those charitable organizations are responsible for managing and preserving the charitable assets that benefit all of us. Whatever their mission or size, all organizations should have policies and procedures established so that (1) members of their boards understand their fiduciary responsibilities, (2) assets are managed properly and (3) the charitable purposes are carried out. A failure to meet these obligations is a breach of fiduciary duty and can result in financial and other liability for the board of directors.

Please read this booklet carefully. It contains general information to assist current and prospective members of nonprofit boards. It outlines some of the duties of board members and points out questions to ask and information to look for when considering and/or fulfilling the responsibilities of board membership. The Charities Bureau also publishes other guidance containing more detailed information on managing a charitable organization and overseeing its assets. That guidance and other publications of interest to board members are posted at www.charitiesnys.com.

This guidance is designed to assist board members by providing them with basic information. It is not a substitute for more detailed information or advice from an attorney, independent certified public accountant or other professional.

► . WHO MAY JOIN A BOARD?

Board members come from all backgrounds, bringing many different talents to the organizations they serve. Anyone over eighteen is legally qualified to serve on a board.

► WHAT SHOULD A PROSPECTIVE BOARD MEMBER KNOW BEFORE JOINING A BOARD?

Anyone thinking about joining a board should consider doing the following *before* joining:

- √ Read the organization's certificate of incorporation, application for federal income tax exemption, by-laws and board and committee minutes for at least the last year to learn about its purposes, activities and concerns.

- √ Obtain a current list of board and committee members and find out from the board chair and the organization's chief executive and financial officers what is expected of board members.

- √ Talk to current and recent former board members to learn about what the board does. In addition, make sure that the board and committee meetings are usually well-attended.

- √ If you know of any board members who recently left the board, see if you can find out why.

- √ Review the organization's Internal Revenue Service Form 990, 990EZ or 990 PF and, if it has an outside auditor, its audited financial statements for at least the last two years as well as its current internal financial reports to see how the organization uses its assets and to evaluate its financial health. Ask some questions - Is its auditor's report on its financial statements unqualified? Has the auditor sent the organization a management letter identifying issues of concern? Has the Internal Revenue Service recently audited the organization? If so, what was the result to the audit?

- √ Obtain an understanding of the internal control structure of the organization and the processes in place to monitor it.

- √ Find out if the organization is required to register with the Attorney General's Charities Bureau and, if so, whether it has registered and filed all required reports. Find out if it has filed required reports with the IRS and any other government agencies.

√ Understand the organization's mission, learn about its programs, read its publications, visit its program sites, look at its website and talk to key staff and major donors. Find out about its reputation in the community.

√ Review the organizational chart and understand the accountability structure of the organization. Find out about the employee evaluation and compensation processes and due diligence procedures for entering into material contracts.

√ Make sure there is a conflict of interest policy and that it is provided to and signed by new directors and before they join the organization, and annually to directors, officers, and employees for review and signature annually. Find out how the organization addresses actual or potential conflicts.

√ Find out what committees the board has established and decide which (if any) to join. Make sure the committees appear to be sufficient (audit, investment, budget, finance, compensation, human resources, nominating, governance, etc.). Under New York's Not-for-Profit Corporation Law, corporations required to file an audit with the Attorney General's Charities Bureau must have an audit committee made up of independent directors or the board must assume that function with only independent members participating. Independent directors are members of the board who are not paid by the organization and neither they nor their family members have any financial relationship with the organization.¹

√ Find out if materials to be considered by the board or its committees are distributed in advance of meetings and whether they provide sufficient information necessary to be part of the stewardship process. Find out how the meetings are structured: by consent agenda or other means.

√ Obtain the current year's budget and cash flow projections. Find out how they compare to actual income and expenses and what processes are in place to monitor these comparisons.

√ Find out whether the insurance coverage appears to be appropriate, including Directors' and Officers' liability and employee fidelity insurance. The latter is particularly important - it is surprising how often embezzlement is discovered.

√ Most important, make sure you are able to devote the time expected of a board member. Understand any responsibilities for fundraising, personal giving commitments and other functions expected of board members. Joining a board without sufficient time to devote to its business is often at the root of troubles faced by boards. A decision to

¹ Section 102(a)(21) of the Not-for-Profit Corporation Law sets forth the definition of Independent Director.

decline an invitation to join a board because you don't have the time to devote to the board should be respected.

✓ Learn what training (if any) is provided to board members.

► WHAT ARE THE DUTIES OF BOARDS OF DIRECTORS?

Most nonprofit organizations are created to achieve a specific purpose or purposes, such as making grants to operating charities, setting up a soup kitchen, teaching children to read, providing health care, supporting cultural institutions, preserving the environment, assisting senior citizens or one of the many thousands of other charitable activities conducted in our state and our country. Those purposes, or the mission of the organization, may be described in its certificate of incorporation, by-laws or other constituent document.

If an organization's purposes are not already clearly included in one of its organizational documents, one of the first activities of the board should be to draft a clear mission statement which should correspond to the purposes described in its certificate of incorporation and application for tax exemption submitted to the Internal Revenue Service. Everyone involved with the organization - directors and officers, employees, volunteers, fundraising professionals, and other professionals – should be familiar with and understand its mission. Those individuals plan its future, conduct its programs, raise its funds, make it known to the public, present its financial records to regulatory agencies and others and give it professional advice.

Unless they fully understand why the organization was formed and what it plans to accomplish, board members will not be able to perform their respective tasks appropriately. The mission should be periodically re-assessed and evaluated and amended as needed. Periodic review of an organization's structure, procedures and programs will assist board members in determining what is working well and what practices the organization might want to change in order to be more efficient, effective or responsible.

While the board is not usually involved in the day-to-day activities of the organization, it is responsible for managing the organization and must make decisions crucial to the life and direction of the organization, such as adding or removing board members, hiring and firing key officers and employees, engaging auditors and other professionals and authorizing significant financial transactions and new program initiatives. In carrying out those responsibilities, members of a board of directors must fulfill fiduciary duties to the organization and the public it serves.

Those primary legal duties are commonly referred to as the duties of *care*, *loyalty* and *obedience*. If the organization has affiliates or subsidiaries, the legal duty of impartiality and the duty of fairness to all the charitable interests, may also come into play.

● Duty of Care

The *duty of care* requires a director to be familiar with the organization's finances and activities and to participate regularly in its governance. In carrying out this duty, directors must act in "good faith" using the "degree of diligence, care and skill" which prudent people would use in similar positions and under similar circumstances. In exercising the duty of care, a responsible board of directors should, among other things, do the following:

√ The directors as a group, and the officers of the corporation, should exercise their responsibility to undertake reasonable efforts to assure that the organization is operating in compliance with the law. For directors, this means assuring that there is an effective compliance program reporting ultimately to the directors, that there is a policy for protection of whistleblowers which has been communicated to employees, that there are effective internal controls, that there is an effective external audit by an independent auditor, and that allegations of violations of law are investigated and addressed. (Although New York law only requires organizations with over 20 employees and over \$1 million in revenue to have a whistleblower policy, smaller organizations might find it helpful to adopt such a policy as well.)

√ Attend board and committee meetings and actively participate in discussions and decision-making, such as setting of policies. Carefully read the material prepared for board and committee meetings prior to the meetings and note any questions they raise. Allow time to meet without senior management present.

√ Read the minutes of prior meetings and all reports provided, including financial statements and reports by employees. Do not hesitate to suggest corrections, clarification and additions to the minutes or other formal documents.

√ Make sure to get copies of the minutes of any missed committee or board meeting, read them timely and suggest any changes that may be appropriate.

√ Make sure there is a clear process for approval of major obligations such as fundraising, professional fees (including auditors), compensation arrangements and construction contracts.

√ Make sure that board minutes reflect any dissenting votes in action taken by the board or that any dissenting vote is expressed in writing by letter to the board. Such records are necessary in order for a board member to disclaim responsibility for any particular decision. Absent board members must do this promptly in writing.

√ Read literature produced as part of the organization's programs.

√ Make sure that monthly financial reports prepared for management are available to the board or finance and audit committees, and that they are clear and communicate the information needed for proper stewardship. Make sure there is an ongoing actual to budget comparison with discrepancies explained.

√ Participate in risk assessment and strategic planning discussions for the future of the organization.

√ Ensure that the organization has addressed the sufficiency of its written internal financial controls and written policies that safeguard, promote and protect its assets and that they are updated regularly, and has considered an employees', officers' and directors' fidelity bond to protect the organization from embezzlement.

√ Assure that the organization has a background check policy for prospective employees.

√ Determine whether or not the organization indemnifies its officers and directors from liability and has directors' and officers' liability insurance. If it does, find out what is covered and what is not. If it does not, find out why.

√ Encourage diversity among board members. Diversity will help insure a board committed to serve the organization's mission with a range of appropriate skills and interests.

√ Be involved in the selection and periodic review of the performance of the organization's Chief Executive Officer, Chief Financial Officer and other key employees responsible for the day-to-day activities of the organization. The board is responsible for ascertaining whether these individuals have the appropriate education, skills and experience to assume a key position; communicating duties, expectations and goals; and then evaluating their performance at least annually, first in an executive session and then with the officer directly.

● **Duty of Loyalty**

Directors are charged with the duty to act in the interest of the corporation. This duty of loyalty requires that any conflict of interest, real or possible, be disclosed in advance of joining a board and when they arise. So that all members are aware of - and avoid - transactions in which the nonprofit's interests are not primary, New York law requires nonprofits to have a written "conflicts of interest" policy. Among the provisions that should be included in such policies are provisions that:

√ Define the circumstances that constitute a conflict of interest;

√ Set forth procedures for disclosing a conflict of interest to the audit committee or the board;

√ Prohibit anyone with a conflict of interest from being present during or participating in the deliberation, voting on the issue that resulted in the conflict, or influencing the deliberation or vote on the issue that resulted in the conflict;

√ Require the nonprofit to document the existence and resolution of each conflict;

√ Require directors to sign annually a statement that identifies entities in which they serve as an officer, director, trustee, member, or employee and with which the corporation has a relationship; as well as any transaction of the nonprofit in which the director might have a conflicting interest.

● Duty of Obedience

A board has a *duty of obedience* to ensure that the organization complies with applicable laws and regulations, its mission and its internal governance documents and policies, including:

√ Dedicating the organization's resources to its mission.

√ Ensuring that the organization carries out its purposes and does not engage in unauthorized activities.

√ Complying with all appropriate laws, including registering and filing annual financial reports with the Attorney General's Charities Bureau in New York State, complying with similar laws in other states in which it conducts activities and/or solicits contributions, filing required financial reports with the State Worker's Compensation Board, the State Department of Taxation and Finance and the Internal Revenue Service; and paying all taxes such as Social Security, income tax withholding (federal, state and local) and any unrelated business income tax. Board members may be personally liable for failing to pay employees' wages and benefits, and for failing to withhold, escrow and pay over to state and federal authorities withholding taxes on employees' wages.

√ Providing copies of its applications for tax-exempt status (IRS Form 1023), federal reports (IRS forms 990, 990 PF, 990 EZ) and its financial reports filed with the Attorney General's Charities Bureau to members of the public who request them. Many organizations post their annual reports and other information on the Internet.

► MONITOR FUNDRAISING CONDUCTED ON BEHALF OF THE ORGANIZATION

Many organizations contract with outside organizations or individuals to raise funds on their behalf. Since the fundraiser represents the organization to the public, the selection of a fundraising professional is extremely important. Establishing and following procedures for selection of a fundraiser can avoid future problems. Board members

should assess whether management has undertaken reasonable procedures to protect the organization, including:

√ Obtaining bids from several fundraising professionals before entering into a contract. Services and fees differ, and comparing bids will aid in the selection of the best contractor for the organization.

√ Checking with the Attorney General's Charities Bureau to see if the fundraising professionals being considered are registered and have filed all required contracts and financial reports.

√ Asking the Charities Bureau for copies of the fundraising professional's contracts with other charities to determine the services performed for and the fees charged to those charities.

√ Asking the fundraising professional for references. Reputable fundraising professionals should be happy to provide a potential client with the contact information for some of its clients.

√ Contacting some of the fundraising professional's other clients to see if they were satisfied with the services received.

√ Finding out whether the organization's fundraising contracts contain the clauses required by Article 7-A of the Executive Law.

√ Reviewing written solicitations and scripts used by the fund raising professional to make sure that solicitations appropriately describe the organization and its activities, include the name of the organization as registered with the Attorney General and advise potential contributors that they may obtain the organization's financial report from the organization itself or from the Attorney General.

√ Requiring, as mandated by New York law, that the fundraising professional and any of its representatives ("professional solicitors") disclose the name of the specific professional solicitor and the employing fundraising professional and state that the solicitor is being paid to raise funds.

√ When considering engaging a fundraiser to solicit via the telephone, reviewing *Pennies for Charity*, the Attorney General's annual report on telemarketing by professional fundraisers, to see the results of those fundraisers' campaigns.

► MAKE USE OF AVAILABLE RESOURCES

In carrying out their responsibilities, board members should realize that they need not do it alone. Board members should consider the need for advice from professionals or experts to assist them in the performance of their duties, and make appropriate requests

for such advice. There are many other resources available to assist nonprofit organizations in fulfilling their fiduciary duties.

Following are some of those resources:

√ **The Attorney General's Web site** – www.charitiesnys.com - posts all forms and instructions for registration and annual filing with the Charities Bureau and publications of interest to nonprofit organizations, including guidance on the Nonprofit Revitalization Act of 2013.

√ **Contact Us** - If the material on the Attorney General's web site does not answer your particular questions -

For questions about nonprofit organizations, contact:
charities.bureau@ag.ny.gov or (212) 416-8401

For questions about fundraising professionals, contact:
charities.fundraising@ag.ny.gov or (518) 776-2160

√ **Other Helpful Web Sites** - Many more resources are available on the Internet and in communities around the state. Links to some of those resources are posted on the Attorney General's web site – www.charitiesnys.com Please note that inclusion of any particular entity should not be construed as an endorsement by the Attorney General of that entity or the services it renders.

Section II.

Internal Controls and Financial Responsibility for Not-for-Profit Boards



INTERNAL CONTROLS AND FINANCIAL ACCOUNTABILITY FOR NOT-FOR-PROFIT BOARDS

**Office of the NYS Attorney General
Charities Bureau
www.charitiesnys.com**

**Guidance Document 2015 - 3, V 1.0
Issue date: April 13, 2015**

The Charities Bureau of the Office of the New York State Attorney General drafted this guidance to assist current and future boards of directors of not-for-profit corporations and trustees of charitable trusts to understand and carry out their fiduciary responsibilities to the organizations they serve. The guidance includes general information concerning internal controls for the protection and oversight of charitable assets. It is not a substitute for advice from a qualified lawyer, independent public accountant or other professional.

The Charities Bureau also publishes *Right from the Start - Responsibilities of Directors of Not-for-Profit Corporations*, which describes basic responsibilities of boards of not-for-profit corporations. That booklet and other publications of interest to directors may be found at <http://www.charitiesnys.com>. The information in this booklet reflects changes to the Not-for-Profit Corporation Law that were included in the [Nonprofit Revitalization Act of 2013](#).

I. INTERNAL CONTROLS

A primary responsibility of a nonprofit's board of directors is to ensure that the organization is accountable for its programs and finances to its contributors, members, the public and government regulators. The development of proper internal controls helps organizations ensure accountability. Accountability requires that the organization comply with all applicable laws and ethical standards; adhere to the organization's mission; create and adhere to conflict of interest, personnel, whistleblower and accounting policies; and protect the rights of members. Each organization must also prepare an annual financial report which must be distributed to all board members. Organizations exempt from taxation must prepare an IRS form 990, 990EZ or 990PF and file it with the Internal Revenue Service. An organization required to register with the

Charities Bureau must file a version of IRS form 990, whether or not it files that form with the IRS. Forms filed with the IRS and/or the Charities Bureau must be made available members of the public who request it.

► **What are Internal Controls?**

Internal controls are policies and procedures that protect the assets of an organization, create reliable financial reporting, promote compliance with laws and regulations and achieve effective and efficient operations. Each organization should adopt internal controls that are appropriate to its particular needs and activities. Internal controls should address accounting and reporting policies and the organization's communication processes, internally and externally, and include procedures for

- √ handling funds received and expended by the organization,
- √ preparing appropriate and timely financial reporting to board members and officers,
- √ conducting the annual audit of the organization's financial statements,
- √ evaluating staff and programs,
- √ maintaining inventory records of real and personal property and their whereabouts, and
- √ implementing personnel, conflicts of interest and whistleblower policies.

II. IMPLEMENTATION AND MONITORING OF INTERNAL FINANCIAL CONTROLS

► **Procedures for Monitoring Assets**

Every organization should have procedures to monitor and keep records of assets received, held and expended. These financial controls should be described in a written document. The procedures should be reviewed with a copy given to directors and officers, trustees, employees and volunteers affected by the policies. It should include procedures for:

- √ preparing an annual income and expense budget and periodic reports - at least quarterly, preferably monthly - comparing actual receipts and expenditures to the budget with timely explanations of variances.
- √ writing and signing checks or vouchers, authorizing use of credit cards and electronic deposits and withdrawals, receiving, recording, securing and depositing cash and other receipts, and authorizing and verifying expenditures. The procedures should ensure that no single individual is responsible for receiving, recording and depositing

funds, and writing and signing checks. Such procedures make embezzlement and misuse of funds more difficult.

- √ ensuring that grants and contributions received are properly recorded, accountings required as a condition of any grant are completed, and restrictions on the use of funds, such as contributions given for a restricted purpose or prohibitions on the use of the principal of an endowment, are obeyed.
- √ accessing, inputting and changing electronic data maintained by the organization.
- √ preserving electronic records, protecting private data, ensuring data compatibility when systems change and creating an appropriate records retention policy.
- √ providing for regular oversight by an audit committee or, if there is no audit committee, by the board of directors itself.¹
- √ preparing for the annual audit process in a timely manner.
- √ reporting to the audit committee or board by employees, contractors and volunteers of allegations of fraud or financial improprieties.
- √ ensuring that timely and appropriate financial reports are distributed to all directors and officers and reviewed by them, as well as the president, chief executive officer, treasurer and chief financial officer.
- √ providing procedures for approving contracts to which the organization is a party, including securing competitive bids from vendors.
- √ making clear the responsibilities of all individuals involved with the organization, including directors, officers, employees, volunteers and consultants, and maintaining an organizational chart and updating such information as necessary.
- √ developing a prudent investment strategy and providing proper oversight of the investment assets.
- √ complying with governmental and other reporting requirements, including watchdog agencies.

¹ Under New York's Not-for-Profit Corporation Law, corporations required to file an audit with the Attorney General's Charities Bureau must have an audit committee made up of independent directors or the board must assume that function with only independent members participating. Independent directors are members of the board who are not paid by the organization and neither they nor their family members have any financial relationship with the organization.

- ✓ complying with obligations to members, employees and the public, including their right to a copy of the organization's annual financial report.

► **Various Roles in the Organization**

A nonprofit should have written job descriptions for its directors, officers, employees, volunteers and consultants. The work of the organization will be more easily accomplished and problems will be avoided if all involved understand what is expected of them and the limits of their authority. A comprehensive description of the chief executive officer's job should make clear that person's responsibilities in the day-to-day activities of the organization and set forth exactly what information is expected by the board and when it must be communicated. For example, if the board expects monthly financial reports and bi-monthly programmatic reports, making those expectations clear from the beginning will avoid ambiguity and will clarify the responsibility for accountability to the board.

Likewise, all other employees should have written job descriptions that advise them of what is expected of them. Volunteers are no exception. They should be given job descriptions that clearly describe what is expected of them. For many organizations, volunteers are the only people who conduct programs and have contact with the public. If they do not understand their responsibilities or do not act professionally, the organization could be at risk.

► **Personnel Policies**

Personnel policies, including vacation and sick leave, health insurance and other benefits, evaluations, ordinary and overtime compensation, conflicts of interest and code of ethics, and grievance procedures (including protections for "whistle blowers") should be in writing and given to all employees prior to hiring, with changes in policies communicated on a regular basis.

► **Training**

Appropriate training should be arranged for all involved. New directors, officers, employees and volunteers should be trained by those who are familiar with the organization and its operations. There are many organizations that provide free or low-cost training for board members and others involved with nonprofits. Also, there are numerous resources that provide guidance and training to nonprofits. Some of those resources are listed on the Attorney General's website – www.charitiesnys.com. For all involved, familiarity with the organization's internal controls is essential. Training is a wise investment!

► **Conflicts of Interest Policies and Code of Ethics**

Directors, officers, trustees, employees and others who serve a nonprofit organization may have personal or business interests that may conflict with their responsibilities to the organization. The Nonprofit Revitalization Act of 2013 enacted a new section 715-a of the Not-for-Profit Corporation Law ("N-PCL") and a new section 8-1.9 of the Estates, Powers and Trusts Law ("EPTL") requiring nonprofits and charitable trusts to adopt and follow a conflicts of

interest policy. Those statutes set forth the procedures to be followed if a board member's personal or financial interests may be advanced by an action of the board.

The conflicts of interest policy must require an individual to disclose any interest the individual and/or the individual's family has in any entity that does business with the organization and that any change in the information concerning potential conflicts should be provided to the organization immediately. The policy should be set forth in the organization's by-laws.

The policy must require that an individual with a conflict may not participate in any decision to approve doing business with the individual or any entity in which the individual or his or her family has an interest, and such decision must be made by a disinterested majority of the board of directors or trustees. Officers, directors and key employees should be provided with the conflict of interest policy and be required to disclose any actual or potential conflicts they may have.

The organization should also have a code of ethics addressing issues such as transparency, disclosure in fundraising solicitations, integrity in governance and diversity.

Additional guidance on the adoption and implementation of conflict of interest policies is posted on the Charities Bureau's web page at www.charitiesnys.com.

► **Auditing a Nonprofit's Finances**

The Nonprofit Revitalization Act of 2013 created a new section 712-a of the N-PCL and a new section 8-1.9 of the EPTL requiring nonprofits and charitable trusts to have the audit overseen by an audit committee made up of independent directors² (or independent members of the entire board must assume that function) if they are required to file an annual audit with the Charities Bureau under Article 7-A of the Executive Law.

Whether or not a nonprofit is required to file an audit with the Charities Bureau, it may be required by other laws or by its funders to have an audit. A nonprofit's board may also decide to have its finances audited as part of the oversight of its assets.

Before commencing an audit, a nonprofit should form an audit committee composed of independent directors and engage an *independent* Certified Public Accountant ("CPA") to conduct the audit. An independent CPA is an individual or company who does not have a financial or other relationship with the nonprofit other than being paid for accounting functions. For example, this means that the CPA can't be a member of the organization's board, a paid employee, a relative of an employee or have other professional or financial dealings with the organization.

Additional information concerning the audit oversight responsibilities of nonprofits is posted on the Charities Bureau's web page at www.charitiesnys.com.

² Section 102(a)(21) of the Not-for-Profit Corporation Law sets forth the definition of Independent Director.

► Review of the Organization's Governance Structure, Procedures and Programs

Periodic review of an organization's structure, procedures and programs will assist board members in determining what is working well and what practices the organization might want to change in order to be more efficient, effective or responsible.

III. MAKE USE OF AVAILABLE RESOURCES

In carrying out their responsibilities, board members should realize that they do not need to it alone. There are many resources available to assist nonprofit organizations in fulfilling their fiduciary duties.

Following are some of those resources:

✓ **The Attorney General's Web site** - www.charitiesnys.com - posts all forms and instructions for registration and annual filing with the Charities Bureau and publications of interest to nonprofit organizations, including guidance on the Nonprofit Revitalization Act of 2013.

✓ **Contact Us** - If the material on the Attorney General's web site does not answer your particular questions -

For questions about nonprofit organizations, contact:
charities.bureau@ag.ny.gov or (212) 416-8401

For questions about fundraising professionals, contact:
charities.fundraising@ag.ny.gov or (518) 486-9797

✓ **Other Helpful Web Sites** - Many more resources are available on the Internet and in communities around the state. Links to some of those resources are posted on the Attorney General's web site – www.charitiesnys.com . Please note that inclusion of any particular entity should not be construed as an endorsement by the Attorney General of that entity or the services it renders.

Section III.

Audit Committee Responsibilities and Requirements



**Charities Bureau
Guidance Document
Issue date: September 2018**

**AUDIT COMMITTEE REQUIREMENTS AND RESPONSIBILITIES UNDER
NEW YORK’S NOT-FOR-PROFIT CORPORATION LAW
AS AMENDED THROUGH 2017**

New York’s Executive Law requires most organizations that solicit charitable contributions in New York to register with the Attorney General’s Charities Bureau pursuant to Article 7-A of the Executive Law.¹ Organizations that are required to register with the Charities Bureau and whose revenues exceed the thresholds described later in this guidance are required to submit audited financial statements “in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants.”² The audit must be submitted to the Charities Bureau with New York’s Annual Filing for Charitable Organizations (Form CHAR500) and Internal Revenue Service Form 990. To enhance compliance with the audit requirement, the Nonprofit Revitalization Act of 2013 (“NPRA”) added section 712-a to the Not-for-Profit Corporation Law (“N-PCL”) setting forth the audit oversight responsibilities of not-for-profit corporations and section 8-1.9 to the Estates, Powers and Trusts Law (“EPTL”) setting forth the responsibilities of trusts³ that are subject to the audit requirements. EPTL section 8-1.9 specifically makes applicable to charitable trusts a number of sections of the NPRA, including the provisions addressing audit oversight, as well as related party transactions and mandatory conflict of interest and whistleblower policies. This guidance reflects amendments to the NPRA that were adopted in November of 2016 and, with one exception, became effective on May 27, 2017.⁴

¹Section 172-a of the Executive Law exempts from registration certain categories of organizations, including religious organizations. That statute, which is posted at www.charitiesnys.com, should be consulted to determine if a particular organization may be entitled to an exemption.

² Section 172-b of the Executive Law.

³ Throughout this guidance, the term “nonprofit” may be used to refer collectively to not-for-profit corporations and charitable trusts.

⁴ An amendment to Not-for-Profit Corporation Law § 713(f) that permits an employee to be the board chair under certain circumstances became effective on January 1, 2017.

New York's legislature enacted NPRA's audit provisions to require a nonprofit's review of its auditor's report to be independent of management and to be conducted by individuals who have no financial interest in the nonprofit and whose families have no such interests. NPRA also requires certain internal controls to be implemented to strengthen the oversight of nonprofits' assets. Likewise, by mandating the formation of Audit Committees by nonprofits and requiring the independence of nonprofits' auditors, NPRA was enacted to assure nonprofits' are accountable for the use and protection of charitable assets, and to provide direction on use of the services of an independent auditor and the work of a committee of independent directors formed for those purposes.

The independent professional auditor is the only professional who, pursuant to the N-PCL, not-for-profit corporations are required to engage. The independent auditor has a dual responsibility - the public responsibility to provide reasonable assurance that financial statements detailing the sources and uses of charitable funds are complete and accurate, and a responsibility to those charged with governance to provide the benefit of information obtained during their audit work. Review by competent and responsible auditors - based on their expertise, systems, and experience with other organizations - can provide a significant benefit to those charged with governance by identifying best practices and opportunities for organizational improvement.

This guidance has been prepared to assist nonprofits in implementing audit oversight procedures or revising procedures already in place, and to help them make effective use of the independent audit process. It should not, however, be viewed as a substitute for advice from an organization's attorney, accountant, or the opinion of the independent auditor.

Establishing or Modifying the Audit Committee

Effective with the adoption of the NPRA, on July 1, 2014, a corporation or trust required by Article 7-A of the Executive Law to file an independent certified public accountant's audit, must have either a designated Audit Committee consisting entirely of "independent" directors or the Board of Directors (with only independent members participating in the deliberations or voting) oversee the audit of the corporation's financial statements. N-PCL section 712-a (b) requires additional oversight responsibilities of nonprofits that have annual revenue of over one million dollars.

The Charities Bureau recognizes that Audit Committees and Boards may require assistance from individuals with expertise in accounting and financial matters who are not members of the Board or Audit Committee. However, participation in the Audit Committee's formal deliberations and voting must be limited to the independent director members. Nothing in the law or this guidance precludes the Board or the Audit Committee from seeking advice from such non-members, or from providing some honorific designation to persons who provide such services. However, members of current management, who are responsible for developing and maintaining financial controls, should not also be involved in the Audit Committee's performance of its duties as set forth in N-PCL Section 712-a (b).

Only independent directors may participate in any board or committee deliberations or voting relating to the matters set forth in Section 712-a (b). However, nothing in the NPRA or any guidance shall prevent members of the Board who are not independent directors from receiving or hearing the report of the Audit Committee's activities to the Board as set forth in N-PCL Section 712-a(b)(4).

Hiring an Independent Certified Public Accountant

The board (or audit committee) of a nonprofit required to file an audit with its form CHAR500 must engage an *independent* Certified Public Accountant (“CPA”) to perform the annual financial statement audit. An independent CPA (also commonly referred to as an “auditor”) is an individual or company that does not have a financial or familial relationship with the nonprofit. For example, the CPA cannot be a member of the organization’s board, a paid employee, a relative of an employee or have other professional or financial transactions with the organization. The American Institute of CPAs’ (“AICPA”) Code of Professional Conduct as revised, effective December 15, 2014 guides the CPA in meeting independence requirements. (<http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx>)

According to the AICPA Code of Professional Conduct, independence consists of two elements, defined as follows:

(a) Independence of mind is the state of mind that permits a member to perform an attest service without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism, and

(b) Independence in appearance is the avoidance of circumstances that would cause a reasonable and informed third party who has knowledge of all relevant information, including the safeguards applied, to conclude reasonably that the integrity, objectivity, or professional skepticism of a firm or member of the attest engagement team is compromised. For example, an auditor cannot independently evaluate its own firm's work, including, for example, maintaining the client’s general ledger, even if performed by another unit or group in the auditing organization.

Among other considerations, the audit committee or board should consider when hiring or re-appointing an auditor, is the reputation of the CPA (both the firm and the individuals assigned to the engagement), references provided, expertise or familiarity with nonprofit accounting and the fee structure for the engagement. Staff continuity of the audit team, the expected timeline and delivery of services, and other benefits of engaging a particular firm should also be considered.

Before engaging an auditor, the Audit Committee should also inquire whether the audit firm or predecessor firms have been sanctioned or been the subject of a government investigation, prosecution, or settlement in connection with its audit work, and, if so, the circumstances and outcome of such investigation, prosecution, or settlement.

The nonprofit should also ask for a copy of the CPA’s most recent peer review report, to ensure that its standing with the AICPA and in the marketplace is solid. See generally, <http://www.aicpa.org/InterestAreas/PeerReview/Pages/PeerReviewHome.aspx>. The Charities Bureau recommends, as a best practice, regular rotation of a nonprofit’s auditors, for example, every five years. However, there is no legal requirement for such rotation in the New York Not-for-Profit Corporation Law.

The Role of the CPA Auditor or CPA Audit Firm

The purpose of an audit is to provide users of a financial statement with an opinion prepared by the auditor in accordance with the professional standards established by the American Institute of Certified Public Accountants (AICPA) as to whether the financial statements of the entity are presented fairly, in all

material respects, in accordance with an applicable financial reporting framework (*e.g.*, generally accepted accounting principles, usually referred to as “GAAP”). An audit includes performing procedures to obtain evidence about the amounts and disclosures in the financial statements, assessing the risks of material misstatements in the financial statements, and considering internal controls relevant to the preparation and fair presentation of the financial statements. Financial statements typically consist of the statement of financial position (balance sheet), statement of activities, statement of functional expenses (if applicable), statement of cash flows, and notes to financial statements.

In addition to certifying the financial statements, as part of the audit process the CPA is required to communicate to “those charged with governance” (independent members of the board or the Audit Committee acting on behalf of the Board) certain internal control or other issues identified during the audit that concern the processing of financial information of the organization. Since the audit process does not encompass a comprehensive evaluation of an organization’s internal controls, the board should decide if additional review of the organization’s internal control procedures is warranted, and if so, by whom. It is also extremely important that issues identified in the auditor’s prior year’s communication to the board – management letters, identification of issues of fraud, internal control deficiencies, violations of law, or issues that may impact the nonprofit’s functioning as a going concern - have been addressed to the satisfaction of the Audit Committee and the Independent Auditor.

Independent auditors are required by their professional AICPA standards to prepare complete documentation of each audit engagement, including summaries of certain oral communications with management and with the Audit Committee concerning the audit, and to maintain these records after completion of the audit engagement. These required communications include discussions of suspicion of fraud, violations of law, lack of integrity or false statements by management, and risks to the organization as a going concern. It is important for members of the Audit Committee to be aware that conversations with the independent auditor are never “off the record.” although they may not be in formal written communications to the client, the Audit Committee, or management.

The Role of the Audit Committee or the Board

The audit committee or the board is responsible for overseeing the accounting and financial reporting processes of the organization and the audit of its financial statements. The NPRA requires that a designated audit committee, made up of *independent* directors, or the board itself, with only *independent* directors participating, fulfill the oversight responsibility. An independent director, as more fully described in section 102(a)(21) of the N-PCL and section 8-1.9(a)(7) of the EPTL,⁵ is an individual who:

- 1) is not, and has not been during the prior three years, an employee or key person⁶ of the organization or any of its affiliates,
- 2) has not received over \$10,000 from such organizations during that period, and

⁵ The full text of the N-PCL §102(a)(21) and EPTL §8-1.9(a)(7) should be consulted to determine whether a particular individual qualifies as an independent director or trustee within the meaning of those statutes.

⁶ The 2016 amendments substituted the term “key person” for “key employee” and made clear that an individual who has certain control or managerial authority in the organization comes within the definition of independent director. See N-PCL section 102(a)(25) for the definition of key person.

- 3) does not have a relative who has been a key person of or received over \$10,000 from such organizations during that period. (Note, though, that a director's independence is not affected if the director has a relative who is an employee but not a "key person" in the organization or any affiliate.)

In addition, in order to be independent, neither the director nor his relatives may have certain relationships with entities with which the organization conducts a certain level of business activity. In particular, pursuant to the 2016 amendments, a director is not independent if all three of the following are true:

- 1) he or she is a current employee of or has a substantial financial interest in (or has a relative who is a current officer of or has a substantial financial interest in) an entity, *and*
- 2) that entity has provided payments, property or services to, or received payments, property or services from, the corporation or an affiliate, *and*
- 3) the amount paid by the corporation to the entity or received by the corporation from the entity for such property or services, in any of the last three fiscal years, exceeded these thresholds:

If the outside entity's consolidated gross revenue is	Then the director is not independent if the amount that entity paid to or received from the corporation exceeded
Under \$500,000	The lesser of \$10,000 or 2% of the entity's gross revenue
Over \$500,000 but less than \$10 million	\$25,000
\$10 million or more	\$100,000

The 2016 amendments provide that, in determining the independence of a board member, "payments" do not include:

- 1) charitable contributions,
- 2) dues or fees paid for services that are part of a nonprofit's programs as long as such services are available to the public on the same terms,
- 3) payments made by the corporation at fixed or non-negotiable rates or amounts for services received, if the services are available to individual members of the public on the same terms, and any services received by the corporation are not available from another source.

It is important to note that a member of the board is considered independent even if he or she receives reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director.

N-PCL section 713(f) permits an employee to be the chair of a nonprofit's board if elected by a two-thirds vote of the entire board and the basis of that vote is documented in writing. However, no such employee may be an independent director.

In determining whether a director is independent, the board should make reasonable efforts to determine whether a director is independent and adopt procedures for making such a determination. Organizations may take guidance from the following instructions for completing line 1b (number of voting members of the governing body of who are independent) of Part VI of IRS form 990 and the Charities Bureau guidance on conflict of interest and related party transactions posted at www.charitiesnys.com:

Reasonable effort. The organization need not engage in more than a **reasonable effort** to obtain the necessary information to determine the number of **independent voting members of its governing body** and can rely on information provided by such members. For instance, the organization can rely on information it obtains in timely signed responses to the mandatory questionnaire sent annually to each member of the governing body that includes the member's name and title, blank lines for the member's signature and signature date, and the pertinent instructions and definitions for line 1b of IRS form 990, to determine whether the member is or isn't independent.

While not mandated by the NPRA, having audit committee members who have sufficient financial expertise or practical experience to understand these processes is a desirable goal.

The NPRA requires the audit committee or independent members of the board to:

- 1) Retain or renew the retention of the CPA to conduct the annual financial statement audit,
- 2) Review the completed audit with the CPA, and
- 3) Review with the CPA the communications to those charged with governance (including but not limited to any management letter) resulting from the audit. The term “review” as used here requires a conversation between the Committee and the independent auditor in which audit committee members participate. It does not require a face-to-face meeting, which can add significantly to the cost for small organizations.

For any fiscal year in which the organization expects to have over \$1 million in revenue (or if it had over \$1 million in the prior year), the audit committee or independent members of the board must also:

- 1) Prior to commencement of the audit, review with the CPA the scope and planning of the audit;
- 2) When the audit has been completed, review and discuss with the CPA:
 - i. Material risks and weaknesses in internal controls identified by the CPA;
 - ii. Any restrictions on the scope of the CPA’s activities or access to requested information;
 - iii. Any significant disagreements between the CPA and management; and
 - iv. The adequacy of accounting and financial reporting processes of the organization; and

3) Annually review the performance and independence of the CPA

If an audit committee performs the above responsibilities, the committee must report to the board the results of these procedures. N-PCL § 712-a “Audit Oversight.”

The audit committee should also maintain records of its meetings, including minutes with the names of all present, and how each voted – accepted, objected or abstained - on a motion to accept the audit; copies of board books and other material submitted to the committee before or during its meetings. Maintaining minutes and other records of the audit committee (or the board) is important in demonstrating that the oversight process is appropriate.

In addition to the audit committee’s role in the audit process, the board, the audit committee, or another committee must identify and monitor related party transactions and review the conflicts of interest, ethics, whistleblower and related party disclosure policies periodically and updating as needed.⁷

The board or a committee of the board’s responsibilities should also include (but are not limited to) the following:

- 1) Ensuring that proper federal and state compliance and tax filings are submitted timely, including payroll taxes, sales taxes, unrelated business income taxes, and foreign filings (if applicable), and that any taxes due have been paid or provided for;
- 2) Reviewing the organization’s internal and financial controls on a periodic basis;
- 3) Assuring the conduct of appropriate risk assessments and risk response plans;
- 4) Monitoring any legal matters that could impact the reputation and financial health and reporting of the organization;
- 5) Instituting and overseeing any special investigatory work as needed, and assuring responses to investigations; and
- 6) Periodically reviewing the organization’s insurance coverage and determining its adequacy.

The audit committee should also maintain minutes of its meetings. Maintaining minutes of the audit committee (or the board) is important in demonstrating that the oversight process is appropriate.

When an organization’s revenue reaches the threshold at which an audit is required (see “Revenue Thresholds Requiring a CPA’s Audit” below), it will have to take steps to comply with N-PCL § 712-a, including establishing an audit committee or designating independent members of the board to assume that function, making appropriate changes to its by-laws and engaging to the appropriate Certified Public Accountant. The Charities Bureau recommends that organizations take these steps as soon as they realize that their revenue will reach the audit threshold so that appropriate procedures are in place before the audit process begins.

⁷ See additional guidance concerning these responsibilities posted at www.charitiesnys.com.

Revenue Thresholds Requiring a CPA's Audit

Over a period of seven years, from July 1, 2014 to July 1, 2021, the NPRA raised the revenue thresholds that trigger the audit requirement for organizations that, pursuant to Article 7-A of the Executive Law, are required to file a CPA's audit report with the Charities Bureau. The revenue threshold, which was \$250,000 before enactment of the NPRA, will rise to \$1,000,000 in 2021. As a result, fewer organizations will be required to file CPA audit reports with the Charities Bureau.

Following are the NPRA audit thresholds and the reports to which they apply:

Annual reports with an original or extended due date between July 1, 2014 and June 30, 2017:

Gross Revenue and Support	CPA Audit
More than \$500,000	CPA Audit Required

Annual reports with an original or extended due date between July 1, 2017 and June 30, 2021:

Gross Revenue and Support	CPA Audit
More than \$750,000	CPA Audit Required

Annual reports with an original or extended due date on or after July 1, 2021:

Gross Revenue and Support	CPA Audit
More than \$1,000,000	CPA Audit Required

Please note that organizations that have revenue over \$250,000, but under the above audit thresholds, and are required to register with the Attorney General's Charities Bureau pursuant to Article 7-A of the Executive Law, must file a CPA's review report. For information about the CPA financial statement review report requirements see Executive Law § 172-b and the Charities Bureau's guidance posted at http://www.charitiesnys.com/pdfs/NYSGuidance2014_Audit%20Thresholds%20and%20Fee.pdf

Other Guidance and Resources

Additional guidance on the on the Nonprofit Revitalization Act of 2013 is posted on the Charities Bureau's website at http://www.charitiesnys.com/nonprofit_rev_act_guidance.jsp.

Guidance and resources posted by the accounting profession may be found at:

Financial Accounting Standards Board – www.fasb.org

American Institute of CPAs – www.aicpa.org

The following AICPA standards are specifically applicable to audits: AU-C-240, AU-C-250 and AU-C-260. The AICPA posts those standards on its website at <https://www.aicpa.org/research/standards/auditattest/clarifiedsas.html>

The Charities Bureau posts forms and instructions for filing annual financial reports at
www.charitiesnys.com

Please send questions concerning registration and annual financial reporting with the Charities Bureau to
charities.bureau@ag.ny.gov

Section IV.

Conflicts of Interest Policies Under the Not-for- Profit Corporations Law



Conflicts of Interest Policies Under the Not-for-Profit Corporation Law

Charities Bureau
www.charitiesnys.com

Guidance Document
Issue date: September 2018

Conflicts of interest for board members are almost inevitable in not-for-profit corporations, and the existence of conflicts of interest should not disqualify board service. In fact, board members with significant community and business relationships are valuable because of the contacts and expertise they bring to the board, and more likely to have conflicts arising from those relations. An effective conflict of interest policy allows a not-for-profit entity to benefit from engaged and sophisticated board members, and to manage conflict of interest issues in ways that provide reassurance that the mission of the entity remains paramount.

This guidance has been drafted to assist not-for-profit corporations and trusts (hereafter collectively “nonprofits”) that are drafting, reviewing, or revising their Conflict of Interest Policies and adopting and implementing those policies. It has been up-dated to reflect amendments to the Not-for-Profit Corporation Law (“N-PCL” that were enacted in November of 2016 and, with one exception, became effective on May 27, 2017¹. The guidance is not intended to serve as a substitute for advice from a nonprofit’s attorney, nor should it be construed to have anticipated or addressed every issue that a nonprofit should consider or address when drafting or implementing its policy.

¹¹ An amendment to Not-for-Profit Corporation Law § 713(f) that permits an employee to be the board chair under certain circumstances became effective on January 1, 2017.

The N-PCL follows both common law and best practices literature in requiring directors to make disclosures about potential conflicts of interest at the beginning of their service, and on an annual basis thereafter. It also requires directors, officers and key persons (called “key employees” prior to the 2016 amendments)² to disclose potential conflicts of interest in issues that come before the board and to refrain from participating in board deliberations and decisions on those issues. The N-PCL requires that a nonprofit’s procedures for disclosing and resolving conflicts of interest be set forth in a Conflict of Interest Policy adopted by the board. The Conflict of Interest Policy adopted by the Board must reflect the minimum standards set forth in N-PCL Section 715-a.

Where a director, officer, or key person has a conflict of interest, as defined by a nonprofit’s Conflict of Interest Policy, in an issue coming before the board, that individual must disclose the circumstances giving rise to the conflict, and the nonprofit has an obligation to make a record of the existence of the conflict and how it was addressed, both with respect to that individual and with respect to the transaction.

Director, officer, key person, related party and relative are all terms that are defined in the N-PCL. *See* N-PCL §§ 102(a)(6), 102(a)(22), 102(a)(23), 102(a)(25), 713(f). A 2016 amendment to the N-PCL replaced the term “Key employee” with the term “key person” and defined a key person as someone who is **not** an officer or director and who, whether or not employed by the corporation, has responsibilities or powers similar to those of officers and directors, manages the corporation of a substantial part of its activities, assets or finances, or has a role in controlling a substantial part of its capital expenditures or budget.

A key person might be

A founder who, although he or she has no title or official role, exercises apparent authority over the organization, or

A substantial donor who, although he or she has no official role or title in the organization, participated in setting the agenda and making employment decisions.

² The amendments changed the term “key employee” to key person and amended the definition of that term. An explanation of the change is included later in this guidance.

Conflict of Interest Policy: Minimum Statutory Requirements

The board of each nonprofit must adopt, implement and oversee compliance with a Conflict of Interest Policy “to ensure that its directors, officers, and key persons act in the [nonprofit’s] best interest and comply with applicable legal requirements.”

The policy must cover conflicts and possible conflicts of interest, including related party transactions, which are defined by the N-PCL as transactions, agreements or arrangements in which a related party has a financial interest and in which the nonprofit or an affiliate is a participant. The policy may also cover other types of conflicts that may exist even though there is no financial interest at stake or the circumstances are otherwise outside the definition of a related party transaction.

The Conflict of Interest Policy must include:

1. A definition of the circumstances that constitute a conflict of interest (N-PCL § 715-a(b)(1)).

The statute gives the Board of Directors discretion to define the circumstances that constitute a conflict of interest, including the discretion to define exceptions for de minimis transactions and ordinary course of business transactions not covered by the policy. The board also has discretion to define the procedures that should be followed for different types of conflicts. This discretion includes the power to define additional restrictions on transactions between a board member and the corporation, or between the nonprofit’s employees and third parties (for example, by articulating a no acceptance of gifts policy, a no nepotism policy, or by incorporating Food and Drug Administration or Public Health Service conflict standards into a university’s conflict policy).

In addition, there may be circumstances specific to the organization that involve dual interests but do not present a significant risk of conflicting loyalties. For example, religious corporations in their charter or by-laws frequently will include directors who are members of religious orders, employees of sponsoring or related churches, or bishops who, by canon law, hold title to all property of related religious corporations and may be called upon to approve the disposition of that property. City-related nonprofits may define “circumstances that constitute a

conflict of interest” to exclude the responsibility of an ex-officio director to the electorate or the city appointing official, particularly where such *ex-officio* role is specifically set forth in the nonprofit’s enabling legislation, charter or certificate of incorporation, since the role and definition of the *ex-officio* includes the responsibility of advocating a broader public interest in board discussions, and that role is clear to all non-city directors.

2. Procedures for disclosing a conflict of interest to the board or a committee or the board (N-PCL § 715-a(b)(2)).

These procedures may include expectations for each class of conflict reporters, forms, record-keeping, custodians; disclosure to other persons within the nonprofit or to third parties, timing, and committee review and action.

3. Requirement that the person with the conflict of interest not be present at or participate in board or committee deliberations or vote on the matter giving rise to such conflict. (N-PCL § 715-a(b)(3)).

The language of the statute refers only to board or committee deliberations and votes. It is recommended that the board adopt a more comprehensive policy that articulates standards of conduct for board members, officers and key persons regarding conflicts of interest, disclosure requirements, reporting requirements, and procedures for mitigation.

In the board or committee setting, however, the board may request that the person with the conflict of interest present information as background or answer questions at a committee or boards meeting prior to the commencement of deliberations or voting.

4. Prohibition of any attempt by the person with the conflict to influence improperly the deliberations or voting on the matter giving rise to such conflict. (N-PCL § 715-a(b)(4)).

“Improperly influence” in this context should have a meaning similar to that used by the Securities and Exchange Commission in addressing improperly influencing audits: “coercing, manipulating, misleading, or fraudulently influencing (collectively referred to herein as “improperly influencing”) the “decision-making “ when the officer, director or other person knew or should have known that the

action, if successful, could result “in the outcome which the officer or director could not deliberate or vote on directly. (“Improper Influence on Conduct of Audits,” <http://www.sec.gov/rules/final/34-47890.htm>).

5. Requirement that existence and resolution of a conflict be properly documented, including in the minutes of any meeting at which the conflict was discussed or voted upon. (N-PCL § 715-a(b)(5)).

6. Procedures for disclosing, addressing, and documenting related party transactions pursuant to N-PCL § 715. Related party transactions include any transaction, agreement, or other arrangement in which a related party has a direct or indirect financial interest and in which the nonprofit or an affiliate participates. (N-PCL § 715-a(b)(6)).

A person has an indirect financial interest in an entity if a relative, as defined by the N-PCL, has an ownership interest in that entity or if the person has ownership in an entity that has ownership in a partnership or professional corporation. This is consistent with the definition of “indirect ownership interest” that is found in the instructions to Form 990, Schedule L.

A director, officer, or key person must disclose his or her interest in a transaction, agreement or arrangement *before* the board enters into that related party transaction.

Pursuant to N-PCL § 102(a)(24), the record-keeping requirements of N-PCL § 715 do not apply to the following three types of transactions: a) transactions in which the related party’s financial interest is de minimis, b) transactions that are not customarily reviewed by the board or boards of similar organizations in the ordinary course of business and are available to others on similar terms, and c) provision of benefits provided to a related party solely as a member of a class that the corporation intends to benefit as part of the accomplishment of its mission.

While these transactions may not require the statutory process mandated by section 715 of the N-PCL, both the related party and the decision-maker have other obligations defined by governing law. The Board member or other related party in each of these cases may not intervene or seek to influence the decision-maker or reviewer in these transactions. The decision-maker, and those responsible for

reviewing or influencing these transactions, should not consider or be affected by a related party's involvement in decisions on matters that may affect the decision-maker or those who review or influence the decision.

- What constitutes a “de minimis” transaction will depend on the size of the corporation's budget and assets and the size of the transaction. A transaction that merits review by the Board of a smaller corporation might not merit review by the Board of a larger organization.
- A transaction or activity is in the ordinary course of business if it is consistent either with the corporation's past practices in similar transactions, or with common practices in the sector in which the corporation operates.

Examples of ordinary course of business transactions:

- A. The library of a nonprofit university buys a book written by a member of the board, pursuant to a written library acquisitions policy.
- B. A nonprofit hospital uses the local electric utility for its electrical service and supply, and a 35% shareholder of the local electric utility is a member of the board.
- C. General counsel of a health system has a written, established, and enforced policy for the selection, retention, evaluation, and payment of outside counsel. A board member is a partner of and has a greater than 5% share in one of the firms retained by general counsel.
- D. The curatorial department of a museum has a paid summer intern selection process involving resume review and evaluation and group interviews. The daughter of a board member is selected pursuant to the process as a summer intern.
- E. The grandson of a board member of a hospital has just graduated from a university nursing school. He applies for and is selected by the Nursing Department of the hospital for a tuition repayment benefit and will receive a salary and overtime, consistent with the hospital's written policy regarding recruitment of new nursing graduates.
- F. A board member is the sole owner of a fuel delivery company. In the ordinary course of business, the facilities department of a nonprofit housing

project puts out a written request for proposals for fuel supply for its properties, evaluates, and documents the selection of the board member's company based upon cost and service.

- G. A university board member owns a 35% share of a restaurant conveniently located near the campus of the university. Some faculty members responsible for arranging staff holiday lunches buy food from this restaurant, using university credit cards. Each department has a modest authorized budget for these lunches, and faculty members have discretion about where to buy food for the lunches.

To qualify for the exception for benefits provided to a related party solely as a member of a class that the corporation intends to benefit as part of the accomplishment of its mission, the benefits must be provided in good faith and without unjustified favoritism towards the related party.

Example of a transaction in this category: A legal services program agrees to handle the eviction case of one of its board members who is eligible to be a client, and who is serving as one of the minimum number of client-eligible board members that is required by federal regulations. The decision to accept the case is made pursuant to the organization's established case acceptance policy, without regard to the client's status as a board member.

Transactions related to compensation of employees, officers or directors or reimbursement of reasonable expenses incurred by a related party on behalf of the corporation are not considered related party transactions, unless that individual is otherwise a related party based on some other status, such as being a relative of another related party . However, such transactions must be reasonable and commensurate with services performed, and the person who may benefit may not participate in any board or committee deliberation or vote concerning the compensation (although he or she may be present before deliberations at the request of the board in order to provide information).

7. The Policy must require that each officer, director and key employee submit to the Secretary prior to initial election to the board, and annually thereafter, a written statement identifying possible conflicts of interest. That statement should include, to the best of the individual's knowledge, any entity of

which the director is an officer, director, trustee, member, owner, or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director has or might have a conflicting interest.

Disclosure of conflicts is required; the requirement of disclosure to the Secretary can be satisfied by disclosure to the Secretary's designee as custodian (e.g., the compliance officer), if set forth in the conflict of interest policy.

When initial election to the board is not reasonably foreseeable, for example when board candidates are nominated from the floor at an annual meeting of members held to elect directors, the written statement may be provided to the Secretary promptly after the initial election.

A conflict of interest disclosure statement is required from directors, officers, and key persons of nonprofits. All types of nonprofits are covered, including religious corporations.

The Secretary must provide a copy of the completed statements to the chair of the audit committee or the chair of the board. There is no statutory requirement that conflict of interest disclosure statements be shared with other members of the board, or members of the corporation, or with the public. Conflict of interest disclosures often contain sensitive personal financial information that could be harmful if disclosed.

The Secretary may direct his/her designee/custodian to provide a copy of the completed statements to the chair of the audit committee or the chair of the board. The Secretary should maintain a record of conflict of interest disclosures.

The N-PCL does not prescribe the method or content of assertions that a board member, officer, or key person's participation in deliberations or voting is barred by a conflict as defined by the policy. The N-PCL does require that the "existence and resolution of the conflict be documented in the corporation's records, including the minutes of any meeting in which the conflict was discussed or voted upon." The records or minutes do not need to reflect the specifics of a conflict of interest not "discussed or voted upon" so long as the records reflect that an

individual board member, officer, or key person did not participate in discussions or voting on the topic.

Section V.

Whistleblower Policies Under the Nonprofit Revitalization Act of 2013



Whistleblower Policies Under the Nonprofit Revitalization Act of 2013

**Office of the New York State
Attorney General
Charities Bureau
www.charitiesnys.com**

**Guidance Document 2015-5, V. 1.0
Issue date: April 13, 2015**

The Nonprofit Revitalization Act of 2013 (“NPRA”) amended the Not-for-Profit Corporation Law (“N-PCL”) and the Estates, Powers and Trusts Law (“EPTL”) in numerous ways, including to require certain not-for-profit corporations and charitable trusts to adopt whistleblower policies. Where appropriate, these amendments to the N-PCL and EPTL are referenced together as “the amendments,” and the corporations and trusts to which they apply are referenced as “nonprofits.”

This guidance describes the specific requirements of the amendments and exceptions to them. The Attorney General's Charities Bureau drafted it to assist nonprofits required to implement whistleblower policies, by clarifying the law and responding to questions the Bureau has received. It is not substitute for advice from a nonprofit's attorney.

What is a whistleblower policy?

Generally, a whistleblower policy is a procedure by which individuals may report suspected improper conduct within an organization without fear of retaliation or adverse employment consequences for doing so, and a procedure within the organization for collecting, recording, reporting, and addressing allegations of suspected improper conduct. *See* N-PCL § 715-b; EPTL § 8-1.9(e).

What nonprofits must have a whistleblower policy?

A not-for-profit corporation or a charitable trust that has 20 or more employees *and* had annual revenue in excess of \$1,000,000 in the prior fiscal year must have a whistleblower policy. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1).

Although the NPRA requires only nonprofits that meet these criteria to have whistleblower policies, smaller nonprofits should consider adopting such policies.

The Internal Revenue Service Form 990 specifically requests all organizations completing the form to respond to question 13 of Part VI:

Did the organization have a written whistleblower policy?

As the Internal Revenue Service states in its Form 990 instructions, “A whistleblower policy encourages staff and volunteers to come forward with credible information on illegal practices or violations of adopted policies of the organization, specifies that the organization will protect the individual from retaliation, and identifies those staff or board members or outside parties to whom such information can be reported.”

The IRS also notes:

“Certain federal or state laws provide protection against whistleblower retaliation and prohibit destruction of certain documents. For instance, while the federal Sarbanes-Oxley legislation generally does not pertain to tax-exempt organizations, it does impose criminal liability on tax-exempt as well as other organizations for (1) retaliation against whistleblowers that report federal offenses, and (2) for destruction of records with the intent to obstruct a federal investigation. See 18 U.S.C. sections 1513(e) and 1519. Also note that an organization is required to keep books and records relevant to its tax exemption and its filings with the IRS. Some states provide additional protection for whistleblowers.” Source: Instructions to the 2014 IRS Form 990, page 23

Whistleblower policies are generally recognized as part of an effective compliance program and an important part of an effective enterprise risk management and internal control assessment program. See, Committee of Sponsoring Organizations of the Treadway Commission (COSO) 2013 Internal Control.

What if a nonprofit already has a whistleblower policy?

If a nonprofit organization “has adopted and possesses” a whistleblower policy pursuant to federal, state or local law, and that policy “is substantially consistent with” the whistleblower policy requirements of the amendments (discussed below), the organization will be considered in compliance with the amendments and does not need to adopt a new whistleblower policy. *See* N-PCL § 715-b(c); EPTL § 8-1.9(e)(3). The Charities Bureau interprets “has adopted and possesses” to mean that the nonprofit has formally adopted a whistleblower policy by action of the governing board or a committee of the board and acts in compliance with that policy. An example of such whistleblower policy is that contained in 18 NYCRR 521 for Medicaid Provider Compliance programs, which applies to New York Medicaid providers with Medicaid revenues above a dollar threshold.

In addition, a not-for-profit corporation is not required to adopt a new whistleblower policy if: (1) it is a “state authority” or “local authority” under New York’s Public Authorities Law; (2) its board members have already established written policies and procedures protecting employees from retaliation for disclosing information concerning misconduct; *and* (3) the organization is prohibited by the Public Authorities Law from taking adverse actions against the whistleblower. *See* N-PCL § 715-b(c).

If a nonprofit has a whistleblower policy *but* that policy does not meet either of the two exceptions above, it must either revise its policy or adopt a new whistleblower policy in compliance with the amendments. A nonprofit that does not have a whistleblower policy, must adopt a policy in compliance with N-PCL § 715-b.

In addition to complying with the whistleblower provisions of N-PCL § 715-b, nonprofits must comply with other applicable laws. For example, New York's Labor and Civil Service Laws also protect whistleblowers in certain situations. *See* N.Y. Labor Law § 740; N.Y. Civil Service Law § 75-b.

What *must* a nonprofit’s whistleblower policy include?

The whistleblower policy must include each of the following provisions identified in the NPRA:

- First, the policy must include procedures for reporting violations or suspected violations of laws or corporate policies, including procedures for maintaining the confidentiality of the reported information, and for tracking and reporting on the results of whistleblower reports. These procedures must address appropriate protection from retaliation for persons who report suspected improper conduct. The 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 legally required policies of the corporation shall suffer intimidation, harassment, discrimination, or other retaliation or, in the case of employees, adverse employment consequence. N-PCL § 715-b(b)(1) and EPTL §-b(b)(1) and EPTL § 8-1.9(e)(2)(A).

These procedures should address: (i) the individual(s) or entity(ies) to whom violations may be reported; (ii) the possible means of reporting, such as email or telephone; (iii) the investigative steps the organization will take; (iv) the consequences for violating the policies designed to protect from retaliation persons who report improper conduct and (v) any other procedures the organization deems appropriate. The procedures should provide for an anonymous reporting option.

- Second, the policy must designate one or more employee(s), officer(s), trustee(s) or director(s) of the nonprofit to administer the policy. N-PCL § 715-b(b)(2) and EPTL § 8-1.9(e)(2)(B).

For example, the policy could designate the Chair of the Audit Committee as the person to receive and investigate complaints regarding financial improprieties. It could designate the head of the Human Resources Department as the person to receive and investigate complaints regarding violations of the corporation's applicable human resources policies, problems with co-workers or managers, or issues related to alleged employment discrimination or sexual or any other form of unlawful harassment.

- Each designated person must be required to report on the policy, its implementation, and the general type and resolution of whistleblower complaints to the Audit Committee or other committee of the Board consisting of independent Directors, or to the Board itself. N-PCL § 715-b(b)(2) and EPTL § 8-1.9(e)(2)(B).

Nothing in this guidance is intended to prevent the formation or use of internal compliance committees under the guidance of the Board or a Board Committee. The designated person or persons must accept and implement this responsibility, and should have sufficient knowledge, resources, and training to carry it out, maintain records of whistleblower interactions, and identify and address needs for improvement in the policy.

- Finally, a copy of the policy must be given to all officers, employees, trustees, directors and volunteers. (At a not-for-profit corporation, the policy only needs to be given to volunteers who provide substantial services; at charitable trusts, however, it must be given to all volunteers.) N-PCL § 715-b(b)(3) and EPTL § 8-1.9(e)(2)(C).

What is an “adopted policy” of an organization?

Adopted policies as to which a nonprofit must provide whistleblower protection include, without limitation, policies formally adopted by the nonprofit's governing body that are designed to: prevent financial wrongdoing, such as internal and external financial controls, accounting policies, and policies prohibiting fraud, theft, embezzlement, bribery, kickbacks, and abuse or misuse of corporate assets; conflict of interest policies; policies addressing unethical conduct; and harassment and discrimination policies. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1). Some complaints of violations of policies adopted by the Board may not be entitled to whistleblower protection. This could include, for instance, a complaint that a co-worker is wearing sandals in violation of a dress code that is contained in the employment manual adopted by the Board.

How does the Whistleblower Policy have to be distributed?

The N-PCL requires a nonprofit to distribute a copy of its whistleblower policy to the individuals described above. Best practices would include an initial distribution of the whistleblower policy to each of the necessary individuals (for example, as part of the new

employee handbook or new director, employee or volunteer orientation), with the requirement that they acknowledge that they have received and reviewed the policy. However, provision of “a copy of the policy” requirement may be satisfied by posting the policy on the organization’s publicly available website. It is incumbent on the organization to ensure that every individual entitled to receive the policy actually has access to it, so a “hard copy” should be given to anyone who requests it in that form. In addition, nonprofits should promote ongoing awareness of the policy and its requirements and protections as part of their normal compliance training and communication.

Who is a volunteer?

The NPRA does not contain a definition of “volunteer.” In making a determination as to who is a volunteer covered by the provisions of the NPRA, and whether a volunteer provides “substantial services,” a corporation should look to the circumstances of the organization and the role of and relationship with people who assist it in carrying out its mission. A nonprofit may also refer to the criteria used to determine who is a volunteer in determining the number of volunteers required to be reported in its IRS Form 990. Also, some nonprofits may have a volunteer policy that will guide them in identifying who qualifies as a volunteer. Each nonprofit’s definition will reflect its activities and the role played by individuals who assist it without being paid.

What constitutes “retaliation” or an “adverse employment consequence”?

Retaliation and adverse employment consequences include those identified in the NPRA (intimidation, harassment and discrimination) and can include failure to promote, adverse impact on compensation, termination, discharge, suspension, demotion, other change in responsibilities, whether formal or informal, and other negative consequences. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1).

What constitutes “good faith”?

A good faith report is one which the whistleblower reasonably believes to be true, and reasonably believes to constitute illegal conduct, fraud, or a violation of an organization's policy. The good faith requirement focuses on the existence of the violation or suspected violation, and not necessarily on the motives of the whistleblower in bringing it to the attention of the organization. A whistleblower policy might provide that a whistleblower does not necessarily get immunity for participating or being complicit in the violation or suspected violation that is the subject of her or his report or subsequent investigations. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1).

How do the New York False Claims Act whistleblower provisions interact with the whistleblower requirements of the NPRA?

For nonprofits that are recipients of funds from the federal government, or from the State of New York or New York county and municipal governments, it is important to recognize the additional requirements under Article XIII of the State Finance Law (New York's False Claims Act) which apply to whistleblowers and whistleblower policies. That statute includes provisions to protect individuals making whistleblower complaints concerning violations of the New York False Claims Act, and nonprofits that receive government funds should consult it when drafting their whistleblower policies.

Are sample whistleblower policies available?

There are many sample whistleblower policies publicly available. However, any sample whistleblower policy should be used for guidance *only*. No sample policy can be appropriate for all nonprofits. Each nonprofit is cautioned to tailor its whistleblower policy to its own needs and risks.

Section VI.

Revised CPA Review and Audit Thresholds and Annual Filing Fees for 7A or Dual Filers

**Office of the Attorney General
Charities Bureau
Guidance Document 2014-1
Issue date: March 2014**

**Guidance on Provisions of the Nonprofit Revitalization Act of 2013
Revised CPA Review and Audit Thresholds and Annual Filing Fees for 7A or DUAL Filers**

The Nonprofit Revitalization Act of 2013 (“the Act”), proposed by the Office of the Attorney General and based on recommendation of the Leadership Committee for Nonprofit Revitalization he formed, became effective on July 1, 2014. The Act changed the filing requirements and filing fees mandated by Article 7-A of the Executive Law, exempting smaller organizations from the requirement to file a CPA's audit or review report. This change affects certain organizations registered with the Charities Bureau to solicit contributions in New York pursuant to Article 7-A of the Executive Law and required to file a an independent Certified Public Accountant's review or audit because their revenue exceeds the thresholds described in the charts below. Organizations required to register under Article 7-A are categorized by the Charities Bureau as “7-A” or “DUAL” organizations. To find the registration category of a particular organization, please consult our searchable [Charities Bureau Registry](#).

7A and DUAL organizations are required to file their financial annual reports and pay an annual filing fee within four and one-half months after the end of their fiscal year. However, the Charities Bureau grants an automatic six-month extension to organizations that cannot meet that deadline. For example, if an organization's fiscal year ended on December 31, 2017, it must file its annual report by November 15, 2018. Forms and instructions for filing annual reports are posted [here](#).

The Act raised the revenue thresholds requiring an independent Certified Public Accountant’s (CPA) review or audit report. Those thresholds are based on the organization's gross revenue and support during the reporting year, which includes all income received by the organization from any source, including contributions, grants, fees and proceeds of sales.

An audit of the financial statements of an organization is done by a CPA to determine that they properly reflect its financial activities in accordance with generally accepted accounting principles. Financial statements include information that describes an entity's financial position and financial activities. They include an organization's Balance Sheet, Statement of Financial Activities, Statement of Cash Flow and supporting information. An audit includes procedures such as assessing fraud risk and testing accounting records by obtaining appropriate evidence through inspection, observation, confirmation, or the examination of source documents (for example, cancelled checks or bank images).

A review by a CPA involves procedures (primarily analysis and inquiries) that will provide a reasonable basis for obtaining limited assurance that there are no material changes that should be made to the financial statements for them to conform to the applicable financial reporting framework. It does not include audit procedures such as assessing fraud risk or testing records.

The revised thresholds and the annual filing fees are as follows:

Requirements for annual reports with an original or extended due date before July 1, 2014 were unchanged:

Gross Revenue and Support	CPA Audit or CPA Review	7A Fee
Up to \$100,000	No Audit or Review Required	\$10
At least \$100,000 but not more than \$250,000	CPA Review	\$10
More than \$250,000	CPA Audit	\$25

Thresholds applicable to annual reports with an original or extended due date between July 1, 2014 and June 30, 2017:

Gross Revenue and Support	CPA Audit or CPA Review	7A Fee
Up to \$250,000	No CPA Audit or Review Required	\$25
At least \$250,000 but not more than \$500,000	CPA Review	\$25
More than \$500,000	CPA Audit	\$25

Thresholds applicable to annual reports with an original or extended due date between July 1, 2017 and June 30, 2021:

Gross Revenue and Support	CPA Audit or CPA Review	7A Fee
Up to \$250,000	No CPA Audit or Review Required	\$25
At least \$250,000 but not more than \$750,000	CPA Review	\$25
More than \$750,000	CPA Audit	\$25

Thresholds applicable to annual reports with an original or extended due date on or after July 1, 2021:

Gross Revenue and Support	CPA Audit or CPA Review	7A Fee
Up to \$250,000	No CPA Audit or Review Required	\$25
At least \$250,000 but not more than \$1,000,000	CPA Review	\$25
More than \$1,000,000	CPA Audit	\$25

For More Information

The Charities Bureau works for New York citizens to prevent fraudulent, deceptive, and unfair practices by charities and to provide information to charities and other nonprofits to assist them in complying with governing law. To file a complaint, use our [complaint form](#) or send an email to charities.complaints@ag.ny.gov. To get free information on charities issues, visit [our website](#) or send an email to charities.bureau@ag.ny.gov.

Your Opportunity to Comment

The Charities Bureau collects comments from charities, advisors, advocates, and citizens about compliance and enforcement activities. To comment, send an email to charities.bureau@ag.ny.gov.

Section VII.

A Practical Guide to the New York Prudent Management of Institutional Funds Act

A PRACTICAL GUIDE TO THE NEW YORK PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Office of the Attorney General Charities Bureau

The Charities Bureau of the New York State Attorney General’s Office offers this guide on the New York Prudent Management of Institutional Funds (“NYPMIFA” or “the Act”), which took effect on September 17, 2010. This guide provides an overview of the Act and includes practical guidance that is intended to assist charities and other institutions in complying with the Act’s new requirements. This guide contains general information and is not a substitute for legal advice from an attorney.

BACKGROUND

NYPMIFA – New York’s version of the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”) – governs the management and investment of funds held by not-for-profit corporations and other institutions. It replaces and updates key provisions of the Uniform Management of Institutional Funds Act (“UMIFA”), which was adopted in New York in 1978.

NYPMIFA makes important changes to the rules governing the spending of endowment funds – funds that are not wholly expendable on a current basis due to donor-imposed restrictions on spending. In particular, and unlike prior law, it allows institutions to spend endowment funds below their original dollar amount (“historic dollar value”) without court approval or Attorney General review, if the institution’s board of directors concludes that such spending is prudent. NYPMIFA also provides standards for the prudent management and investment of institutional funds, the delegation of management and investment functions to outside advisors, and procedures for lifting or modifying donor-imposed restrictions on the management, expenditure or use of institutional funds.

Recognizing that the proposed uniform legislation (UPMIFA) gives boards of directors broader authority to spend donor-restricted endowment funds than they had under prior law, New York’s version of the legislation built in additional requirements for institutions and their boards and additional protections for donors – provisions unique among the 47 states that had thus far adopted UPMIFA. Among other things, NYPMIFA requires that boards determine whether it is appropriate to consider alternatives before deciding whether to authorize expenditure of an endowment fund. It also requires that a notice be given to available donors of endowment funds who executed the gift instrument before September 17, 2010, allowing these donors to opt out of the new rule permitting institutions to spend below the historic dollar value of endowment funds. In addition, the Act includes several provisions that strengthen corporate governance with respect to oversight of institutional funds and delegation of management and investment functions. These additional provisions are designed to encourage and assist boards to exercise their broader spending powers responsibly.

The text of the Act can be found on the Charities Bureau website at www.charitiesNYS.com.

OVERVIEW OF THE ACT

The Act adds a new Article, 5-A (§§ 550-558), to New York’s Not-for-Profit Corporation Law (N-PCL)¹, which addresses four principal areas:

- Standards of conduct for prudently managing and investing institutional funds (new N-PCL § 552);
- Rules that boards must follow in deciding whether to appropriate from or accumulate endowment funds (new N-PCL § 553);
- Standards for delegating management and investment functions to outside agents (new N-PCL § 554); and
- Rules pertaining to the lifting or modification of donor restrictions on management and investment of institutional funds, and on donor restrictions on use of such funds (new N-PCL § 555).

The Act applies to all entities defined as “institutions” under the Act, including all New York not-for-profit corporations, corporations formed under the Religious Corporations Law and education corporations as defined in Education Law § 216-a.² Under the Act, whenever an action is required to be taken by an institution, such action must be authorized by the institution’s governing board. N-PCL § 551(d).

Standard of Conduct in Managing and Investing Institutional Funds (N-PCL § 552)

The Act provides that each person responsible for managing and investing an institutional fund “shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” N-PCL § 552(b). The Act sets forth basic requirements for satisfying the standard of prudence, including a requirement that an institution make a reasonable effort to verify facts relevant to the management and investment of the fund, and that an institution only incur costs that are reasonable and appropriate.

The Act also requires that the following factors, if relevant, be considered in managing and investing an institutional fund:

- (1) general economic conditions;
- (2) the possible effect of inflation or deflation;
- (3) the expected tax consequences, if any, of investment decisions or strategies;
- (4) the role that each investment or course of action plays within the overall investment portfolio of the fund;

¹ The Act also amends portions of N-PCL Article 5 and N-PCL § 717, as well as sections of the Religious Corporations Law, the Estates Powers and Trusts Law, the Surrogate’s Court Procedure Act, and the Executive Law. L.2010 ch.490 §§ 2-14. The existing special rules for cemetery corporations continue to apply. *See* N-PCL § 1507.

² N-PCL § 551(d)(3) defines “institution” as: “(1) a person, other than an individual, organized and operated exclusively for charitable purposes; (2) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated; or (3) any corporation described in subparagraph five of paragraph (a) of section 102 (Definitions).”

- (5) the expected total return from income and the appreciation of investments;
- (6) other resources of the institution;
- (7) the needs of the institution and the fund to make distributions and to preserve capital; and
- (8) an asset's special relationship or special value, if any, to the purposes of the institution.

N-PCL § 552(e)(1).

Additionally, the Act requires that investments of an institutional fund be diversified “unless the institution prudently determines that, because of special circumstances, the purposes of the fund are better served without diversification.” N-PCL § 552(e)(4). A decision not to diversify must be reviewed as frequently as circumstances require, but at least annually.

The Act also requires every institution to adopt a written investment policy setting forth guidelines on investments and delegation of management and investment functions. N-PCL § 552(f).

Expenditure of Endowment Funds (N-PCL § 553)

Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets (*i.e.*, may not be spent) until they are “appropriated for expenditure” by the institution. N-PCL § 553(a). Although this term is not defined in the Act, an appropriation is generally understood to mean a decision by the governing board to release a portion of an endowment fund from the donor-imposed restriction on spending, thus authorizing it to be spent in accordance with the terms of the gift instrument. Funds appropriated for expenditure need not be spent immediately; such funds may be appropriated on one date and spent at a later date or over a period of time. Effective September 17, 2010, decisions to appropriate from endowment funds are governed by N-PCL § 553.

Under prior law, an institution could appropriate for expenditure so much of the net appreciation as the board determined was prudent; however, the institution could not appropriate below the historic dollar value of an endowment fund without court approval unless the gift instrument permitted such appropriation. *See* former N-PCL § 513(c). The Act removes the prohibition on appropriations below the historic dollar value of endowment funds; however, the donor of an endowment fund established before September 17, 2010 who is “available” as defined in the Act may opt to retain the historic dollar value limit with respect to that fund by responding to a notice sent by the institution (see below). Furthermore, as under prior law, the donor of an endowment fund may include an explicit spending limitation in the gift instrument. The Act continues to require that decisions to appropriate for expenditure from endowment funds be made prudently, but adds specific criteria for determining when this standard is met.

In deciding whether to appropriate from an endowment fund, the institution must act “in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances,” and must consider, if relevant, the following factors:

- (1) the duration and preservation of the endowment fund;
- (2) the purposes of the institution and the endowment fund;
- (3) general economic conditions;
- (4) the possible effect of inflation or deflation;
- (5) the expected total return from income and the appreciation of investments;

- (6) other resources of the institution;
- (7) where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution; and
- (8) the investment policy of the institution.

N-PCL § 553(a)(1)-(8).

The seventh factor, requiring an institution to consider alternatives to expenditure, is unique to New York and is discussed further in the Guidance below.

Contemporaneous Records

An institution must make a contemporaneous record of the consideration it gave to each of the factors in deciding to appropriate. If the institution decides to accumulate rather than appropriate from an endowment fund, it must also keep a record of such action. N-PCL § 553(a), (f).

Presumption of Imprudence

For endowment gifts made after September 17, 2010, the Act creates a rebuttable presumption of imprudence if an institution appropriates more than 7% of the fund's fair market value (averaged over a period of not less than the preceding five years) in any year. The presumption of imprudence does not apply to appropriations permitted by law or by the gift instrument. An appropriation of 7% or less of an endowment fund's value in any year is not presumptively prudent. N-PCL § 553(d)(1), (2).

Notice to Donors of Endowment Funds

The Act allows "available" donors of endowment gifts made pursuant to gift instruments executed before September 17, 2010 to opt out of the new rule permitting institutions to appropriate below the historic dollar value of endowment funds. A donor is considered available if the donor can be found with reasonable efforts and is living (if an individual) or conducting activities (if an entity). The institution must send each available donor a written notice describing the donor's two options, which contains language substantially as follows:

Attention, Donor:

Please check Box #1 or #2 below and return to the address shown above.

- () #1 The institution may spend as much of my gift as may be prudent.
- () #2 The institution may not spend below the original dollar value of my gift.

If you check Box #1 above, the institution may spend as much of your endowment gift (including all or part of the original value of your gift) as may be prudent under the criteria set forth in Article 5-A of the Not-for-Profit Corporation Law (The Prudent Management of Institutional Funds Act).

If you check Box #2 above, the institution may not spend below the original dollar value of your endowment gift but may spend the income and the appreciation over the original dollar value if it is prudent to do so. The criteria for the expenditure of

endowment funds set forth in Article 5-A of the Not-for-Profit Corporation Law (The Prudent Management of Institutional Funds Act) will not apply to your gift.

N-PCL § 553(e)(1).

If the donor does not respond within 90 days from the date notice was given, or if the donor returns the notice within 90 days and checks Box #1, NYPMIFA's new spending rules will apply to the donor's endowment gift. If the donor checks Box #2, the institution may not appropriate for expenditure below the historic dollar value of the endowment gift but may spend the income and appropriate the appreciation over historic dollar value if it is prudent to do so, unless otherwise prohibited by the gift instrument. Institutions must keep a record of all notices sent to donors. *See* N-PCL § 553(f).

Donor notice is not required in three circumstances:

- The gift instrument already permits spending below historic dollar value;
- The gift instrument expressly limits spending in the manner set forth in § 553(b) of the Act; or
- The donor made the gift in response to an institutional solicitation but did not include a separate statement restricting use of the funds.

N-PCL § 553(e)(2).

Delegation of Management and Investment Functions to Outside Agents (N-PCL § 554)

NYPMIFA sets forth legal standards that govern the delegation of management and investment functions by boards of directors to agents outside of the institution (external agents). The Act requires that boards use prudence in selecting, continuing or terminating an agent, and that they consider, among other things, the agent's independence including any conflicts of interest that such agent has or may have.

Standard of Care for Delegation

The Act provides that, subject to any specific limitation set forth in a gift instrument or another law, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that such a delegation is prudent under the circumstances. In order to delegate prudently, an institution must act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances in:

- (1) selecting, continuing or terminating an agent, including assessing the agent's independence including any conflicts of interest such agent has or may have;
- (2) establishing the scope and terms of the delegation, including the payment of compensation, consistent with the purposes of the institution and the institutional fund; and

- (3) monitoring the agent's performance and compliance with the scope and terms of the delegation.

N-PCL § 554(a)(1)-(3).

Standard of Care for External Agent Performing Delegated Duties

In performing a delegated function, an external agent owes a duty to the institution to exercise reasonable care, skill and caution to comply with the scope and terms of the delegation. N-PCL § 554(b). The Act continues to require that any contract that delegates a management or investment function to an external agent must provide that the contract may be terminated at any time, without penalty, with up to 60 days prior notice. N-PCL § 554(e).

Release of Donor-Imposed Restrictions on Management, Investment, or Purpose of an Institutional Fund (N-PCL § 555)

The Act modifies the standards for releasing donor-imposed restrictions on institutional funds, including restrictions on the management and investment of funds, the expenditure of funds (endowment restrictions), and the purposes for which a fund may be used. It also sets forth procedures for seeking court release of restrictions, and a new procedure for releasing restrictions on funds valued at less than \$100,000 that have been in existence for more than 20 years.

As under prior law, an institution may obtain the donor's written consent to release or modify a restriction on management or investment. If the donor is available and withholds such consent, or if the donor is not available, an institution may seek court approval to release or modify a restriction regarding the management or investment of an institutional fund if the restriction is impracticable or wasteful, impairs management or investment or if, because of circumstances not anticipated by the donor, a modification or release would further the purposes of the fund. To the extent practicable, any modification must be made in accordance with the donor's probable intention. N-PCL § 555(a), (b).

Similarly, an institution may obtain the donor's written consent to release or modify a use restriction. If the donor is available and withholds such consent, or if the donor is not available, an institution may also seek court approval to release a donor's restriction on the use of a fund if the restriction becomes impossible, impracticable, unlawful or wasteful. N-PCL § 555(c).

A key difference from prior law is that under NYPMIFA an institution may seek court release from a restriction if the donor does not consent to the release. Notice of the court proceeding must be provided to the donor and to the Attorney General, both of whom will have an opportunity to be heard. N-PCL § 555(b), (c). However, under the Act, the executors or heirs of a deceased donor are not included in the definition of "donor" and thus are not entitled to notice.

In addition, the Act provides a new procedure whereby an institution may lift or modify a donor-imposed restriction on the management, investment, or purpose of an institutional fund if the fund is less than \$100,000 in value and has been in existence for more than 20 years. If an institution determines that such a restriction is unlawful, impracticable, impossible to achieve, or wasteful, the institution may release or modify the restriction, in whole or part, without court

approval, after giving written notice to the Attorney General, unless the Attorney General objects to the release or modification within 90 days. If the Attorney General does not notify the institution within 90 days, the institution may proceed with the release or modification. N-PCL § 555(d).

The institution's written notice to the Attorney General must contain the following:

- An explanation of (i) the institution's determination that the restriction is unlawful, impracticable, impossible to achieve, or wasteful, and (ii) the proposed release or modification;
- A copy of a record of the institution approving the release or modification; and
- A statement of the proposed use of the institutional fund after such release or modification.

N-PCL § 555(d)(2), (3).

The notice must also be given to the donor, if available.³

After releasing or modifying the restriction, the institution must use the property in a manner consistent with the purposes expressed in the gift instrument. N-PCL § 555(d)(1)(C).

Solicitations for Endowment Funds (Executive Law § 174-b[2])

The Act also amends Executive Law § 174-b[2] to require a disclosure when institutions solicit for endowment funds. Under the new provision, the solicitation must include a statement that, unless otherwise restricted by the gift instrument pursuant to N-PCL § 553(b), the institution may expend so much of the endowment fund as it deems prudent after considering the factors set forth N-PCL § 553(a).⁴

³ Although the Act provides that notice to the donor need not be given for funds described in N-PCL § 553(e)(2)(B), this appears to be a drafting error. The intended reference may have been to § 553(e)(2)(C), where the gift consists of funds received as a result of an institutional solicitation without a separate statement by the donor expressing a restriction on the use of funds. Absent clarification by the Legislature, it is the view of this Office that notice pursuant to N-PCL § 555(d) should be given to any donor that is available.

⁴ L.2010 ch.490 §14 (amending Executive Law § 174-b[2]).

GUIDANCE

In the following sections, we provide practical guidance for institutions on key topics covered by the Act. This guidance is subject to change and may be supplemented from time to time. The views expressed here are those of the Attorney General's Charities Bureau; the meaning and effect of the provisions of the Act are ultimately matters for determination by the Courts of this State.

Notice to Donors of Endowment Funds

Is notice to donors required?

The Act states that unless an exception applies, an institution “must” provide 90 days notice to available endowment donors who executed gift instruments prior to September 17, 2010 before applying the new endowment spending rules in N-PCL § 553(a) for the first time. The notice requirement as written is not optional; the institution must send the notice before appropriating from the endowment fund. (The three exceptions to the notice requirement are described on page 5 above.)

It is possible that in the interim between September 17, 2010 and the issuance of this guidance some institutions, acting in good faith, may have appropriated from endowment funds before sending notice to the donors as required by N-PCL § 553(e)(1). In this case, the institution should promptly send the notice to donors if it has not already done so. If the donor responds by checking Box #2 on the notice, it is the view of this Office that the institution must restore the fund to its historic dollar value if any pre-notice appropriation reduced the fund below that level. (The rules that apply when the donor checks Box #2 are discussed below.)

Questions have been asked about whether notice is required if the endowment fund is above historic dollar value and the institution has no present intention to appropriate below historic dollar value. It is the view of this Office that notice is required. The Act makes no distinction between funds that are above historic dollar value or below; the notice is required in either case. If notice were not required while the fund is above historic dollar value, institutions could delay sending the notice, perhaps indefinitely, which is not, in our view, what the Legislature intended.

Read in the context of N-PCL § 553 as a whole, the notice serves two related but distinct policy objectives: (1) to provide the donor with *information* about the change in law with regard to an institution's authority to appropriate for expenditure below the historic dollar value of endowment funds, and (2) to give the donor an *opportunity to clarify or amend* the terms of the donor's gift with regard to such appropriations. The informational purpose of the notice is not served if the notice is not given. Furthermore, although a particular endowment fund may be “above water” now, the fund may drop below historic dollar value at some point in the future when the donor may no longer be available to clarify or amend the terms of the gift. Delaying the notice or withholding it altogether would deprive the donor of the statutorily-mandated opportunity to clarify or amend the terms of the gift with regard to appropriations below historic dollar value. For these reasons, it is this Office's view that institutions are required to send the

notice to all available donors of endowment gifts who executed the gift instrument before September 17, 2010, unless a statutory exception applies.

May an institution appropriate from an endowment fund during the 90-day period after notice is sent?

Although not expressly addressed in the Act, it is this Office's view that the Legislature did not intend the notice requirement to harm organizations by prohibiting any appropriation of endowment funds before the notice process is completed. A reasoned interpretation of the notice requirement is that, after notice is sent, an institution may appropriate the income and the net appreciation over historic dollar value of an endowment fund during the 90-day notice period, if it is prudent to do so in accordance with N-PCL § 553(a). Expenditures above historic dollar value after giving notice to the donor would not prejudice donors who may check Box #2 because principal would remain preserved during the 90-day notice period. An institution may not, however, appropriate for expenditure below the historic dollar value of an endowment fund until the 90-day notice period ends, unless the donor has returned the notice and checked Box #1.

What rules apply to the endowment fund if the donor checks Box #1 on the notice?

If the donor checks Box #1, all decisions to appropriate and spend endowment funds, as well as decisions to accumulate and not spend those funds, are governed by N-PCL § 553(a). The historic dollar value limitation on endowment appropriations that existed under prior law no longer applies.

What rules apply to the endowment fund if the donor checks Box #2 on the notice?

If the donor checks Box #2, the institution may not appropriate below the historic dollar value of the endowment fund without first obtaining court approval on notice to the Attorney General and the donor, if available. The institution may spend the income and appropriate the appreciation over the historic dollar value of the fund if it is prudent to do so. As under prior law, the historic dollar value of a "Box #2" endowment fund and the amount, if any, of appreciation of the fund that is available for appropriation is determined on a fund-by-fund basis, not by simply aggregating the asset values of multiple endowment funds. Also, as under prior law, if an institution appropriates below the historic dollar value of such an endowment fund (for example, as a result of applying a spending policy), it is the view of this Office that the institution has a duty under N-PCL §§ 553(e)(1) and 717 to restore the endowment fund to its historic dollar value.

Questions have been raised about the effect of language in the notice stating that if Box #2 is checked "the criteria for the expenditure of endowment funds set forth in Article 5-A of the Not-for-Profit Corporation Law (The Prudent Management of Institutional Funds Act) will not apply to your gift." When read in the context of the overall notice provision, it is apparent that this language was intended to clarify that the statutory criteria permitting expenditures below historic dollar value do not apply when Box #2 is checked. It is this Office's view that, other than the historic dollar value limitation, Article 5-A continues to apply to these endowment funds. Thus, for example, if the donor checks Box #2, the governing board must still determine that any appropriation from the endowment fund is prudent after considering the factors enumerated in § 553(a), and the board must make a contemporaneous record of each determination to

appropriate from the fund. To conclude otherwise would take “Box #2” endowment funds out of the Act entirely, with no statutory standard governing appropriation and accumulation of funds, which is a result the Legislature could not have intended.

While the Act requires that the notice to donors contain language substantially as set forth in N-PCL § 553(e)(1), institutions may wish to add an assurance to donors that if Box #2 is checked, all decisions to appropriate from the endowment fund must still be prudent under the Act and that the endowment fund will remain subject to other provisions of the Act.

Does the term “original dollar value” in the required notice have the same meaning as “historic dollar value”?

The Act does not define “original dollar value”; however, when read in the context of the statutory notice set forth in N-PCL § 553(e)(1), it is this Office’s view that this term is intended to be a plain-English equivalent of “historic dollar value” as defined in N-PCL § 102(a)(16). That section defines “historic dollar value” as “the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund.” That section goes on to state that “[t]he determination of historic dollar value made in good faith by the corporation is conclusive.”

What steps should an institution take to determine whether a donor is “available” such that notice is required?

A donor who is an individual is “available” if the donor is living and can be identified and located with reasonable efforts. If the donor of a particular fund is not known, the institution should make reasonable efforts to identify the donor. For donors whose current address is unknown, the institution should make reasonable efforts to locate the donor, including Internet searches and contacting known associates of the donor, such as an attorney who represented the donor when the gift was made. The statute requires institutions that send the N-PCL § 553(e)(1) notice to keep a record. The record should document the institution’s efforts to locate donors even if those efforts ultimately did not succeed.

Expenditure of Endowment Funds

How does the Act modify previous concepts of endowment spending?

Traditional endowment concepts focused on preserving “principal” and spending “income.” In the 1970s, UMIFA expanded permissible spending to include a prudent amount of the appreciation of the endowment fund; this remained the law until September 17, 2010. The Act takes a different approach, reflecting the view that a prudent investment strategy requires institutions to invest their endowments and other institutional funds for “total return,” which may result in increases (or decreases) in principal, income or both. The Act thus requires institutions to determine spending based on the total assets of the endowment fund. As the drafters of UPMIFA have noted:

Although the Act does not require that a specific amount be set aside as “principal,” the Act assumes that the institution will act to preserve “principal” (i.e., to maintain the purchasing power of the amounts contributed to the fund) while spending “income” (i.e. making a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions). Thus, an institution should monitor principal in an accounting sense, identifying the original value of the fund (the historic dollar value) and the increases in value necessary to maintain the purchasing power of the fund.⁵

Must the board consider all eight factors for every endowment fund appropriation?

The Act states that the board must consider the eight factors “if relevant,” so at a minimum the board must consider each factor to determine whether or not it is relevant. As discussed below under “Contemporaneous Records,” if the board determines that any factor is not relevant, it should document how it reached that conclusion.

If a factor is relevant, the board should go on to consider to what extent the factor affects the decision whether or not to appropriate or how much to appropriate. Although the factors should be considered individually, the board should also look at the “big picture” and consider how the factors, considered together and weighted appropriately, affect the decision at hand. The nature and extent of the board’s consideration of the factors may vary from institution to institution, depending on the institution’s size, purposes, programs, financial condition and other circumstances.

May an institution make a single appropriation decision for multiple endowment funds?

In this Office’s view, the Act contemplates that decisions to appropriate from endowment funds will ordinarily be made on a fund-by-fund basis and documented in a separate contemporaneous record for each endowment fund.⁶ A question has arisen as to whether there are circumstances in which the Act would permit an institution to make a single decision to appropriate from multiple endowment funds and document that decision in a single contemporaneous record. The question is of particular interest to larger institutions holding numerous endowment funds, for example, a community fund with numerous endowment donors or an educational institution with hundreds or even thousands of endowment funds for scholarships, endowed chairs and other purposes.

In this Office’s view, the governing board of an institution may make a single decision to appropriate from multiple endowment funds, and this decision may be documented in a single contemporaneous record, provided that the endowment funds are similarly situated. The

⁵ National Conference of Commissioners on Uniform State Laws, Uniform Prudent Management of Institutional Funds Act (2006), available at http://www.law.upenn.edu/bll/archives/ulc/umoifa/2006final_act.pdf (“UPMIFA”) § 4, Comment at p. 21.

⁶ This is evidenced by N-PCL § 553’s consistent use of the defined terms “donor,” “endowment fund” and “gift instrument,” each of which is phrased in the singular. See also the definitions of these terms in N-PCL § 551(a-1), (b) and (c).

governing board should develop written procedures for determining when a group of funds is similarly situated for this purpose. Such a determination may be based on factors including the purposes of the funds as stated in the gift instruments, the spending restrictions imposed in the gift instruments, the durations of the funds, the financial condition of the funds, whether the funds are invested similarly, and such other factors as may be relevant under the circumstances.

A decision to treat a group of endowment funds as similarly situated group should be made with care to ensure that any decision to appropriate from the funds collectively would be justified if the factors in N-PCL § 553(a) were applied to each fund individually.

What is meant by “alternatives to expenditure of the endowment fund,” and how should institutions give consideration to that factor?

As noted above, N-PCL § 553(a) requires that, in making a determination to appropriate or accumulate from an endowment fund, the board must consider, if relevant, eight factors, including “(7) where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution.” In this Office’s view, the inclusion of this factor, which is unique among all states that have adopted UPMIFA, was intended to ensure that boards do not automatically decide to appropriate from endowment funds when circumstances warrant considering whether reasonable alternatives are available. For example, if an endowment fund has diminished in value, the board may determine that it is appropriate to take steps to avoid or reduce further spending of the fund. Such steps might include, where appropriate, fund-raising efforts, expense reductions, sale of non-essential assets, or reductions in non-essential staff. The board might also consider whether certain expenditures can prudently be deferred. The board should identify the particular alternatives that might be appropriate in the circumstances and discuss to what extent these steps are feasible as an alternative to endowment spending, including what impact such alternatives would have on the institution’s operations and programs. The consideration of alternatives should be appropriately documented (see “Contemporaneous Records,” below).

Contemporaneous Records of the Determination to Appropriate

What should the contemporaneous record address?

The contemporaneous record of the determination to appropriate should address each of the eight factors included in N-PCL § 553(a) and discuss the consideration that the board gave to each factor. In this Office’s view, it is not sufficient to state in a conclusory fashion that the board considered a particular factor; rather, the record should describe the substance of the consideration given to each factor. If any factor was deemed not relevant to the board’s decision, the record should explain why.

As stated above, if the governing board of an institution makes a single decision to appropriate from multiple endowment funds that are similarly situated, it is this Office’s view that the decision may be documented in one contemporaneous record.

How should the contemporaneous records be documented?

The form of the record is less important than the substance. The record may be made in the board's minutes; alternatively, boards may wish to develop a record especially for the purpose of documenting their decisions to appropriate endowment funds for expenditure. Contemporaneous records of decisions to appropriate from endowment funds should be maintained as part of the permanent records of the institution. The Charities Bureau may request production of these records in the exercise of the Attorney General's supervisory authority over institutions.

When should contemporaneous records be prepared?

To be contemporaneous, the record should be prepared at the time the board makes a decision to appropriate from an endowment or immediately thereafter. If the board relies on advice and information from professionals (such as lawyers, accountants or investment advisors) when it decides to appropriate endowment funds for expenditure, it may (but is not required to) incorporate all or part of such written advice in its contemporaneous record, to the extent such advice is not privileged, confidential or proprietary.

Presumption of Imprudence

Does the presumption of imprudence mean that an institution can safely appropriate up to 7% of the value of its endowment funds each year?

The Act makes it clear that an appropriation of 7% or less of the value of an endowment fund in any year does not create a presumption of prudence. The level of appropriation for each endowment fund held by an institution must be determined in accordance with the prudence standard in N-PCL § 553(a) of the Act, after consideration of the enumerated factors.

Does an endowment spending policy of 7% or less per year in itself ensure that the presumption of imprudence will not be triggered?

No. The Act's 7% standard is based on the endowment fund's fair market value averaged over at least *five years* immediately preceding the year in which the appropriation for expenditure is made (or over the life of the fund if the fund has been in existence less than five years). If, for example, an institution's spending policy is based on fair market value averaged over a shorter period, the spending policy may result in appropriations that are presumptively imprudent under the Act. All spending policies should be reviewed to determine how they interact with the presumption of imprudence. If necessary, institutions must perform a separate calculation, averaging the fund's fair market value over at least the preceding five years, in order to determine whether a proposed appropriation would be presumptively imprudent.

Managing and Investing Institutional Funds

What topics should the investment policy address?

There is no “one size fits all” investment policy that applies to all institutions. The contents of the investment policy will depend on factors including the extent of the financial resources of the institution, the types of investments it holds, the charitable purposes of the institution, and nature and scope of the institution’s activities or programs. Examples of the subjects an investment policy may include:

- (1) general investment objectives;
- (2) permitted and prohibited investments;
- (3) acceptable levels of risk;
- (4) asset allocation and diversification;
- (5) procedures for monitoring investment performance;
- (6) scope and terms of delegation of investment management functions;
- (7) the investment manager’s accountability;
- (8) procedures for selecting and evaluating external agents;
- (9) processes for reviewing investment policies and strategies; and
- (10) proxy voting.

The board should review the investment policy at regular intervals and whenever a change in the institution’s financial condition or other circumstances so require.

Delegation of Management and Investment Functions to Outside Agents

What steps should a board take to assess an outside investment agent’s independence?

Governing boards should be diligent in assessing the independence of outside investment agents – both before and after retaining them. Outside investment agents should be selected based on the agent’s competence, experience, past performance, and proposed compensation, and not on any business or personal relationships between the agent and board members or other insiders. It is essential that board members are capable of objectively assessing and monitoring investment performance and risk without regard to those relationships.

Before retaining an agent, the governing board should consider whether any business or personal relationships would reasonably be expected to interfere with the ability of the board to provide proper oversight. For example, assume a chairman of the board asks the board to transfer management of institutional funds to his private investment firm. The board must decide whether it is prudent to do so under the circumstances, and whether it feels it can objectively oversee and monitor the agent’s performance going forward. The governing board should also consider whether the retention of outside agents who have business or personal relationships with board members or other insiders might prevent the board from receiving independent advice on investment strategy and risk. For example, assume the board chair wishes to switch investments to his firm, in part to invest in derivative products developed by his firm. Can the board of directors, based on advice it receives from investment advisors employed by the board chair’s firm,

determine in good faith that such an investment strategy is in the best interests of the organization?

To avoid these situations and alleviate the pressure that board members may experience, some boards may determine that the best course of action is to adopt a policy requiring that all outside agents be independent. Although not required by the Act, it is this Office's view that institutions are well-advised to adopt policies that require full disclosure of relationships with outside agents and implement practices that ensure objective oversight by the board. At a minimum, an institution should have a conflict of interest policy and follow the policy in selecting, continuing or terminating the agent. Such a policy would generally include procedures for determining whether any of the institution's officers or directors have a substantial financial interest in the agent or have any other material business or personal relationship with the agent. If so, the policy should provide for reporting such relationships or interests to the board and should address abstention or recusal of the director or officer in question.

Release of Donor-Imposed Restrictions

What should an institution do before seeking court release of a donor-imposed restriction on an institutional fund?

Because a court proceeding can be expensive and time-consuming, an institution may first wish to inquire whether the donor is available and willing to consent in writing to the proposed release or modification in accordance with N-PCL § 555(a). The donor's written consent would obviate the need for court approval.

If it is necessary to seek court release or modification of a donor-imposed restriction, when should the institution contact the Attorney General's Office?

Although not required by law, we urge institutions and their counsel to submit a draft petition to the Attorney General's Charities Bureau for review and discussion before filing the petition with the court. A copy of the gift instrument and other relevant documentation should also be submitted in advance. Advance review by the Charities Bureau can help to identify and resolve potential issues, thus simplifying the proceeding and saving time. Petitions should be submitted to the Charities Bureau at the earliest possible time to allow sufficient time for review. Please confirm that the Charities Bureau's review has been completed before commencing a proceeding in court.

What procedures apply when submitting a notice to the Attorney General under N-PCL § 555(d) to release or modify a restriction on a "small, old" fund?

The institution should first determine whether the donor, if available, will consent to the release, thus avoiding the need to submit a notice to the Attorney General. If the donor is not available or is unwilling to consent, then the institution must comply with § 555(d) in order to release the restriction. First, the institution must make a record (typically, a resolution of the board) approving the release or modification of the restriction. A copy of this record must be submitted to the Attorney General's Charities Bureau together with a written notice of the

institution's intention to release the restriction and explaining why the restriction has become unlawful, impracticable, impossible to achieve, or wasteful. The notice must also describe the proposed use of the fund if the restriction is released.

In addition to meeting the above statutory requirements, the notice to the Attorney General's Charities Bureau should include a copy of the gift instrument and other documentary evidence sufficient to show that the fund's total value is less than \$100,000 and that more than 20 years have elapsed since the fund was established. Additionally, if the donor is available, and particularly if the donor has withheld consent, the notice should include copies of any correspondence between the institution and the donor with regard to the proposed release or modification. If the donor has been notified pursuant to N-PCL § 555(d)(4), a copy of this notice should be included in the notice sent to the Attorney General.

Notices to the Attorney General pursuant to N-PCL § 555(d) should be sent as follows:

If sent by e-mail with PDF attachment (preferred method), to:
section555notice@ag.ny.gov

If sent by regular mail, to:
Attorney General of the State of New York
Attention: Chief, Charities Bureau
28 Liberty Street
New York, NY 10005

What procedures apply after the § 555(d) notice is submitted to the Charities Bureau?

If the Charities Bureau has questions or requires further information, or if the Charities Bureau objects to the proposed release or modification, the Charities Bureau will notify the institution in writing within 90 days. If such notice is received, the institution should not release or modify the restriction unless and until it receives a further written notice from the Charities Bureau stating that any questions or objections have been resolved to the satisfaction of the Attorney General. We anticipate that many such issues will be resolved after discussions with the institution or its counsel.

CONCLUSION

For further information, please contact the Attorney General's Charities Bureau at the address shown above.

This and other Charities Bureau booklets, forms and instructions are available on the Attorney General's website at http://www.charitiesnys.com/guides_advice_new.html.

March 2011

Section VIII.

Procedures for Forming and Changing a New York Not-For-Profit Corporation



PROCEDURES FOR FORMING AND CHANGING A NEW YORK NOT-FOR-PROFIT CORPORATION

**Office of the NYS Attorney General
Charities Bureau
www.charitiesnys.com**

**Guidance Document 2015-2, V. 1.0
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Introduction

This booklet was prepared to provide guidance to individuals, organizations and attorneys in forming a new Not-for-Profit Corporation in New York or amending the Certificate of Incorporation of an existing corporation. The information in this booklet reflects changes to the Not-for-Profit Corporation Law that were enacted when the Legislature passed the Nonprofit Revitalization Act of 2013. This guidance and other information of interest to not-for-profit corporations may be found on the Attorney General's Internet site: <http://www.charitiesnys.com>.

This guidance is not intended to be a substitute for legal advice. If you have questions about forming a not-for-profit corporation or amending the certificate of an existing not-for-profit corporation, you should consult your attorney.

I. HOW TO INCORPORATE AS A NEW YORK STATE NOT-FOR-PROFIT CORPORATION

The Not-for-Profit Corporation Law ("N-PCL") sets forth the procedures for forming not-for-profit corporations in New York State. This guidance summarizes the steps to follow to incorporate.

The New York State Department of State is the agency that determines whether a Certificate of Incorporation is acceptable for filing. Therefore, you may also wish to consult the Department of State's website - <http://www.dos.ny.gov> - which contains information to assist you, including Frequently Asked Questions which are posted at <http://www.dos.ny.gov/corps/nfpfaq.asp>.

A. Drafting a Certificate of Incorporation

Following is information to assist you in drafting of a Certificate of Incorporation of a not-for-profit corporation.

Quick Statutory Reference Guide	
Contents of Certificate of Incorporation	N-PCL § 402

1. Name of the Corporation

Article 3 of the N-PCL contains provisions concerning corporate names. In selecting a name for a corporation, remember that unless the corporation is formed for charitable or religious purposes or purposes requiring approval from the Department of Social Services or the Public Health Council or is a bar association, it must contain the word CORPORATION, INCORPORATED OR LIMITED, or an abbreviation of one of those words. In the case of a foreign corporation seeking authority to do business in New York, one of these words or its abbreviation must be added to its name.

Quick Statutory Reference Guide

Corporate Name	N-PCL § 301(a)(1)
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Except under the special circumstances described in the N-PCL, the name of a not-for-profit corporation may not contain any of the following words or phrases, or any abbreviations or derivatives of them:

Acceptance	Doctor	Insurance	State Police
Annuity	Endowment	Investment	State Trooper
Assurance	Fidelity	Lawyer	Surety
Bank	Finance	Loan	Title
Bond	Guaranty	Mortgage	Trust
Casualty	Indemnity	Savings	Underwriter

Quick Statutory Reference Guide

Corporate Name	N-PCL §§ 301(a)(5)(A) & (B)
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Note: Consult N-PCL § 301 for additional restrictions concerning names of not-for-profit corporations.

To be sure that the corporate name you choose is available for use, contact the New York State Department of State, Division of Corporations in writing and make a request for the availability of the name(s) you want to use. Enclose a check, money order for \$5.00 payable to the Department of State or Credit Card Authorization Form, (available at <http://www.dos.ny.gov/forms/corporations/1515-f-l.pdf>) and send the request to:

New York State Department of State
Division of Corporations
One Commerce Plaza
99 Washington Street
Albany, NY 12231-0001

You may also reserve an available corporate name for 60 days by submitting an Application for Reservation of Name and the appropriate filing fee¹ to the Department of State Division of Corporations. The form for reserving a name is available at <http://www.dos.ny.gov/forms/corporations/0635-f-l.pdf>. A reservation can be extended for up to an additional two 60-day periods by filing an extension request with an additional fee.

Quick Statutory Reference Guide

Reservation of name	N-PCL § 303
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¹ Consult N-PCL § 104-A for the appropriate filing fee.

If the corporate name contains a proper name, such as “Friends of ABC University” or “Mary Smith Foundation,” you should be aware that section 174-d of the Executive Law makes it a misdemeanor to use anyone’s name (including an organization’s name) to raise funds without receiving prior written permission.

2. Purposes for Which a New York Not-for-Profit Corporation May be Formed

Pursuant to the N-PCL, a not-for-profit corporation is either charitable or non-charitable. See “Contents of a Certificate of Incorporation” below for further explanation of these purposes.

Quick Statutory Reference Guide	
Definition of Charitable	N-PCL §§ 102(a)(3-a) and (3-b)
Definition of Non-charitable	N-PCL § 102(a)(9-a)
Purposes of a Corporation	N-PCL § 201

3. Contents of a Certificate of Incorporation

The Certificate of Incorporation must include the following:

- a. The name of the corporation.
- b. A statement that the corporation is a corporation as defined in section 102(a)(5) of the Not-for-Profit Corporation Law.
- c. A statement as to whether the corporation is charitable or non-charitable.
- d. The purposes for which it is formed. The corporation may state that is formed for one of the purposes set forth in the N-PCL as:
 - i. Charitable, defined in the N-PCL as “charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.”
 - or
 - ii. Non- Charitable, defined in the N-PCL as “other than a charitable corporation, including but not limited to one formed for any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, or animal husbandry, or for the purpose of operating a professional, commercial, industrial, trade or service association.

However, an organization may decide that a fuller explanation of an organization’s purposes may be appropriate because, for example, agencies whose approval of the certificate or foundations and governmental funding agencies may require such

information. Also, members of the public considering contributing to the corporation may look to the certificate for the organization's purposes.

- e. The county in New York in which the corporation will be located.
- f. The names and addresses of the initial directors.
- g. The duration of the corporation if the duration is not perpetual.
- h. A designation of the Secretary of State as the agent for service of process and the address in New York or elsewhere to which a copy of any process should be sent.
- i. If the corporation has a registered agent for service of process, the name and address in New York of that agent and a statement that the registered agent is the agent to whom process may be served.
- j. If the corporation is a "Special Not-for-Profit Corporation" as described in Article 14 of the N-PCL, the certificate must include any additional statements required by that article.²
- k. If the certificate is for an existing unincorporated association or group, an affidavit of the certificate's subscribers must be attached stating that they are the majority of a committee authorized to incorporate the association or group.
- l. If the corporation does not require approval or consent of any organization or governmental agency pursuant to section 404 of the N-PCL, the certificate must include a statement to that effect.

The certificate may also include additional provisions concerning its internal operations, such as classes of members, quorum requirements, and the date of the annual meeting. In addition it may include language required by other statutes or agencies. Most notably, the Internal Revenue Service requires that certain statements be included in the certificate if a corporation is seeking tax exemption. The language suggested by the IRS is posted at [http://www.irs.gov/Charities-&-Non-Profits/Suggested-Language-for-Corporations-and-Associations-\(per-Publication-557\)](http://www.irs.gov/Charities-&-Non-Profits/Suggested-Language-for-Corporations-and-Associations-(per-Publication-557)). If the IRS language is added, the Department of State requires that it be preceded by the following:

"The following language relates to the corporation's tax exempt status and is not a statement of purposes and powers. Consequently, this language does not expand or alter the corporation's purposes or powers set forth in paragraph number XX."

If the organization wants to be exempt from taxation, it must apply to the Internal Revenue Service (IRS). Information and forms for applying to the IRS for tax exemption are

² See Article 14 of the N-PCL for the types of organizations designated as Special Not-for-Profit Corporations.

posted at [http://www.irs.gov/uac/Form-1023,-Application-for-Recognition-of-Exemption-Under-Section-501\(c\)\(3\)-of-the-Internal-Revenue-Code](http://www.irs.gov/uac/Form-1023,-Application-for-Recognition-of-Exemption-Under-Section-501(c)(3)-of-the-Internal-Revenue-Code). Questions about applying for federal and state income tax exemption and exemption from state sales and other taxes should be directed to the taxing authorities. The website of the IRS is www.irs.gov and the website of the NY State Department of Taxation and Finance is www.tax.ny.gov.

If consent or approval of an agency or officer is required, a copy of such consent(s) or approval(s) must be attached to the certificate (See section B “Required Approvals from Agencies and Officers” below). If no approvals or consents are required, the certificate must contain a statement that corporation’s purposes and powers do not include any for which consent or approval is required pursuant to section 404 of the N-PCL (*see* sub-paragraph I above).

A sample Certificate of Incorporate is posted on the Department of State’s website at <http://www.dos.ny.gov/forms/corporations/1511-f-1.pdf>.

Quick Statutory Reference Guide	
Contents of Certificate of Incorporation	N-PCL § 402
Corporate Name	N-PCL § 402(a)(1)
Corporate Purposes	N-PCL § 402(a)(2-a)
Location (County) of the Corporation	N-PCL § 402(a)(3)
Names and Addresses of Initial Directors	N-PCL § 402(a)(4)
Duration of the Corporation	N-PCL § 402(a)(5)
Designation of the Secretary of State as Agent for Service	N-PCL § 402(a)(6)
Designation of Registered Agent for Service	N-PCL § 402(a)(7)
Special Not-for-Profit Corporations	N-PCL §§ 402 (a)(8) & 1401 - 1412
Certificates for formerly unincorporated associations	N-PCL § 402(b)
Additional Language Pursuant to Other Laws	N-PCL § 402(c)
Approvals, Notices and Consents	N-PCL § 404
Statement that no Approval of Consent Required	N-PCL §§ 402(a)(2-b) & 404

B. Required Approvals from and Notices to Agencies and Officers

Depending on the purpose of an organization, it may be required to get the approval of its Certificate of Incorporation from a particular agency or organization or it may be required to provide a particular agency or organization with a certified copy of the Certificate of Incorporation after the Certificate is filed with the Secretary of State. If an approval is required, the approval must be attached to the original Certificate of Incorporation. Following is a partial list of the agencies that must approve Certificates of Incorporation before they are filed with the Department of State and/or receive certified copies of filed Certificates of Incorporation. For a complete list of the agencies and organizations from which approvals must be secured or to which copies of the Certificate must be sent, N-PCL sections 404 (a) – (w) should be consulted. If you have a question concerning such approval, please contact the organization or agency from which approval is required.

Type of Corporation	Agency Required to Approve or Receive a Copy of Filed Certificate	N-PCL Section
Trade or Business Association	Approval required from: Office of the Attorney General Antitrust Bureau 28 Liberty Street New York, NY 10005 (212) 416-8262 Antitrust.bureau@ag.ny.gov	N-PCL § 404(a)
Corporations whose purposes include care of destitute, delinquent, abandoned, neglected or dependent children; establishment or operation of any adult care facility, or the establishment or operation of a residential program for victims of domestic violence, or placing-out or boarding-out of children or a home or shelter for unmarried mothers, or the solicitation of contributions for those purposes.	Approval required from: Office of Children & Family Services 52 Washington Street Rensselaer, NY 12144 http://ocfs.ny.gov/main/ (518) 473-7793 Inquiries to OCFS may be sent by email to info@ocfs.ny.gov	N-PCL § 404(b)(1)
Corporations whose purposes include the establishment or operation of a child day care center.	Certified copy of filed Certificate must be sent to: Office of Children & Family Services 52 Washington Street Rensselaer, NY 12144 http://ocfs.ny.gov/main/ (518) 473-7793 Inquiries to OCFS may be sent by email to info@ocfs.ny.gov	N-PCL § 404(b)(2)
A school, college, university or other entity providing post-secondary education; a library; or a museum or historical society	Approval required from: Department of Education Office of Counsel State Education Building - Room 148 Albany, NY 12234 Questions may be sent to legal@mail.nysed.gov	N-PCL § 404(d)
Any corporation whose purposes include a purpose for which a corporation might be chartered by the regents of the university of the State of New York.	Certified copy of filed Certificate must be sent to: Department of Education Office of Counsel State Education Building - Room 148 Albany, NY 12234 Questions may be sent to legal@mail.nysed.gov	N-PCL § 404(d)
A Hospital	Commissioner of Health www.health.ny.gov/commissioner (518) 471-2011 Commissioner of Insurance Public Health and Planning Council	N-PCL §§ 404(c) & (o)
A Substance Abuse Program	Office of Alcoholism and Substance Abuse Services 1450 Western Avenue Albany, NY 12203-3526 (518) 473-3460 communications@oasas.ny.gov	N-PCL § 404(u)

Quick Statutory Reference Guide

Approvals, notices and consents

N-PCL §§ 404 (a) through (v)

C. Filing the Certificate of Incorporation

Completed certificates of incorporation of charitable corporations, with any approvals required by N-PCL § 404, must be submitted to the New York State Department of State but do not need to be reviewed by the Attorney General.

Certificates of Incorporation for most non-charitable corporations may also be filed directly with the New York State Department of State without review by the Attorney General.

However, as noted in section B above, “Required Approvals from Agencies and Officers,” approval of the Office of the Attorney General is required for certificates of incorporation of trade and business associations. The original and one copy of such certificate (with a self-addressed envelope) should be sent to:

New York State Attorney General
Antitrust Bureau
28 Liberty Street
New York, New York 10005

After reviewing the certificate, the Office of the Attorney General will return the original certificate with its consent to the filing of the certificate or advise you as to why consent is not being given. When approved, the certificate must then be submitted to the New York State Department of State, Division of Corporations.

Completed certificates, with any required approvals and the necessary filing fee³ (check, money order or Credit Card Authorization Form) made payable to the Department of State should be sent to:

NYS Department of State
Division of Corporations, State Records and Uniform Commercial Code
One Commerce Plaza
99 Washington Ave. Albany, NY 12231
Albany, New York 12231
Fax (518) 474-1418

When a Certificate of Incorporation is accepted for filing by the Department of State, the organization’s corporate existence begins. The Department of State will issue an official filing receipt that contains the filing date, which is also the date of incorporation. By paying the required fee, you may request plain or certified copies of a filed Certificate of Incorporation. The required fees are posted at http://www.dos.ny.gov/corps/faq_copies.page.asp.

³ Consult N-PCL § 104-A for the appropriate filing fee.

II. REGISTRATION REQUIREMENTS - REGISTRATION WITH THE ATTORNEY GENERAL

Most organizations that hold property of any kind in New York for charitable purposes are required to register with the Attorney General's Charities Bureau pursuant to section 8-1.4 of the Estates, Powers and Trusts Law. Most organizations that solicit charitable contributions from members of the public, foundations and other organizations and governmental agencies in New York State are required to register with the Attorney General's Charities Bureau pursuant to Article 7-A of the Executive Law. Organizations that hold property and solicit contributions in New York fall within the requirements of both laws, but only one registration is required.

The full text of both statutes as well as a summary of the registration and reporting requirements may be found on the Attorney General's Internet site at www.charitiesnys.com. Also posted on that site are the categories of organizations that are exempt from registration.

Organizations that plan to solicit contributions must register prior to beginning such solicitation. Organizations that hold property in New York for charitable purposes must register within six months of receiving such property.

Questions concerning registration should be sent to charities.bureau@ag.ny.gov.

III. AMENDMENTS, RESTATED CERTIFICATES AND APPLICATIONS FOR AUTHORITY

Prior to the enactment of the Nonprofit Revitalization Act of 2013 ("the NPRA"), New York not-for-profit corporations were classified in one of four Types – A, B, C and D. Pursuant to the NPRA, and effective on July 1, 2014, New York not-for-profit corporations are classified either as charitable or non-charitable. The NPRA provides the following concerning New York not-for-profit corporations formed before July 1, 2014:

- Type A corporations are deemed to be non-charitable corporations.
- Type B and C corporations are deemed to be charitable corporations.
- Type D corporations with charitable purposes are deemed to be charitable
- Type D corporations with non-charitable purposes are deemed to be non-charitable

Since corporations seeking to amend or restate their certificates may have been formed prior to July 1, 2014, reference to the former corporate types is included in this guidance.

Quick Statutory Reference Guide	
Definition of Charitable	N-PCL §§ 102(a)(3-a) and (3-b)
Definition of Non-charitable	N-PCL § 102(a)(9-a)
Purposes of a Corporation	N-PCL § 201

A. Amendments and Restated Certificates

Pursuant to Article 8 of the N-PCL, a New York Not-for-Profit Corporation may amend its Certificate of Incorporation to:

1. Change its corporate name;
2. Change, add or limit its purposes;
3. Strike out, change or add any provision that is not inconsistent with the N-PCL or any other applicable law or the rights of its members, officers or directors;
4. Extend its duration or revive its existence if its original period of duration has expired;
5. Specify, change or revoke the voting rights of its directors or members;
6. State or change the corporation's location;
7. State or change the address to which the Secretary of State must send a copy of any process served on the Secretary;
8. Designate, change or revoke the designation of a registered agent; or
9. Authorize the issuance of capital certificates and fix their value and terms and the rights and privileges of their holders.

Pursuant to Article 8 of the N-PCL, a New York Not-for-Profit Corporation may re-state its Certificate of Incorporation to:

1. Restate in a single certificate the text of its Certificate of Incorporation without making any amendment or change, except that it may include any amendments or changes which may be authorized by its board without a vote of its members, or
2. Restate in a single certificate the text of its Certificate of Incorporation as amended to include any amendments or changes authorized by the N-PCL.

A restated Certificate of Incorporation must be entitled "Restated Certificate of Incorporation of (Name of Corporation) under section 805 of the Not-for-Profit Corporation Law" and must include:

1. The name of the corporation and, if it has been changed, the name under which it was formed.

2. The date its Certificate of Incorporation was filed by the Department of State.
3. If the restated certificate restates the text of the Certificate of Incorporation without making any amendment or change, a statement that the text of the Certificate of Incorporation is restated without amendment or change and the restated certificate must be set forth in full.
4. If the restated certificate restates the text of the Certificate of Incorporation as amended or changed thereby, a statement that the Certificate of Incorporation is amended or changed to include one or more amendments or changes authorized by the N-PCL and specifying each amendment or change and that the text of the Certificate of Incorporation is restated as amended or changed. Also, the restated certificate must be set forth in full.
5. A statement as to the manner in which the restated certificate was authorized.

Note: Approval or consent of the Supreme Court, the Attorney General or any other governmental body or officer, or other person or body, which was required for the corporation's Certificate of Incorporation or any Certificate of Amendment is not required if the restated certificate contains no amendments and if any consent previously required was secured.

When the restated certificate is filed by the Department of State, the original Certificate of incorporation will be superseded and the restated Certificate of Incorporation, including any amendments and changes it makes, shall be the Certificate of Incorporation of the corporation.

Quick Statutory Reference Guide	
Right to Amend Certificate of Incorporation	N-PCL § 801
Restated Certificate of Incorporation	N-PCL § 805

Article 8 of the N-PCL sets forth the statutory requirements for amending a Certificate of Incorporation, including the required contents of a Certificate of Amendment. Those requirements include the following:

1. Trade Associations or Business Corporations (Type A or non-charitable)

Certificates of Amendment and Restated Certificates of trade or business associations must be approved by the New York State Attorney General's Antitrust Bureau and then submitted to the Department of State.

Type A or non-charitable corporations (other than trade or business associations) should submit their amended certificates directly to the Department of State.

Quick Statutory Reference Guide	
Approvals	N-PCL §§ 404(a) and 804

2. Type B and C, charitable Type D and Charitable Not-For-Profit Corporations

Certificates of Amendment of Type B and C, charitable Type D and Charitable Not-for-Profit Corporations seeking to amend or change their powers and/or purposes (either by adding or eliminating a power or purpose) must be reviewed and approved by the Supreme Court on notice to the Attorney General **or** by the New York State Attorney General's Charities Bureau or the office of the Attorney General designated to receive such documents. A list of the offices of the Attorney General and the counties they serve is in Appendix A.⁴

Certificates of Amendment of corporations with certain purposes must be approved by certain organizations and government agencies. Required approvals must be attached to the Certificate of Amendment. *See* "Required Approvals from Agencies and Officers" above for information concerning required approvals. The N-PCL should be consulted for a complete list of required approvals.

If a purpose or power is being added, the certificate must be accompanied by an affidavit from an officer of the corporation stating that current assets will be used for current purposes and powers and future assets will be used for purposes and powers as stated in the amended or restated certificate.

The original and one copy of the amended or restated certificate and the affidavit must be submitted to the office of the Attorney General that covers the county in which the corporation is located. A list of those offices and the counties they serve may be found in Appendix A.

Quick Statutory Reference Guide	
Approvals	N-PCL §§ 404 and 804

PLEASE NOTE: Pursuant to the NPRA, a corporation that is changing its purposes and/or powers has the option of submitting its amended or restated certificate to either the Attorney General or the Court on notice to the Attorney General for approval. The NPRA also provides that at any time, including if the Attorney General does not approve an amended certificate of incorporation or the Attorney General concludes that court review is appropriate, the corporation may apply for approval to the Supreme Court in the judicial district where the corporation's principal office is located.

After its review of the certificate, the office of the Attorney General will advise the corporation, or its attorney if the certificate was submitted by an attorney, of any additional information that is needed or if court approval is appropriate. Otherwise, the office of the Attorney General will return the original certificate with a written approval.

⁴ Changes to a certificate other than to a corporation's purposes or powers should be submitted directly to the Department of State.

A Certificate of Amendment will not be approved for a corporation that has not complied with New York's registration requirements *See* III. "REGISTRATION REQUIREMENTS - REGISTRATION WITH THE ATTORNEY GENERAL" above.

A sample Certificate of Amendment of a Certificate of Incorporation of a Not-for-Profit Corporation is posted by the Department of State at <http://www.dos.ny.gov/forms/corporations/1553-f-a.pdf>.

B. Application for Authority

Article 13 of the N-PCL requires foreign (non-New York) corporations to file an Application for Authority with New York's Secretary of State if they are planning to conduct activities in New York. The application must include:

1. The name of the foreign corporation;
2. If applicable, the fictitious name the corporation will use in New York;
3. The jurisdiction in which the corporation was formed and the date it was incorporated;
4. A statement that the corporation is a foreign corporation as defined in section 102(a)(7) the N-PCL⁵;
5. A statement that, if formed in New York, it would be, as applicable, a charitable corporation or non-charitable corporation;
6. A statement the purposes it will pursue in New York and the activities which it proposes to conduct in New York and that it is authorized to conduct those activities in the jurisdiction in which it was incorporated;
7. The county in New York in which its office is to be located;
8. A designation of the New York Secretary of State as its agent upon whom process against it may be served and the post office address in or outside New York to which the Secretary shall mail a copy of any process;
9. If the corporation will have a registered agent for service, the name and address of the agent within New York and a statement that the registered agent is to be its agent upon whom process against the corporation may be served;

⁵ N-PCL § 102(a)(7) "Foreign corporation" means a corporation formed under laws other than the statutes of this state, which, if formed under the statutes of this state, would be within the term "corporation or domestic corporation" as herein defined.

10. A statement that the foreign corporation has not, since its incorporation or since the date its authority to conduct activities in New York was last surrendered, done any act in New York, except as set forth in N-PCL § 1301(b); or instead of such statement the consent of the New York State Tax Department to the filing of the application must be attached⁶;
11. Any provision required by any governmental agency or officer or other person or body as a condition for giving the consent or approval required for the filing of an application for authority.

The Application for Authority must have attached to it:

1. A certificate from an authorized officer of the jurisdiction of its incorporation confirming that it is an existing corporation in that jurisdiction; and
2. Any consent or approval from any governmental body or officer, or other person that would be required if the corporation were formed in New York; and
3. If required, consent of the New York State Tax Department to the filing of the application.

If the application for authority includes any purpose requiring a New York corporation to provide notice of the filing of a Certificate of Incorporation to any person or entity, the corporation must send, by certified mail, return receipt requested, a certified copy of the certificate of authority to such person or entity within ten business days after the corporation receives confirmation from the Department of State that the certificate has been accepted for filing.

A sample Application for Authority is posted by the New York State Department of State at <http://www.dos.ny.gov/forms/corporations/1555-f-a.pdf>.

Quick Statutory Reference Guide	
Authorization of Foreign Corporations	N-PCL § 1301
Application for Authority; contents	N-PCL § 1304
Approvals, Notices and Consents	N-PCL § 404

⁶ See N-PCL § 1301(b) for categories of activities that are not “considered to be conducting activities” in New York.

Appendix A

Offices of the New York State Attorney General and the counties covered by each:

ALBANY -

Charities Bureau
The Capitol
Albany, NY 12224-0341
518-776-2160

Counties: Albany, Columbia, Fulton, Greene, Hamilton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington (note: Sullivan and Ulster for trusts and estates matters only)

BINGHAMTON REGIONAL OFFICE

44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-251-2770

Counties: Broome, Chemung, Chenango, Delaware, Otsego, Schuyler, Tioga and Tompkins

BUFFALO REGIONAL OFFICE

Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400

Counties: Allegheny, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming

NASSAU REGIONAL OFFICE

200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302

Counties: Nassau (note: trusts and estates matters are handled by NYC)

NEW YORK CITY

Charities Bureau
Transactions Section
28 Liberty Street
New York, NY 10005
212-416-8401

Counties: Bronx, Kings, New York, Queens and Richmond (note: NYC also handles Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester – trusts and estates matters only)

PLATTSBURGH REGIONAL OFFICE

43 Durkee Street, Suite 700
Plattsburgh, NY 12901-2958
518-562-3288

Counties: Clinton, Essex and Franklin

POUGHKEEPSIE REGIONAL OFFICE

One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900

Counties: Dutchess, Orange, Sullivan and Ulster (note: Dutchess and Orange County trusts and estates matters are handled by NYC; Sullivan and Ulster County trusts and estates matters are handled by Albany)

ROCHESTER REGIONAL OFFICE

144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430

Counties: Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates

SUFFOLK REGIONAL OFFICE

300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424

Counties: Suffolk (note: trusts and estates matters are handled by NYC)

SYRACUSE REGIONAL OFFICE

615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800

Counties: Cayuga, Cortland, Madison, Onondaga and Oswego

UTICA REGIONAL OFFICE

207 Genesee Street, Room 508
Utica, NY 13501-2812
315-864-2000

Counties: Herkimer and Oneida

WATERTOWN REGIONAL OFFICE

Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-523-6080

Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER REGIONAL OFFICE

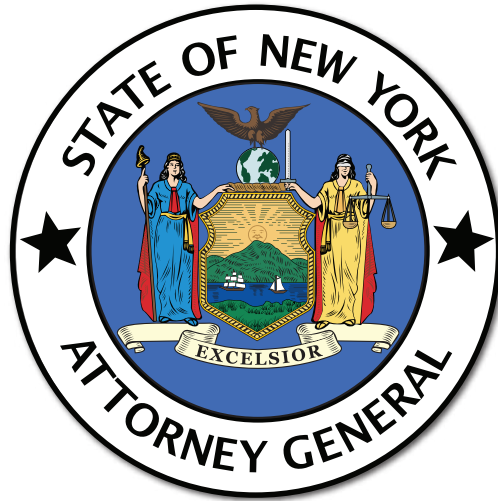
44 South Broadway
White Plains, NY 10601
914-422-8755

Counties: Putnam, Rockland and Westchester (note: trusts and estates matters are handled by NYC)

Section IX.

Sales and Dispositions of Assets of Not-for-Profit Corporations

A GUIDE TO SALES AND OTHER DISPOSITION OF ASSETS BY NOT-FOR-PROFIT CORPORATIONS



Office of the NYS Attorney General
Charities Bureau
28 Liberty Street
New York, NY 10005

(212) 416-8401

www.charitiesnys.com

**A GUIDE TO SALES AND OTHER DISPOSITION OF ASSETS
PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW §§ 510, 511 and 511-a
Attorney General
Charities Bureau
www.charitiesnys.com**

Issue date: December 2018

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**A GUIDE TO SALES AND OTHER DISPOSITION OF ASSETS
PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW §§ 510, 511 and 511-a**

INTRODUCTION

The New York State Attorney General's Charities Bureau has prepared this guidance to assist not-for-profit corporations and the attorneys who represent them when seeking approval of the Attorney General and/or the court for sales and other dispositions of their assets, including real and/or personal property, as well as intangible property such as bonds, stocks or certificates of deposit. Not-for-Profit Corporation Law ("N-PCL"). N-PCL §§ 510, 511 and 511-a. Please consult "Religious Corporations: Sales and other Disposition of Assets," posted at www.charitiesnys.com, for guidance concerning property transactions by religious corporations.

New York law governing not-for-profit corporations provides certain protections against the inappropriate transfer of assets of such corporations, including internal procedural rules for authorizing transfers. The law also provides for review by the Attorney General and/or by New York State Supreme Court for certain transactions.

Because of the important and unique role and responsibility of not-for-profit corporations in the lives of our citizens and communities, and because of their legal responsibility to safeguard their assets and provide for the interests of their members and beneficiaries, the law requires the court's or the Attorney General's approval of certain transactions by such corporations.

The procedures described in this guidance reflect amendments to the N-PCL that were included in the Nonprofit Revitalization Act of 2013 ("the Act" or "NPRA") and 2015 and 2016 amendments to the Act. The Act amended the N-PCL and sets forth procedures to be followed when transferring or mortgaging property and gives corporations the option of submitting a petition to the Attorney General OR the Supreme Court on notice to the Attorney General for approval of the transaction. As more fully described below, in an application solely to the Attorney General, the Attorney General may determine that court review of a particular application is appropriate. In such cases, the verified petition must be submitted to the court and to the Attorney General, even though court approval is sought.

This guidance is not a substitute for legal advice from an attorney but is intended to provide guidance to not-for-profit corporations that are seeking to sell or otherwise dispose of their assets and to the lawyers who represent them.

The information in this guidance is general in nature. Each transaction is governed by its own facts, and the Attorney General reviews each one on a case-by-case basis. You are encouraged to discuss the proposed transaction in advance with the Attorney General's Charities Bureau in New York City or Albany or with an Assistant Attorney General in the appropriate Regional Office of the Attorney General to which you should submit your application. A list of the offices of the Attorney General, their

contact information and the New York counties they serve is in Appendix F. If you anticipate that members or employees of the organization, members of the public served by the organization, a public agency with regulatory oversight or contractual relationships with the organization, or members of the local community may have concerns about the proposed transaction, it is prudent to advise them of the planned transaction in order to address their concerns to the extent feasible, consistent with the mission of the organization, and to document these outreach and consultation efforts.

WHAT TRANSACTIONS ARE COVERED

The sale, lease, exchange or other disposition of all or substantially all of the assets¹ of a charitable not-for-profit corporation² requires approval of the Attorney General or the court, with notice to the Attorney General, pursuant to the procedures set forth in the N-PCL. N-PCL §§ 510, 511 and 511-a. The assets may be real and/or personal property, including intangible property such as bonds, stocks or certificates of deposit. N-PCL § 510(a). Transactions by foreign charitable corporations that do business in New York are also covered. N-PCL § 103.

There is no fixed numerical or arithmetic measure of “all or substantially all.” Approval by the Attorney General or the court is required when the transaction involves a large proportion of the corporation’s total assets or when it may affect the ability of the corporation to carry out its purposes, regardless of the percentage of the corporation’s total assets that are the subject of the transaction.

Exceptions to Covered Transactions by Not-for-Corporations

Mortgages are not covered unless a component of the transaction would otherwise be covered by the N-PCL, such as when there is a conveyance or lease of the property to the lender. N-PCL §§ 510 or 511. Non-charitable not-for-profit corporations do not need Attorney General approval for their transactions. Non-charitable transactions are defined at N-PCL § 102(a)(9-a).

ROLE OF THE ATTORNEY GENERAL

The N-PCL requires not-for-profit corporations seeking to sell, exchange or otherwise dispose of all or substantially all of their assets to submit a verified petition for approval of such transaction *either* to the Attorney General or to the court on notice to the Attorney General.

Whether the petitioner decides to seek approval from the Attorney General or the court, it is advisable to make sure that the contract for the sale of the property is

¹ Throughout this guidance, the term "transaction" will also be used to refer to the sale, lease, exchange or other disposition of all or substantially all of a not-for-profit corporation's assets.

² See N-PCL §§ 102(a)(3-a) and (3-b) for the definitions of charitable corporation and charitable purposes. Corporations previously formed as Type B corporations are, effective July 1, 2014, deemed to be charitable corporations. N-PCL § 201(c).

contingent upon the approval of either the Attorney General and/or the Supreme Court. This will protect the corporation since the sale may only take place if it is approved.

When court approval is sought, the N-PCL requires that, upon filing the verified petition with the court, the Attorney General be given a minimum of 15 days' notice before a hearing on the application. N-PCL § 511. **However, the procedure preferred by the Charities Bureau and most courts is submission of a verified petition and proposed order, in draft form with tabs identifying any exhibits, to the Attorney General for review in advance of filing with the court.** This procedure enables the Attorney General to review the papers to ensure that all statutory requirements are met, all necessary documents are included as exhibits, and any concerns of the Attorney General are resolved *before* submission to the court. A sample petition to the court is attached as Appendix B, a checklist of documents needed to request approval of a transaction is attached as Appendix A, and a sample order is attached as Appendix D.

In the case of an application to the court on notice to the Attorney General, if the Attorney General has no objection to the transaction, the Attorney General's Office will provide the petitioner with a "No Objection" endorsement. Such endorsement, typically provided in a letter to the petitioner or stamped on the proposed order approving the transaction, will waive statutory service of the petition since the papers will have already been submitted to and reviewed by the Office of the Attorney General. The signed petition, which must be exactly the same as the final draft petition and include exactly the same exhibits reviewed by the Attorney General, may then be submitted to the court. However, if a hearing or other proceeding is subsequently scheduled, the petitioner must give notice of such proceeding to the Attorney General. In addition, a copy of the order, when signed by the judge, must be submitted to the Attorney General.

If the Attorney General does not approve a petition, if the Attorney General concludes that court review of the petition is appropriate, or if the corporation chooses to do so, the corporation may apply to the Supreme Court for an order approving the transaction, on notice to the Attorney General, in the judicial district where the corporation's principal office is located.

Circumstances in which the Attorney General may determine that court approval, on notice to the Attorney General, rather than administrative approval of the Attorney General is appropriate include:

- The corporation is insolvent and must proceed on notice to creditors pursuant to N-PCL § 511(c).
- The Attorney General has received complaints or objections from members, creditors of the corporation or other interested persons who are entitled to notice pursuant to N-PCL § 511(b).
- The Attorney General has objections to the transaction that have not been resolved after discussion.

- In addition, there may be circumstances when the Attorney General has no objection to a transaction but determines that review by the court is appropriate, including transactions that are unusually complex or will have an impact on the public.

STATUTORY STANDARD

Under the N-PCL's two-prong test, the court and/or the Attorney General must be satisfied that (1) that the consideration and the terms of the transaction are fair and reasonable to the corporation and (2) that the purposes of the corporation or the interests of its members will be promoted by the transaction. N-PCL §§ 511(d) and 511-a(c). These statutory standards and other statutory requirements are discussed more fully below.

THE CORPORATION'S PREPARATION FOR THE TRANSACTION

Approval of the Transaction by the Board

The board of directors or trustees must approve the transaction, and, if there are members entitled to vote (see *Approval of the Transaction by Members* below,) the board must adopt a resolution recommending the transaction. A vote of at least two-thirds of the corporation's entire board is required unless the board has 21 or more directors, in which case a vote of a majority of the entire board is sufficient. A corporation's certificate of incorporation or by-laws may provide for greater quorum or voting requirements.

The resolution must specify the terms and conditions of the proposed transaction, including the anticipated consideration to be received by the corporation, the eventual use of the proceeds of the transaction by the corporation, and a statement as to whether or not dissolution of the corporation is contemplated. N-PCL §§ 510(a)(1) and (2).

If the transaction involves a sale or transfer to a "related party,"³ the corporation must follow the procedures set forth in the N-PCL § 715, including ensuring that the transaction is in the best interest of, and fair and reasonable to, the corporation and that any officer, director or key employee who has an interest in the transaction discloses the facts of that interest.

Where an officer, director, or key employee has such an interest, the officer, director or key employee must not participate in deliberations or votes of the Board in

³ "Related party" means (i) any director, officer or key person of the corporation or any affiliate of the corporation; (ii) any relative of any director, officer or key person of the corporation or any affiliate of the corporation; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent 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 five percent. N-PCL § 102 (23).

considering or approving the action. In addition, in certain circumstances, the Board must explicitly consider reasonable alternatives to the transaction. The abstention of the officer, director, or key employee, and the consideration of reasonable alternatives to the transaction must be documented in the minutes of the Board. Corporations planning a transaction should review and assess their compliance with the requirements of the N-PCL before entering into the transaction. N-PCL § 715.

Approval of the Transaction by Members

If a corporation has members with voting rights, the membership must approve the transaction. First, the board must adopt a resolution recommending the transaction. The resolution must describe the parties to and the terms and conditions of the proposed transaction, including the consideration to be received by the corporation, an explanation as to how the proceeds will be used and a statement of whether or not dissolution of the corporation is contemplated. The board resolution must then be submitted to a vote at an annual or special meeting of members entitled to vote on it. N-PCL § 510(a)(1).

Each member and each holder of subvention certificates or bonds of the corporation, whether or not entitled to vote, is entitled to notice of the meeting. The members may approve the proposed transaction according to the terms of the board resolution, or authorize the board to modify the terms and conditions of the proposed transaction, by a two-thirds vote of the members present at the meeting, if the number of affirmative votes is at least equal to the quorum. N-PCL §§ 510(a)(1) and 613.

The quorum for a membership meeting is a majority of the members, unless the corporation's certificate of incorporation or by-laws provides for a greater or lesser quorum requirement. If the certificate of incorporation or by-laws provide for a lesser quorum, the quorum may not be less than the number entitled to cast one hundred votes or one-tenth of the total number of votes entitled to be cast, whichever is less. N-PCL § 608(a) and (b) and 615.

Voting by proxy is permitted for members of not-for-profit corporations, if the by-laws or certificate of incorporation permits proxy voting. N-PCL § 609.

PREPARING TO PETITION FOR APPROVAL OF A TRANSACTION

Fair and Reasonable Consideration: Appraisals

In preparing to petition for approval of a transaction, the corporation must determine that the proposed consideration is fair and reasonable. To do so, the corporation must secure an independent appraisal of the property that is the subject of the transaction. Although the statute does not explicitly require an appraisal, court decisions have established that fair market value can best be determined by means of an appraisal, and the court and the Attorney General will generally reject the petition if it is not supported by an appraisal. A licensed appraiser who is completely independent of both buyer and seller must do the appraisal. A real estate agent or broker involved in the sale

of the property may not do the appraisal. A real estate agent or broker “fair market assessment” of a property is NOT the same as an appraisal.

If the asset is real property, the appraisal, which should be done no more than 12 months before the date of the contract, should be based on at least three comparable sales, unless a different valuation method is more appropriate. If the transaction is not an arm’s length transaction (i.e., if it involves a sale or transfer to a director, officer, employee or other person with some connection to the corporation), the Attorney General may require two appraisals. If the proposed transaction is for the development of real property, the appraisal should be based on full FAR (floor area ratio) and evaluate any unused development rights (sometimes called “air rights”).

Fair and Reasonable Consideration: Non-cash Consideration

Any non-cash consideration to be received by the corporation in the transaction needs confirmation of value. Such confirmation may be by submission of a third party valuation or, in some instances, acceptable evidence of costs associated with the building and delivery of in-kind consideration such as a new facility. Non-cash consideration may also include, but is not limited to, anticipated future payments based on a partnership or joint venture interest. The value of any future payments, including ground lease payments, should be analyzed showing the net present value using an appropriate discount rate. Please note that anticipated future payments resulting from a joint venture or partnership arrangement are considered speculative and should not form the basis of a seller’s fair and reasonable consideration analysis.

Fair and Reasonable Consideration: Security

If the corporation is entering into a development transaction in which the purchaser or a third party plans to build and deliver real property back to the seller, adequate security and assurances need to be evidenced in the documentation. Such security and assurances can take the form of escrow arrangements, guaranties, letters of credit, performance bonds, construction timetables with default provisions and adequate remedies, as well as appropriate provision for conducting the corporation’s activities during construction.

Option Contracts

Option contracts require Attorney General or court approval at the time the option is exercised. The Charities Bureau discourages the use of option or other contingent contracts, especially if they may be exercised over a long term.

Use of Proceeds of a Transaction

The use of the proceeds must be consistent with the corporation’s purposes. Proceeds cannot be used for the personal benefit of a director, officer, employee, member or other interested party.

If the property being sold is a not-for-profit corporation's main premises and, as of the date of the sale, the corporation has not yet entered into a contract to purchase or lease new premises, the Attorney General will require, as a condition of approval, that the sale proceeds be placed in escrow to ensure that funds will be available to obtain new premises so that the corporation can continue to carry out its corporate purposes.

VERIFIED PETITION FOR ATTORNEY GENERAL OR COURT APPROVAL

The N-PCL requires that charitable not-for-profit corporations seeking to sell, lease, exchange or otherwise dispose of all or substantially all of their assets must seek approval of the Attorney General or the Supreme Court. N-PCL § 510(a)(3). A request for approval of such a transaction must be in the form of a verified petition to the Attorney General or to the Court.

Verified Petition to the Attorney General or the Court

A verified petition to the Attorney General or to the court must include the following information:

- The name of the corporation as it appears on its certificate of incorporation or an amendment. N-PCL § 511(a)(1). A copy of the certificate of incorporation and all amendments, and a certified copy of the corporation's by-laws must be attached as exhibits.
- The address of the corporation's principal location.
- The section of the law under which the corporation was incorporated. N-PCL § 511(a)(1).
- The names of the corporation's directors and principal officers, and their home addresses. N-PCL § 511(a)(2).
- A description of the corporation's activities. N-PCL § 511(a)(3).
- A description of the property that is the subject of the transaction. N-PCL § 511(a)(4). For sales, a copy of the deed must be attached as an exhibit. Include a statement as to whether the deed contains restrictions.
- A copy of the contract or lease must be attached as an exhibit. If the contract has been assigned or will be assigned prior to closing, the assignment agreement must also be attached as an exhibit.
- A statement of the fair value of the property. N-PCL § 511(a)(4). A copy of the appraisal must be attached as an exhibit.

- A statement of the amount of the corporation's debts and liabilities and how they are secured. N-PCL § 511(a)(4). In addition, a copy of the corporation's most recent annual financial report or audited financial statements must be attached as an exhibit. If the corporation does not have annual financial reports, it should prepare a current schedule, certified by its Treasurer, of all assets, liabilities, income and expenses of the corporation and attach it as an exhibit. In certain circumstances, the Attorney General may decide that financial statements certified by an independent accountant are required. If the Petition is brought before the end of the fiscal year, then a financial report to date should be included.
- The consideration to be received by the corporation. N-PCL § 511(a)(5). If the consideration is less than the appraised value of the property, include a documented explanation.
- A description of the proposed use of the consideration. N-PCL § 511(a)(5). If the corporation is purchasing or leasing new premises, a copy of the contract or lease must be attached as an exhibit. Documentation to support the payment of debts, expenses or other use of proceeds must be attached as an exhibit (evidence of debt, invoices and a closing statement.)
- A statement as to whether dissolution of the corporation is contemplated. N-PCL § 511(a)(5).
- A statement that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation, or the interests of its members, will be promoted by the transaction, and a statement of the reasons for that determination. N-PCL § 511(a)(6).
- A statement that the transaction was recommended or authorized by a vote of the directors in accordance with law, at a meeting duly called and held. N-PCL § 511(a)(7). The statement must also include the total number of directors, the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, must be attached as an exhibit. If any board members have voted against the transaction, provide a brief explanation of the basis for such votes.
- If consent of members of the corporation is required by law, a statement that such consent was given, in accordance with law, at a meeting of the members duly called and held. N-PCL § 511(a)(8). The total number of members, the number of members present at the meeting, the vote pro and con, and the number that constitutes a quorum must be included. A copy of the membership resolution, certified by the secretary, must be attached as an exhibit. If any members have voted against the transaction, provide a brief explanation of the basis for such votes.

- A statement of any unusual or extraordinary circumstances of the transaction that will assist in the Attorney General's and/or court's review.
- A statement that the transaction is arms-length and none of the directors, officers, key employees or members of the corporation or their relatives will receive a direct or indirect financial benefit as a result of the transaction or commitments for distribution of proceeds. If any exceptions to the prior statement are necessary, include a statement of how the related party arrangement was approved by the corporation, including but not limited to, compliance with N-PCL § 715, and exhibits evidencing such approval.
- A statement as to whether or not an application to the Attorney General or the court for similar approval was made previously, and, if so, the determination made concerning the application.
- If the application for approval is made to the Attorney General, a statement that the corporation is not insolvent and will not become insolvent as a result of the transaction. N-PCL § 511-a(b).
- If the application for approval is made to the Attorney General, a statement as to whether any persons or entities have raised, or have a reasonable basis to raise, objections to the transaction, including a statement setting forth the names and addresses of such persons, the nature of their interest, and a description of their objections. N-PCL § 511-a(b).
- A statement of the relief requested (approval to sell real property, approval of lease, etc.). N-PCL § 511(a)(9).

Venue

If the application for approval of the transaction is made to the court, the verified petition must be submitted to the Supreme Court of the judicial district or County Court of the county where the corporation has its office or principal place of carrying out the purposes for which it was formed, even if the property to be sold is located elsewhere. N-PCL §§ 510(a)(3) and 511(a).

If the application for approval of the transaction is to the Attorney General, the verified petition must be submitted to the office of the Attorney General's Charities Bureau in New York City or Albany or to the appropriate Regional Office of the Attorney General that handles such applications in the county where the corporation's principal address is located. A list of the offices of the Attorney General, the New York counties they serve and their contact information is in Appendix F.

Notice to Interested Persons

The court in its discretion may direct that notice of the application be given to any interested person, such as a member, officer or creditor of the corporation. N-PCL § 511(b). The notice must specify the time and place, fixed by the court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

In certain circumstances, the Attorney General may ask the court to give notice to interested parties (including tenants or other occupants of the premises) and/or hold an evidentiary hearing. For example, if there is a membership dispute, a dispute as to who constitutes a duly authorized board or a question about the adequacy of the consideration, the Attorney General may ask the court to hold an evidentiary hearing to resolve the dispute.

Notice to Creditors

If the corporation is insolvent or if its assets are insufficient to liquidate its debts and liabilities in full, all creditors of the corporation must be served with a notice of the time and place of the hearing. N-PCL 511(c). In such circumstances, notice to creditors is required by statute, and the petition must be approved by the court on notice to the Attorney General.

REQUIREMENTS FOR THE COURT ORDER OR ATTORNEY GENERAL APPROVAL

If the petition requests court approval, a copy of the proposed order should be submitted to the Attorney General with the verified petition. The order should set forth the terms of the transaction and the consideration. For sales, the sale price, the name of the purchaser and the address of the property must be included. For leases, the amount of rent, the term of the lease, the name of the lessee and the address of the property must be included.

The order must also set forth how the corporation will use the proceeds to be received by the corporation. N-PCL § 511(d). If all or part of the proceeds is to be placed in escrow, this must be stated in the order. Funds placed in escrow may only be released by further order of the court on notice to the Attorney General.

In addition, the Attorney General requires that the order contain the following: a statement that a copy of the signed court order shall be served on the Attorney General, and that the Attorney General shall receive written notice that the transaction has been completed (i.e., upon closing), if the transaction has been abandoned, or if it is still pending 90 days after court approval.

If the verified petition requests approval of the Attorney General, a copy of the proposed Attorney General Approval should be submitted to the Attorney General with

the petition. The Attorney General Approval should include all of the information described above that is required to be included in a proposed order.

REGISTRATION WITH THE ATTORNEY GENERAL'S CHARITIES BUREAU

If the corporation is required to register with the Attorney General pursuant to Executive Law Article 7-A or Estates, Powers and Trusts Law § 8-1.4, the Attorney General will check to ensure that the corporation is registered and that its annual financial reports are up to date before completing the review of the transaction. If the corporation is not registered, or if its reports are delinquent, it will have to register and file all required annual financial reports before the Attorney General's review can be completed. If the purchaser is required to register, its registration and reports must also be current before the Attorney General's review can be completed. Note that certain corporations, such as religious corporations, are exempt from registration.

NOTE – Effective November 1, 2018, registration with the Charities Bureau must be done online. The instructions and the portal for registration are posted on the Charities Bureau's website, www.charitiesnys.com.

GOVERNMENT AGENCY APPROVALS

If other government agency approvals are required for the proposed transaction (i.e., NYS Department of Health, NYS Public Health and Health Planning Council, NYS Education Department, US Department of Housing and Urban Development, etc.), the Attorney General will require that such approvals be obtained before the Attorney General review is completed. A copy of each government agency approval should be attached as an exhibit to the petition.

CONCLUSION

If you have any questions about the information contained in this booklet or about the procedures for obtaining Attorney General review and Court approval of a transaction, you may contact the Attorney General's Charities Bureau in New York City or Albany or any of the Attorney General's regional offices for assistance. A list of regional offices and their contact information is included in Appendix F.

Appendix A - Checklist for Petitions for Approval of Property Transactions

Verified Petition to the Attorney General or the Court

- ____ Petition
- ____ Verification of Petition

Attachments to Verified Petition

- ____ Copy of the corporation's Certificate of Incorporation and all amendments
- ____ Copy of the corporation's by-laws or constitution and all amendments
- ____ Copy of the deed to any real property that is the subject of the transaction
- ____ Copy of the contract, lease or other disposition
- ____ If the contract has been or will be assigned, a copy of the assignment agreement
- ____ If the corporation seeks to use the proceeds to purchase or lease new premises, a copy of the contract or lease
- ____ If the corporation intends to use any of the proceeds to pay existing commitments or debts, including closing costs, copies of the evidence of the commitments or debts (invoices, executed notes, etc.) and proposed closing statement.
- ____ Copy of the appraisal
- ____ Copy of the corporation's most recent financial statement and, if not reflected in the financial statement, a schedule of existing debts and liabilities (amount, owned to whom, if overdue, if secured).
- ____ Copy of the resolution of the board, certified by the corporation's secretary, authorizing or adopting or recommending the key terms of the proposed transaction and use of proceeds and stating the total number of directors present at the meeting, the number of votes for and against the resolution and the number of board members constituting a quorum.
- ____ A copy of the resolution of the members of the corporation, certified by the corporation's secretary, approving the key terms of the transaction and the use of the proceeds and stating the total number of members, the number of members present at the meeting, the number of votes for and against the resolution and the number of members constituting a quorum.

- ____ If approval of any government agencies is required, copies of such approvals
- **Approval of the Attorney General or Order of the Court**
- ____ If the Court's approval is sought, a proposed Order (see Appendix D)
- ____ If the Attorney General's approval is sought, a proposed Attorney General Approval (see Appendix E)

Appendix B - Sample Petition for Court Approval of Sale of Assets

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

In the Matter of the Application of _____ :
(NAME OF CORPORATION)

VERIFIED PETITION

For Approval to (type of transaction) _____ :
pursuant to Sections 510 and 511 of the
Not-for-Profit Corporation Law

Index No.

-----X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Petitioner, (name of corporation) by (name and title of officer) of the corporation for its
Verified Petition herein respectfully alleges:

TEXT OF THE PETITION (See Appendix A)

WHEREFORE, petitioner requests that the Court approve the (type of transaction) by
(Name of Corporation), a not-for-profit corporation, pursuant to the Not-for-Profit
Corporation Law Sections 510 and 511.

.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed
this ____ day of (Month), 20____ by

(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

****Include the verification set forth on page 17.**
Verification

STATE OF NEW YORK)
 SS
COUNTY OF _____)

 (Name) , being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation), the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except any matters that are stated on information and belief and, as to those matters, I believe them to be true.

(Signature)

Sworn to before me this
____day of (Month), 20__.

Notary Public

Appendix C - Sample Petition for Attorney General Approval of Sale of Assets

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
In the Matter of the Application of _____ :
(NAME OF CORPORATION) VERIFIED PETITION
For Approval to (type of transaction) :
Pursuant to Sections 510 and 511-a of the
Not-for-Profit Corporation Law :
-----X

TO: OFFICE OF THE ATTORNEY GENERAL

(Street Address)

(City/Town), New York _____
(Zip Code)

Petitioner, (name of corporation) by (name and title of officer) of the corporation for its
Verified Petition herein respectfully alleges:

TEXT OF THE PETITION (See Appendix A)

WHEREFORE, petitioner requests that the Attorney General approve the (type of
transaction) by (Name of Corporation), a not-for-profit corporation, pursuant to the Not-
for-Profit Corporation Law Sections 510 and 511-a.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed
this ____ day of (Month), 20____ by

(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

**Include the verification set forth on page 19.

Verification

STATE OF NEW YORK)
 SS
COUNTY OF _____)

 (Name) , being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation), the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except those matters that are stated on information and belief and, as to those matters, I believe them to be true.

Signature

Sworn to before me this
 ____ day of (Month), 20__.

Notary Public

APPENDIX D - Sample Court Order Approving Sale of Assets

At the Supreme Court of
the State of New York,
held in and for the
the County of _____
on the __ day of (Month), 20__.

P R E S E N T:

HON.

Justice.

-----X

In the Matter of the Application of :
(NAME OF CORPORATION)

ORDER

For Approval to (type of transaction) :

Pursuant to Sections 510 and 511 of the

Index No.

Not-for-Profit Corporation Law

-----X

ADD BODY OF ORDER WITH RECITATIONS

AND DECRETAL PARAGRAPHS REGARDING THE TERMS OF THE
TRANSACTION AND THE USE OF PROCEEDS

E N T E R:

Justice of the Supreme Court

Date

APPENDIX E - Sample Attorney General's Approval of Transactions

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
In the Matter of the Application of _____ :
(NAME OF CORPORATION) ATTORNEY GENERAL
for Approval to (type of transaction) : APPROVAL
Pursuant to Sections 510 and 511-a of the
Not-for-Profit Corporation Law :
-----X

1. By Petition verified on (Date) , (Name of Corporation) applied to the Attorney General pursuant to Sections 510 and 511-a of the Not-for-Profit Corporation Law for approval of an application to (TYPE OF TRANSACTION)

2. The assets that are the subject of the Petition are (DESCRIBE ASSETS)

3. The terms of the transaction and the consideration are as follows:

Note - For sales, include the sale price, the purchaser and the address of the property. For leases, include the amount of rent, the term of the lease, the lessee and the address of the property. For mortgages, include the amount of the loan, the interest rate, the length of the mortgage and the name of the lender.

4. The proceeds will be used for the following purposes:

Note - If all or part of the proceeds is to be placed in escrow, this should be set forth. Funds in escrow may only be released by further approval of the Attorney General.

5. Based on a review of the Petition and the exhibits thereto (and the additional documents and information requested by the Attorney General), and the verification of (Name of Certifier) that (Name of the Corporation) has complied with the provisions of the Not-for-Profit Corporation Law applicable to the sale or other disposition of all or substantially all of its assets, and neither the Petitioner or any third party having raised with the Attorney General any objections to the proposed transaction, the transaction is approved.

6. Petitioner shall provide written notice to the Attorney General that the transaction has been completed, if it has been abandoned, or if it is still pending 90 days after approval.

Attorney General of the State of New York

By: _____
Assistant Attorney General

Date: _____

**Appendix F - Offices of the Attorney General
and the counties covered by each:**

ALBANY - New York State Attorney General

Charities Bureau

The Capitol

Albany, NY 12224-0341

518-776-2160

Counties: Albany, Columbia, Fulton, Greene,
Hamilton, Montgomery, Rensselaer, Saratoga,
Schenectady, Schoharie,

Warren and Washington (note: Sullivan and Ulster for
trusts and estates matters only)

BINGHAMTON

New York State Attorney General

Binghamton Regional Office

44 Hawley Street, 17th Floor

Binghamton, NY 13901-4433

607-721-8771

Counties: Broome, Chemung, Chenango, Delaware,
Otsego, Schuyler, Tioga and Tompkins

BUFFALO

New York State Attorney General

Buffalo Regional Office

Main Place Tower - Suite 300A

Buffalo, NY 14202

716-853-8400

Counties: Allegheny, Cattaraugus, Chautauqua, Erie,
Genesee, Niagara, Orleans and Wyoming

NASSAU (not for trusts & estates matters)

New York State Attorney General

Nassau Regional Office

200 Old Country Road, Suite 240

Mineola, NY 11501-4241

516-248-3302

Counties: Nassau (note: trusts and estates matters are
handled by NYC)

NEW YORK CITY

New York State Attorney General

Charities Bureau

Transactions Section

28 Liberty Street – 19th Floor

New York, NY 10005

212-416-8401

Counties: Bronx, Kings, New York, Queens and
Richmond

(note: NYC also handles Dutchess, Nassau, Orange,
Putnam, Rockland, Suffolk and Westchester – trusts
and estates matters)

PLATTSBURGH

New York State Attorney General

Plattsburgh Regional Office

70 Clinton Street - Suite 700

Plattsburgh, NY 12901-2818

518-562-3288

Counties: Clinton, Essex and Franklin

POUGHKEEPSIE (not for trusts & estates matters)

New York State Attorney General

Poughkeepsie Regional Office

One Civic Center Plaza - Suite 401

Poughkeepsie, NY 12601-3157

845-485-3900

Counties: Dutchess, Orange, Sullivan and Ulster (note:
Dutchess and Orange County trusts and estates matters
are handled by NYC; Sullivan and Ulster County
trusts and estates matters are handled by Albany)

ROCHESTER

New York State Attorney General

Rochester Regional Office

144 Exchange Boulevard

Rochester, NY 14614-2176

716-546-7430

Counties: Livingston, Monroe, Ontario, Seneca,
Steuben, Wayne and Yates

SUFFOLK (not for trusts & estates matters)

New York State Attorney General

Suffolk Regional Office

300 Motor Parkway

Hauppauge, NY 11788-5127

631-231-2424

Counties: Suffolk (trusts & estates matters - NYC)

SYRACUSE

New York State Attorney General

Syracuse Regional Office

615 Erie Blvd. West, Suite 102

Syracuse, NY 13204

315-448-4800

Counties: Cayuga, Cortland, Madison, Onondaga and
Oswego

UTICA

New York State Attorney General

Utica Regional Office

207 Genesee Street, Room 508

Utica, NY 13501-2812

315-793-2225

Counties: Herkimer and Oneida

WATERTOWN

New York State Attorney General

Watertown Regional Office

Dulles State Office Building

317 Washington Street

Watertown, NY 13601-3744

315-785-2444

Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER (not for trusts & estates matters)

New York State Attorney General

Westchester Regional Office

44 South Broadway

White Plains, NY 10601

914-422-8755

Counties: Putnam, Rockland and Westchester (note:
trusts and estates matters are handled by NYC)

Section X.

Mergers and Consolidations

A GUIDE TO MERGERS AND CONSOLIDATIONS OF NOT-FOR-PROFIT CORPORATIONS UNDER ARTICLE 9 OF THE NEW YORK NOT-FOR-PROFIT CORPORATION LAW

**Office of the NYS Attorney General
Charities Bureau
www.charitiesnys.com**

**Guidance Document 2014-3, V. 1.0
Issue date: June 23, 2014**

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A GUIDE TO MERGERS AND CONSOLIDATIONS OF NOT-FOR-PROFIT CORPORATIONS UNDER ARTICLE 9 OF THE NEW YORK NOT-FOR-PROFIT CORPORATION LAW

Introduction

This booklet has been prepared to assist not-for-profit corporations and their attorneys who plan to seek approval of the Attorney General or the Court to merge or to consolidate with other organizations pursuant to Article 9 of the Not-for-Profit Corporation Law (“N-PCL”).

A well-run charitable organization and its board may consider a merger or consolidation with another where circumstances make it appropriate. Competing organizations with similar missions may separately have higher administrative expenses, a smaller donor pool, and lesser impact on their desired objectives. Government agencies, legislators, donors, volunteers, or members may prefer one organization as advocate, grantee, or dues recipient. The original goals of the organization may have been largely accomplished, or the existing leadership may be close to retirement..

In a merger or consolidation, the parties must negotiate a variety of details, and the Not-For-Profit Corporation Law permits the parties to reach mutual agreement. Although senior managers will have responsibility for recommending and implementing a merger or consolidation, board members and volunteer leadership play a very important role in considering a merger or consolidation, assessing merger or consolidation partners, conducting due diligence, reviewing the merger or consolidation agreement, assuring compliance with governing approval requirements, and envisioning the future mission, leadership, and finances of the entities. Capable and experienced professional advisors and counsel are usually necessary to plan, negotiate, and implement a successful merger or consolidation.

Board members and senior leadership should also involve other stakeholders in the discussion of a possible merger or consolidation at an early stage and keep them informed and advised throughout the process.

In New York, every merger or consolidation of a not-for-profit charitable organization must be approved by the Attorney General and/or a court. The Attorney General has been given this role in order to protect the interests of the donors to the charity and the beneficiaries of the charity, and to prevent private inurement (appropriation of assets of a charity to benefit one individual).

The procedures described reflect amendments to the N-PCL that were included in the Nonprofit Revitalization Act of 2013 (“the Act” or “NPRA”). Those amendments make changes to the procedures for seeking approval of the merger or consolidation of New York not-for-profit corporations. Those procedures give corporations the option of submitting a verified petition for approval of a merger or consolidation to either the Attorney General or the Court, on notice to the Attorney General.

As more fully described below, the Attorney General may determine that court review of a particular application is appropriate. In such cases the verified petition must be submitted to the Court on notice to the Attorney General. However, if the Attorney General has no objection to the merger or consolidation, but nevertheless determines that court review is appropriate, the Attorney General will typically waive statutory service of the Petition since the papers have already been submitted to and reviewed by the Office of the Attorney General.

Each merger or consolidation is governed by its own facts and is reviewed, on a case-by-case basis, by the Attorney General's Charities Bureau in New York City or Albany or an Assistant Attorney General in the regional office to which the application should be submitted. A list of the offices of the Attorney General, their contact information and the New York counties they serve is in Appendix F.

The information in this booklet is not a substitute for legal advice from an attorney but has been drafted to provide guidance to those preparing applications to merge or consolidate not-for-profit corporations.

Definitions

Merger and consolidation are procedures required by law when two or more corporations ("constituent" corporations) become a single corporation. In a merger, the resulting corporation, called the surviving corporation, is one of the merging corporations. In a consolidation, the resulting entity is a new corporation, called the consolidated corporation.

Quick Statutory Reference Guide	
Definitions of merger, consolidation, constituent corporation, surviving corporation, and consolidated corporation	N-PCL § 901

Since, in the experience of the Office of the Attorney General, mergers are more common than consolidations, for the sake of simplicity, the term "merger" will be used for both mergers and consolidations, and the term "surviving corporation" for both surviving and consolidated corporations, unless the context requires that merger and consolidation be discussed separately.

Mergers Requiring Approval of the Attorney General or the Court

N-PCL Article 9 governs mergers of New York not-for-profit corporations. Approval of the Attorney General or the Supreme Court¹ is required for any merger or

¹ At any time, including if the Attorney General concludes that court review is appropriate or the Attorney General does not approve an application for approval of a merger or consolidation, the applicant may apply to the Court for such approval.

consolidation in which any constituent corporation or the consolidated corporation is a charitable² corporation or would be a charitable corporation if formed under the N-PCL.

A corporation planning to merge or consolidate has the option of seeking approval of either the Attorney General or the Supreme Court. If court approval is sought, the application must also be submitted to the Attorney General. The Attorney General's office has found that it is more efficient if applicants submit *drafts* of their papers for court approval to the Attorney General for review prior to submission to the Court. That procedure allows an opportunity to resolve concerns raised by the Attorney General *prior* to submitting the papers to the Court. Likewise, applications to the Attorney General should be submitted in *draft* form initially.

Quick Statutory Reference Guide	
Definitions of Charitable and Non-charitable Corporations	N-PCL §§ 102 (a)(3-a) and (3-b)
Approval of mergers and consolidations by the Supreme Court	N-PCL § 907-a
Approval of mergers and consolidations by the Attorney General	N-PCL § 907-b

In addition to mergers of New York charitable corporations, approval of the Attorney General or the Court is required for mergers if:

(i) one or more New York charitable corporations merges with one or more foreign (non-New York) corporations, if any constituent corporation is a charitable corporation or would be such if formed under the N-PCL;

or

(ii) one or more religious corporations (formed pursuant to the Religious Corporations Law) merges with one or more corporations formed for religious purposes to which the N-PCL applies by virtue of N-PCL §103(a).

Quick Statutory Reference Guide	
Merger of domestic (New York) charitable corporations	N-PCL § 901
Merger or consolidation of a New York corporation and foreign (non-New York) corporations	N-PCL § 906
Merger or consolidation of a religious corporation with a not-for-profit corporation formed for religious purposes	N-PCL § 910

² The Nonprofit Revitalization Act of 2013 eliminated corporate Types A, B, C and D and replaced them with two categories of not-for-profit corporations, "Charitable" and "Non-Charitable."

In addition to securing approval of the Attorney General or the Supreme Court, merging and consolidating corporations must secure the approval or consent of any government body, officer, or person whose approval or consent was required to form such corporations.

Quick Statutory Reference Guide	
Required approvals and consents	N-PCL §§ 909, 404

Approval is not required for mergers where all constituent corporations are non-charitable corporations. However, mergers of trade or business associations, typically formed in New York as non-charitable corporations, formerly formed as Type A corporations, must be reviewed by the Attorney General's Antitrust Bureau.

Quick Statutory Reference Guide	
Required approvals and consents for trade or business associations	N-PCL § 404(a)

Although court approval may be required for mergers where all constituent entities are corporations formed pursuant to the Religious Corporations Law, notice to the Attorney General is not required and the Attorney General is not a party to such court proceedings. *See* “Mergers of Religious Corporations With Other Religious Corporations,” below.

Role of the Attorney General

The Attorney General is a statutory party to any proceeding seeking court approval of a merger or consolidation where any constituent corporation or the consolidated corporation is, or would be if formed under the N-PCL, a charitable not-for-profit corporation. *See* N-PCL § 907-a. The N-PCL provides that upon the filing of the application, the Court shall fix a time for a hearing and direct that notice be given to interested persons, including the Attorney General and any governmental body or officer whose consent or approval is required. *See* N-PCL §907-b (b).

Whether the petition seeks approval of a merger from the Court on notice to the Attorney General, or from the Attorney General alone, the Charities Bureau in New York City or Albany or the appropriate regional office of the Attorney General reviews the papers to make sure that statutory requirements are met, all necessary documents are included as exhibits to the application, and that any questions raised by the Attorney General's office have been answered. A sample Petition for court approval of a merger is in Appendix A, a sample Petition for Attorney General's approval is in Appendix B and a checklist of required documents and information is in Appendix C.

Where court approval is sought, the procedure preferred by the Charities Bureau and most courts is for the petitioner to submit the draft petition and exhibits, including the proposed plan of merger and proposed certificate of merger, to the Charities Bureau or

the appropriate regional office for review in advance of filing with the Court. This enables the Attorney General to review the papers to ensure that all statutory requirements are met, all necessary documents are included as exhibits, and any questions of the Attorney General are answered before the application is submitted to the Court. Substantively, the Attorney General's review assists the Court to determine whether all statutory requirements have been met and whether the interests of the constituent corporations and the public interest will not be adversely affected by the merger, as required by N-PCL § 907(e).

Whether approval is sought from the Attorney General alone or the Court, on notice to the Attorney General, the Charities Bureau or an Assistant Attorney General in a regional office reviews the purposes of each corporation and whether they are compatible and consistent, or whether any restrictions on future use of funds may be necessary. The review includes an analysis of the financial condition of each constituent corporation, including its short-term and long-term indebtedness, to assess the likely effect of the merger on all constituent corporations and the surviving corporation. With respect to hospital mergers, for example, the constituent hospitals will be asked to provide information as to any reduction in services, facilities or hospital bed counts that would result from the merger. The Charities Bureau may consult with the Attorney General's Health Care and Antitrust Bureaus.

The Attorney General also reviews endowment and other restricted funds held by each of the constituent corporations to ensure that funds held for a particular purpose will continue to be used for the specified purpose after the merger. In instances where the continued use of funds for a specific purpose will become impossible or impracticable after the merger, the Attorney General will seek to ensure that an appropriate modification of the restriction is ordered by the Court in conjunction with its approval of the merger.

After the Attorney General's review is complete, if the Attorney General has no objection to the proposed merger, the Attorney General will, in the case of application to the Attorney General for approval of the merger, provide the petitioner's attorney with written confirmation in the form of an Attorney General Approval. In the case of an application to the Court, on notice to the Attorney General, if the Attorney General has no objection to the merger, the petitioner's attorney will be provided with written confirmation by means of a "No Objection" endorsement. Such endorsement, typically stamped on the proposed order approving the Certificate of Merger, will waive statutory service of the Petition since the papers have already been submitted to and reviewed by the Office of the Attorney General. The petition can then be submitted to the Court and, if a hearing or other court proceeding is scheduled, the Petitioner must give notice of such proceeding to the Attorney General. In addition, a copy of the Certificate of Merger, with a copy of the Court's order, must be submitted to the Attorney General when the Certificate is filed with the Department of State.

If the Attorney General does not approve the Petition or there are other parties that object to the merger and wish to be heard by the Court, the application must then be

made to the Court, on notice to the Attorney General and any other appropriate parties, for an order approving the merger.

Circumstances in which the Attorney General may determine that court approval is appropriate, include:

- There is opposition to or complaints about the merger by members of a constituent corporation or members of the public.
- The Attorney General does not object to the merger but, in his discretion, determines that court review is appropriate because, for example, the merger will have a significant impact on the public or, the merger raises conflicts of interests.
- The Attorney General does not object to the merger, but, in his discretion, determines that court approval is necessary because assets of a merging corporation are held for a specific purpose requiring court approval pursuant to N-PCL § 907-a (c).
- The Attorney General has objections to the merger which have not been resolved after discussion and, if the petitioner wishes to proceed, court review is necessary.

Plan of Merger

The first step in a merger is adoption of a plan. The board of each corporation proposing to merge must adopt a plan of merger or consolidation which must set forth the following:

- The name of each constituent corporation and the name of the surviving corporation. If any constituent corporation was formed under a different name, the name under which it was formed.
- For each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification and voting rights, if any. If there are none, a statement to that effect.
- The terms and conditions of the proposed merger, including the manner and basis of converting membership or other interest in each constituent corporation into membership or other interest in the surviving corporation, or the cash or other consideration to be paid in exchange for membership or other interest in each constituent corporation.
- In the case of a *merger*, a statement of any amendments or changes that the merger will effect in the certificate of incorporation of the surviving corporation.

- In the case of a *consolidation*, all statements required to be included in a certificate of incorporation for a corporation formed under the N-PCL, except statements of facts not available at the time the plan of consolidation is adopted.
- In the case of a merger of New York and foreign (non-New York) corporations, a statement of any agreements required by N-PCL 906(d)(2)(D) confirming that any surviving foreign corporation may be served with process in New York and that the surviving foreign corporation may be sued in New York as required by the N-PCL.

Quick Statutory Reference Guide	
Contents of plan of merger or consolidation	N-PCL §§ 902(a)(1) - (5)
Agreement concerning service of process on non-New York constituent corporations	N-PCL § 906(d)(2)(D)

Board and Membership Approval of a Plan of Merger

The plan of merger must be approved by the board of each constituent corporation.

If a constituent corporation has members with voting rights, the plan of merger must also be approved by the members.

For any constituent corporation that has members, notice of a meeting at which a vote on the merger shall take place must be given to each member, whether or not entitled to vote, with a copy of the plan of merger or an outline of the plan. The plan of merger must be approved by a two-thirds vote of the members at a meeting where a quorum is present, provided that the "yes" votes are at least equal to the quorum.

If any constituent corporation has no members entitled to vote, a plan of merger is approved when it is adopted by the board of such corporation.

Quick Statutory Reference Guide	
Approval of plan of merger or consolidation by the board	N-PCL § 903(a)
Notice of meeting to members	N-PCL §§ 605 and 903(a)(1)
Submission of plan of merger or consolidation to members	N-PCL § 903(a)(1)
Approval of the plan of merger or consolidation by members	N-PCL §§ 903(a)(2), 613(c)

Certificate of Merger

After the plan of merger or consolidation is approved, a certificate of merger or consolidation must be signed on behalf of each constituent corporation. The certificate of merger must set forth the following:

- The name of each constituent corporation and, if the name of any constituent corporation has been changed, the name under which it was formed.
- The name of the surviving corporation.
- For each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification and voting rights, if any. If there are none, a statement to that effect.
- In the case of *merger*, a statement of any amendments or changes in the certificate of incorporation of the surviving corporation to be effected by the merger.
- In the case of a *consolidation*, all statements required to be included in a certificate of incorporation for a corporation formed under the N-PCL except statements as to facts not available at the time the plan of consolidation was adopted by the board.
- The effective date of the merger or consolidation if other than the date of filing of the certificate of merger or consolidation by the Department of State.
- The date when the certificate of incorporation of each constituent corporation was filed by the Department of State or, in the case of constituent corporations created by special law, the chapter number and year of passage of such law.
- The manner in which the merger or consolidation was authorized with respect to each constituent corporation, including the date of the meeting of the directors or members and whether the approval was by a vote at a meeting or by unanimous written consent.

/Quick Statutory Reference Guide	
Contents of certificate of merger or consolidation	N-PCL § 902(a)(1), (2) and (4) and § 904(a)
Approvals by government agencies	N-PCL §§ 404 and 909
Effective date of the certificate of merger or consolidation	N-PCL § 904(a)(2)
Statement required in certain certificates of <i>consolidation</i>	N-PCL § 904(a)(3)
Date when each constituent corporation's certificate was filed and the chapter number and year of any law that created any constituent corporation	N-PCL § 904(a)(4)
Manner in which each corporation authorized the merger or consolidation	N-PCL § 904(a)(5)

Approvals by Government Bodies or Officers

If the purposes of any constituent or consolidated corporation would require the approval or consent of any governmental body or agency to the filing of its certificate of incorporation, the approval or consent of such governmental agency must be attached to the certificate of merger or consolidation before filing with the Department of State.

Quick Statutory Reference Guide	
Approvals required for filing a certificate of incorporation	N-PCL §§ 404, 909

Registration with the Attorney General's Charities Bureau

If any constituent corporation is required to register with the Attorney General pursuant to Executive Law Article 7-A ("Article 7-A") or Estates, Powers and Trusts Law § 8-1.4 ("EPTL"), it should be registered and its annual reports should be up to date prior to the merger.

If any such corporation is required to register but has not, or if its reports are delinquent, the Office of the Attorney General will generally require the corporation to register and file all required annual financial reports before completing its review.

Certain corporations, such as religious corporations, may be exempt from registration. A detailed summary of the registration and reporting requirements for charitable organizations and a list of statutory exemptions are posted at www.charitiesnys.com. Effective November 2018, charities must register online.

Quick Statutory Reference Guide	
Registration of corporations holding assets in New York	EPTL § 8-1.4
Registration of corporations soliciting contributions in New York	Executive Law, Article 7-A

Procedure for Approval of the Merger by the Attorney General or the Court, on Notice to the Attorney General

Venue

An application to obtain Supreme Court approval of the proposed merger may be made in the judicial district in New York in which the principal office of the surviving or consolidated corporation is to be located or in which the office of one of the domestic constituent corporations is located.

An application to obtain the Attorney General's approval of the proposed merger must be submitted to the Charities Bureau in New York City or Albany or to the appropriate regional office of the Attorney General.

Quick Statutory Reference Guide	
Application for approval of the Court	N-PCL §§ 907 and 907-a
Application for approval of the Attorney General	N-PCL §§ 907 and 907-b

Verified Petition to the Attorney General or the Supreme Court

The parties to a proposed merger must prepare a joint affidavit, signed on behalf of both corporations, or a verified petition to the Attorney General or the Court seeking approval of the merger. The following documents must be submitted by the constituent corporations in their application to the Attorney General alone or the Court, on notice to the Attorney General:

- The plan of merger must be attached as an exhibit.
- Certificates of incorporation, by-laws and any other governing instruments, including any amendments for each constituent corporation and any proposed amendments or changes to the certificate of incorporation or by-laws of the surviving corporation as a result of the merger and, for non-New York corporations, a certificate of good standing from the jurisdiction of incorporation, must be attached as an exhibit.
- For each constituent corporation, a statement that the plan of merger was approved by a vote of the directors in accordance with law, at a meeting duly called and held. Include a statement of the total number of directors, the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, should be attached as an exhibit.
- If there were members entitled to vote, for each such constituent corporation, a statement that the plan of merger was approved by a vote of the members in accordance with law, at a meeting duly called and held. Include a statement of

the total number of members, the number of the members present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the membership resolution, certified by the secretary, should be attached as an exhibit.

- The objects and purposes of each corporation that will be promoted by the merger. Include a description of the purposes and activities of each constituent corporation, an explanation of why the corporations are merging, and how their purposes will be promoted by the merger.
- A statement describing all property held by the constituent corporations and the manner in which it is held; and a statement of all liabilities and the amount and sources of the annual income of each constituent corporation, usually provided in the form of financial statements and IRS Form 990 for each corporation, which should be attached as exhibits.
- A statement whether any votes against adoption of the resolution approving the plan of merger were cast at the meeting of members or directors at which the resolution was adopted by each constituent corporation.
- A statement of the facts confirming that the merger is authorized by the laws of the jurisdiction in which each of the constituent corporations was formed. Provide the citation for any jurisdiction outside New York.
- A statement whether or not any of the constituent corporations has restricted funds. If there are restricted funds, an exhibit should be annexed which identifies for each such restricted fund (a) the amount of the fund, (b) the historic dollar value of any endowment fund, (c) the nature of the restriction and whether the restriction is temporary or permanent, (d) the gift instrument or other document(s) containing the restriction and (e) the provisions of any applicable reversionary or remainder provision. The affidavit or petition should state that no restricted funds will be required to be returned, transferred or conveyed to any third party by reason of the merger except as specifically identified therein. The affidavit or petition may and should seek *cy pres* relief pursuant to N-PCL §907(c) with respect to restrictions which have become obsolete or which would become impossible or impracticable after the merger. The facts and circumstances supporting *cy pres* relief, and the precise nature of the relief requested, should be set forth in detail (*see also* “*Cy Pres Relief in Connection with Merger*,” below).
- All required consents and approvals of any governmental body or officer should be attached as exhibits.
- If the application is to the Attorney General for approval, a statement as to whether anyone raised, or has a reasonable basis to raise, objections to the merger or consolidation, the names and addresses of such persons, the nature of their interest, and a description of their objections.

Quick Statutory Reference Guide	
Application for approval of the supreme court	N-PCL §§ 907(a), 907-a(a)
Application for approval of the attorney general	N-PCL §§ 907(a), 907-b(b)

In addition, the affidavit or petition should include:

- A list of the names of the directors (sometimes called trustees) of each constituent corporation, and any anticipated changes in the membership or directors of the constituent corporations that would result from the merger; as well as any changes in the membership or directors of any such corporation that have already occurred in connection with pre-merger governance and organizational changes. Copies of supporting documentation should be attached as exhibits.
- Any letter of intent and any other agreements entered into by any constituent corporation in connection with the proposed merger. A copy should be attached as an exhibit.
- A description of all governance or organizational changes made by the constituent corporations in advance of the merger, including changes to or restructuring of their boards of directors and executive management, with supporting documentation attached as an exhibit.

The Office of the Attorney General may request additional documents and information needed in order to review the application, such as IRS form 1023 or the IRS letter of determination of exempt status.

Proposed Order of the Court or Attorney General Approval

If the application is made to the Court, it must be accompanied by a proposed order which should include the following provisions:

- A finding that the interests of the constituent corporations and the public interest will not be adversely affected by the merger.
- Any proposed terms and conditions for the merger that the Court has discretion to impose.
- One or more paragraphs granting *cy pres* relief with respect to assets that require such relief (*see “Cy Pres Relief in Connection with Merger,”* below)
- Direction that copies of (a) the order as signed and (b) the certificate of merger as filed by the Department of State shall be served on the Attorney General.

If the application is made to the Attorney General, it must be accompanied by a proposed Attorney General Approval including the following:

- A finding that the interests of the constituent corporations and the public interest will not be adversely affected by the merger.
- Any proposed terms and conditions for the merger that the Attorney General in his discretion may prescribe
- Direction that a copy of the certificate of merger as filed by the Department of State shall be served on the Attorney General.

Quick Statutory Reference Guide	
Order of the Supreme Court	N-PCL § 907-a(e)
Approval of the Attorney General	N-PCL § 907-b(f)

Cy Pres Relief in Connection with Merger

If any assets of any of the constituent corporations are held for a charitable purpose or if any assets are required to be used for a particular purpose, but not upon a condition requiring return, transfer or conveyance because of the merger, the Court may, in its discretion, direct that such assets be transferred or conveyed to the surviving corporation or to one or more other New York or foreign corporations or organizations engaged in substantially similar activities, upon an express trust the terms of which shall be approved by the Court. N-PCL § 907-a(c); *see also* N-PCL § 513, which generally provides that a charitable corporation holds “full ownership rights” in any assets held by a corporation “in trust for, or with a direction to apply the same to, any purpose specified in its certificate of incorporation, and shall not be deemed a trustee of an express trust of such assets.”

Notice to Interested Persons and Entities

If the application is made to the Court, after the petition is filed, the Court shall direct that notice of the application be given to interested persons, including any governmental body or officer and any other person or body whose consent or approval is required by N-PCL § 909. If the Attorney General believes that any individual or body should receive such notice, he will so inform the petitioners in connection with his review of the proposed merger.

If application is made to the Attorney General alone, the office may also direct that notice be given to interested individuals or entities or may conclude that court approval of the application is necessary.

Quick Statutory Reference Guide	
Attorney General may require notice of application to interested parties and government agencies	N-PCL § 907-b(c)
Notice to Interested Parties	N-PCL §§ 907-a(b), 909

Approval by the Attorney General

Upon completion of the review of the application for approval of the plan and certificate of merger or consolidation, the Attorney General may provide approval of the application on the Attorney General Approval, a sample of which is Appendix E.

Quick Statutory Reference Guide	
Attorney General's approval of the application	N-PCL § 907-b
Disapproval or conditional approval of the Attorney General	N-PCL § 907-b(e)
Attorney General may conclude that court review is required	N-PCL § 907-b(h)

Hearing by the Court

If court approval of the merger is sought, the Court will set a time for a hearing and direct the applicants to give notice to any interested party, including the Attorney General, any governmental body or officer and any other person or entity whose consent to filing is required. However, as noted above, the procedure preferred by the Attorney General and most courts is for a *draft* petition and required attachments to be submitted to the Attorney General *prior* to submission to the Court.

If the Court finds that the applicants have complied with provisions of law applicable to mergers, and that the interests of the constituent corporations and the public interest will not be adversely affected by the merger, it will grant an order approving the plan and certificate of merger. A certified copy of the court order must be attached to the certificate of merger when it is filed with the office of the Secretary of State.

If the Court finds that the interests of non-consenting members are or may be substantially prejudiced by the proposed merger, the Court may disapprove the plan or may direct a modification of it. In the event of a modification, if the Court shall find that the interests of any members may be substantially prejudiced by the proposed merger as modified, the Court must direct that the modified plan be submitted to a vote of the members of the constituent corporations, or if the Court finds that there is no substantial prejudice, it shall approve the agreement as so modified without further approval by the members. Any further vote of members must be obtained in the same manner as the original vote of the members.

Filing the Certificate of Merger

After the Supreme Court or the Attorney General has approved the merger, the certificate of merger must be filed with the Department of State. If the certificate has been approved by the Attorney General, the Attorney General's written approval must

be attached to the certificate. If the Supreme Court has approved the certificate, a certified copy of the court's order must be attached to the certificate.

After the certificate of merger is filed by the Department of State, the surviving corporation must file a certified copy of the certificate with the county clerk of each county in which the office of a constituent corporation, other than the surviving corporation, is located, and with the office of the recording officer in each county in which real property of a constituent corporation, other than the surviving corporation, is situated.

A copy of the certificate of merger must also be filed with the Office of the Attorney General.

Quick Statutory Reference Guide	
Delivery of Certificate to Department of State with information concerning constituent foreign corporations	N-PCL §§ 904 and 906(c)
Filing Certificate with Secretary of State with supreme court order or the Attorney General Approval	N-PCL § 907(a)
Filing of Certificates of religious corporations	RCL § 3

Effective Date and Legal Effects of Merger

Effective Date. A merger becomes effective upon the filing of the certificate of merger by the Department of State, or on a later date, as stated in the certificate of merger, which may not be more than 30 days after such filing.

Legal Effects of Merger or Consolidation. The legal effects of merger and consolidation are set forth in the N-PCL § 905(b). In brief, the surviving corporation, in a manner consistent with its certificate of incorporation, acquires all of the assets, rights and privileges, and assumes all of the obligations, liabilities and penalties, of each of the constituent corporations, including but not limited to all debts owed to creditors.

In the case of a *merger*, the certificate of incorporation of the surviving corporation is automatically amended to the extent, if any, that changes in its certificate of incorporation are set forth in the plan of merger and certificate of merger.

In the case of a *consolidation*, the statements set forth in the certificate of consolidation and which are required or permitted to be set forth in a certificate of incorporation of a not-for-profit corporation formed under the N-PCL constitute the certificate of incorporation of the consolidated corporation.

Quick Statutory Reference Guide	
Effect of Merger or Consolidation - Date	N-PCL § 905(a)
Effects of Merger or Consolidation - certificate, property, liabilities	N-PCL § 905(b)

Mergers of Domestic and Foreign Corporations

The N-PCL also covers mergers and consolidations in which one or more of the constituent corporations or the surviving corporation is a foreign corporation. With respect to procedure, including the requirement of approval by members, each New York corporation must comply with the provisions of the N-PCL relating to merger or consolidation of domestic corporations, and each foreign corporation must comply with the laws of the jurisdiction under which it is incorporated.

If the surviving corporation is a New York corporation, the certificate of merger must be delivered to the New York Department of State as provided in N-PCL (*see* “Certificate of Merger,” above). In addition, the certificate must set forth the jurisdiction and date of incorporation of each constituent foreign corporation and the date when its application for authority to conduct activities in New York was filed by the Department of State, and its fictitious name used in this state, if applicable, or, if no such application has been filed, a statement to that effect.

If the surviving corporation is a foreign corporation, it must comply with the provisions of the Article 13 of the N-PCL relating to foreign corporations. It must also deliver to the Department of State a certificate of merger which sets forth the information required by N-PCL:

(A) The name of each constituent corporation and the name of the surviving corporation. If any constituent corporation was formed under a different name, the name under which it was formed;

(B) For each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification and voting rights, if any. If there are none, a statement to that effect;

(C) The jurisdiction and date of incorporation of the surviving foreign corporation, the date when its application for authority to conduct activities in New York was filed by the Department of State and its fictitious name used in this state, or, if no such application has been filed, a statement to that effect and that it is not to conduct activities in this state until an application for such authority has been filed by the Department of State;

(D) The date when the certificate of incorporation of each constituent New York corporation was filed by the Department of State and the jurisdiction and date of incorporation of each constituent foreign corporation, other than the surviving foreign

corporation, and, in the case of each such corporation authorized to conduct activities in this state, the date when its application for authority was filed by the Department of State;

(E) An agreement that the surviving corporation may be served with process in this state in any action or proceeding for the enforcement of any liability or obligation of any domestic corporation or of any foreign corporation, previously amenable to suit in this state, which is a constituent corporation in the merger, and an agreement that the surviving foreign corporation may be sued in New York in respect of any property transferred or conveyed to it as provided in N-PCL § 907(c), or the use made of such property, or any transaction in connection therewith;

(F) A designation of the New York Secretary of State as its agent upon whom process against it may be served and a post office address within or without New York to which the Secretary of State shall mail a copy of the process in such action or special proceeding; and

(G) The manner in which the plan of merger was approved with respect to each constituent domestic corporation and that the merger is permitted by, and is in compliance with, the laws of the jurisdiction of each constituent foreign corporation, and

(H) The effective date of the merger if other than the date of filing of the certificate of merger by the Department of State.

If the surviving corporation is a domestic corporation, the effect of the merger of one or more foreign and domestic corporations is the same as in the case of a merger of domestic corporations. If the surviving corporation is a foreign corporation, the effect is the same as in the case of a merger of domestic corporations, except insofar as the law of the foreign jurisdiction provides otherwise.

Quick Statutory Reference Guide	
Merger or consolidations of domestic and foreign corporations	N-PCL § 906(a)
Contents of certificate of merger or consolidation	N-PCL §§ 904 and 906(d)(2)
Foreign Corporations	N-PCL Article 13

Mergers of Religious Corporations with Not-for-Profit Corporations

A corporation formed under the Religious Corporations Law (“RCL”) may merge with a not-for-profit corporation with religious purposes. Each constituent corporation must comply with the procedures applicable to mergers of not-for-profit corporations. *See* "Procedure for Approval of the Merger by the Attorney General or the Court, on Notice to the Attorney General" above.

The certificate of merger must be filed with the Department of State or, if the surviving corporation is a religious corporation, with the county clerk of the county where the corporation maintains its principal office. N-PCL § 910(c), (d); RCL § 3.

Quick Statutory Reference Guide	
Merger or consolidation of religious corporations and not for profit corporations formed for religious purposes	N-PCL § 910
Filing of certificate of merger	N-PCL § 910(c)(d) and RCL § 3

Mergers of Religious Corporations with Other Religious Corporations

The Attorney General does *not* review mergers or consolidations of incorporated churches and other corporations formed under the Religious Corporations Law. Mergers and consolidations of such corporations are governed by the applicable provisions of the RCL.

Although Supreme Court approval is required for certain mergers and consolidations of religious corporations, notice to the Attorney General is not required and the Attorney General does not play a role in such proceedings (unless requested to do so by the Court).

Quick Statutory Reference Guide	
Consolidation of incorporated churches	RCL §§ 13
Consolidation of incorporated presbyteries	RCL §15-a
Consolidation or merger of incorporated Presbyterian and Lutheran synods	RCL 15-b
Trusts for Shakers and Friends	RCL § 202
Consolidation of Jewish congregations	RCL §§ 208-209
Merger and consolidation of Unitarian and Universalist Societies Unitarian and Universalist Societies	RCL § 412

Mergers and Consolidations of Corporations Chartered by the Regents under the Education Law

Mergers and Consolidation of corporations chartered by the Regents of The University of the State of New York are governed by Education Law and Article 9 of the N-PCL (except § 907). The Attorney General does not review such consolidations.

Quick Statutory Reference Guide	
Application of the not-for-profit corporation law to education corporations	Education Law §§ 216-a(4) and 223

Conclusion

If you have any questions about the information in this booklet or about the procedures for obtaining Attorney General review and/or court approval of a proposed merger or consolidation, you may contact the Attorney General's Charities Bureau by email to charities.bureau@ag.ny.gov or any of the Attorney General's Regional Offices for assistance. The addresses and telephone numbers of the Attorney General's regional offices may be found in Appendix F.

Additional guidance and information for charities as well as forms and instructions for registration are posted at www.charitiesnys.com.

APPENDIX A - Sample Petition for Court Approval of Merger

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

In the Matter of the Application of

(NAME OF CORPORATION and NAME OF
CORPORATION)

:

VERIFIED PETITION

:

Index No.

For an Order Approving Their Plan of Merger Under :
Section 907-a of the Not-for-Profit Corporation Law
and Authorizing the Filing of a Certificate of Merger :
under Section (904/906) of the Not-for-Profit
Corporation Law :

-----X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Petitioners, (NAME OF CORPORATION and NAME OF CORPORATION) by (NAME
AND TITLE OF OFFICER OF EACH CORPORATION) for their Verified Petition
herein respectfully allege:

TEXT OF THE PETITION

WHEREFORE, petitioners request an order of this Court, pursuant to Section 907-a of
the Not-for-Profit Corporation Law, approving the Plan of Merger attached as Exhibit ____
and authorizing the filing of a Certificate of Merger, a copy of which is attached as
Exhibit ___, and for such other and further relief as may be appropriate.

.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed
this ____day of ____, 20____ by

(Name of Officer and Title)

(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

Verification

STATE OF NEW YORK)

SS

COUNTY OF _____)

_____(Name)____, being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation), a corporation named in the above
Petition and make this verification at the direction of its Board of Directors. I have read
the foregoing Petition and know the contents thereof to be true of my own knowledge,
except those matters that are stated on information and belief and as to those matters I
believe them to be true.

Signature

Sworn to before me this
____day of (Month) 20____.

Notary Public

STATE OF NEW YORK)

SS

COUNTY OF _____)

_____(Name)____, being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation), a the corporation named in the above
Petition and make this verification at the direction of its Board of Directors. I have read
the foregoing Petition and know the contents thereof to be true of my own knowledge,
except those matters that are stated on information and belief and as to those matters I
believe them to be true.

Signature

Sworn to before me this
____day of (Month), 20____.

Notary Public

APPENDIX B - Sample Petition for Attorney General Approval of Merger

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

In the Matter of the Application of

(NAME OF CORPORATION and NAME OF
CORPORATION)

:

VERIFIED PETITION

:

For Approval of Their Plan of Merger Under
Section 907-b of the Not-for-Profit Corporation Law
and Authorizing the Filing of a Certificate of Merger
under Section (904/906) of the Not-for-Profit
Corporation Law

:

:

:

-----X

TO: OFFICE OF THE ATTORNEY GENERAL

_____(Street Address)

_____(City/Town), New York _____(Zip Code)

Petitioners, (NAME OF CORPORATION and NAME OF CORPORATION) by
(NAMES AND TITLES OF OFFICERS) for their Verified Petition herein respectfully
allege:

TEXT OF THE PETITION

WHEREFORE, Petitioners request that the Attorney General, pursuant to Section 907-b
of the Not-for-Profit Corporation Law, approve the Plan of Merger attached as Exhibit ____
and authorizing the filing of a Certificate of Merger, a copy of which is attached as
Exhibit ____, and for such other and further relief as may be appropriate.

.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed
this ____ day of ____ (Month), 20____ by

(Name of Officer and Title)

(Name of Officer and Title)

APPENDIX C - Checklist for Documents and Information Required to be Submitted to the Attorney General in Connection with an Application for the Attorney General's or the Court's Approval of a Merger

Following is a checklist of documents required by the Attorney General, whether the application is submitted to the Attorney General or the Court:

Verified Petition or Joint Affidavit to the Attorney General or the Court

_____ Petition or joint affidavit (initial submission should be in draft form)

Attachments to Petition

_____ Plan of merger

_____ Proposed certificate of merger, including the effective date if other than the date it is filed with the Secretary of State

_____ Copies of certificates of incorporation, by-laws and any other governing instruments for the constituent corporations and any surviving corporation, and certificate of good standing for foreign corporations.

_____ Board, committee and membership minutes and resolutions, certified by the secretary, relating to the merger and any governance or organizational changes that have already taken place or are under consideration.

_____ Any letter of intent and any other agreements entered into by any constituent corporation in connection with the proposed merger.

_____ IRS Form 990 and audited financial statements for the past year for each constituent corporation.

_____ A list of the endowments or other restricted funds of each constituent corporation; for each fund, specify the fund's purposes, the amount in the fund, the historic dollar value of any endowment funds, the name and address of the custodian, whether any portion of the fund has been pledged or otherwise used to secure loans or other indebtedness, and the provisions of any applicable reversionary clause; identify funds for which *cy pres* relief is sought, including any funds which have not been used for three years or more.

_____ Copies of all approvals or consents of governmental bodies or officers whose approval or consent is required for the merger pursuant to N-PCL §§ 909 and 404.

_____ A list of the names of the directors (sometimes called trustees) of each constituent corporation, and any anticipated changes in the membership or directors of the constituent corporations that would result from the merger; as well as any changes in

the membership or directors of any such corporation that have already occurred in connection with pre-merger governance and organizational changes.

____ Any letter of intent and any other agreements entered into by any constituent corporation in connection with the proposed merger.

____ Documents supporting all governance or organizational changes made by the constituent corporations in advance of the merger, including changes to or restructuring of their boards of directors and executive management.

Court Order or Attorney General Approval

____ If a court order approving the merger is sought, a proposed Order.

____ If the Attorney General's approval is sought, a proposed Attorney General Approval.

APPENDIX D - Sample Order Approving Merger

At the Supreme Court of
the State of New York,
held in and for the County of
on the ___ day of (Month), 20__.

P R E S E N T :
HON.
Justice.

-----X
In the Matter of the Application of :
(NAME OF CORPORATION and NAME OF CORPORATION) : ORDER
For an Order Approving Their Plan of Merger Index No.
under Section 907-a of the Not-for-Profit Corporation :
Law and Authorizing the Filing of a Certificate of
Merger under Section (904/906) of the Not-for-Profit :
Corporation Law
-----X

ADD BODY OF ORDER WITH RECITATIONS

AND DECRETAL PARAGRAPHS, including

ORDERED, that a signed copy of this Order shall be sent to the New York State
Attorney General's office; and it is further

ORDERED, that a copy of the Certificate of Merger as filed with the Department of State
of New York shall be sent to the New York State Attorney General's office.

E N T E R:

Justice of the Supreme Court

Date

APPENDIX E - Sample Attorney General's Approval of Merger

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
In the Matter of the Application of _____ :
(NAME OF CORPORATION and NAME OF CORPORATION) : ATTORNEY GENERAL
CORPORATION) : APPROVAL
For an Approval of Their Plan of Merger
under Section 907-b of the Not-for-Profit Corporation :
Law and Authorizing the Filing of a Certificate of
Merger under Section (904/906) of the Not-for-Profit :
Corporation Law
-----X

1. By Petition verified on (Date), (NAMES OF CORPORATIONS) applied to the
Attorney General pursuant to Article 9 of the Not-for-Profit Corporation Law for
approval of an application to (MERGE OR CONSOLIDATE)

2. The name of the (SURVIVING OR CONSOLIDATED) corporation is (NAME OF
CORPORATION)

ADD RECITALS AS WOULD APPEAR IN ORDER

Based on a review of the Petition and the exhibits thereto (and the additional documents
and information requested by the Attorney General), and the verifications of
(NAMES OF CERTIFIERS), the Attorney General has determined that the petitioners
have complied with the provisions of Article 9 the Not-for-Profit Corporation Law
applicable to the merger of not-for-profit corporations, and neither the Petitioners nor
any third party having raised with the Attorney General any objections to the proposed
merger, and it appearing to the satisfaction of the Attorney General that the interests of
the constituent corporations and the public interest will not be adversely affected by the
merger, the Plan of Merger is approved and the Certificate of Merger is authorized to be
filed with the Department of State.

A copy of the Certificate of Merger, as filed with the Department of State shall be sent to
the Attorney General's office within 10 days of its filing.

New York State Attorney General

By: _____
Assistant Attorney General

Date: _____

Appendix F –

**Offices of the New York State Attorney General
and the counties covered by each:**

ALBANY -

Charities Bureau
The Capitol
Albany, NY 12224-0341
518-776-2160

Counties: Albany, Columbia, Fulton, Greene, Hamilton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington (note: Sullivan and Ulster for trusts and estates matters only)

BINGHAMTON REGIONAL OFFICE

44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-251-2770

Counties: Broome, Chemung, Chenango, Delaware, Otsego, Schuyler, Tioga and Tompkins

BUFFALO REGIONAL OFFICE

Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400

Counties: Allegheny, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming

NASSAU REGIONAL OFFICE

200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302

Counties: Nassau (note: trusts and estates matters are handled by NYC)

NEW YORK CITY

Charities Bureau
Transactions Section
28 Liberty Street
New York, NY 10005
212-416-8401

Counties: Bronx, Kings, New York, Queens and Richmond (note: NYC also handles Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester – trusts and estates matters only)

PLATTSBURGH REGIONAL OFFICE

43 Durkee Street, Suite 700
Plattsburgh, NY 12901-2958
518-562-3288

Counties: Clinton, Essex and Franklin

POUGHKEEPSIE REGIONAL OFFICE

One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900

Counties: Dutchess, Orange, Sullivan and Ulster (note: Dutchess and Orange County trusts and estates matters are handled by NYC; Sullivan and Ulster County trusts and estates matters are handled by Albany)

ROCHESTER REGIONAL OFFICE

144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430

Counties: Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates

SUFFOLK REGIONAL OFFICE

300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424

Counties: Suffolk (note: trusts and estates matters are handled by NYC)

SYRACUSE REGIONAL OFFICE

615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800

Counties: Cayuga, Cortland, Madison, Onondaga and Oswego

UTICA REGIONAL OFFICE

207 Genesee Street, Room 508
Utica, NY 13501-2812
315-864-2000

Counties: Herkimer and Oneida

WATERTOWN REGIONAL OFFICE

Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-523-6080

Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER REGIONAL OFFICE

44 South Broadway
White Plains, NY 10601
914-422-8755

Counties: Putnam, Rockland and Westchester (note: trusts and estates matters are handled by NYC)

Section XI.

Dissolution of Not-for-Profit Corporations Without Assets

VOLUNTARY DISSOLUTION OF NOT-FOR-PROFIT CORPORATIONS WITH NO ASSETS

**Office of the New York State Attorney General
Charities Bureau
www.charitiesnys.com**

**Guidance Document
Issue date: 2018**

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This booklet is for dissolving Not-for-Profit corporations that meet the following criteria:

- ✓ **The corporation has no assets or liabilities at the time of dissolution.**

Corporations that have assets to distribute or liabilities at the time of dissolution should use the booklet entitled “Voluntary Dissolution of Not-For-Profit Corporations with Assets to Distribute,” which is available on the Attorney General’s website at <http://www.charitiesnys.com>.

The information in this booklet is not a substitute for legal advice from an attorney but has been drafted to provide guidance to not-for-profit corporations that are seeking to dissolve and the lawyers who represent them.

This booklet and other information of interest to not-for-profit corporations may be found on the Attorney General’s Internet site: <http://www.charitiesnys.com>.

INTRODUCTION

The Attorney General's Charities Bureau prepared this guidance to assist not-for-profit corporations that have no assets or liabilities at the time of dissolution to fulfill the requirements for dissolution pursuant to Article 10 of the Not-for-Profit Corporation Law ("N-PCL").

Dissolving corporations that are required to be registered with the Charities Bureau must update their registration and annual filings prior to dissolution.¹ *See* Appendix F for a summary of registration requirements.

NOTE: This booklet reflects changes to the Not-for-Profit Corporation Law that are included in the Nonprofit Revitalization Act of 2013.

¹ The officers and directors of charitable organizations are obligated to administer their assets responsibly, and comply with the duties of care, loyalty and obedience. If the assets are not being used for their intended purposes, they must be distributed to another charitable organization with similar purposes.
NPCL §§ 720(a)(1)(A); 1001(d)(3)

SUMMARY OF PROCEDURES FOR A NO ASSET DISSOLUTION

Step 1:

The Board of Directors adopts a Plan of Dissolution ("Plan"). *See* Appendix B for a sample Plan. A quorum must be present and at least a majority of the directors present must vote for dissolution. Alternatively, the Board may adopt the Plan by unanimous written consent if not prohibited by the certificate of incorporation or by-laws. If there are fewer than three directors, the affirmative vote of all remaining directors is required to adopt the Plan. If only one director remains, that person should be identified as the "sole remaining director."

Quick Statutory Reference Guide	
Board of directors' adoption and authorization of Plan of Dissolution	N-PCL §§ 1001(a), 1002(a) & 1002(b)
Quorum and required vote for board approval of Plan	N-PCL §§ 1002(a)(1)(i), 707, 708 & 709
If there are fewer than the number of directors required for a quorum, the vote of the remaining directors must be unanimous	N-PCL § 1002(a)(1)(ii)

Step 2:

If the corporation has members entitled to vote, after the board of directors has authorized the Plan, the Plan is submitted to the membership for approval. A vote of at least two-thirds of the members with a quorum present at a meeting is required for approval. Alternatively, the plan may be approved without a meeting by unanimous written consent of all the members entitled to vote if the corporation's documents permit.

If the organization has no voting members, *i.e.*, members who elect the board of directors, the Plan is deemed authorized upon adoption by the board.

Quick Statutory Reference Guide	
Submission of Plan to members for approval	N-PCL § 1002(a)(2)
Quorum and required vote for membership approval	N-PCL §§ 1002(a)(2), 612, 613(c) and 614
Authorization requirements if there are no members	N-PCL § 1002(b)

Step 3:

If approval of any governmental body or officer was required for the formation of the corporation, the corporation must get written approval of the dissolution from the same governmental body or officer. To determine whether any approvals are necessary, see N-PCL §§ 404(b)-(v) and 1002(c). Please refer to Appendix F for list of required government approvals.

NOTE: The **original** of any required approvals must be attached to the original Certificate of Dissolution.

Quick Statutory Reference Guide	
Government approvals of Plan of Dissolution	N-PCL §§ 404(b) - (v) and 1002(c)

Step 4:

The corporation prepares a Certificate of Dissolution with a Legal Back. *See* the form of Certificate of Dissolution linked here to the Department of State website: [<https://www.dos.ny.gov/forms/corporations/1561-f-a.pdf>]. The Certificate of Dissolution confirms that, at the time of dissolution, the corporation had no assets and no liabilities. The Certificate of Dissolution must be signed by an officer, director, attorney-in-fact or another duly authorized person and must identify the name of such person and the capacity in which the person signs.

Quick Statutory Reference Guide	
Preparation of Certificate of Dissolution with a Legal Back	N-PCL §§ 104(d) and 1003(a)
Attachment of Approvals to Certificate of Dissolution	N-PCL §§ 1003(b)(1) and 404(b) - (v)

Step 5:

The corporation prepares a Petition to the Attorney General for Approval of the Certificate of Dissolution. *See* Appendix C, and files it with the appropriate office of the Attorney General. *See* Appendix E for Attorney General offices.

Quick Statutory Reference Guide	
Preparation of Petition for Approval of the Certificate of Dissolution	N-PCL § 1003(c)

Step 6:

The corporation submits the following to the Attorney General (please refer to Appendix E for a list of offices of the Attorney General and the counties they serve):

- A. The Petition with all required attachments:
- (i) a copy of the Certificate of Incorporation together with any amendments, and the current by-laws,
 - (ii) the Plan of Dissolution,
 - (iii) copies of any required government approvals (attached to the Certificate of Dissolution), and

(iv) either the unanimous written consent of the board, or certified copies of resolutions adopted at a meeting and, if applicable, the same for the corporation's membership.

B. The **original** Certificate of Dissolution with the **original** of any governmental consents, if required.

C. All required financial reports, including a final report. Please *See* Appendix D and the sample Verified Petition for a list of final reports.

If acceptable, the Attorney General will place an endorsement on the original Certificate of Dissolution and return it to the corporation or to its attorney if submitted by an attorney to then be filed with the Department of State.

Quick Statutory Reference Guide	
Verified Petition to the Attorney General	N-PCL § 1003(c)

Step 7:

The organization must request a *Consent to Dissolution of a Corporation* from the New York State Department of Taxation and Finance ("Tax Department"). The process and the documentation you will need depend on whether your organization has been granted tax exempt status. Some charitable organizations may not have been granted tax exempt status by NY State. Instructions and forms for securing the Tax Department's consent are posted at:

https://www.tax.ny.gov/bus/doingbus/vol_dissolution.htm.

Note - If your organization has done business in New York City and has incurred tax or other liabilities under the New York City Administrative Code, it will also need the consent of the Commissioner of Finance of New York City. A "Request for Consent to Dissolution" form is posted at:

http://www1.nyc.gov/assets/finance/downloads/pdf/collections/request_dissolution.pdf.

Quick Statutory Reference Guide	
Consent of the NYS Department of Taxation	N-PCL § 1004(a)
Consent of New York City Commissioner of Finance	N-PCL § 1004(b)

For those corporations filing outside New York City, check the requirements of your local commissioner of finance.

Step 8:

The corporation (or its attorney) sends the original Certificate of Dissolution with the original NYS Department of Taxation and Finance clearance and the original of any required governmental body or officer consents, along with a check for the required filing fee² payable to the NYS Department of State to:

NYS Department of State
Division of Corporations
One Commerce Plaza - 99 Washington Avenue
Albany, New York 12231

Step 9:

The Department of State will send to whomever is identified as the filer on the certificate's Legal Back a receipt indicating that the Certificate of Dissolution has been filed.

Step 10:

The corporation sends a copy of the Department of State's receipt to the Attorney General. Once the corporation files its final annual and financial report with the Charities Bureau (as requested by the Petition to the Attorney General), the corporation will no longer be required to file with the Charities Bureau and its registration will be closed.

Step 11:

The corporation may need to file certain documents with the Internal Revenue Service.

² Check N-PCL § 104-A(l) to determine the amount of the required filing fee.

APPENDIX A - CHECKLIST OF DOCUMENTS FOR A NO ASSET DISSOLUTION

Following is a list of the forms and documents necessary for a no asset dissolution:

- ___ Plan of Dissolution (to be an attachment to the Petition)
- ___ Original Certificate of Dissolution
Other than an approval by the Attorney General, all required governmental body and officer approvals attached.
- ___ Petition to the Attorney General for Approval of Certificate of Dissolution
- ___ Attachments to Petition for Approval of Certificate of Dissolution:
 - Copy of the Certificate of Incorporation together with all amendments, and the current by-laws.
 - Plan of Dissolution.
 - Resolutions of the Board and if appropriate, the membership.
- ___ Final Financial Report (and any other required final reports)

Please submit this checklist, signed by the Petitioner, with the Verified Petition.

APPENDIX B – SAMPLE FORM FOR A PLAN OF DISSOLUTION NO ASSETS

Plan of Dissolution

of

The Board of Directors of [name of corporation] has considered the advisability of voluntarily dissolving the corporation and has determined that dissolution is in the best interest of the corporation.

1. The Corporation has no assets or liabilities.
2. If applicable: Since the date of its incorporation on (date), (name of corporation) has never been funded and has never had any assets. (NOTE: This statement applies only to corporations that have never received any funds or other assets from any source.)
3. (A.) In addition to Attorney General approval, the following governmental approvals of the Plan are required and copies of the approvals will be attached to the Verified Petition submitted to the Attorney General.

[list governmental approvals]

or

(B.) Other than the approval of the Attorney General, no approval of the dissolution of the corporation by any governmental body or officer is required.

4. A Certificate of Dissolution shall be signed by an authorized director or officer and all required approvals shall be attached thereto.

(Name of Officer and Title)

(Date)

**APPENDIX C - SAMPLE VERIFIED PETITION TO THE ATTORNEY GENERAL
FOR APPROVAL OF CERTIFICATE OF DISSOLUTION W/OUT ASSETS**

-----X
In the Matter of the Application of
(Name of Corporation) : VERIFIED PETITION
For Approval of Certificate of
Dissolution pursuant to :
Section 1002 of the Not-for -Profit
Corporation Law. :
-----X

TO: THE ATTORNEY GENERAL OF THE STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
(Street Address)
(City/Town) , New York (Zip Code)

Petitioner, (Name of Corporation) by (Name and Title of Signatory) of the corporation, for its
Verified Petition alleges:

1. (Name of Corporation) , whose principal address is located in the county of (Name of County), was incorporated pursuant to New York’s Not-for-Profit Corporation Law on (Date of Incorporation). A copy of the Certificate of Incorporation (and all amendments) and the complete and current By-laws are attached as Exhibit ____.³

2. The names, addresses and titles of the corporation’s directors and officers are as follows:

Name	Title	Address
------	-------	---------

3. The purposes for which the corporation was organized are set forth in its Certificate of Incorporation [or relevant amendment] at paragraph ____ thereof and are as follows:

[insert a description of the purposes of the corporation]

4. The corporation is a [charitable] [non-charitable] corporation.

5. The corporation plans to dissolve in accordance with the Plan of Dissolution attached hereto as Exhibit _____ (the “Plan”).

6. The corporation is dissolving because [add a brief explanation of reasons for dissolution.]
[Please also note here if the corporation is aware of any ongoing or completed audit or inquiry by the Internal Revenue Service (“IRS”) in the past three years or if the corporation paid any

³ Please check the Department of State website to confirm that your stated date of incorporation is consistent with their records.

excise taxes or disclosed an excess benefit transaction or diversion of assets on its information returns to the IRS.]

7. (A.) The Board of Directors met at a duly called meeting on proper notice on [date] at which a quorum of ____ directors out of ____ total directors was present, and [unanimously approved] [approved by ____ votes in favor ____ votes against] resolutions adopting the Plan, and authorizing the filing of a Certificate of Dissolution. Such resolution, certified by the Secretary or other duly authorized officer is attached hereto as Exhibit ____.

or

(B.) [The Board of Directors by unanimous written consent] [The sole remaining director by written consent] dated _____ approved resolutions adopting the Plan, and authorizing the filing of a Certificate of Dissolution. Such written consent is attached hereto as Exhibit ____.

8. (A.)(i). [Include one of these paragraphs only if the corporation has members with voting rights.] After the Board of Directors approved the Plan, the members received and reviewed the Plan and adopted a resolution approving the Plan at a duly called meeting on proper notice on [state date] at which a quorum of ____ members was present [by at least a two-thirds majority consisting of ____ members out of a total of ____ votes, in favor **or** unanimous vote.] Such resolution, certified by the Secretary or other duly authorized officer, is attached hereto as Exhibit ____.

or

(ii). After the Board of Directors approved the Plan, the members received and reviewed it and by unanimous written consent voted in favor of adoption of the Plan. Such unanimous written consent is attached hereto as Exhibit ____.

or

(B.) The corporation does not have any members.

9. The corporation has no assets or liabilities as of the date hereof.

10. The corporation has filed a final financial report on form CHAR500, with all required attachments, with the Charities Bureau showing no assets or liabilities and attaching the appropriate registration fee, if required.

or

The corporation is submitting herewith as Exhibit ____ a final financial report on form CHAR500, with all required attachments, with the Charities Bureau showing no assets or liabilities and attaching the appropriate filing fee.

or

The corporation acknowledges its obligation to file a final financial report on form CHAR500, with all required attachments, with the Charities Bureau showing no assets or liabilities and is submitting herewith as Exhibit ____ such draft. The corporation gives its assurance that (i) the final financial report shall be the same in all material respects to that which is attached hereto and (ii) the corporation shall duly file its final CHAR500 report with all required attachments with the Charities Bureau.

or

The corporation is not required to file a final financial report with the Charities Bureau because the organization is exempt from registration with the Charities Bureau.

11. (A.) Other than the approval of the Attorney General, no approval of the dissolution of the corporation is required by any governmental body or officer.

or

(B.) Copies of any governmental approvals to the Plan are set forth in the Plan and attached to the Certificate of Dissolution.

12. With this Petition, the original Certificate of Dissolution is being submitted to the Attorney General for approval pursuant to Not-for-Profit Corporation Law Section 1003.

WHEREFORE, petitioner requests that the Attorney General approve the Certificate of Dissolution of (Name of Corporation), a not-for-profit corporation, pursuant to Not-for-Profit Corporation Law Section 1003.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed
This ____ day of _____, 20 ____, by

Signature

(Name of Signatory and Title)

Verification and Certification

STATE OF NEW YORK)

:SS.:

COUNTY OF _____)

_____(Name)_____, being duly sworn, deposes and says:

I am the _____(Title)_____ of _____(Name of Corporation)_____, the corporation named in the above Petition, and make this verification and certification at the direction of its Board of Directors. I have read the foregoing Petition and (i) I know the contents thereof to be true of my own knowledge, except those matters that are stated on information and belief, and as to those matters I believe them to be true and (ii) I hereby certify under penalties of perjury that the Plan was duly authorized and adopted by the Board of Directors [and by the corporation's members.]

Signature

Sworn to before me this
_____day of _____, 20__.

Notary Public

APPENDIX D - REGISTRATION REQUIREMENTS AND FINAL REPORTS

A not-for-profit corporation seeking to dissolve must comply with the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law. The text of both statutes and a summary of the registration and reporting requirements are posted Attorney General's Internet site at: <http://www.charitiesnys.com>. Effective November 2018, charities must register online on that site.

If the not-for-profit corporation is subject to the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law, but has failed to comply, it must register, file annual financial reports (e.g., Attorney General's Form CHAR500 with federal form 990) for the last three years and pay all required filing fees.

If the not-for-profit corporation is subject to the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law, but has been exempt from filing annual financial reports, it must submit a summary annual report⁴ for the last six years. No filing fees are required to accompany such reports.

A not-for-profit corporation that is not subject to the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law must submit a summary annual report³ for the last six years. No filing fees are required to accompany such reports.

⁴ A sample summary annual report is provided on the following page.

Sample Financial Report for Dissolving Entities Not Otherwise Required to File Annual Reports

Note: This schedule is for informational purposes only and illustrates the type of information the Office of the Attorney General reviews regarding dissolving entities otherwise exempt from filing annual financial reports. Such entities may also submit financial reports maintained in the ordinary course of their operations that contain similar information.

Year ended

/ /	/ /	/ /	/ /	/ /	/ /
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STATEMENT OF REVENUES & EXPENSES

1	Beginning cash balance						
2	Contributions received						
3	Investment income (interest, dividends)						
4	Rental income						
5	Gains/(losses) from sale of securities						
6	Net proceeds from sale of assets						
7	Other income (itemize)						
8	Total income (add lines 1-7)						
9	Salaries						
10	Legal fees						
11	Accounting fees						
12	Other expenses of dissolution						
13	Occupancy/Rent						
14	Contributions paid (itemize)						
15	Other expenses: (itemize)						
16	Total expenses (add lines 9-15)						
17	Ending cash balance (Line 1 + Line 8 - Line 16)						

BALANCE SHEETS

18	Cash, savings, investments						
19	Other assets (itemize)						
20	Total assets (Line 18 + Line 19)						
21	Total liabilities (itemize)						
22	Net assets or fund balances (Line 20 - 21)						

Appendix E –

**Offices of the New York State Attorney General
and the counties covered by each:**

ALBANY -

Charities Bureau
The Capitol
Albany, NY 12224-0341
518-776-2160
Counties: Albany, Columbia, Fulton, Greene,
Hamilton, Montgomery, Rensselaer, Saratoga,
Schenectady, Schoharie, Warren and Washington
(note: Sullivan and Ulster for
trusts and estates matters only)

BINGHAMTON REGIONAL OFFICE

44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-251-2770
Counties: Broome, Chemung, Chenango, Delaware,
Otsego, Schuyler, Tioga and Tompkins

BUFFALO REGIONAL OFFICE

Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400
Counties: Allegheny, Cattaraugus, Chautauqua, Erie,
Genesee, Niagara, Orleans and Wyoming

NASSAU REGIONAL OFFICE

200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302
Counties: Nassau (note: trusts and estates matters are
handled by NYC)

NEW YORK CITY

Charities Bureau
Transactions Section
28 Liberty Street
New York, NY 10005
212-416-8401
Counties: Bronx, Kings, New York, Queens and
Richmond (note: NYC also handles Dutchess,
Nassau, Orange, Putnam, Rockland, Suffolk and
Westchester – trusts and estates matters only)

PLATTSBURGH REGIONAL OFFICE

43 Durkee Street, Suite 700
Plattsburgh, NY 12901-2958
518-562-3288
Counties: Clinton, Essex and Franklin

POUGHKEEPSIE REGIONAL OFFICE

One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900
Counties: Dutchess, Orange, Sullivan and Ulster
(note: Dutchess and Orange County trusts and estates
matters are handled by NYC; Sullivan and Ulster
County trusts and estates matters are handled by
Albany)

ROCHESTER REGIONAL OFFICE

144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430
Counties: Livingston, Monroe, Ontario, Seneca,
Steuben, Wayne and Yates

SUFFOLK REGIONAL OFFICE

300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424
Counties: Suffolk (note: trusts and estates matters are
handled by NYC)

SYRACUSE REGIONAL OFFICE

615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800
Counties: Cayuga, Cortland, Madison, Onondaga and
Oswego

UTICA REGIONAL OFFICE

207 Genesee Street, Room 508
Utica, NY 13501-2812
315-864-2000
Counties: Herkimer and Oneida

WATERTOWN REGIONAL OFFICE

Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-523-6080
Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER REGIONAL OFFICE

44 South Broadway
White Plains, NY 10601
914-422-8755
Counties: Putnam, Rockland and Westchester (note:
trusts and estates matters are handled by NYC)

APPENDIX F – LIST OF GOVERNMENTAL APPROVALS

Section of NPCL	Organizational Purpose	When is consent required?	Which State Agency?
404(b)(1)	Destitute children, adult care facility, residential program for youth, unmarried mothers	Pre filing	Department of Health
404(b)(2)	Child day care center	Post filing	Office of Children and Family Services
404(c)	Hospital Service, health service of medical/dental expense indemnity plan	Pre filing	Department of Health
404(d) ¹	Operation of a school, college or university, museum or library	Pre filing	NYS Education Department
404(d)	Any other corporation whose purposes might be chartered by the Regents	Post filing	NYS Education Department
404(e)	Cemetery Corporation	Pre filing	NYS Cemetery Board
404(f)	Fire Corporations	Pre filing	Village, Town or City Board
404(g)	Prevention of cruelty to animals	Pre filing unless dispensed with	American Society for the Prevention of Cruelty to Animals
404(h)	YMCAs	Pre filing	National YMCA
404(i)	Support of armed forces in USA or foreign country	Pre filing	
404(j)	Labor Unions	Pre filing	Industrial Board of Appeals
404(k)	Savings bank or life insurance	Pre filing	Superintendent of Banks
404(l)	Licensed insurance agents or brokers or underwriters	Pre filing	Superintendent of Insurance
404(m)	Political Parties	Pre filing	County Committee of said Party
404(n)	American Legions	Pre filing	Dept. of NY American Legion
404(o)	Hospital Corporations	Pre filing	Public Health and Health Planning Council
404(p)	Medical Corporation	Pre filing	DOH and Public Health
404(q)	Mental Health Facility	Pre filing	Commissioner of Mental Health
404(r)	Health Maintenance Organization	Pre filing	DOH
404(t)	Facility providing health related services	Pre filing	Public Health and Health Planning Council
404(u)	Substance Abuse Programs	Pre filing	Office of Alcoholism and Substance Abuse Services
404(v)	Non-profit property/casualty insurance	Pre filing	Superintendent of Insurance

¹404(d) has two parts as noted: actual educational organization such as school, library, museum or college there require “pre filing” all others require post filing. All post filings are done within 30 days.

Section XII.

Dissolution of Not-for-Profit Corporations With Assets

**VOLUNTARY DISSOLUTION OF NOT-FOR-PROFIT CORPORATIONS
WITH ASSETS**

**Office of the NYS Attorney General
Charities Bureau
Guidance Document
Issue date: 2018**

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INTRODUCTION

This guidance is designed to assist New York charitable not-for-profit corporations that have assets and are planning to dissolve. Organizations that do not have assets at the time of dissolution should consult “Voluntary Dissolution of Not-For-Profit Corporations with No Assets to Distribute,” which is available on the Attorney General’s website at <http://www.charitiesnys.com>.

This information is not a substitute for legal advice from an attorney but has been drafted to provide guidance to not-for-profit corporations that are seeking to dissolve and the lawyers who represent them.

This guidance and other information of interest to not-for-profit corporations may be found on the Attorney General's Internet site: <http://www.charitiesnys.com>.

NOTE: This guidance reflects the amendments to the Not-for-Profit Corporation Law that were enacted as part of the Nonprofit Revitalization Act of 2013.

Included in this guidance are instructions and sample forms for the preparation and filing of petitions to the Attorney General for approval of a Plan of Dissolution and Distribution of Assets (Step 1) and approval of the Certificate of Dissolution (Step 2). A Petition to the Attorney General and the required attachments must be submitted to the office of the Attorney General designated to receive such documents. A list of the offices of the Attorney General and the counties they serve is in Appendix F.

PLEASE NOTE: Pursuant to the Nonprofit Revitalization Act of 2013 (the "Act"), a nonprofit corporation that has assets at the time of its dissolution has the option of submitting a petition for approval of its Plan of Dissolution and Distribution of Assets (“Plan”) to either the Attorney General or the Court on notice to the Attorney General. The Act also provides that at any time, including if the Attorney General does not approve a petition or the Attorney General concludes that court review of the petition is appropriate, the corporation may apply to the Supreme Court in the judicial district where the corporation's principal office is located for an order approving the Plan.

Dissolving corporations that are required to be registered with the Attorney General’s Charities Bureau pursuant to Article 8 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law must comply with the applicable registration and annual financial reporting requirements prior to dissolution.¹ Registration and reporting requirements are posted at www.charitiesnys.com. Effective November 2018, charities must register electronically on that site.

¹ The officers and directors of charitable organizations are obligated to administer their assets responsibly, and comply with the duties of care, loyalty and obedience. Assets must be used for their intended purposes and not distributed except as provided by law.
NPCL §§ 720(a)(1)(A); 1001(d)(3)

SUMMARY OF PROCEDURES FOR AN ASSET DISSOLUTION

Following are the procedures to be followed by dissolving organizations. It will entail the preparation and filing of two (2) Verified Petitions.

A. Preparation and Filing of Plan of Dissolution and Distribution of Assets and a Verified Petition to Attorney General (Step 1)

1. The Board of Directors must approve a Plan of Dissolution (“Plan”). *See* Appendix A for a sample plan. A quorum must be present and at least a majority of the directors must vote for dissolution. Alternatively, the Board may adopt the Plan by unanimous written consent if such a vote is not prohibited by the corporation’s certificate of incorporation or by-laws. However, if the number of directors is less than the number required for a quorum or there are fewer than three directors, the unanimous vote of all remaining directors is required to adopt the Plan. A copy of the resolution approving the Plan, certified by the corporation’s secretary or other authorized officer, or a copy of the Board’s unanimous written consent, must be attached as an exhibit to the Petition.

Quick Statutory Reference Guide	
Board of directors' adoption and authorization of Plan of Dissolution	N-PCL §§ 1001(a), 1002(a) and (b)
Quorum and required vote for board approval of Plan	N-PCL §§ 1002(a)(1)(i), 707, 708 and 709
If the number of directors in office is less than the number of directors required for a quorum or there are fewer than three directors, the remaining directors' vote must be unanimous	N-PCL § 1002(a)(1)(ii)

2. If the corporation has members entitled to vote, after the Board of Directors has authorized the Plan, the Plan must be submitted to the membership for a vote to approve the Plan. A vote of at least two-thirds of the members with a quorum present at a meeting, or the unanimous written consent of the members, is required for approval.

If the corporation has members entitled to vote, a copy of the members’ resolution, certified by the corporation’s secretary or other authorized officer, or if permitted, a copy of the members’ unanimous written consent must be attached as an exhibit to the Petition.

If the organization has no voting members, *i.e.*, members who elect the board of directors, the Plan is deemed authorized upon adoption by the Board. A statement to that effect must be in the Petition.

Quick Statutory Reference Guide	
Submission of Plan to members for approval	N-PCL § 1002(a)(2)
Quorum and required vote for membership approval	N-PCL §§ 1002(a)(2), 612, 613(c) and 614
Authorization of plan if there are no members entitled to vote	N-PCL § 1002(b)

3. If approval of any governmental body or officer was required for the formation of the corporation, the corporation must secure written approval of the Plan from such governmental agency or officer, and copies of the approvals must be attached to the Petition and to the Certificate of Dissolution. Please refer to Appendix G for a list of required approvals.

Quick Statutory Reference Guide	
Government approvals of the Plan	N-PCL §§ 404 (b) - (v) and 1002(c)

4. If the corporation holds property for any charitable purposes to be distributed to one or more charitable organizations, the corporation must secure from each such organization (a) its governing instrument, with all amendments; (b) its most recent financial report; and (c) an affidavit from a director or officer of the corporation stating its purposes and that it is currently exempt from taxation. These documents must be attached to the Plan.

Note: If the corporation holds property for any charitable purposes, the assets of the corporation must be distributed to a charitable organization or organizations exempt from taxation pursuant to federal and state laws, and engaged in activities substantially similar to those of the dissolved corporation as required by law and approved by the Attorney General or a Court. If the corporation holds assets for a specific purpose as required by any gift instrument, the same restriction must be maintained by the recipient entity. The Plan must include a statement that the assets shall be distributed for the purposes required by law and, if applicable, for a specific purpose as required by any gift instrument.

If any of the assets of the corporation will be distributed for a particular purpose pursuant to a gift instrument, the Plan must identify the terms of the gift, and the instrument should be attached along with a written agreement from the recipient confirming that the assets will be used for the particular purpose.

Quick Statutory Reference Guide	
Definitions of charitable and non-charitable corporations	N-PCL § 201
Charitable corporate purposes	N-PCL § 201(b)
Distribution of assets for charitable purposes	N-PCL § 1001(d)(3).

5. If any of the assets of the corporation will be distributed to another organization for a particular purpose, other than those described in number 4 above, the corporation must secure a written agreement, which may be in the form of a letter, from the proposed recipient confirming that the assets will be used for such purpose. The agreement must be attached as an exhibit to the Plan.

Quick Statutory Reference Guide	
Agreement concerning assets to be used for a legally required purpose.	N-PCL § 1001(d)(4)

6. Prepare a Verified Petition to the Attorney General (the "Petition") for approval of the Plan.

The Petition must be verified under penalties for perjury and the following exhibits must be attached: (a) the Plan with required information concerning recipients of the assets (See 4 above), (b) copies of the Board's resolution and, if applicable, the members' resolution (c) copies of all required governmental approvals, (d) copies of the dissolving corporation's Certificate of Incorporation and all amendments, (e) a copy of the corporation's current by-laws and (f) a proposed Attorney General's Approval. *See* Appendix B for a sample Petition, Appendix B-1 for a checklist of attachments to the Petition and Appendix C for a sample Attorney General Approval.

The Attorney General's office reviews each Petition for approval of a Plan to confirm that all statutory requirements have been met and to identify any additional information needed. The Attorney General's office will advise the Petitioner of any additional material required. The Attorney General's office will also advise the Petitioner of any objections to the Plan or if any individuals or entities should receive notice of the Petition. If the Attorney General objects to the plan, the petitioner may file the Petition with the court directly, and the Attorney General must be given notice of its filing as well as any other statutory and court-ordered notice.

Quick Statutory Reference Guide	
Petition to the Attorney General	N-PCL §§ 1002(d)(1) and (2)
Petition to the Supreme Court	N-PCL § 1002(d)(3)

7-A. Submission of the Petition to the Attorney General. Submit the Petition with all exhibits attached to the appropriate office of the Attorney General. A list of offices of the Attorney General and the counties they serve is in Appendix F.

After the Attorney General's review is complete, if the Attorney General determines that all statutory requirements have been met and approval of the Plan is appropriate, the Attorney General will, in the case of application to the Attorney General, provide the petitioner's attorney with written confirmation in the form of an Attorney General Approval.

In certain cases, the Attorney General may decline to approve the Plan or determine that approval of the Plan by the Supreme Court is appropriate. Among the issues that the Attorney General's office deems may warrant court approval are the following:

- The Attorney General has received complaints or objections from members, creditors of the organization or other interested persons.
- The Attorney General has objections to the dissolution which have not been resolved after discussion.
- The Attorney General concludes that an Article II judicial dissolution or other judicial relief is required.

In such cases, the Attorney General will advise the Petitioner that it may submit an application to the court, on notice to the Attorney General.

7-B Submission of the Petition to the Court. Petitioner may submit the Petition, with all exhibits directly to the court.

The N-PCL provides that a petition to the court for an order approving a Plan should be submitted to the court on ten days' notice to the Attorney General. *However*, the Attorney General's office has found that it is more efficient if applicants submit their draft papers for court approval to the Attorney General *before* submission to the court. That procedure allows applicants to resolve concerns raised by the Attorney General *prior* to submitting the papers to the court and, in most cases, avoids the Attorney General's Office objecting to the Plan.

If the application for approval of the plan is made to the court on notice to the Attorney General and the Attorney General has no objection to the Plan, the petitioner's attorney will be provided with written confirmation by means of a "No Objection" endorsement. Such endorsement, typically stamped on the proposed order approving the Plan and signed by an identified Assistant Attorney General, will waive statutory service of the Petition since the papers have already been submitted to and reviewed by the Office of the Attorney General. The petition can then be submitted to the court and, if a hearing or other court proceeding is scheduled, the Petitioner must give notice of such proceeding to the Attorney General. In addition, a copy of the signed order must be submitted to the Attorney General.

Quick Statutory Reference Guide	
Application for Approval of the Attorney General	N-PCL § 1002(d)(2)
Application for Approval of the Supreme Court	N-PCL § 1002(d)(3)

VERIFIED PETITION TO THE ATTORNEY GENERAL FOR APPROVAL OF CERTIFICATE OF DISSOLUTION

B. Preparation of Petition for Approval of Certificate of Dissolution (Step 2)

1. Within two hundred seventy (270) days after the date on which the Attorney General or the Court approved the Plan, the corporation must carry out the Plan, pay its liabilities, distribute its assets and wind up its business in accordance with the Plan.

Quick Statutory Reference Guide	
Carrying out the Plan	N-PCL § 1002-a

Please Note: Pursuant to N-PCL § 1002-a(d), if a creditor cannot be identified or found 270 days after the Plan has been approved, any assets which would have been distributed to such creditor must be paid to the State Comptroller pursuant to the Abandoned Property Law.

2. After the corporation's assets have been fully distributed, the corporation must prepare a final financial report showing no assets or liabilities.

3. The corporation must prepare a Certificate of Dissolution. *See* the form Certificate of Dissolution on the Department of State website linked here:
<https://www.dos.ny.gov/forms/corporations/1337-f.pdf>.

Quick Statutory Reference Guide

Contents of Certificate of Dissolution	N-PCL § 1003(a)
--	-----------------

4. The corporation must prepare a Verified Petition to the Attorney General for Approval of the Certificate of Dissolution (the "AG Petition"). See Appendix D for a sample Verified Petition for Approval of Certificate of Dissolution and Appendix D-1 for a checklist of required attachments to the Petition.

Quick Statutory Reference Guide	
Application to the Attorney General for Approval of Certificate of Dissolution	N-PCL § 1003(c)

5. The corporation submits the AG Petition to the Attorney General. A copy of the Certificate of Dissolution and the corporation's final financial report must be attached to the AG Petition. (Please see Appendix E and sample AG Petition for a description of the final reports required.) The **original** Certificate of Dissolution should be submitted in a separate Legal Back. This material should be submitted to the Attorney General's office to which the dissolving corporation submitted its prior Verified Petition. See Appendix F for the addresses and telephone numbers of the Attorney General's offices and the counties they serve.

6. If the AG Petition and the Certificate of Dissolution are acceptable, the Attorney General will endorse the **original** Certificate of Dissolution and return it to the person who filed the dissolution papers.

7. The organization must request a *Consent to Dissolution of a Corporation* from the New York State Department of Taxation and Finance ("Tax Department"). The process and the documentation you will need depends on whether your organization has been granted tax exempt status. Some charitable organizations may not have been granted tax exempt status by NY State.

Instructions and forms for securing the Tax Department's consent are posted at https://www.tax.ny.gov/bus/doingbus/vol_dissolution.htm

Note - If a dissolving corporation has done business in New York City and has incurred tax or other liabilities under the New York City Administrative Code, it will also need the consent of the Commissioner of Finance of New York City. A "Request for Consent to Dissolution" form is posted. https://www1.nyc.gov/assets/finance/downloads/pdf/collections/request_dissolution.pdf

Quick Statutory Reference Guide	
Consent of the NYS Department of Taxation	N-PCL § 1004(a)
Consent of New York City Commissioner of Finance	N-PCL § 1004(b)

For those corporations filing outside New York City, check the requirements of your local commissioner of finance.

8. The corporation must send the **original** Certificate of Dissolution with the Consent of the NYS Department of Taxation and Finance and the consent of the NYC Commissioner of Finance, if necessary, along with a check for the appropriate filing fee (see N-PCL§ 104-A for appropriate

fee) payable to the NYS Department of State to:

NYS Department of State
Division of Corporations
One Commerce Plaza - 99 Washington Avenue
Albany, New York 12231

- 9.** The Department of State will send the filer a receipt stating that the corporation's Certificate of Dissolution has been filed.
- 10.** A copy of the Department of State's filing receipt must be sent to the Attorney General.
- 11.** Once it files its final annual and financial report with the Charities Bureau (as required by the AG Petition), the corporation will no longer be required to register or file annual reports with the Charities Bureau, and its registration file will be closed.
- 12.** The corporation may need to file certain documents with the Internal Revenue Service.

APPENDIX A - SAMPLE PLAN OF DISSOLUTION AND DISTRIBUTION OF ASSETS

Plan of Dissolution and Distribution of Assets of

(Name of Corporation)

The Board of Directors of [name of corporation] has considered the advisability of voluntarily dissolving the corporation and has determined that dissolution is in the best interest of the corporation.

1. (A.) The assets of the corporation and their fair market values are as follows:

List the corporation's assets and their fair market values.

(B.) The following assets are held as donor restricted funds.² [Add and list only if the corporation holds restricted gifts]

2. (A.) The corporation has no liabilities.

or

(B.) The corporation has liabilities of \$_____.

[Include a list, with reasonable certainty, of the corporation's debts and liabilities. Include any future liabilities to be accrued prior to the dissolution of the corporation, including any proposed dissolution costs such as legal, accounting and filing fees; each liability should be separately listed and include the maximum amount to be paid and the name of each payee. Actual payments of any stated liability shall not exceed any amounts stated herein, however, it is acceptable to state that if actual payment of any liability is less than amounts stated as liabilities herein, the remaining funds will be distributed to one or more of the charitable designees.]

3. The organization(s) proposed to receive the corporation's assets [is/are] a charitable organization(s) engaged in activities substantially similar to the corporation's activities and consistent with any specific dissolution requirement specified in the corporation's Certificate of Incorporation.

For each organization proposed in this Plan to receive the assets, the following documents are attached as Exhibit____:

- X the certificate of incorporation, with all amendments;
- X most recent financial report; and
- X an affidavit from a director or officer stating the purposes of the organization, that it is currently exempt from taxation under Section 501 (c)(3) of the Internal Revenue Code, that it is up to date in its registration and annual financial filings with the Charities Bureau or is exempt from registration with the Charities Bureau, and if restricted assets are being transferred, a statement that those assets will be

² Such restricted assets shall not be subject to the general liabilities of the corporation.

held in accordance with the restrictions.

4. (A.) In addition to Attorney General approval, the following governmental approvals of this Plan are required and copies of the approvals will be attached to the Verified Petition submitted to the Attorney General.

List governmental approvals

or

(B.) Other than the approval of the Attorney General, no governmental approvals of this Plan are required.

5. Within two hundred seventy days after the date on which the Attorney General approves the Plan, the corporation shall carry it out. After the Plan is carried out, a Certificate of Dissolution shall be signed by an authorized director or officer and all required approvals shall be attached thereto.

(Name of Officer and Title)

(Date)

**APPENDIX B – SAMPLE VERIFIED PETITION FOR ATTORNEY GENERAL
APPROVAL OF THE PLAN OF DISSOLUTION AND DISTRIBUTION OF ASSETS**

ATTORNEY GENERAL

[Address of the Attorney General]

COUNTY OF _____

-----X

In the Matter of the Application of _____ :
[Name of Corporation]

For Approval of Plan of Dissolution and _____ : VERIFIED PETITION
Distribution of Assets pursuant to
Section 1002 of the Not-for- Profit _____ : AG# _____³
Corporation Law

-----X

TO: THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

COUNTY OF _____

Petitioner, [Name of Corporation] by the undersigned officer/director of the corporation for its
Verified Petition herein respectfully alleges:

1. [Name of Corporation], whose principal office is located in the county of [Name of County],
was incorporated pursuant to New York's Not-for-Profit Corporation Law on
[Date of Incorporation]. A copy of the Certificate of Incorporation, any amendments thereto, and
the complete and current By-laws are attached as Exhibit _____.⁴

2. The names, addresses and titles of the corporation's officers and/or directors are as follows:

Name	Title	Address
------	-------	---------

3. The purposes for which the corporation was organized are set forth in its Certificate of
Incorporation [or relevant amendment] at paragraph ____ thereof and are as follows:

[description of purposes]

4. The corporation is a [charitable] [non-charitable] corporation.

5. The corporation plans to dissolve and distribute its assets and pay its liabilities in accordance
with the Plan of Dissolution and Distribution of Assets attached hereto as Exhibit____ (the
"Plan").

³ When your Petition is approved, the office of the Attorney General will assign an approval number that must be
placed on all subsequent submissions. Do not insert your file # here.

⁴ Please check the Department of State website to confirm that your stated date of incorporation is consistent with
their records.

6. The corporation is dissolving because [add a brief explanation of reasons for dissolution]. [Please also note here if the corporation is aware of any ongoing or completed audit or inquiry by the IRS in the past three years or if the corporation paid any excise taxes or disclosed an excess benefit transaction or diversion of assets on its information returns to the IRS.]

7. (A.) The Board of Directors met at a duly called meeting on proper notice on [date] at which a quorum of ____ directors out of ____ total directors was present, and [unanimously approved] [approved by ____ votes in favor ____ votes against] adoption of the Plan, and authorized the filing of a Certificate of Dissolution. Such resolutions certified by the Secretary or other duly authorized officer are attached hereto as Exhibit ____.

or

(B.) [The Board of Directors by unanimous written consent] [The sole remaining director by written consent] dated _____ approved resolutions adopting the Plan, and authorizing the filing of a Certificate of Dissolution. Such written consent is attached hereto as Exhibit ____.

8. (A.)(i). [Include one of these paragraphs only if the corporation has members with voting rights]. After the Board of Directors approved the Plan, the members received and reviewed the Plan and adopted a resolution approving the Plan at a duly called meeting on proper notice on [state date] at which a quorum of ____ members was present [by at least a two-thirds majority consisting of ____ members out of a total of ____ votes, in favor **or** unanimous vote]. Such resolution, certified by the Secretary or other duly authorized officer, is attached hereto as Exhibit ____.

or

(ii). After the Board of Directors approved the Plan, the members received and reviewed it and by unanimous written consent voted in favor of adoption of the Plan. Such unanimous written consent is attached hereto as Exhibit ____.

or

(B.) The corporation does not have any members.

9. (A.) Copies of any required governmental approvals of the Plan are attached hereto as Exhibit ____.

or

(B.) Other than the approval of the Attorney General, no other governmental approvals of the Plan are required.

10. (A.) The corporation is registered with the Charities Bureau of the Office of the Attorney General and its registration number is: _____. The corporation is up to date with

its filings and most recently filed its annual report with the Charities Bureau for its fiscal year ended _____.

or

(B.) The corporation is registered with the Charities Bureau of the office of the Attorney General and its registration number is: _____. The corporation is not up to date with its filings and the delinquent annual reports for the fiscal years _____ are attached hereto as Exhibit _____.

or

(C.) The corporation is exempt from registration with the Charities Bureau pursuant to _____ and a summary annual financial report showing the last six fiscal years of financial information of the corporation is attached hereto as Exhibit _____. [See sample summary financial report on last page of this Guidance.]

11. (A.) No previous application for approval of the Plan has been made.

or

(B.) An application was previously made for approval of the Plan under the following circumstances and with the following resolution/determination:

WHEREFORE, Petitioner requests that the Attorney General approve the Plan of Dissolution and Distribution of Assets of [Name of Corporation], a not-for-profit corporation, pursuant to the Not-for-Profit Corporation Law Section 1002.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed this _____ day of _____, 20____ by

Signature

Phone #:

Email address:

(Name of Signatory and Title)

Verification and Certification

STATE OF NEW YORK)
:SS.:
COUNTY OF _____)

_____(Name)_____, being duly sworn, deposes and says:

I am the _____ (Title) _____ of _____ (Name of Corporation) _____, the corporation named in the above Petition. I make this verification and certification at the direction of its Board of Directors. I have read the foregoing Petition and (i) I know the contents thereof to be true of my own knowledge, except those matters that are stated on information and belief and as to those matters I believe them to be true, and (ii) I hereby certify under penalties of perjury that the Plan was duly authorized and adopted by the Board of Directors [and by the corporation's members.]

Signature

Sworn to before me this ____ day of ____, 20__

Notary Public

APPENDIX B-1

CHECKLIST OF DOCUMENTS FOR PETITION TO THE ATTORNEY GENERAL FOR APPROVAL OF A PLAN OF DISSOLUTION AND DISTRIBUTION OF ASSETS (Step 1)

The following forms and documents constitute an application for approval of the Plan:

___ Verified Petition to the Attorney General or the Court for Approval of Plan of Dissolution and Distribution of Assets;

___ Attachments to Verified Petition

- Plan of Dissolution with the following documents concerning all recipients of the corporation's assets; recipients' Certificates of Incorporation and all amendments, latest financial reports and an affidavit confirming their purposes and tax status. See page 4.
- Copies of the board's resolution or unanimous written consent and, if applicable, the members' resolutions or unanimous written consent approving the Plan of Dissolution.
- Copies of the dissolving corporation's Certificate of Incorporation, together with all amendments and the current by-laws.
- Other than the Attorney General approval, all required governmental approvals.
- Proposed Attorney General Approval
- Copies of any delinquent annual reports that should have been filed with the Charities Bureau.

Please submit this checklist, signed by the Petitioner, with the Verified Petition.

APPENDIX C – SAMPLE APPROVAL OF THE ATTORNEY GENERAL

-----X

In the Matter of the Application of
(Name of Corporation) for

APPROVAL OF A PLAN OF DISSOLUTION
AND DISTRIBUTION OF ASSETS

pursuant to Section 1002 of
the Not-for-Profit Corporation Law

-----X

ATTORNEY GENERAL'S
APPROVAL OF
PLAN OF DISSOLUTION
AND DISTRIBUTION
OF ASSETS

OAG No.:

1. By Petition verified on ____ (Date) ____, ____ (Name of Corporation) ____, applied to the Attorney General pursuant to section 1002 of the Not-for-Profit Corporation Law for approval of a Plan of Dissolution and Distribution of Assets.

2. Based on a review of the Petition and its attachments, and the verification and certification of ____ (Name of Verifier) ____ of ____ (Name of the Corporation) ____, the Attorney General has determined that the corporation has complied with the provisions of section 1002 of the Not-for-Profit Corporation Law applicable to the dissolution of not-for-profit corporations with assets.

3. The Plan of Dissolution and Distribution of Assets is approved.

Attorney General of the State of New York

By: _____
Assistant Attorney General

Dated _____

**APPENDIX D – SAMPLE VERIFIED PETITION TO THE ATTORNEY GENERAL
FOR APPROVAL OF CERTIFICATE OF DISSOLUTION
(after assets have been distributed)**

Attorney General of the State of New York
(Address of the Attorney General)

-----X

In the Matter of the Application of :
(Name of Corporation)

VERIFIED PETITION

For Approval of Certificate of :
Dissolution pursuant to

OAG #

Section 1003 of the Not-for-Profit :
Corporation Law.

-----X

Petitioner, [Name of Corporation] (the “corporation”), a New York charitable corporation, by the undersigned officer/director of the corporation for its Verified Petition alleges:

1. On _____, 20 __, the Attorney General of the State of New York approved the corporation’s Plan of Dissolution and Distribution of Assets (the “Plan”).
2. The corporation has now carried out its Plan and seeks approval to file a Certificate of Dissolution with the Department of State of the State of New York. The corporation’s proposed Certificate of Dissolution signed by an officer of the corporation is attached hereto with a copy of the Attorney General Approval approving the Plan attached.⁵
3. All statements made by the corporation in the Verified Petition dated [date] and verified and certified by [name/title] of the corporation regarding approval of the Plan, continue to be true and correct as of the date hereof and are incorporated herein by reference.
4. The corporation has carried out the Plan and provides below a final report showing distribution of each asset and payment of each liability as provided for in the Plan:

(i) Distribution of Assets:

Amount:

Grantee:

[]

[]

⁵ The Attorney General accepts completed Certificates of Dissolution that use the interactive Certificate of Dissolution form on the New York Department of State Website. [LINK https://www.dos.ny.gov/forms/corporations/1561-f.pdf](https://www.dos.ny.gov/forms/corporations/1561-f.pdf) Please note that in paragraph eighth, there are four possible boxes but only the first box would typically be applicable for a corporation that, as in this sample petition, had assets and is filing a Certificate of Dissolution after having obtained Attorney General approval of a plan of dissolution.

(ii) Payment of Liabilities:

Amount:

Payee:

[]

[]

5. The corporation has no assets or liabilities as of the date hereof.

6. The corporation has filed a final financial report on form CHAR500, with all required attachments, with the Charities Bureau showing no assets or liabilities and attached the appropriate filing fee, if required.

or

The corporation is submitting herewith as Exhibit ____ a final financial report on form CHAR500, with all required attachments, with the Charities Bureau showing no assets or liabilities and attaching the appropriate filing fee.

or

The corporation acknowledges its obligation to file a final financial report on form CHAR500, with all required attachments, with the Charities Bureau showing no assets or liabilities and is submitting herewith as Exhibit ____ such draft. The corporation gives its assurance that (i) the final financial report shall be the same in all material respects to that which is attached hereto and (ii) the corporation shall duly file its final CHAR500 report with all required attachments with the Charities Bureau.

or

The corporation is not required to file a final financial report with the Charities Bureau because the organization is exempt from registration with the Charities Bureau.

7. (A.) Other than the approval of the Attorney General, no approval of the Certificate of Dissolution is required by any governmental body or officer.

or

(B.) The required approvals of governmental agencies or officers are set forth in the Plan and attached to the Certificate of Dissolution.

8. There has been no previous application for approval of the Certificate of Dissolution.

or

An application was previously made for approval of the Certificate of Dissolution under the following circumstances and with the following resolution/determination:

WHEREFORE, petitioner requests that the Attorney General approve the Certificate of Dissolution of (Name of Corporation), a charitable corporation, pursuant to the Not-for-Profit Corporation Law Section 1003.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed this ____ day of _____, 20____, by

Signature
(Name of Officer and Title)
Phone #:
Email address:

Verification

[illegible]

_____(Name)_____, being duly sworn, deposes and says:

I am the _____ (Title) of _____ (Name of Corporation), the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except those matters that are stated on information and belief and as to those matters, I believe them to be true.

Signature

Sworn to before me this
_____ day of _____, 20____.

Notary Public

APPENDIX D-1

CHECKLIST OF DOCUMENTS FOR PETITION FOR APPROVAL OF CERTIFICATE OF DISSOLUTION (Step 2)

Following is a list of the forms and documents necessary for the Petition to the Attorney General:

___ Verified Petition to the Attorney General for Approval of the Certificate of Dissolution.

___ Attachments to the Verified Petition:

- Final Financial Report
- Certificate of Dissolution with the following attachments:
 - Copies of all required government approvals
 - Attorney General's Approval of Step 1 (Approval of the Plan)
 - Legal Back

APPENDIX E - REGISTRATION REQUIREMENTS AND FINAL REPORTS

A not-for-profit corporation seeking to dissolve must be in compliance with the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law. The full text of both statutes as well as a summary of the registration and reporting requirements may be found on the Attorney General's Internet site at: **<http://www.ag.ny.gov>**.

If the not-for-profit corporation is subject to the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law, but has failed to comply, it must register, file annual reports (*e.g.* a CHAR500 with federal Form 900 attached) for the last three years and pay all required filing fees.

If the not-for-profit corporation is subject to the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law, but has been exempt from filing annual financial reports, it must submit annual financial reports* for the last six years. No filing fees are required to accompany such reports.

A not-for-profit corporation that is not subject to the registration and reporting requirements of section 8-1.4 of the Estates, Powers and Trusts Law and/or Article 7-A of the Executive Law must submit annual financial reports* for the last six years. No filing fees are required to accompany such reports.

* A sample financial report format for such entities is provided on the following page.

Sample Financial Report for Dissolving Entities Not Otherwise Required to File Annual Reports

Note: This schedule is for informational purposes only and illustrates the type of information the Office of the Attorney General reviews regarding dissolving entities otherwise exempt from filing annual financial reports. Such entities may also submit financial reports maintained in the ordinary course of their operations that contain similar information.

Year ended

/ /	/ /	/ /	/ /	/ /	/ /
-----	-----	-----	-----	-----	-----

STATEMENT OF REVENUES & EXPENSES

1	Beginning cash balance					
2	Contributions received					
3	Investment income (interest, dividends)					
4	Rental income					
5	Gains/(losses) from sale of securities					
6	Net proceeds from sale of other assets					
7	Other income (itemize)					
8	Total income (add lines 1-7)					
9	Salaries					
10	Legal fees					
11	Accounting fees					
12	Other expenses of dissolution					
13	Occupancy/Rent					
14	Contributions paid (itemize)					
15	Other expenses: (itemize)					
16	Total expenses (add lines 9-15)					
17	Ending cash balance (Line 1 + Line 8 - Line 16)					

BALANCE SHEETS

18	Cash, savings, investments					
19	Other assets (itemize)					
20	Total assets (Line 18 + Line 19)					
21	Total liabilities (itemize)					
22	Net assets or fund balances (Line 20 - 21)					

Appendix F –

**Offices of the New York State Attorney General
and the counties covered by each:**

ALBANY -

Charities Bureau
The Capitol
Albany, NY 12224-0341
518-776-2160
Counties: Albany, Columbia, Fulton, Greene,
Hamilton, Montgomery, Rensselaer, Saratoga,
Schenectady, Schoharie, Warren and Washington
(note: Sullivan and Ulster for
trusts and estates matters only)

BINGHAMTON REGIONAL OFFICE

44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-251-2770
Counties: Broome, Chemung, Chenango, Delaware,
Otsego, Schuyler, Tioga and Tompkins

BUFFALO REGIONAL OFFICE

Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400
Counties: Allegheny, Cattaraugus, Chautauqua, Erie,
Genesee, Niagara, Orleans and Wyoming

NASSAU REGIONAL OFFICE

200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302
Counties: Nassau (note: trusts and estates matters are
handled by NYC)

NEW YORK CITY

Charities Bureau
Transactions Section
28 Liberty Street
New York, NY 10005
212-416-8401
Counties: Bronx, Kings, New York, Queens and
Richmond (note: NYC also handles Dutchess,
Nassau, Orange, Putnam, Rockland, Suffolk and
Westchester – trusts and estates matters only)

PLATTSBURGH REGIONAL OFFICE

43 Durkee Street, Suite 700
Plattsburgh, NY 12901-2958
518-562-3288
Counties: Clinton, Essex and Franklin

POUGHKEEPSIE REGIONAL OFFICE

One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900
Counties: Dutchess, Orange, Sullivan and Ulster
(note: Dutchess and Orange County trusts and estates
matters are handled by NYC; Sullivan and Ulster
County trusts and estates matters are handled by
Albany)

ROCHESTER REGIONAL OFFICE

144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430
Counties: Livingston, Monroe, Ontario, Seneca,
Steuben, Wayne and Yates

SUFFOLK REGIONAL OFFICE

300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424
Counties: Suffolk (note: trusts and estates matters are
handled by NYC)

SYRACUSE REGIONAL OFFICE

615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800
Counties: Cayuga, Cortland, Madison, Onondaga and
Oswego

UTICA REGIONAL OFFICE

207 Genesee Street, Room 508
Utica, NY 13501-2812
315-864-2000
Counties: Herkimer and Oneida

WATERTOWN REGIONAL OFFICE

Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-523-6080
Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER REGIONAL OFFICE

44 South Broadway
White Plains, NY 10601
914-422-8755
Counties: Putnam, Rockland and Westchester (note:
trusts and estates matters are handled by NYC)

APPENDIX G – LIST OF GOVERNMENTAL APPROVALS

Section of NPCL	Organizational Purpose	When is consent required?	Which State Agency?
404(b)(1)	Destitute children, adult care facility, residential program for youth, unmarried mothers	Pre filing	Department of Health
404(b)(2)	Child day care center	Post filing	Office of Children and Family Services
404(c)	Hospital Service, health service of medical/dental expense indemnity plan	Pre filing	Department of Health
404(d) ¹	Operation of a school, college or university, museum or library	Pre filing	NYS Education Department
404(d)	Any other corporation whose purposes might be chartered by the Regents	Post filing	NYS Education Department
404(e)	Cemetery Corporation	Pre filing	NYS Cemetery Board
404(f)	Fire Corporations	Pre filing	Village, Town or City Board
404(g)	Prevention of cruelty to animals	Pre filing unless dispensed with	American Society for the Prevention of Cruelty to Animals
404(h)	YMCAs	Pre filing	National YMCA
404(i)	Support of armed forces in USA or foreign country	Pre filing	
404(j)	Labor Unions	Pre filing	Industrial Board of Appeals
404(k)	Savings bank or life insurance	Pre filing	Superintendent of Banks
404(l)	Licensed insurance agents or brokers or underwriters	Pre filing	Superintendent of Insurance
404(m)	Political Parties	Pre filing	County Committee of said Party
404(n)	American Legions	Pre filing	Dept. of NY American Legion
404(o)	Hospital Corporations	Pre filing	Public Health and Health Planning Council
404(p)	Medical Corporation	Pre filing	DOH and Public Health
404(q)	Mental Health Facility	Pre filing	Commissioner of Mental Health
404(r)	Health Maintenance Organization	Pre filing	DOH
404(t)	Facility providing health related services	Pre filing	Public Health and Health Planning Council
404(u)	Substance Abuse Programs	Pre filing	Office of Alcoholism and Substance Abuse Services
404(v)	Non-profit property/casualty insurance	Pre filing	Superintendent of Insurance

¹404(d) has two parts as noted: actual educational organization such as school, library, museum or college there require “pre filing” all others require post filing. All post filings are done within 30 days.

Section XIII.

Tips on Charitable Giving

Office of the New York State Attorney General Charities Bureau

New Yorkers are charitable people who give generously to a wide variety of issues and causes. We also want to be sure our donations reach the programs that need them, and that organizations are using the money wisely. In New York State, most charities are required to register and file financial reports with my office. That information is available to you on our website — www.charitiesnys.com.

Before you donate, take the time to check out whether the charity is legitimate and whether it is spending its resources wisely.

The tips in this brochure can help you donate your hard earned money in ways that will do the most good. If you have any questions or would like more information, call our Charities Bureau or check out our website.



New York State Attorney General

The State Capitol

Albany, New York 12224

1-800-771-7755

www.ag.ny.gov

charitiesnys.com

212-416-8401

Resources

Office of the New York State Attorney

Find information about a charity's registration and financial filings.

1-800-771-7755

www.ag.ny.gov

Charities Bureau

212-416-8401

www.charitiesnys.com

Internal Revenue Service

Check to see if a charity is eligible to receive tax-deductible gifts.

www.irs.gov/Charities-&-Non-Profits

Charity Navigator

Provides information about charities and tips about donating.

www.Charitynavigator.org

Better Business Bureau

Provides information about charities' finances, effectiveness reporting and fundraising appeals.

Metropolitan New York, Long Island,

Mid-Hudson region

Bbb.org/new-york-city

Upstate New York

Bbb.org/upstate-new-york

TIPS FOR CHARITABLE GIVING



Make a Giving Plan

Consider making an annual giving plan. Decide how much you can afford to donate and charities or causes you would like to support. Take the time to research which charities best suit your goals.

Apart from helping you make well-informed choices, this also gives you a built-in response if pushed for a donation: “I’ve already committed my contributions for this year, but send me more information and I can consider it in future plans.”

Research the Charity

Know where your money goes.

- What is the charity’s mission? For instance, charities involved with health issues may support scientific research, promote public awareness or provide patients with services or information.
- How much of its budget supports its mission? All charities have administrative and fundraising expenses, but be wary if these costs outweigh the amount spent to support the mission.

Is the charity using professional fundraisers?

- Review “Pennies for Charity,” the New York Attorney General’s annual report of telemarketing campaigns in New York, to see how much is spent on fundraising costs and how much has been kept by the charity.

Ask if the charity is appropriately registered.

- Office of the NYS Attorney General – Most charities must register and file regular reports with this office. Check www.charitiesnys.com for registration and reports.

- Internal Revenue Service – If a charity has tax exempt status, it must file reports with the IRS. Use the “EO Select Check” tool on IRS.gov to find out.

Tax Deductions

Not all contributions are tax deductible. You can either ask to see the charity’s IRS determination letter or check it out on IRS.gov. If you contribute more than \$250, the charity must provide you with a formal receipt that states the amount of your tax-deductible contribution.

Telemarketers and Emails

Don’t be pressured. Some tactics, like repeated phone calls or emotional appeals, pressure contributors to respond immediately. “You must act now” can be a red flag for a scam.

You have the right to say no. Or you can simply ignore the email or end the call. If you do continue the call or are interested in the email, ask for information in writing that describes the charity’s mission and how the donations are to be used.

Be wary of new charities after tragedies. Scammers will often solicit funds claiming they are supporting relief efforts after a natural disaster or other current events. Even some well-intentioned groups may not have the appropriate registration and structures in place to use the funds correctly.

Do Not Call Lists

Charitable calls are exempt from the FTC’s Do Not Call list. However, you have the right to request that telemarketers not call you on behalf of specific charities. You may also ask a charity to take you off its solicitation list.

Protect Yourself

Watch Out for Scams

- What’s in a name? Many charity scams use names that are similar to well-known, respected charities. Double check to be sure you are donating to the right organization.
- Law enforcement solicitations — Always check with local law enforcement before donating to a group claiming to support the local police. It is illegal for callers to promise special privileges or police protection.
- Fake invoices — Get an invoice for a pledge you don’t remember making? This could be a scam.
- “Crowd Sourcing” — Groups and individuals increasingly “fundraise” for events, causes or startup businesses through online social media sites. Be sure to research the group before investing.

Protect Your Finances

- Never give your social security number or other personal information in response to a charitable solicitation.
- Never give out credit card or bank account information over the phone or to an organization you are not familiar with.
- Donate securely. When donating online, make sure the website is secure: the web address should start with “https” and it should match the organization to which you are donating. If you donate by text, the charge will appear on your mobile phone bill and could include fees.
- Do not open an attachment in an email unless you know the sender. These can include malware that can steal information from your computer.

Section XIV.

Tips on Hiring a Professional Fundraiser

Get More Information

Thinking about hiring a fundraiser? Before you sign or renew a contract, it's important to look carefully at the details. Be sure you take the necessary steps to maximize the benefits to your charity and help protect it from loss or damage to its reputation.

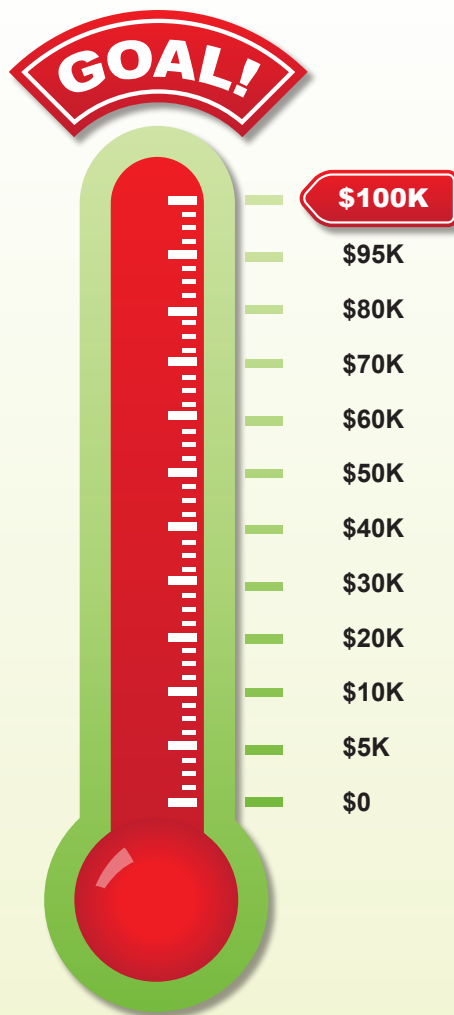
These tips can help guide your hiring process. If you need more information, please go to our website: charitiesnys.com or send an Email to charities.bureau@ag.ny.gov.

If you are considering a telemarketing campaign, read Pennies for Charity, the Attorney General's report on fundraising campaigns by professional fundraisers, to see the results of past campaigns by those fundraisers. The report is posted at www.charitiesnys.com.

You can find forms and instructions for registration with the Charities Bureau, guidance on complying with New York law, links to helpful websites and other information for charities on our website:

www.charitiesnys.com

BEFORE YOU HIRE A FUNDRAISER



New York State Attorney General
The State Capitol
Albany, New York 12224
1-800-771-7755
www.ag.ny.gov
charitiesnys.com
212- 416-8401

Make sure the fundraiser is registered.

Most fundraisers are required to register and file financial reports with the NYS Attorney General's Charities Bureau.

Get the best deal possible.

Check out the fundraiser's performance for other charities – you can get their financial reports from the Charities Bureau. Get proposals from several fundraisers and compare them.

Protect your Rights in Writing

You must have a written contract with a fundraiser clearly describing its responsibilities and your organization's rights. The contract must also include:

- Your charity's right to cancel the contract, without penalties, within 15 days after it is filed with Charities Bureau as well as the addresses of the fundraiser and the Attorney General to which your cancellation notice must be sent;
- The contract's financial terms, including how much will be kept by your organization and how much must be paid for fundraising fees and other expenses;
- A requirement that, within five days of receipt, all contributions must be placed in an account controlled by your charity.

Keep the List of Your Contributors.

Make sure your contract makes your organization the owner of the list of its contributors. Otherwise, the fundraiser may have the right to use the list when raising money for other charities or to sell or rent the list for other campaigns.

Protect your organization's name.

Your organization's name is one of its most important assets. Make sure your contract requires the fundraiser to get your approval of what will be said — orally or in writing — about your organization. In New York, charitable solicitations must include:

- Information about where to obtain the charity's latest financial report;
- A description of the charity's programs or directions about how to obtain that information;
- Disclosure that the solicitation is conducted by a professional fundraiser and the fundraiser's name. Individuals, such as telemarketers, must disclose their names and that they are being paid to solicit.

Get the records.

Require the fundraiser to give you regular reports and records of its expenses. Ask questions about expenses you don't understand or that seem high.

Find out what the public is saying.

Require the fundraiser to give you reports of any complaints it receives and procedures for resolving them.

Section XV.

Registration of Charitable Organizations

2019



ATTORNEY GENERAL LETITIA JAMES

Charities Bureau
28 Liberty Street
New York, NY 10005

Online Charities Registration User Guide

CHARITIES BUREAU



Online Charities Registration

User Guide

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Introduction

The Charities Bureau's online registration process will create a more user friendly and intuitive version of registration, and provide more support to applicants in completing the form.

The online charitable registration system is designed to simplify the process, minimize the response time, and take the guesswork out of the submission requirements by eliminating confusion over which forms to use and which statutory provisions apply. Based on responses provided, the system will automatically make determinations about what information or fees might be needed. Because users must provide an email address when registering with the system, registration confirmation and filing reminders are sent automatically to them.

Here are some advantages of the online registration process:

1. Save your registration and come back later - At any point in the registration process, you can save the information, and submit at a later time (within 30 days of starting the application).
2. Transparent - You can monitor the status of the registration by logging into the application.
3. Conveniences - You can e-sign the completed document right from your phone or tablet or PC.
4. Better communication – You will see email notifications to the email address used for account creation i.e. remainder for payment, remainder for signature, remainder to fill out the form, approval notice letter, incomplete notice letter etc.
5. Associate a charity – You can register, amend or re-register a charity with a single login.



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Chapter 1 - Online Charitable Registration

If you have never used the Charities Bureau's online registration process, you will need to create an account to start new registration, amendment or registration process

Step 1.1: Creating an account with Office of the Attorney General

(First time users will need to create an account. Do not try to sign in without creating an account.)

Click on the Register a Charity Online Now button to start account creation process.

- Click on "Create account" link.
- Enter first name in "First name" field.
- Enter last name in "Last name" field.
- Enter phone number in "Telephone number" field.
- Enter valid e-mail address (this will be your username) in "Email Address" field.
- Click on "I'm not a robot check box" and follow the instructions on the screen.
- Click the Create button to begin the account creation process.
- Confirmation page displays a message to verify your email account.



Login

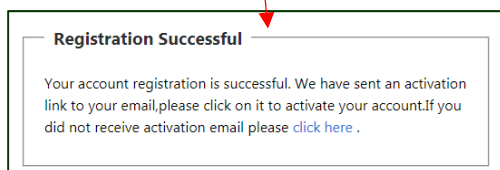
User name *

Password *

Sign in

[Create account](#) or [Forgot password?](#)

WARNING! This system is the property of the New York State Attorney General and contains U.S. Government information. By accessing and using this computer system, you are consenting to system monitoring for law enforcement and other purposes. Unauthorized use of the system is prohibited, and unauthorized use of, or access to, this computer system may subject you to state and federal criminal prosecution and penalties as well as civil penalties.



Create Account

First Name *

Last Name *

Telephone Number *

Email Address *

☐ I'm not a robot

Create Account



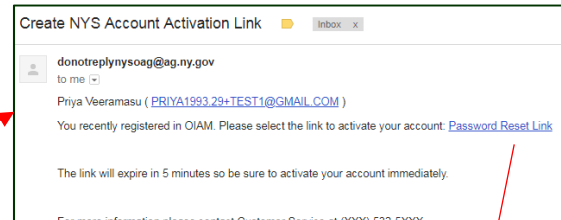
Online Charities Registration

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Step 1.2: Confirm E-mail Address and Login

(Confirmation email sent to the inbox will expire if not activated within 5 minutes.)

- Navigate to the inbox of the email address provided during account creation process.
- Open email from donotreplynysoag@ag.ny.gov with the subject line "Create NYS Account Activation Link"
 - If you can't find the email in your inbox, check your spam/junk/trash folders.
- Click [Password reset link](#) in the email to finish creating your account.
- You are re-directed to the password page
 - Enter password – Password must contain at least 1 special character and a number.
 - Re-enter password in the "confirm Password" field.
- Password reset confirmation message appears. Click [Click here](#) to sign-in to the account.
- Enter username (email account used for account creation), password and click Sign in button.
 - Welcome message is displayed
- Click on Applications dropdown in the top left corner of the page to find Charities Application and click on it.



Set Password

New password *

Confirm new password *

Submit

Reset Password Successful

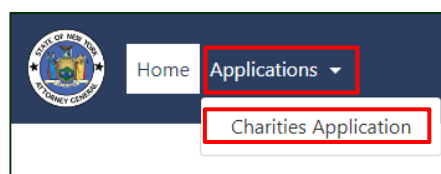
You have successfully reset your password. Please [click here](#) to login

Login

User name *

Password *

Sign in





Online Charities Registration

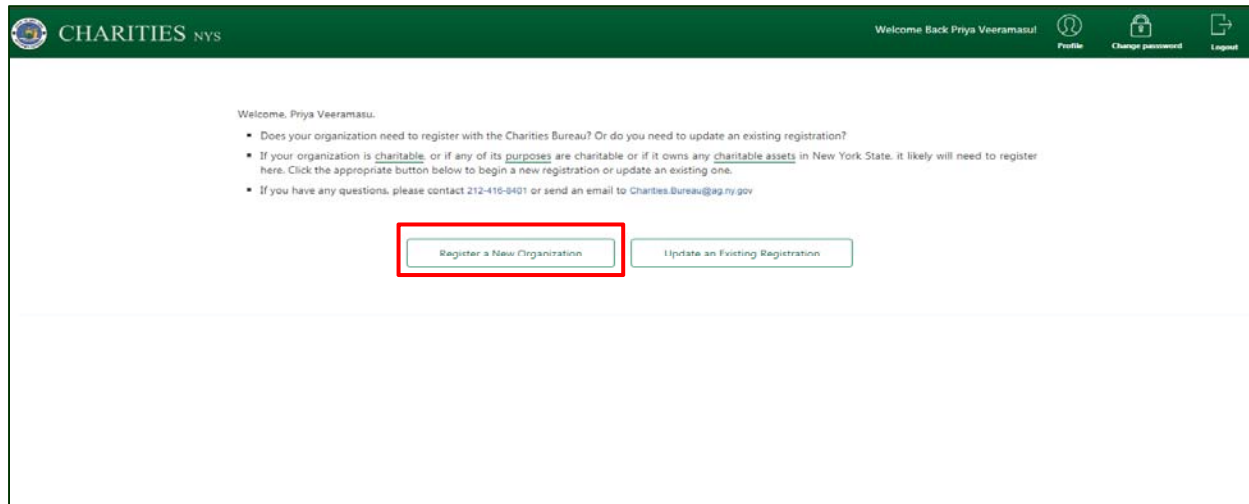
User Guide

Chapter 2: Register a new organization

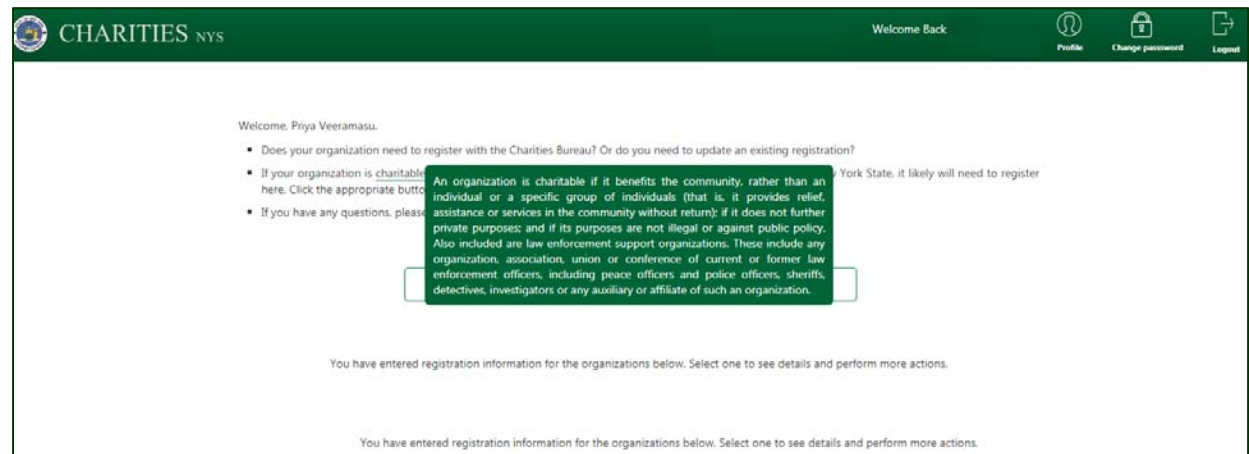
Step 2.1: Organization's landing page:

After successful login to the portal, your name is displayed next to a logout link at the top right side of the page (for your protection, you'll be logged out after 30 minutes of inactivity).

You have the ability to create a new organization, or update (amendment/re-registration) an existing organization. To start the new registration process, click on "Register a New Organization" button.



Note: Hover the mouse over underlined words to see definitions about them. You can also reference the [Appendix](#) page in this document to see more definitions.





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Step 2.2: Enter Employer Identification Number

Enter your EIN number. Also known as a Federal Employer Identification Number, an EIN is a nine-digit number assigned by the Internal Revenue Service and is used to identify tax accounts.

Case -1: If you mistype the EIN, then the system will display an error message. You may have to re-type the EIN and try again.

Case-2: If your organization is recently registered with the IRS, it may take up to 30 days for the IRS to update your EIN in their database. In this case, you will need to come back later and register.

Click on Logout button on top right corner of the page to logout from this process.

Case-3: If the entered EIN number matches any information in IRS records, the results will be displayed on the screen as will an option to continue the registration process.

- Click on “Yes, Continue with Registration” button to continue the registration process.

* Enter your Charity's EIN

Search

You may have mistyped your EIN or if your organization is recently registered with the IRS, it may take up to 30 days for the IRS to update your EIN registration in its system.

Please check your EIN number or come back later.

Return to My CharitiesNYS

* Enter your Charity's EIN: 112233445

Search

This Organization has not yet been registered. Would you like to proceed with registration?

Name	EIN
TEST ORGANIZATION	112233445

Yes, Continue with Registration No, Return to My CharitiesNYS

Things to consider:

1. All fields with a red asterisk (*) indicate a required field that must be filled in (if not system will display an error message).
2. At any point in the registration process click on “Save & Exit” button to save the registration and go back to the home page.
3. You can check where you are in the registration process using the train stops at the top of the page. The train stop will have a dark green background if you are working on that section.



4. You can go back to any filled-in section by clicking on the train stop or by clicking “Back” button.



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Step 2.3: Enter Organization Information

Enter information about your organization.

a. Contact Information section:

- i. Enter the organization name exactly as it appears in the certificate of incorporation or other official organizing document in the “Name of Charity” field.
- ii. Enter the organization’s care of name in “c/o name field” if there is any. If you don’t have any c/o names, then leave this field blank and move to the next field.
- iii. Enter organization’s website in to the “Website” field (if there is any).
- iv. Enter Organization email in Organization Email and Re-enter Organization Email fields.

Contact Info	3rd Party	Statute	Exemptions	Registrations	Signatures	Payment
* Name of Charity	c/o Name (if applicable)			* EIN		
<input type="text"/>	<input type="text"/>			<input type="text"/>		
Website	* Organization Email			* Re-enter Organization Email		
<input type="text"/>	<input type="text"/>			<input type="text"/>		

b. Mailing Address section:

- I. Enter the organization’s street address into the “Street Address” field.
- II. Enter Room/suite into the “Room/Suite” field if applicable.
- III. Enter the city into “City” field.
- IV. Select the state from state dropdown list (if your mailing address is other than United States then Click/select “other”).
- V. Enter the Zip code or postal code into “Zip/Postal Code.”
- VI. Select the country from Country dropdown list.

Mailing Address		
* Street Address	Room/Suite	* City
<input type="text"/>	<input type="text"/>	<input type="text"/>
* State/Province	* Zip/Postal Code	* Country
<input type="text"/>	<input type="text"/>	<input type="text"/>

c. Principal Address section:

Fill in this section if it is different from the mailing address.

d. Primary Contact Information section:



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- I. Enter in the primary contact person's (for example, officer, director, trustee or other individual) first name in "First Name" field.
- II. Enter the primary contact person's middle name in "Middle Name" field (if there is any).
- III. Enter the primary contact person's last name in "Last Name" field.
- IV. Enter the primary contact person email in "Email" and "Re-enter Email" fields.
- V. Enter the primary contact person phone number in "Phone" field.

Primary Contact Information		
* First Name	Middle Name	* Last Name
<input type="text"/>	<input type="text"/>	<input type="text"/>
* Title	* Email	* Re-enter Email
<input type="text"/>	<input type="text"/>	<input type="text"/>
* Phone		
<input type="text"/>		

e. Click the "Save and continue" button to save the information and navigate to next page. (If you don't hit this button, information filled in this page will not be saved)

Note: At any point in the registration process, click on "Save & Exit" button, to save the information and go to home page.



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Step 2.4: Enter 3rd party preparer information

If the registration form is being filled by a 3rd party preparer (this is a person who is not a member or employee of the registering organization, and who is compensated for their work in registering the organization, such as an accountant, a lawyer or a consultant), then answer YES to the question. If not then enter NO to the question.

3rd Party Statute Exemptions

*Are you a third-party preparer? ☐ Yes ☒ No

If the NO option is selected:

Click on “Save & Continue” button to save the entered information and navigate to next page.

Save & Continue

If the Yes option is selected:

- a. Enter 3rd party preparer’s information:
 - i. Enter 3rd party preparer’s first name in “First Name” field.
 - ii. Enter 3rd party preparer’s middle name in “Middle Name” field (if there is any).
 - iii. Enter 3rd party preparer’s last name in “Last Name” field.
 - iv. Enter the firm where 3rd party preparer works in “Name of Firm” field.
 - v. Enter 3rd party preparer’s email in “Email” and “Re-enter email” fields.
 - vi. Enter the title of 3rd party preparer in “Title” field (if there is any).
 - vii. Enter 3rd party preparer’s phone number in “Phone” field.
 - viii. Enter 3rd party preparer’s email different from the email entered in above steps in “Alternate Email” field (if there is any).

*Are you a third-party preparer? ☒ Yes ☐ No

Third Party Preparer Info


* First Name	Middle Name	* Last Name
<input type="text"/>	<input type="text"/>	<input type="text"/>
* Name of Firm	* Email	* Re-enter Email
<input type="text"/>	<input type="text"/>	<input type="text"/>
Title	* Phone	Alternate Email
<input type="text"/>	<input type="text"/>	<input type="text"/>



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- b. Enter 3rd party preparer's mailing address:
- ix. Enter 3rd party preparer's street address in "Street Address" field.
 - x. Enter room/suite number in "Room/Suite" field.
 - xi. Enter the city in "City" field.
 - xii. Select the state from State/Province dropdown list (if your mailing address is not United States then select "Other" option).
 - xiii. Enter the Zip code or postal code in "Zip/Postal Code" field.
 - xiv. Select the country from Country dropdown list.



Mailing Address		
* Street Address	Room/Suite	* City
<input type="text"/>	<input type="text"/>	<input type="text"/>
* State/Province	* Zip/Postal Code	* Country
<input type="text"/>	<input type="text"/>	<input type="text"/>

- c. Click on "Save & Continue" button to save the entered information and navigate to next page



Save & Continue



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Step: 2.5 Answer Statutory questions

- a. Select Yes or No to indicate:

If the organization conducts activity (an organization conducts activities if it maintains an office and/or has employees in New York State) other than soliciting in New York State?

- If selected Yes, then fill out the date on which the organization began or will begin conducting activity

Statute section

- b. Select Yes or No to indicate:

If the organization maintains assets in New York State.

- c. Select Yes or No to indicate:

If the organization solicits or plans to solicit or receive more than \$25,000 annually in total contributions from New York State residents, foundations, corporations or government agencies.

- d. If answered Yes, then fill out the date on which this activity started (if it has already started).
- e. If answered No, then answer Yes or No to indicate if the organization contracts with or plans to contract with professional fundraisers or fundraising counsel?



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Step: 2.6 Check statute result

Depending on the answers provided to the statute questions, an organization can either be exempt or required to register under one or more of the following statutes:

1. Executive Law 7-A
2. The Estates, Powers & Trusts Law 8-1.4
3. Executive Law 7-A and The Estates, Powers & Trusts Law 8-1.4

2.6.1 Exempt organizations

If the organization is exempt:

- A. You can register as an exempt organization and continue the registration process.

To Register as Exempt organization:

- Click on "Register as Exempt Organization" button and follow steps from [2.8](#).

OR

- B. Exit the application without registering.

To Exit the application:

- Click on Exit Application button and/or click Logout button on the top right corner of the page.

Based on your response, you are exempt from required registration with the Charities Bureau. Please be advised that if you do not register, you will not appear in our registry, which may have an impact on the organization's eligibility for some grants and funding.

Back Register as Exempt Organization Exit Application

Note: If you choose not to register with Charities Bureau, you will not appear in our registry, which may have an impact on the organization's eligibility for some grants and funding.

2.6.2 Non- exempt organizations

If the statute result is not exempt, then click on **Next** button to continue to next page.

Based on your initial answers, the organization is likely required to register under:

Executive Law 7-A

Back Next



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Step: 2.7 Answer Exemption questions

All non-exempt organizations are given another chance to see if they may qualify for an exemption. This section is **optional**.

This exemption section is similar to the current Schedule E paper form. Based on the answers provided to these questions, the organization can either be exempt (and has the option to register as an exempt organization) or may have to register under one or more statutes.

A. Skip exemption questions

If you choose to skip exemptions, click on “No Thanks, I’d like to skip Exemptions” link on the top of the page (you will navigate directly to the registration section).

OR

B. Answer exemption questions

- Answer Yes or No to the questions that appeared on the page.
- Click Save & Continue button
 - If you become exempt, follow step [2.6.1](#).
 - If you remain non-exempt, a second set of exemption questions appears. You must answer Yes or No to all the questions
- Click on Save & Continue button
- Exemption section result appears.

Exemption page -1

Exemption Page-2

Exemption result



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Step: 2.8 Registration section – Part 1


There are several pages within this section. Answer all the questions. If Yes is selected to certain questions, follow-up questions will appear

a. Answer Yes or No to indicate:

If the organization has more than one name

- If answered Yes to this, fill in the other names


Note: You can add more rows using  Add button and Delete them using  Delete button

* Does the organization use another name/names?	
* Names/DBA/Assumed Names	
* Other Organization Names	Delete
<input type="text"/>	 Delete

b. Answer Yes or No to indicate:

If the organization had any previous names

- If answered Yes to this, fill in the previous names

* Has the organization had a previous name/names?	
* Previous organization names	
* Previous Organization Names	Delete
<input type="text"/>	 Delete

c. Answer Yes or No to indicate:

If the organization has any prior New York State registration number

- If answered Yes to this, fill in the registration number

* Does the organization have a prior New York State registration number?	
* Registration number:	
<input type="text"/>	
* Does the organization have Federal tax exemption status?	
* Which Status?	
* Describe the organization's <u>charitable purposes</u>	

d. Answer Yes or No to indicate:

If the organization has federal tax exemption status

- If answered Yes to this, select the status from the dropdown list.
- If answered No to this question, select Yes or No to indicate if the organization applied for tax exemption status.

* Has the organization applied for tax exempt status?	
* When did it apply?	
<input type="text"/>	

- o If answered Yes to this question, fill in the date in which organization applied for tax exemption status.

e. Enter the Organization's charitable purposes.

f. Click "Save & Continue" button.



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Step: 2.9 Registration section – Part 2

a. Answer Yes or No to indicate:

If the organization ever was denied tax exemption status? (This question appears only when answered No to [question d in step 2.8.](#))

b. Answer Yes or No to indicate:

If the organization ever had its tax exemption status revoked

- If answered Yes to this, fill in the date on which the tax exemption status got revoked.

c. Select the type of organization from the dropdown list

d. Fill in the date on which the organization was incorporated or formed.

e. Select the State in which the organization was incorporated or formed.

f. Click on Save & Continue button.

Progress bar: Contact Info, 3rd Party, Statute, **Registrations**, Signatures

* Was the organization ever denied tax exemption status? ☒ Yes ☐ No

* Has the organization ever had its tax exempt status revoked? ☒ Yes ☐ No

* When was it revoked?

* What type of organization is it? Corporation

* When was the organization incorporated or formed?

* In which state was the organization incorporated or formed? Iowa

Buttons: Back, Save, **Save & Continue**

Registration section – page 2

Note: Click on “Back” button to go back to registration section page -1 and click on Save & Exit button to save the registration and go back to home page.



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Step: 2.10 Registration section – Part 3

a. Answer Yes or No to indicate:

If the organization has any chapters, branches or affiliates.

- If answered Yes to this, fill in all the questions that appear.

* Does the organization have chapters, branches or affiliates?

* Please list:

* Organization Name	* Relationship	* Street Address	* Relationship
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

b. Fill in the officers, directors, trustees, key persons/key employees information:

Note: Not For Profit organizations incorporated in New York State must provide at least 3 officers, directors, trustees, key persons/key employees information. All others must provide at least one.

- Fill in the officers' first name in First Name field.
- Fill in the officers' last name in Last Name field.
- Fill in the title of each officer in Title field.
- Fill in the email address of each officer in Email field.
- Fill in the officers' addresses in Street address, City, State/Province, Country, and Zip/Postal Code fields.

* List all officers, directors, trustees, key persons/key employees

* First Name	* Last Name	* Title	* Email	* Street Address	* City	* State/Province	* Country	* Zip/Postal Code	Delete
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="button" value="Delete"/>

c. Enter the date of organization's fiscal year end.

d. Click on "Save & Continue" button.



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Step: 2.11 Registration section – Part 4

- a. Answer Yes or No to indicate if the organization or its officers, directors, trustees, key persons/key employees have been prohibited by a government agency or court from soliciting.
 - If answered Yes, then describe the reason in “Please describe” text box.

Navigation: Contact Info, 3rd Party, Statute, Exemptions, **Registrations**

* Has the organization been prohibited by a government agency or court from soliciting contributions? ☒ Yes ☐ No

* Please describe:

* Have any of the organization's officers, directors, trustees, key persons/key employees been prohibited by a government agency or court from soliciting contributions? ☐ Yes ☒ No

* Has the organization or its officers, directors, trustees, key persons/key employees been found in violation of any law in soliciting for a charity? ☐ Yes ☒ No

* Has the organization or its officers, directors, trustees, key persons/key employees ever entered into any agreement with any regulatory body regarding its conduct in connection with any fundraising activity or misappropriation or misuse of the organization's money or property? ☐ Yes ☒ No

Buttons: Back, Save, **Save & Continue**

- b. After all the questions are answered with either Yes or No, click on Save & Continue button.
- c. Answer Yes or No to indicate if the organization's registration or license has been suspended.
- d. Answer Yes or No to indicate if the organization solicits or plan to solicit contributions in New York State.
- e. Answer Yes or No to indicate if the organization engaged any professional fundraisers for fundraising in New York State.
 - If answered Yes, then fill in the fundraisers' information i.e. First Name, Last Name, Type, Address, and Contract start, End dates.

Navigation: Contact Info, 3rd Party, Statute, Exemptions, **Registrations**, Signatures, Payment

* Has the organization's registration or license been suspended by a government agency? ☐ Yes ☒ No

* Does the organization solicit or plan to solicit contributions in New York State? ☐ Yes ☒ No

* Has the organization engaged fundraising professionals for fundraising in New York State? ☒ Yes ☐ No

* Please list all fund raising professionals that the organization has engaged for fundraising in New York State.

* First Name	* Last Name	* Fundraising Type	* Street Address	* City	* State/Province	* Country	* Zip/Postal Code	* Start Date	* End Date	Delete
<input type="text"/>	<input type="text"/>	<input type="radio"/> PFR <input type="radio"/> FRC	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="button" value="Delete"/>

Buttons: Back, Save, **Save & Continue**

- f. After all the questions are answered, click on Save & Continue button.




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Step 2.12 Registration section – Document upload


- a. Answer Yes or No to indicate if the organization has a conflict of interest policy.
- b. Answer Yes or No to indicate if the organization has a whistle blower policy.
- c. Click on Choose files button next to “Upload Certificate of Incorporation field” to upload the Certificate of Incorporation.
 - This will open up your document library. Select Certificate of Incorporation document and double click on it to upload.
 - To attach any amendments to the certificate of incorporation, click on Choose File button again and upload it.

- * Does the organization have a conflict of interest policy?
- * Does the organization have a whistleblower policy?


Upload Certificate of Incorporation, including amendments, or other organizing documents	<div></div> <div><div>Choose Files</div>No file chosen</div>
--	---

Note: Only PDF files are allowed. If you have the file in another format, convert it to PDF before uploading. To delete any uploaded file, click on Delete button.

- d. Click on Choose file button next to Upload Bylaws field to upload Bylaws.
 - This will open up your document library. Select Bylaws document and double click on it to upload.

Upload Bylaws or other organizing document	<div></div> <div><div>Choose Files</div>No file chosen</div>
--	---

- e. To upload any other supporting documents, click on Choose file button, next to Upload other documents field and click Save & Continue button.

Upload other documents(if needed)	<div></div> <div><div>Choose Files</div>No file chosen</div>
<div><div>Back</div><div>Save</div><div>Save & Continue</div></div>	



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Step 2.13 Signatures

Certification requires two different signatures, (**if your organization is a Trust, then only one signature is required**) one from the organization's president or authorized officer/trustee and the other from the chief financial officer or treasurer. They must certify under penalties for perjury that they reviewed this Registration Statement, and that to the best of their knowledge and belief that the information contained in this Registration is true, correct and complete in accordance with the laws of the State of New York which are applicable.

- Fill in the personal information about the President or Authorized Officer/Trustee in First Name, Middle Name, Last Name, Title, Email, and Re-enter email fields.
 - Filled in document to be signed; it will be sent to this email address.
- Similarly, Fill in the personal information about the Chief Financial Officer or Treasurer in First Name, Middle Name, Last Name, Title, Email, and Re-enter email fields.
- Click on Send out for Signatures button to send the filled in form to signatories.

Enter signatory information below

Role	* First Name	Middle Name	* Last Name	* Title	* Email
President or Authorized Officer/Trustee					
Chief Financial Officer or Treasurer					

Back Save & Exit Send out for Signatures

Note: To save the information and send them to signatories at a later time click on “Save & Exit” button. To go back to previous screen click on “Back” button.

- Signatures confirmation page appears, and click on “Close” button to go to charity detail page.

df gd

Federal ID No. (EIN) 44g
NY Registration ID 43-17-29
Registration Type Limited Liability Company (LLC)
Registration Category 1A
Mo. No. Fiscal Year Ends 4

Website
Address as and, Alabama, Alabama 12180
Primary Contact df gd

View Registration Return to My CharitiesNYS

FormType	DateFormed	FilingStatus
Char 410	4/17/2018	Pending Signatures



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Note: Filing status indicates the status of the application. When the registration is pending signatures, you cannot change any filled information. Click on “View Registration” button to see the filled registration in read-only mode.

If based on the statute question, no payment is required (you will receive an email to the email id used for account creation, with the subject line “No Payment Required”), registration will be auto-submitted to charities bureau for review after both the signatures are done.

Here is the list of all filing statuses and their significance

Filing Status	Significance
Saved but not submitted	Registration process has been started but has not been sent out for signatures.
Pending signatures	Registration is sent to both signatories (but both signatories haven’t signed the document).
Signatures Declined	One or both the signatories declined to sign the document.
Pending payment	Registration is signed by the signatories and payment is required.
Pending Charities Bureau Review	Registration is signed by the signatories and no payment is required. (Registration is under the Charities Bureau’s review. You don’t have to take any action on this until you receive an email from the Charities Bureau).
Pending Charities Bureau Review	Required payment is done and approved (Registration is under the Charities Bureau’s review. You don’t have to take any action on this until you receive an email letter from the Charities Bureau.)
Waiting for Applicant Review	Charities Bureau requested more information from the preparer.
Approved	Registration has been approved by the Charities Bureau.
Withdrawn	Registration has been withdrawn by the preparer.
Expired	Registration has expired if no action is taken (signatures are not completed/payment is not done) within 30 days from the start of registration process.
Expired	Preparer didn’t respond to Charities Bureau request to update the information within 20 days.



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Step 2.14 Make payment

2.14.1 Signatures completed

Note: some registrations may not require the payment depending on the statute/exemption result. An email notification will be sent with the payment information (required or not) after the signatures have been completed by the signatories.

- To make the payment, login to your account and see that the charity name is displayed in the home page.
- Click on Charity Name to see more information about it.
- Click on Make Payment button (If you don't see this button, you don't owe any payment).

CHARITIES NYS

Welcome Back Priya Veerasamu

Profile Change password Logout

Welcome, Priya Veerasamu.

- Does your organization need to register with the Charities Bureau? Or do you need to update an existing registration?
- If your organization is charitable, or if any of its purposes are charitable or if it owns any charitable assets in New York State, it likely will need to register here. Click the appropriate button below to begin a new registration or update an existing one.
- If you have any questions, please contact 212-416-8401 or send an email to Charities.Bureau@ag.ny.gov

Register a New Organization Update an Existing Registration

You have entered registration information for the organizations below. Select one to see details and perform more actions.

Charity Name
df gd

CHARITIES NYS

Welcome Back Priya Veerasamu

df gd

Federal ID No. (EIN)	dfg	Website	
NY Registration ID	43-57-29	Address	as asd, Alabama, Albania 12180
Registration Type	Limited Liability Company (LLC)	Primary Contact	df gd
Registration Category	7A		
Mo. No. Fiscal Year Ends	4		

Make Payment Return to My CharitiesNYS

FormType	DateFormed	FilingStatus
Char 410	4/17/2018	Pending Payment

- All the filled in information will be in read-only mode (since the information cannot be changed after the signatories have signed the document); click on Next button until you see Payment train stop.



Online Charities Registration

User Guide

The screenshot shows the 'Payment' step in the CHARITIES NYS registration process. A progress bar at the top indicates the steps: Contact Info, 3rd Party, Statute, Exemptions, Registrations, Signatures, and Payment (current step). The main content area states: 'Both signatures have been provided.', 'Based upon your charity status your payment will be \$ 25.00', 'Clicking continue will take you to the payment process application.', and 'Upon successful payment processing, your application will be reviewed by the OAG Charities Bureau office. You will receive an email from the Charities Bureau with either approved application or request for additional information.' At the bottom, there are three buttons: 'Back', 'Proceed to Payment Processor' (highlighted with a red box and an arrow), and 'Return to My CharitiesNYS'.

- e. Click on “Proceed to Payment Processor” button.
- f. Select the payment method (Credit/Debit cards and eChecks are allowed).

This screenshot shows the 'CHAR410 Registration Fee Payment' form. Fields include: Filing ID (530), Org ID (43-59-25), and Registration Fee (25). A dropdown menu for 'Select Payment Method' is open, showing options: 'Select Payment Method', 'Credit or Debit Card', and 'Checking Account'. The 'Credit or Debit Card' option is highlighted with a red box. A 'Make Payment' button is at the bottom.

i. Credit or Debit card users

- Fill in the card number in the Credit or Debit Card Number field.
- Fill in the Expiration date in the date field.
- Fill in the 3 digit code on back of your card (for American Express cards users, use the 4 digit code on the front side of the card) in *Security Code field.
- Fill in billing address in *Address, City and State, Zip code fields.
- Click Make Payment button.
- A confirmation box will appear asking “You are about to submit your payment. Do you want to continue?”
- Click OK.

This screenshot shows the 'CHAR410 Registration Fee Payment' form with the 'Credit or Debit Card' payment method selected. Fields include: Filing ID (530), Org ID (43-59-25), and Registration Fee (25). The 'Credit or Debit Card' dropdown is highlighted with a red box. Below it are fields for: *Credit or Debit Card Number, *Expiration Date (Month / Year), *Security Code (CVV2/CVC2), *Address, *City, *State, and *ZIP Code. Logos for VISA, MasterCard, and Discover are shown. A 'Make Payment' button is at the bottom.

A confirmation dialog box with the text: 'From an embedded page at uatpayment.ag.ny.gov', 'You are about to submit your payment. Do you want to continue?'. It has two buttons: 'OK' (highlighted with a red box) and 'Cancel'.



Online Charities Registration

User Guide

ii. eCheck users

- Select Checking account as the payment method.
- Enter the type of account in * Checking account type field.
- Enter routing number in * Bank Routing/Transit number field.
- Enter account number in *Bank account number field.
- Agree to the terms and conditions and click “Make Payment” button.
- A confirmation box will appear asking “You are about to submit your payment. Do you want to continue?”
- Click OK.

- f. If the payment information is valid then payment confirmation message appears; if not try again with correct payment information by clicking on Make payment button.

- g. Click on “Return to My CharitiesNYS” button to go back to home page.

Note: Once the payment is successful, registration will be auto-submitted to Charities Bureau for review.



Online Charities Registration

User Guide

2.14.2 Signatures Declined

If any one or both of the signatories declined to sign the document, then you have to make necessary changes in the online form, and re-send it for signatures (registration will not be complete unless both signatories have signed the document).

1. Login to the online system and see the charity created using above steps in the home page.

CHARITIES NYS

Welcome Back

Welcome, Priya Veerasamu.

- Does your organization need to register with the Charities Bureau? Or do you need to update an existing registration?
- If your organization is charitable, or if any of its purposes are charitable or if it owns any charitable assets in New York State, it likely will need to register here. Click the appropriate button below to begin a new registration or update an existing one.
- If you have any questions, please contact 212-416-8401 or send an email to Charities.Bureau@ag.ny.gov

Register a New Organization Update an Existing Registration

You have entered registration information for the organizations below. Select one to see details and perform more actions.

Charity Name
test

2. Click on Charity Name and see more information about it.

CHARITIES NYS

Welcome Back

Test

Federal ID No. (EIN)	123456789	Website	
NY Registration ID	43-57-44	Address	200 Broadway 6 Troy, New York, United States 12180
Registration Type	Corporation	Primary Contact	sdfg@
Registration Category	7A		
Mo. No. Fiscal Year Ends	4		

Yes, Continue with Registration Return to My CharitiesNYS

FormType	DateFormed	FilingStatus
Char 410	4/18/2018	Signatures Declined

3. Click Yes, Continue Registration button.
4. Make necessary changes to the filled information and send it out for signatures again. After the filing status changed to "Pending Payment" (i.e. signatures are completed) follow step [2.14.1](#) to make the payment and complete the registration process.



Online Charities Registration

User Guide

Chapter 3 Update an Existing Organization

Using this functionality you can either Amend (CHAR410-A) or re-register (CHAR410-R) an existing registration.

Note: You should have NY Registration ID to do the amendment or re-registration process. If you are not sure of the organization's registration number, contact the Charities Bureau.

Step 3.1: Organization's landing page:

First time users have to create an account. Refer to section 1.1 and 1.2 to create account.

After successful login to the portal, your name is displayed next to a logout link at the top right side of the page (For your protection, you'll be logged out after 30 minutes of inactivity).

You have the ability to create a new organization, or update (amendment/reregistration) an existing organization. To start the amendment/re-registration process click on "Update an Existing Registration" button.

CHARITIES NYS

Welcome Back Priya Veerasanul

Profile Change password Logout

Welcome, Priya Veerasanul.

- Does your organization need to register with the Charities Bureau? Or do you need to update an existing registration?
- If your organization is charitable, or if any of its purposes are charitable or if it owns any charitable assets in New York State, it likely will need to register here. Click the appropriate button below to begin a new registration or update an existing one.
- If you have any questions, please contact 212-416-8401 or send an email to Charities.Bureau@ag.ny.gov

Register a New Organization

Update an Existing Registration



Online Charities Registration

User Guide

Step 3.2: Associate a charity – NY Registration ID search

Enter your New York State Registration ID and click Lookup.

Case 1: If the NY Registration ID is invalid or didn't exist, system will display an error message. Enter a valid ID and try again or logout from the registration

Note: If you recently filed a new registration using the online system, make sure that the filing is approved before you start the amendment process (if the registration is not approved, you cannot amend it).

* NY Registration ID

The New York Registration ID you entered did not return any results.
Please check and search again or return to your Charities Registration Page.


Case 2: If the entered NY Registration is valid, system will display the charity record.

Click on "Update Charity Record", to create associate the charity with your online account

* NY Registration ID

If the charity you wish to update is listed below, click on the "Update Charity Registration" button.
If this is not correct, please check the NY Registration ID and try searching again, or return to My Registrations page.

Name	EIN	NY Registration ID
FURMAN FDN	136167663	00-00-15

 CHARITIES NYS

Welcome Back Priya Veerasamul

[Profile](#) [Change password](#) [Logout](#)

Welcome, Priya Veerasamul.

- Does your organization need to register with the Charities Bureau? Or do you need to update an existing registration?
- If your organization is charitable, or if any of its purposes are charitable or if it owns any charitable assets in New York State, it likely will need to register here. Click the appropriate button below to begin a new registration or update an existing one.
- If you have any questions, please contact 212-416-8401 or send an email to Charities.Bureau@ag.ny.gov

You have entered registration information for the organizations below. Select one to see details and perform more actions.

Charity Name
MEDINA HR FBO WESTHAMPTON FREE LIBRARY



Online Charities Registration

User Guide

Step 3.3: Amendment/re-registration process

- Click on the charity that you associated in previous step
- If the organization's CHAR410 has been approved by the Charities Bureau, you will see "Amend Registration" button or if the organization's CHAR410 is rejected by the Charities Bureau, you will see Re-registration button. Click on the button that appears.

The screenshot shows the Charities NYS website interface. At the top, there is a green header with the Charities NYS logo and the text "Welcome Back Priya Veerasamul". Below the header, the user's name "Priya" and options for "Profile", "Change password", and "Logout" are visible. The main content area displays the name of the charity, "MEDINA HR FBO WESTHAMPTON FREE LIBRARY", and its registration details. The details are organized into two columns: the left column contains "Federal ID No. (EIN)", "NY Registration ID", "Registration Type", "Registration Category", and "Mo. No. Fiscal Year Ends"; the right column contains "Website", "Address", and "Primary Contact". Below the details, there are two buttons: "Amend Registration" and "Return to My CharitiesNYS". At the bottom, there is a table with three columns: "FormType", "DateFormed", and "FilingStatus". The table contains one row with the following data: "Char 410", "4/17/2018", and "Approved".

FormType	DateFormed	FilingStatus
Char 410	4/17/2018	Approved

- Pre-filled information will be displayed. Make necessary changes to the information and fill in the mandatory fields (if not pre-filled).
- Click on "Save & Continue" button.
- If the information is pre-filled, make necessary changes, or else follow steps [2.4](#) to [2.13](#) or [2.14](#) in this document.

Note: If you are originally registered before the online system launch (i.e. through paper process) and trying to do the amendment/re-registration in the online system, then you likely will need to fill most of the information.

If you are registered in the online system and trying to do the amendment/re-registration, all the information will be pre-filled except the documents and signatories information. Update the necessary fields and submit the registration



Online Charities Registration

User Guide

Chapter 4 How to sign a document

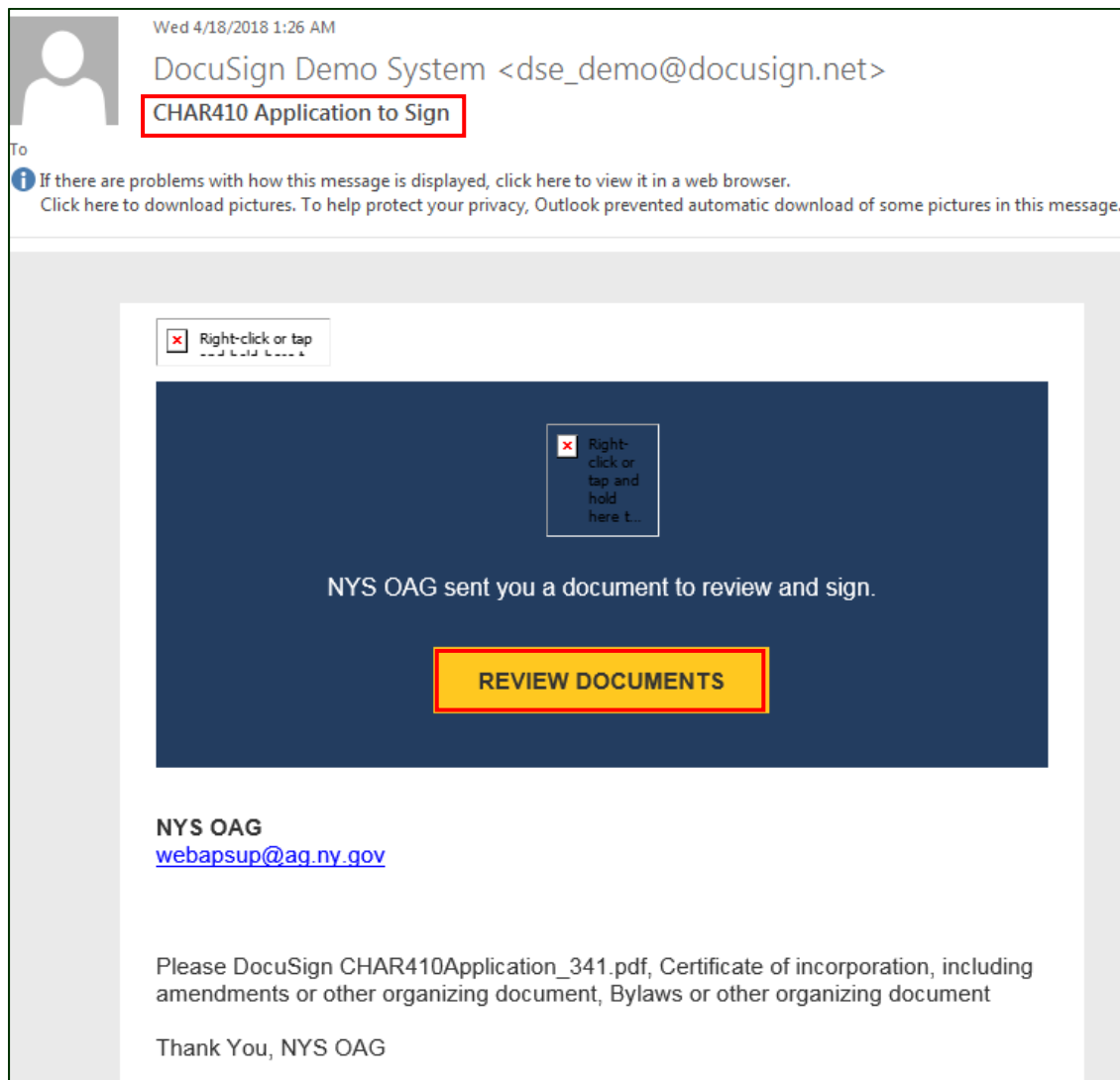
After the preparer fill in all the required information in the online charity registration form, they will be prompted to enter 2 **distinct** signatories information i.e. First Name, Last Name, Title, Email, and Re-enter Email.

Filled in document, will be sent to the 2 email addresses provided in the signatures section of the registration form.

Note: For **Trusts** only **one signature** is required

4.1. Accept and sign the document:

- a. Navigate to the email address and locate the email from DocuSign, with a subject line: **CHAR410 Application to Sign** (if it is an amendment then CHAR410-A Application to Sign, and if it is re-registration then CHAR410-R Application to Sign).





Online Charities Registration

User Guide

- b. Click on **REVIEW DOCUMENTS** link (you will be navigated to DocuSign website in the browser).

Please Review & Act on These Documents

NYS OAG
NYS Office of the Attorney General

Powered by DocuSign

Please review the documents below.

CONTINUE OTHER ACTIONS ▾

DocuSign Envelope ID: 3163DB12-6854-4978-B973-C173D2D548B

DEMONSTRATION DOCUMENT ONLY
PROVIDED BY DOCUSIGN ONLINE SIGNING SERVICE

219-6220

Form: **CHAR410 Online**
For new registrations, amendments, and re-registrations.

Registration Statement for Charitable Organizations
New York State Office of the Attorney General
Charities Bureau - Registration Section
28 Liberty Street
New York, NY 10005
www.charitiesnys.com

Open to Public Inspection

Filing Information

Type of Filing: ☒ Registration ☐ Amendment ☐ Re Registration

Contact Information

1. Name of Charity
Test 0418

2. c/o Name (if applicable)

3. Mailing address (Number and street)
Room/suite
City or town, state or country and ZIP+4
A, Kansas, Kazakhstan, 12345

4. Principal address (Number and street)
Room/suite
City or town, state or country and ZIP+4
KK

5. EIN
141364805

6. Website

7. Primary contact
Title
Phone
1234567890
Primary Contact Email
a@k.com
Organization Email
a@k.com

3rd Party Preparer Information

1. Name

2. Name of Firm

3. Mailing address (Number and street)
Room/suite
City State/Province Postal Code Country

4. Title

5. Phone

6. Email

7. Alternate Email

Statute Review

1. Does the organization conduct activity (other than soliciting) in New York State? ☒ Yes ☐ No

2. When did the organization begin conducting activity?
4/18/2018

- c. Accept the terms and conditions (click on the check box) and click **CONTINUE** button.
- d. Review the filled CHAR410 online form and scroll down to the end of the document to see Certificate of Incorporation, Bylaws, or any other document attached while filling the registration form online.

Certificate of incorporation, including amendments or other organizing document
This supplement is for your information. **VIEW**

Bylaws or other organizing document
This supplement is for your information. **VIEW**


- e. Click View button to view the documents (close the document after you view by clicking x button).
- f. After the documents are viewed and all the information in the form is validated, click on **FINISH** button (at the end of the page or at the top right corner of the page).



Online Charities Registration

User Guide

- g. You will be navigated to the location to sign the document

- h. Click on  button to sign the document.
- i. DocuSign will auto generate a signature based on your first and last names. You can either click on ADOPT AND SIGN button or Draw your own signature.

OR



Online Charities Registration

User Guide

- j. Click FINISH button to finish signing the document.

Log in to DocuSign

Download

Print

Close

A copy of this document has been saved to your DocuSign account. Please log in to view it.

Email

priya.veeramasu@ag.ny.gov

LOG IN

NO THANKS

- k. You can either create an account with DocuSign or click NO THANKS (after both the signatures are done, signed copy will be sent to your email address even if you don't create an account with DocuSign).

DocuSign

You're done!

Thanks for using DocuSign.

After all recipients finish signing, you will receive an email with a link to the document.



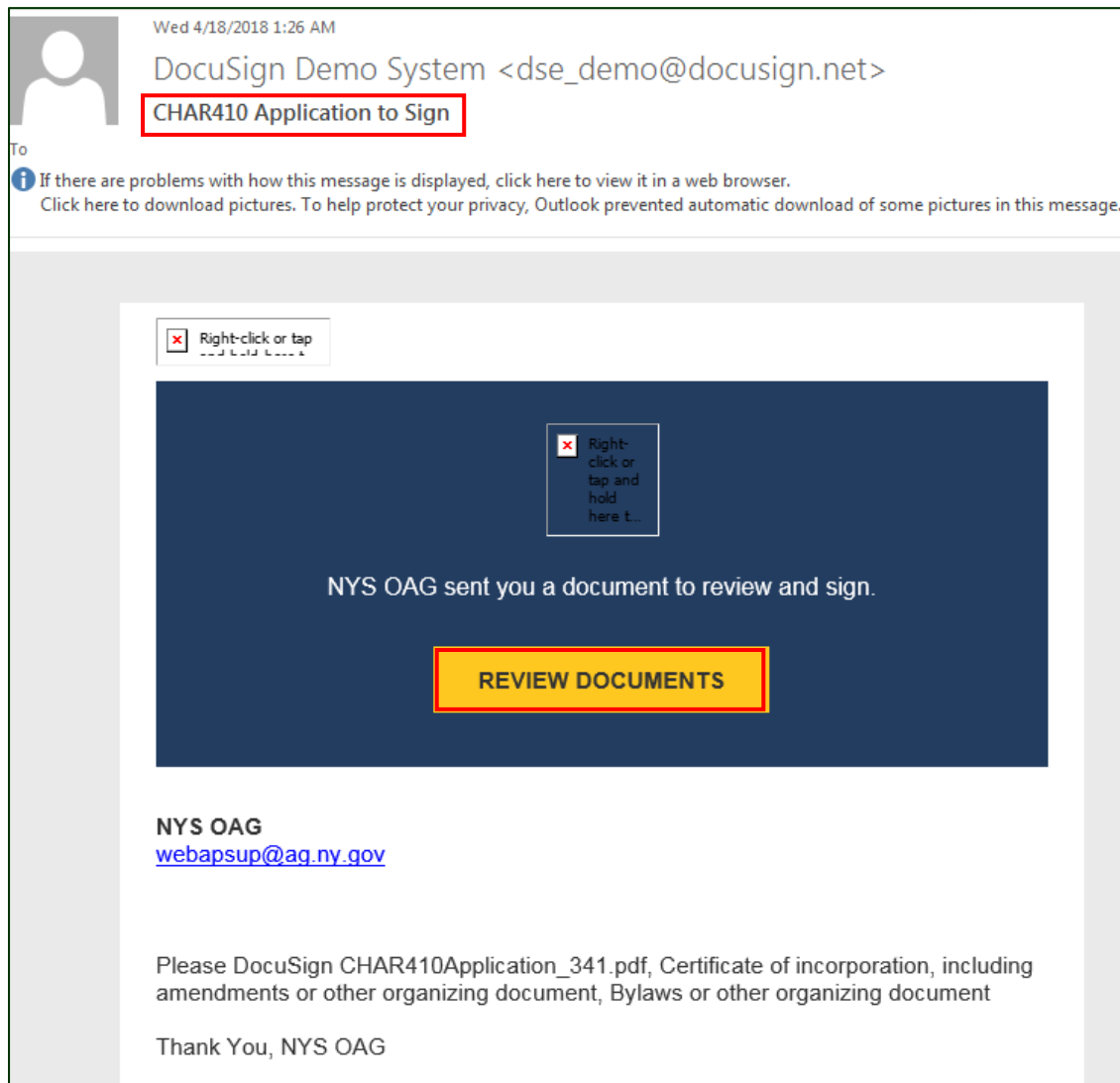
Online Charities Registration

User Guide

4.2. Reject to sign

As a signatory, you have the capability to reject the document if the information in the form is incorrect. To reject, follow below steps.

- Navigate to the email address and locate the email from DocuSign, with a subject line: **CHAR410 Application to Sign** (if it is an amendment then CHAR410-A Application to Sign, and if it is re-registration then CHAR410-R Application to Sign).





Online Charities Registration

User Guide

- b. Click on **REVIEW DOCUMENTS** link (you will be navigated to DocuSign website in the browser).

The screenshot shows a DocuSign envelope interface. At the top, it says 'Please Review & Act on These Documents' and 'Please review the documents below.' A yellow 'CONTINUE' button is highlighted with a red box. To the right is an 'OTHER ACTIONS' dropdown menu. The main content is a 'Registration Statement for Charitable Organizations' form. It includes sections for 'Filing Information' (Type of Filing: Registration, Amendment, Re-Registration), 'Contact Information' (Name of Charity, EIN, Website, Mailing address, Principal address, City, State, Country, ZIP+4), '3rd Party Preparer Information' (Name, Title, Phone, Email, Alternate Email), and 'Statute Review' (Does the organization conduct activity in New York State? Yes/No, When did the organization begin conducting activity? 4/18/2018).

- c. Accept the terms and conditions (click on the check box) and click **CONTINUE** button.
- d. Click on OTHER ACTIONS dropdown on the top right side of the page and select "Decline to Sign" option.

The screenshot shows the 'OTHER ACTIONS' dropdown menu. The options are: Finish Later, Print & Sign, Decline to Sign (highlighted with a red box), Help & Support, About DocuSign, View History, View Certificate (PDF), View Electronic Record and Signature Disclosure, and Session Information.

- e. A caution message appears, read the message and click **CONTINUE**.



Online Charities Registration

User Guide

Caution

If you choose to continue, this document will be void and inaccessible to other signers.

To request changes to this document, please select **FINISH LATER** and contact the sender directly with your request.

CONTINUE

FINISH LATER

CANCEL

- f. Include the reason for declining the document in the text box and click DECLINE TO SIGN button.

Decline to Sign

Please provide a reason for declining:

500 characters remaining

DECLINE TO SIGN

CANCEL

- g. Confirmation message appear on the screen (an email will be sent to both the signatories with the subject line: Declined: CHAR410 Application to Sign).

DocuSign

You have declined to sign.

The sender has been notified that you declined to sign.

If you have any questions, contact the sender.



Online Charities Registration

User Guide

Contact

Refer to the list of Charitable FAQs in [Online Registration FAQ's](#) page for help with registration process. If you have any questions while filling out the form, please contact Charities Bureau registration section at [212-416-8401](tel:212-416-8401) or send an email to Charities.Bureau@ag.ny.gov

Appendix

Annual Financial Report:

A state-of-the-company report that includes financial data, including the previous 12 months expenditures and revenues, costs and results of operations and development activities.

Certificate of Incorporation:

The document that sets out the names of the persons creating the not-for-profit, the not-for-profit's name, its purposes and any other information that an incorporating State may require that a not-for-profit corporation file to be established.

Charitable:

An organization is charitable if it benefits the community, rather than an individual or a specific group of individuals (that is, it provides relief, assistance or services in the community without return); if it does not further private purposes; and if its purposes are not illegal or against public policy. Also included are law enforcement support organizations. These include any organization, association, union or conference of current or former law enforcement officers, including peace officers and police officers, sheriffs, detectives, investigators or any auxiliary or affiliate of such an organization.

Charitable assets:

Assets given to an organization to accomplish a charitable purpose (for example, help children in need, provide care for the elderly, etc.).

Charitable Lead Trust:

Any trust in which a charitable beneficiary has a lead interest.

Charitable purposes:

An organization has charitable purposes if one or more of those purposes benefits the community in one way or another.

Conduct activity:

An organization conducts activities if it maintains an office, and/or has employees, and/or solicits money in New York State.



Online Charities Registration

User Guide

Fundraising Counsel (FRC):

A fundraising counsel (FRC) is someone who plans, manages or advises an organization on soliciting contributions in New York State. An FRC does not have access to the funds collected from such a campaign. A charity's director, trustee, officer, employee or a volunteer for the charity is not a fund raising counsel.

Fund Raising Professional:

A fund raising professional is a professional fundraiser (PFR) or fundraising counsel (FRC). A professional fundraiser (PFR) has a contract or other agreement with a charity that compensates the person to manage, conduct or assist a charity in its solicitations. That solicitation may be direct or indirect and includes advertising that using a service, buying an item, attending an event or other activity will benefit a charity. A professional fundraiser has access to the contributions raised on the charity's behalf, and may pay the expenses of a campaign from those receipts. A charity's director, trustee, officer, employee or a volunteer for the charity is not a professional fundraiser. A fundraising counsel (FRC) is someone who plans, manages or advises an organization on soliciting contributions. An FRC does not have access

Government agency:

An administrative division of any local, State or Federal government (for example a department, commission, board or bureau) that has regulatory or other oversight authority.

Hospital, nursing home or diagnostic treatment center:

The organization must be incorporated under Article 28 of the New York Public Health Law and provide medical services by or under the supervision of physicians licensed under the New York Public Health Law.

Key person:

These are individuals other than officers and directors, who have responsibilities, power or influence over the organization as a whole similar to that of an officer or a director.

Law Enforcement Support Organization:

This includes any organization, association, union or conference of current or former law enforcement officers, including peace officers and police officers, sheriffs, detectives, investigators or any auxiliary or affiliate of such an organization.

Maintain assets:

An organization maintains assets if it has property of any kind and/or owns real property—that is, real estate—in New York State.

Membership Organizations:

A group of people who join together for a specific purpose to achieve shared goals. The organization must clearly define the qualifications and requirements for membership in its bylaws or other organizing document, and the membership must represent the collective body of the organization and be comprised of persons having voting rights and other powers of governance.



Online Charities Registration

User Guide

Museum:

These are institutions that promote the arts and culture, which is generally recognized as educational; and/or instruct the public on subjects useful to the individual and/or beneficial to the community.

Professional Fundraiser (PFR):

A professional fundraiser (PFR) has a contract or other agreement with a charity that compensates the person to manage, conduct or assist a charity in its solicitations. That solicitation may be direct or indirect and includes advertising that using a service, buying an item, attending an event or other activity will benefit a charity. A professional fundraiser has access to the contributions raised on the charity's behalf, and may pay the expenses of a campaign from those receipts. A charity's director, trustee, officer, employee or a volunteer for the charity is not a professional fundraiser.

Religious:

A religious organization is one that has been set up exclusively for religious purposes, such as worship or religious education, or that is under the control and direction of such an organization. See IRS guidance at <https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined>.

Solicits:

An organization solicits when it directly or indirectly requests contributions, including grants. A solicitation need not result in a contribution. Soliciting includes advertising that using a service, buying an item, attending an event or other activity will benefit a charity.

Solicit Contributions:

To solicit contributions is to directly or indirectly request contributions, including grants. A solicitation need not result in a contribution. A contribution is the promise or grant of any money or property of any value, including a grant or other financial assistance from a government agency, except for payments by members of an organization for membership or services or another benefit.

Third-party preparer:

A person who is not a member or employee of the registering organization, and who is compensated for their work in registering the organization, such as an accountant, a lawyer or a consultant.

CHAR500

NYS Annual Filing for Charitable Organizations
www.CharitiesNYS.com

Send with fee and attachments to:
NYS Office of the Attorney General
Charities Bureau Registration Section
28 Liberty Street
New York, NY 10005

2017
Open to Public
Inspection

1. General Information

For Fiscal Year Beginning (mm/dd/yyyy) <input type="text"/> / <input type="text"/> / 2017 and Ending (mm/dd/yyyy) <input type="text"/> / <input type="text"/> / <input type="text"/>		
Check if Applicable: <input type="checkbox"/> Address Change <input type="checkbox"/> Name Change <input type="checkbox"/> Initial Filing <input type="checkbox"/> Final Filing <input type="checkbox"/> Amended Filing <input type="checkbox"/> Reg ID Pending	Name of Organization:	Employer Identification Number (EIN): <input type="text"/>
	Mailing Address:	NY Registration Number: <input type="text"/> - <input type="text"/> - <input type="text"/>
	City / State / Zip:	Telephone:
	Website:	Email:
Check your organization's registration category: <input type="checkbox"/> 7A only <input type="checkbox"/> EPTL only <input type="checkbox"/> DUAL (7A & EPTL) <input type="checkbox"/> EXEMPT*		Confirm your Registration Category in the Charities Registry at www.CharitiesNYS.com.

2. Certification

See instructions for certification requirements. Improper certification is a violation of law that may be subject to penalties. The certification requires two signatories.

We certify under penalties of perjury that we reviewed this report, including all attachments, and to the best of our knowledge and belief, they are true, correct and complete in accordance with the laws of the State of New York applicable to this report.

President or Authorized Officer: Signature _____ Print Name and Title _____ Date _____

Chief Financial Officer or Treasurer: Signature _____ Print Name and Title _____ Date _____

3. Annual Reporting Exemption

Check the exemption(s) that apply to your filing. If your organization is claiming an exemption under one category (7A or EPTL only filers) or both categories (DUAL filers) that apply to your registration, complete only parts 1, 2, and 3, and submit the certified Char500. No fee, schedules, or additional attachments are required. If you cannot claim an exemption or are a DUAL filer that claims only one exemption, you must file applicable schedules and attachments and pay applicable fees.

- ☐ **3a. 7A filing exemption:** Total contributions from NY State including residents, foundations, government agencies, etc. did not exceed \$25,000 and the organization did not engage a professional fund raiser (PFR) or fund raising counsel (FRC) to solicit contributions during the fiscal year.
- ☐ **3b. EPTL filing exemption:** Gross receipts did not exceed \$25,000 and the market value of assets did not exceed \$25,000 at any time during the fiscal year.

4. Schedules and Attachments

See the following page for a checklist of schedules and attachments to complete your filing.	<input type="checkbox"/> Yes <input type="checkbox"/> No	4a. Did your organization use a professional fund raiser, fund raising counsel or commercial co-venturer for fund raising activity in NY State? If yes, complete Schedule 4a.
	<input type="checkbox"/> Yes <input type="checkbox"/> No	4b. Did the organization receive government grants? If yes, complete Schedule 4b.

5. Fee

See the checklist on the next page to calculate your fee(s). Indicate fee(s) you are submitting here:	7A filing fee: \$ <input type="text"/>	EPTL filing fee: \$ <input type="text"/>	Total fee: \$ <input type="text"/>	Make a single check or money order payable to: "Department of Law"
---	---	---	---------------------------------------	--

CHAR500

Annual Filing Checklist

Simply submit the certified CHAR500 with no fee, schedule, or additional attachments IF:

- Your organization is registered as 7A only and you marked the 7A filing exemption in Part 3.
- Your organization is registered as EPTL only and you marked the EPTL filing exemption in Part 3.
- Your organization is registered as DUAL and you marked both the 7A and EPTL filing exemption in Part 3.

Checklist of Schedules and Attachments

Check the schedules you must submit with your CHAR500 as described in Part 4:

- ☐ If you answered "yes" in Part 4a, submit Schedule 4a: Professional Fund Raisers (PFR), Fund Raising Counsel (FRC), Commercial Co-Venturers (CCV)
- ☐ If you answered "yes" in Part 4b, submit Schedule 4b: Government Grants

Check the financial attachments you must submit with your CHAR500:

- ☐ IRS Form 990, 990-EZ, or 990-PF, and 990-T if applicable
- ☐ All additional IRS Form 990 Schedules, including Schedule B (Schedule of Contributors). Schedule B of public charities is exempt from disclosure and will not be available for public review.
- ☐ Our organization was eligible for and filed an IRS 990-N e-postcard. Our revenue exceeded \$25,000 and/or our assets exceeded \$25,000 in the filing year. We have included an IRS Form 990-EZ for state purposes only.

If you are a 7A only or DUAL filer, submit the applicable independent Certified Public Accountant's Review or Audit Report:

- ☐ Review Report if you received total revenue and support greater than \$250,000 and up to \$750,000.
- ☐ Audit Report if you received total revenue and support greater than \$750,000
- ☐ No Review Report or Audit Report is required because total revenue and support is less than \$250,000
- ☐ We are a DUAL filer and checked box 3a, no Review Report or Audit Report is required

Calculate Your Fee

For 7A and DUAL filers, calculate the 7A fee:

- ☐ \$0, if you checked the 7A exemption in Part 3a
- ☐ \$25, if you did not check the 7A exemption in Part 3a

For EPTL and DUAL filers, calculate the EPTL fee:

- ☐ \$0, if you checked the EPTL exemption in Part 3b
- ☐ \$25, if the NET WORTH is less than \$50,000
- ☐ \$50, if the NET WORTH is \$50,000 or more but less than \$250,000
- ☐ \$100, if the NET WORTH is \$250,000 or more but less than \$1,000,000
- ☐ \$250, if the NET WORTH is \$1,000,000 or more but less than \$10,000,000
- ☐ \$750, if the NET WORTH is \$10,000,000 or more but less than \$50,000,000
- ☐ \$1500, if the NET WORTH is \$50,000,000 or more

Send Your Filing

Send your CHAR500, all schedules and attachments, and total fee to:

NYS Office of the Attorney General
Charities Bureau Registration Section
28 Liberty Street
New York, NY 10005

Need Assistance?

Visit: www.CharitiesNYS.com
Call: (212) 416-8401
Email: Charities.Bureau@ag.ny.gov

Is my Registration Category 7A, EPTL, DUAL or EXEMPT?

Organizations are assigned a Registration Category upon registration with the NY Charities Bureau:

7A filers are registered to solicit contributions in New York under Article 7-A of the Executive Law ("7A")

EPTL filers are registered under the Estates, Powers & Trusts Law ("EPTL") because they hold assets and/or conduct activities for charitable purposes in NY.

DUAL filers are registered under both 7A and EPTL.

EXEMPT filers have registered with the NY Charities Bureau and meet conditions in **Schedule E - Registration Exemption for Charitable Organizations**. These organizations are not required to file annual financial reports but may do so voluntarily.

Confirm your Registration Category and learn more about NY law at www.CharitiesNYS.com.

Where do I find my organization's NET WORTH?

NET WORTH for fee purposes is calculated on:

- IRS Form 990 Part I, line 22
- IRS Form 990 EZ Part I line 21
- IRS Form 990 PF, calculate the difference between Total Assets at Fair Market Value (Part II, line 16(c)) and Total Liabilities (Part II, line 23(b)).

CHAR500

Instructions for Completing Your NY Annual Filing
www.CharitiesNYS.com

Need Assistance?

Visit: www.CharitiesNYS.com
Call: (212) 416-8401
Email: Charities.Bureau@ag.ny.gov

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Before You Begin

Visit www.CharitiesNYS.com and search the Charities Registry to find your organization's NY State Registration Number (##-##-##) and Registration Category (7A, EPTL, DUAL, or EXEMPT). Knowing your organization's Registration Category will help you respond to Sections 1 and 3, determine the required attachments to the CHAR500 and calculate your filing fee. If your organization is not registered with the Charities Bureau, please complete CHAR410 "Registration Statement for Charitable Organizations".

1. General Information

Enter the accounting period covered by the report. Provide the best contact information for your organization. This information will be publicly available in the Charities Registry and will be used for communication to your organization. If your organization is registered and this is your regular annual filing, check *Initial Filing*. If your contact information needs to be updated, check *Address Change* and/or *Name Change*. Check *Amended Filing* if you are making a change to a previous filing. If you have submitted a CHAR410 - Registration Statement for Charitable Organizations - but do not yet have a NY State Registration Number, check *NY Reg Pending*. If this is a final filing and the organization is seeking dissolution or ceasing operations, check *Final Filing* and submit all applicable IRS schedules and attachments. If your organization is a NY corporation, visit www.CharitiesNYS.com for information on how to dissolve. Check the Charities Bureau Registration Category of your organization (7A, EPTL, DUAL, or EXEMPT). EXEMPT organizations are those that have registered with the NY Charities Bureau and meet conditions in Schedule E - Registration Exemption for Charitable Organizations - but have registered and file voluntarily.

2. Certification

When you have completed the form, sign and print the name, title and date. For 7A and DUAL filers, the CHAR500 must be signed by both the president or another authorized officer and the chief financial officer or treasurer. These must be different individuals. EPTL filers have the option of a single signature if the certification is by a banking institution or a trustee of a trust. Clearly state the title of the representative (e.g. "President," "CEO", "Treasurer," "CFO," "Bank Vice President" or "Trustee").

3. Annual Reporting Exemption

You may claim an exemption from the reporting and fee requirements if you meet the filing exemptions applicable to your organization. If claiming an exemption under one statute (7A and EPTL only filers) or both statutes (DUAL filers) that apply to your registration, complete only parts 1, 2, and 3, and submit the certified Char500. No fee, schedule, or additional attachments are required. Otherwise, file all required schedules and attachments and pay applicable fees.

Note: A 7A or DUAL filer with contributions over \$25,000 that did not contract with a professional fund raiser may check the 7A filing exemption in Part 3 if it (i) received all or substantially all of its contributions from a single government agency to which it submitted an annual report similar to that required by Executive Law Article 7A, or (ii) it received an allocation from a federated fund, United Way or incorporated community appeal and contributions from all other sources did not exceed \$25,000.

4. Schedules and Attachments

If you do not qualify for the reporting exemptions as described in Part 3, review the checklist of schedules and attachments required to complete your filing. If your organization qualified for and submitted an IRS 990-N "e-Postcard", you must complete and submit an IRS Form 990-EZ to the NY Charities Bureau for reporting purposes. The NY Charities Bureau will not accept an IRS 990-N "e-postcard" because it does not contain sufficient financial information.

5. Fee

Your total fee is based on your registration category (7A, EPTL or DUAL). 7A or EPTL filers only pay the fee that applies to the statute under which they have registered unless they have claimed an exemption in Part 3. DUAL filers must pay both fees, unless they have claimed an exemption in Part 3. Consult the CHAR500 to calculate your fee or contact the NY Charities Bureau if you have additional questions.

When to Submit Your Filing

7A and DUAL filers: postmarked within 4 1/2 months after the organization's accounting period ends. For example, fiscal year end December 31 reports are due by May 15th of the following year. EPTL filers: postmarked within 6 months after the organization's accounting period ends. An additional 180 day extension is automatically granted. Information regarding extensions is available at www.CharitiesNYS.com.

Where to Submit Your Filing

Payment must be made to the "Department of Law". Send the complete filing with payment to:
NYS Office of the Attorney General, Charities Bureau Registration Section, 28 Liberty Street, New York, NY 10005.

Penalties

The Attorney General may cancel the registration of or seek civil penalties from an organization that fails to comply with the filing requirements.

CHAR500

Schedule 4a: Professional Fund Raisers, Fund Raising Counsels, Commercial Co-Venturers
www.CharitiesNYS.com

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If you checked the box in question 4a in Part 4 on the CHAR500 Annual Filing for Charitable Organizations, complete this schedule for EACH Professional Fund Raiser (PFR), Fund Raising Counsel (FRC) or Commercial Co-Venturer (CCV) that the organization engaged for fund raising activity in NY State. The PFR or FRC should provide its NY Registration Number to you. Include this schedule with your certified CHAR500 NYS Annual Filing for Charitable Organizations and use additional pages if necessary.

Definitions

A **Professional Fund Raiser (PFR)**, in addition to other activities, conducts solicitation of contributions and/or handles the donations (Article 7A, 171-a.4).

A **Fund Raising Counsel (FRC)** does not solicit or handle contributions but limits activities to advising or assisting a charitable organization to perform such functions for itself (Article 7A, 171-a.9).

A **Commercial Co-Venturer (CCV)** is an individual or for-profit company that is regularly and primarily engaged in trade or commerce other than raising funds for a charitable organization and who advertises that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization (Article 7A, 171-a.6).

Professional fund raising does not include activities by an organization's development staff, volunteers, or a grantwriter who has been hired solely to draft applications for funding from a government agency or tax exempt organization.

1. Organization Information

Name of Organization:	NY Registration Number: □□ - □□ - □□
-----------------------	---

2. Professional Fund Raiser, Fund Raising Counsel, Commercial Co-Venturer Information

<input type="checkbox"/> Professional Fund Raiser <input type="checkbox"/> Fund Raising Counsel <input type="checkbox"/> Commercial Co-Venturer	Name of FRP:	NY Registration Number: □□ - □□ - □□
	Mailing Address:	Telephone:
	City / State / Zip:	

3. Contract Information

Contract Start Date:	Contract End Date:
----------------------	--------------------

4. Description of Services

Services provided by FRP:

5. Description of Compensation

Compensation arrangement with FRP:	Amount Paid to FRP:
------------------------------------	---------------------

6. Commercial Co-Venturer (CCV) Report

<input type="checkbox"/> Yes <input type="checkbox"/> No	If services were provided by a CCV, did the CCV provide the charitable organization with the interim or closing report(s) required by Section 173(a) part 3 of the Executive Law Article 7A?
--	--

CHAR500

Schedule 4b: Government Grants
www.CharitiesNYS.com

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If you checked the box in question 4b in Part 4, complete this schedule and list EACH government grant award by a domestic (federal, state or local) agency; interstate or intergovernmental agency (for example Port Authority of New York and New Jersey); and state or local authorities. **Use additional pages if necessary.** Include this schedule with your certified CHAR500 NYS Annual Filing for Charitable Organizations.

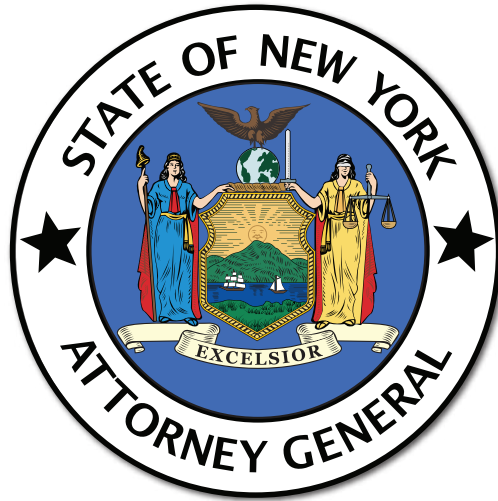
1. Organization Information

Name of Organization:	NY Registration Number: <div><div></div><div></div> - <div><div></div><div></div></div> - <div><div></div><div></div></div></div>
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2. Government Grants

Name of Government Agency	Amount of Grant
1.	1.
2.	2.
3.	3.
4.	4.
5.	5.
6.	6.
7.	7.
8.	8.
9.	9.
10.	10.
11.	11.
12.	12.
13.	13.
14.	14.
15.	15.
Total Government Grants:	Total:

Religious Corporations: Sales and other Disposition of Assets



Office of the New York State Attorney General
Charities Bureau
28 Liberty Street
New York, NY 10005

(212) 416-8400

www.charitiesnys.com



**A GUIDE TO SALES AND OTHER DISPOSITION OF ASSETS BY
RELIGIOUS CORPORATIONS PURSUANT TO
RELIGIOUS CORPORATIONS LAW § 12 and
NOT-FOR-PROFIT CORPORATION LAW §§ 510, 511 and 511-a**

Office of the Attorney General

**Charities Bureau
www.charitiesnys.com**

**Guidance Document
Issue Date - July, 2018**

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**A GUIDE TO SALES AND OTHER DISPOSITIONS OF ASSETS BY
RELIGIOUS CORPORATIONS PURSUANT TO
RELIGIOUS CORPORATIONS LAW § 12
AND NOT-FOR-PROFIT CORPORATION LAW §§ 510, 511 and 511-a**

INTRODUCTION

The New York State Attorney General's Charities Bureau has prepared this guidance to assist religious corporations and the lawyers who represent them when seeking approval of the Attorney General and/or the Court for sales, mortgages and leases of their real property pursuant to Religious Corporations Law ("RCL") § 12 and Not-for-Profit Corporation Law ("N-PCL") §§ 510, 511 and 511-a.

NOTE: The following denominations are EXEMPT from submitting their petitions to the Attorney General for review of their transactions. HOWEVER, they are required to seek Supreme Court approval.
(RCL §2-b(d-1)):

- Protestant Episcopal Church
- Roman Catholic Church
- Ruthenian Catholic Church of the Greek Rite
- African Methodist Episcopal Zion Church
- Presbyterian Church of the General Assembly of the Presbyterian Church U.S.A.
- United Methodist Church
- Reformed Church of the General Synod of the Reformed Church in America.

The procedures described in this guidance reflect amendments to the RCL and the N-PCL that were included in the Nonprofit Revitalization Act of 2013 ("the Act" or "NPRA") and 2015 and 2016 amendments to NPRA. Those amendments changed procedures to be followed when transferring or mortgaging real property and gave religious corporations the option of submitting a petition to the Attorney General OR the Supreme Court for approval of the transaction. As more fully described below, in an application solely to the Attorney General, the Attorney General may determine that court review of a particular application is appropriate. In such cases, the verified petition must be submitted to the Court, on notice to the Attorney General.

This guidance is not a substitute for legal advice from a corporation's attorney but is intended to provide guidance to religious corporations, and the

lawyers who represent them, when seeking to sell, mortgage or otherwise dispose of their real property.

The information in this guidance is general in nature. Each transaction is governed by its own facts, and the Attorney General's Charities Bureau reviews each one on a case-by-case basis. You are encouraged to discuss the proposed transaction in advance with the Attorney General's Charities Bureau in New York City or Albany or with an Assistant Attorney General in the Regional Office of the Attorney General to which you are required to submit your application. A list of the offices of the Attorney General, their contact information and the New York counties they serve is in Appendix F.

NOTE: This guidance addresses transactions involving real property. If a religious corporation intends to sell or otherwise dispose of all or substantially all of its assets, regardless of their form, including intangible property such as bonds, stocks or certificates of deposit, Article 2-b of the RCL should be consulted.

Quick Statutory Reference Guide	
Sale, mortgage and lease of real property of religious corporations.	RCL § 12
Disposition of all or substantially all assets.	N-PCL § 510
Petition for court approval	N-PCL § 511
Petition for Attorney General approval.	N-PCL § 511-a.
Application of N-PCL	N-PCL § 103; RCL §2-b

WHAT TRANSACTIONS BY RELIGIOUS CORPORATIONS ARE COVERED BY RCL § 12?

The lease for over five years, sale, mortgage, exchange or other disposition of the real property¹ of a religious corporation requires approval of the Attorney General or the court pursuant to the procedures set forth in the RCL and N-PCL. RCL § 12, N-PCL §§ 510, 511 and 511-a.

Transactions by foreign corporations that do business in New York are also covered. N-PCL § 103.

¹ Throughout this booklet, the term "transaction" will also be used to refer to the sale, lease, mortgage, exchange or other disposition of a religious corporation's assets.

Exceptions to Covered Transactions

Purchase money mortgages (a mortgage taken out at the time of purchase and secured by the new property, as distinguished from mortgaging any property currently owned) are not subject to review by the Attorney General unless the mortgage encumbers other property already owned by the petitioner. Purchase money security agreements and real property acquired as a result of a mortgage foreclosure proceeding or by a deed in lieu of the foreclosure of a mortgage owned by a religious corporation are also not subject to the provisions of N-PCL §§ 510 or 511. RCL §§ 12(1) and § 12(10).

ROLE OF THE ATTORNEY GENERAL

The N-PCL and RCL, as amended by the Act, authorize religious corporations seeking to sell or otherwise dispose of their real property to submit a verified petition for approval of such transaction to *either* the Attorney General or the Supreme Court. RCL § 12 and N-PCL §§ 511 and 511-a.

When deciding whether approval will be sought from the Attorney General or the court, it is advisable to make sure that the contract for the sale of the property is contingent upon the approval of either the Attorney General and/or the Supreme Court. This will protect the corporation since the sale may only take place if it is approved.

When court approval is sought, the N-PCL requires that, upon filing the verified petition with the court, the Attorney General be given a minimum of 15 days' notice before a hearing on the application. N-PCL § 511. **However, the procedure preferred by the Charities Bureau and most courts is submission of a verified petition and proposed order, in draft form with tabs identifying any exhibits, to the Attorney General for review in advance of filing with the court.** This procedure enables the Attorney General to review the papers to ensure that all statutory requirements are met, all necessary documents are included as exhibits, and any concerns of the Attorney General are resolved *before* submission to the court. A sample petition to the court is attached as Appendix A, a checklist of documents needed to request approval of a transaction is attached as Appendix C, and a sample order is attached as Appendix D.

When an application is to the court on notice to the Attorney General and the Attorney General has no objection to the transaction, the Attorney General's Office will provide the Petitioner with a "No Objection" endorsement. Such endorsement, typically stamped on the proposed order approving the transaction, waives statutory service of the Petition since the papers have already been submitted to and reviewed by the Office of the Attorney General. The signed

petition, which must be exactly the same as the final draft petition and include exactly the same exhibits reviewed by the Attorney General, may then be submitted to the court. If a hearing or other court proceeding is subsequently scheduled by the judge, the Petitioner must give notice of such proceeding to the Attorney General. In addition, a copy of the final order, signed by the judge, must be submitted to the Attorney General.

If the Attorney General does not approve the Petition or if there are other parties that object to the transaction and wish to be heard by the court, the application must then be made to the court, on notice to the Attorney General and any other appropriate parties, for an order approving the transaction.

If the Attorney General does not approve a petition, if the Attorney General concludes that court review of the petition is appropriate, or if the corporation chooses to do so, the corporation may apply to the Supreme Court, on notice to the Attorney General, in the judicial district where the corporation's principal office is located for an order approving the transaction.

Circumstances in which the Attorney General may determine that court approval, on notice to the Attorney General, rather than approval of the Attorney General is appropriate include:

- The corporation is insolvent and must proceed on notice to creditors pursuant to N-PCL § 511(c).
- The Attorney General has received complaints or objections from members, creditors of the corporation or other interested persons who are entitled to notice pursuant to N-PCL § 511(b).
- The Attorney General has objections to the transaction that have not been resolved after discussion.

In addition, there may be circumstances when the Attorney General has no objection to a transaction but determines that review by the court is appropriate, including transactions that are unusually complex or will have an impact on the public.

STATUTORY STANDARD

Under the N-PCL's two-prong test, the Attorney General or the court must be satisfied: 1) the consideration and the terms of the transaction are fair and reasonable to the corporation, and 2) the purposes of the corporation or the interests of its members will be promoted by the transaction. N-PCL §§ 511(d) and

511-a(c). These statutory standards and other statutory requirements are discussed more fully below.

THE CORPORATION'S PREPARATION FOR THE TRANSACTION

Approval of the Transaction by the Board

The board of directors or trustees must approve the transaction, and, if there are members entitled to vote (see *Approval of the Transaction by Members* below) the board must adopt a resolution recommending the transaction. A vote of at least two-thirds of the corporation's entire board is required unless the board has 21 or more directors, in which case a vote of a majority of the entire board is sufficient. A corporation's certificate of incorporation or by-laws may provide for greater quorum or voting requirements.

The resolution must specify the terms and conditions of the proposed transaction, including the anticipated consideration to be received by the corporation, the eventual use of the proceeds of the transaction by the corporation, and a statement as to whether or not dissolution of the corporation is contemplated. N-PCL §§ 510(a)(1) and (2).

If the transaction involves a sale or transfer to a "related party,"² the corporation must follow the procedures set forth in the N-PCL § 715, including ensuring that the transaction is in the best interest of, and fair and reasonable to, the corporation and that any officer, director or key employee who has an interest in the transaction discloses the facts of that interest.

Where an officer, director, or key employee has such an interest, the officer, director or key employee must not participate in deliberations or votes of the Board in considering or approving the action. In addition, in certain circumstances, the Board must explicitly consider reasonable alternatives to the transaction. The abstention of the officer, director, or key employee, and the consideration of reasonable alternatives to the transaction must be documented in the minutes of the Board. Corporations planning a transaction should review and

² "Related party" means (i) any director, officer or key person of the corporation or any affiliate of the corporation; (ii) any relative of any director, officer or key person of the corporation or any affiliate of the corporation; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent 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 five percent. N-PCL § 102 (23).

assess their compliance with the requirements of the N-PCL before entering into the transaction. N-PCL § 715.

Approval of the Transaction by Members

The RCL provides that many religious denominations have members with voting rights, and, in many cases, requires that the voting membership must approve the transaction and use of proceeds **even if the organization's governing documents do not expressly require such an approval**. For these religious corporations, the voting "members" of the corporation in this context means the religious corporation's congregation even if the governing documents of the corporation state otherwise. For example, religious corporations incorporated under Articles 7 and 10 of the RCL must obtain approval of their congregation.

In all cases, the voting members must approve a written resolution, adopted by the board, describing the real property involved in, the parties to, and the terms and conditions of, the proposed transaction, including the consideration to be received by the corporation, an explanation as to how the proceeds will be used and a statement of whether or not dissolution of the corporation is contemplated. The resolution must be submitted to a vote at an annual or special meeting of the voting members. N-PCL § 510(a)(1).

Each member of the corporation is entitled to notice of the meeting at which voting on the proposed transaction takes place. The applicable sections of the RCL as well as the certificate of incorporation and bylaws of the corporation should be consulted as to the notice and quorum requirements for voting members for the purposes of the approval. *See, e.g.*, RCL §§ 134, 164 and 195 (minimum requirements of six members for certain denominations listed therein unless a greater quorum set by governing documents of the religious corporation.)

Members of Jewish religious corporations are permitted to vote by proxy if the by-laws or certificate of incorporation permits proxy voting. N-PCL § 609 and RCL § 207.

The resolution, certified by the secretary of the corporation, must be attached to the petition as an exhibit.

Approval of the Transaction by a Governing or Administrative Body

If the corporation's denomination requires the consent or approval of a governing or advisory body, such as a consistory, synod or Bishop's Counsel, the

petition must affirm that such consent was provided, and a copy of the consent must be attached as an exhibit. If no such approval is required, a statement to that effect must be included.

PREPARING TO PETITION FOR APPROVAL OF A TRANSACTION

Fair and Reasonable Consideration: Appraisals

In preparing to petition for approval of a transaction, the corporation must determine that the proposed consideration is fair and reasonable. To do so, the corporation must secure an independent appraisal of the property that is the subject of the transaction. Although the statute does not explicitly require an appraisal, court decisions have established that fair market value can best be determined by means of an appraisal, and the court and the Attorney General will generally reject the petition if it is not supported by an appraisal. A licensed appraiser who is completely independent of both buyer and seller must do the appraisal. A real estate agent or broker involved in the sale of the property may not do the appraisal. A real estate agent or broker “fair market assessment” of a property is NOT the same as an appraisal.

An appraisal is not necessary where a solvent religious corporation seeks to convey real property to another religious corporation or to a membership, educational, municipal or not-for-profit corporation for nominal consideration. RCL § 12(8).

If the asset is real property, the appraisal, which should be done no more than 12 months before the date of the contract, should be based on at least three comparable sales, unless a different valuation method is more appropriate. If the transaction is not an arm’s length transaction (i.e., if it involves a sale or transfer to a director, officer, employee or other person with some connection to the corporation), the Attorney General may require two appraisals. If the proposed transaction is for the development of real property, the appraisal should be based on full FAR (floor area ratio) and evaluate any unused development rights (sometimes called “air rights”).

Fair and Reasonable Consideration: Non-cash Consideration

Any non-cash consideration to be received by the corporation in the transaction needs confirmation of value. Such confirmation may be by submission of a third party valuation or, in some instances, acceptable evidence of costs associated with the building and delivery of in-kind consideration such as a new house of worship. Non-cash consideration may also include, but is not limited to, anticipated future payments based on a partnership or joint venture interest. The

value of any future payments, including ground lease payments, should be analyzed showing the net present value using an appropriate discount rate. Please note that anticipated future payments resulting from a joint venture or partnership arrangement are considered speculative and should not form the basis of a seller's fair and reasonable consideration analysis.

Fair and Reasonable Consideration: Security

If the corporation is entering into a development transaction in which the purchaser or a third party plans to build and deliver real property back to the seller, adequate security and assurances need to be evidenced in the documentation. Such security and assurances can take the form of escrow arrangements, guaranties, letters of credit, performance bonds, construction timetables with default provisions and adequate remedies, as well as appropriate provision for worship during construction.

Use of Proceeds of a Transaction

The use of the proceeds must be consistent with the corporation's purposes. Proceeds cannot be used for the personal benefit of a director, officer, employee, member or other interested party. All debts, costs and expenses to be paid at closing must be disclosed in the petition with supporting documentation provided as an exhibit.

If the property being sold is the religious corporation's house of worship and, as of the date of the sale, the corporation has not yet entered into a contract to purchase or lease new premises, the Attorney General will require, as a condition of approval, that the sale proceeds be placed in escrow to ensure that funds will be available to obtain new premises so that the corporation can continue to carry out its corporate purposes. The funds held in escrow will be released only upon a subsequent application to the Supreme Court or Attorney General.

Option Contracts

Option contracts require Attorney General or court approval at the time the option is exercised. The Charities Bureau discourages the use of option or other contingent contracts by religious corporations, especially if they may be exercised over a long term.

VERIFIED PETITION FOR ATTORNEY GENERAL OR COURT APPROVAL

The N-PCL requires that religious corporations seeking to sell, mortgage, lease for a term of more than five years, exchange or otherwise dispose of its property must seek approval of the Attorney General or the Supreme Court. N-PCL § 510(a)(3). A request for approval of such a transaction must be in the form of a verified petition to the Attorney General or to the court on notice to the Attorney General.

Requirements for the Verified Petition to the Attorney General or the Supreme Court

A verified petition to the Attorney General or the court must include the following information:

- The name of the corporation as it appears on its certificate of incorporation or an amendment. N-PCL § 511(a)(1). A copy of the certificate of incorporation and all amendments, and a certified copy of the corporation's by-laws must be attached as exhibits.
- The address of the corporation's principal location.
- The section of the law under which the corporation was incorporated. N-PCL § 511(a)(1).
- The names of the corporation's directors and principal officers, and their home addresses. N-PCL § 511(a)(2).
- A description of the corporation's activities. N-PCL § 511(a)(3).
- A description of the property that is the subject of the transaction. N-PCL § 511(a)(4). For sales, a copy of the deed must be attached as an exhibit. Include a statement as to whether the deed contains restrictions.
- A copy of the contract, lease, or mortgage commitment must be attached as an exhibit. If the contract has been assigned or will be assigned prior to closing, the assignment agreement must also be attached as an exhibit.
- A statement of the fair value of the property. N-PCL § 511(a)(4). A copy of the appraisal must be attached as an exhibit.

- A statement of the amount of the corporation's debts and liabilities and how they are secured. N-PCL § 511(a)(4). In addition, a copy of the corporation's most recent annual financial report or audited financial statements must be attached as an exhibit. If the corporation does not have annual financial reports, it should prepare a current schedule, certified by its Treasurer, of all assets, liabilities, income and expenses of the corporation and attach it as an exhibit. In certain circumstances, the Attorney General may decide that financial statements certified by an independent accountant are required. If the Petition is brought prior to the end of the fiscal year, then a financial report to date should be included.
- The consideration to be received by the corporation. N-PCL § 511(a)(5). If the consideration is less than the appraised value of the property, include a documented explanation.
- A description of the proposed use of the consideration. N-PCL § 511(a)(5). If the corporation is purchasing or leasing new premises, a copy of the contract or lease must be attached as an exhibit. Documentation to support the payment of debts, expenses or other use of proceeds must be attached as an exhibit (evidence of debt, invoices and a closing statement).
- A statement as to whether dissolution of the corporation is contemplated. N-PCL § 511(a)(5). If the corporation is contemplating dissolution, please refer to RCL §18 for guidance as to the disposition of property through a dissolution proceeding in Supreme Court.
- A statement that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation, or the interests of its members, will be promoted by the transaction, and a statement of the reasons for that determination. N-PCL § 511(a)(6).
- A statement that the transaction was recommended or authorized by a vote of the directors in accordance with law, at a meeting duly called and held. N-PCL § 511(a)(7). Include the total number of directors, the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, must be attached as an exhibit. If any board members have voted against the transaction, provide a brief explanation therefor.
- If consent of members of the corporation is required by law, a statement that such consent was given, in accordance with law, at a meeting of the members duly called and held. N-PCL § 511(a)(8). Include the total

number of members, the number of members present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the membership resolution, certified by the secretary, must be attached as an exhibit.

- If denominational or other governing authority approval is required for the proposed transaction, a statement that such approval has been obtained. A copy of such approval must be attached as an exhibit.
- A statement of any unusual or extraordinary circumstances of the transaction that will assist in the Attorney General's and/or court's review.
- A statement that the transaction is arms-length and none of the directors, officers, key employees or members of the corporation or their relatives will receive a direct or indirect financial benefit as a result of the transaction or commitments for distribution of proceeds. If any exceptions to the prior statement are necessary, include a statement of how the related party arrangement was approved by the corporation, including but not limited to, compliance with N-PCL § 715, and exhibits evidencing such approval.
- A statement as to whether or not an application to the Attorney General or the court for similar approval was made previously, and, if so, the determination made concerning the application.
- If the application for approval is made to the Attorney General, a statement that the corporation is not insolvent and will not become insolvent as a result of the transaction. N-PCL § 511-a(b).
- If the application for approval is made to the Attorney General, a statement as to whether any persons or entities have raised, or have a reasonable basis to raise, objections to the transaction, including a statement setting forth the names and addresses of such persons, the nature of their interest, and a description of their objections. N-PCL § 511-a(b).
- A statement of the relief requested (approval to sell real property, approval of mortgage, etc.). N-PCL § 511(a)(9).

Venue

If the application for approval of the transaction is made to the court, the verified petition must be submitted to the supreme court of the judicial district or

county court of the county where the corporation has its office or principal place of carrying out the purposes for which it was formed, even if the property to be sold is located elsewhere. N-PCL §§ 510(a)(3) and 511(a).

If the application for approval of the transaction is to the Attorney General, the verified petition must be submitted to the office of the Attorney General's Charities Bureau in New York City or Albany or to the appropriate Regional Office of the Attorney General that handles such applications in the county where the corporation's principal address is located. A list of the offices of the Attorney General, the New York counties they serve and their contact information is in appendix F.

Notice to Interested Persons

The court in its discretion may direct that notice of the application be given to any interested person, such as a member, officer or creditor of the corporation. N-PCL § 511(b). The notice must specify the time and place, fixed by the court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

In certain circumstances, the Attorney General may ask the court to give notice to interested parties (including tenants or other occupants of the premises) and/or hold an evidentiary hearing. For example, if there is a membership dispute, a dispute as to who constitutes a duly authorized board or a question about the adequacy of the consideration, the Attorney General may ask the court to hold an evidentiary hearing to resolve the dispute.

Notice to Creditors

If the corporation is insolvent or if its assets are insufficient to liquidate its debts and liabilities in full, all creditors of the corporation must be served with a notice of the time and place of the hearing. N-PCL 511(c). In such circumstances, notice to creditors is required by statute, and the petition must be approved by the court on notice to the Attorney General.

REQUIREMENTS FOR THE COURT ORDER OR ATTORNEY GENERAL APPROVAL

If the petition requests court approval, a copy of the proposed order should be submitted to the Attorney General with the verified petition. The order should set forth the terms of the transaction and the consideration. For sales, include the sale price, the purchaser and the address of the property. For leases, include the

amount of rent, the term of the lease, the lessee and the address of the property. For mortgages, include the name and address of the lender, the amount of the loan, the interest rate, the length of the mortgage, and any period of amortization, and the address of the property.

The order must also set forth how the corporation will use the proceeds to be received by the corporation. N-PCL § 511(d). If all or part of the proceeds is to be placed in escrow, this must be stated in the order. Funds in escrow may only be released by further order of the court on notice to the Attorney General.

In addition, the Attorney General requires that the order contain the following: a statement that a copy of the signed court order shall be served on the Attorney General, and that the Attorney General shall receive written notice that the transaction has been completed (i.e., upon closing), if the transaction has been abandoned, or if it is still pending 90 days after court approval.

If the verified petition requests approval of the Attorney General, a copy of the proposed Attorney General Approval should be submitted to the Attorney General with the petition. The Attorney General Approval should include all of the information described above that is required to be included in a proposed order.

CONCLUSION

If you have any questions about the information contained in this booklet or about the procedures for obtaining Attorney General or court approval of a transaction, you may contact the Attorney General's Charities Bureau in New York City or Albany or any of the Attorney General's regional offices for assistance. A list of regional offices and their contact information is included in Appendix F of this booklet.

Appendix A - Sample Petition for Court Approval of Sale of Assets

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
In the Matter of the Application of _____ :
(NAME OF CORPORATION) VERIFIED PETITION
For Approval to (type of transaction) :
pursuant to Not-for-Profit Corporations Law
§§ 510 and 511 and Religious Corporations :
Law § 12) -----X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Petitioner, (name of corporation) by (name and title of officer) of the corporation
for its Verified Petition herein respectfully alleges:

TEXT OF THE PETITION

WHEREFORE, petitioner requests that the Court approve the (type of transaction)
by (Name of Corporation), pursuant to Religious Corporations Law § 12.

.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be
executed

this ____ day of (Month), 20____ by

(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

NOTE – INCLUDE VERIFICATION PRINTED ON NEXT PAGE

Verification

STATE OF NEW YORK)

SS

COUNTY OF _____)

_____(Name_____, being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation), the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except those matters stated on information and belief, and, as to those matters, I believe them to be true.

(Signature)

Sworn to before me this
____day of (Month), 20__.

Notary Public

Appendix B - Sample Petition for Attorney General Approval of Sale of Assets

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
In the Matter of the Application of _____ :
(NAME OF CORPORATION) VERIFIED PETITION
For Approval to (type of transaction) :
pursuant to Sections 510 and 511-a of the
Not-for-Profit Corporation Law and Section 12
Of the Religious Corporations Law :
-----X

TO: OFFICE OF THE ATTORNEY GENERAL

(Street Address)

(City/Town), New York _____
(Zip Code)

Petitioner, (name of corporation) by (name and title of officer) of the corporation
for its Verified Petition herein respectfully alleges:

TEXT OF THE PETITION

WHEREFORE, petitioner requests that the Attorney General approve the (type of
transaction) by (Name of Corporation), a not-for-profit corporation, pursuant to
the Not-for-Profit Corporation Law Sections 510 and 511-a and Religious
Corporations Law §12.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be
executed

this ____ day of (Month), 20____ by

(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

NOTE – INCLUDE VERIFICATION PRINTED ON NEXT PAGE

Verification

STATE OF NEW YORK)

SS

COUNTY OF _____)

____(Name)____ , being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation), the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except those matters that are stated on information and belief and as to those matters, I believe them to be true.

Signature

Sworn to before me this
____day of (Month), 20____.

Notary Public

Appendix C - Checklist for Petition to the Attorney General or the Court for Approval to Sell, Lease, Mortgage or Otherwise Dispose of Assets

Following is a checklist of documents required of corporations seeking approval of the Attorney General or the court to enter into a property transaction:

Verified Petition to the Attorney General or the Court

___ Petition

___ Verification of Petition

Attachments to Verified Petition

___ Copy of the corporation's Certificate of Incorporation and all amendments

___ Copy of the corporation's by-laws

___ Copy of the deed to any real property that is the subject of the transaction

___ Copy of the contract, lease, or mortgage commitment

___ If the contract has been or will be assigned, a copy of the assignment agreement

___ If the corporation seeks to purchase or lease new premises, a copy of the contract or lease

___ Copy of the appraisal

___ Copy of the corporation's financial statements

___ Copy of the resolution of the board authorizing or adopting or recommending the transaction, certified by the corporation's secretary, that includes the total number of directors, the number of directors present at the meeting, the vote pro and con and what constitutes a quorum

___ The resolution of the members approving the transaction, certified by the corporation's secretary, that includes the total number of members, the number of members present at the meeting, the vote pro and con, and what constitutes a quorum

___ If approval of any governing authority is required, copies of such approvals

Approval of the Attorney General or Order of the Court

___ If the Attorney General's approval is sought, a proposed Attorney General Approval

___ If a court order approving the transaction is sought, a proposed Order

APPENDIX D - Sample Court Order Approving Sale of Assets

At the Supreme Court of
the State of New York,
held in and for the County of
on the ___ day of (Month), 20__.

P R E S E N T :

HON.

Justice.

-----X

In the Matter of the Application of :
(NAME OF CORPORATION)

ORDER

For Approval to (type of transaction) :

pursuant to the Sections 510 and 511 of the

Not-for- Profit Corporation law and the :

Index No.

Religious Corporations Law § 12)

-----X

ADD BODY OF ORDER WITH RECITATIONS

AND DECRETAL PARAGRAPHS

E N T E R:

Justice of the Supreme Court

Date

APPENDIX E - Sample Attorney General's Approval of Transactions

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
In the Matter of the Application of _____ :
(NAME OF CORPORATION) ATTORNEY GENERAL
for Approval to (type of transaction) : APPROVAL
pursuant to Section 510 and 511-a of the
Not-for-Profit Corporation Law and Section 12 : OAG Approval of the
Religious Corporations Law OAG-__-20__ -__
:
-----X

1. By Petition verified on (Date) , (Name of Corporation) applied to the Attorney General pursuant to Section 12 of the Religious Corporations Law and sections 510 and 511-a of the Not-for-Profit Corporation Law for approval of an application of (TYPE OF TRANSACTION)

2. The assets that are the subject of the Petition are (DESCRIBE ASSETS)

3. The terms of the transaction and the consideration are as follows:

Note - For sales, include the sale price, the purchaser and the address of the property. For leases, include the amount of rent, the term of the lease, the lessee and the address of the property. For mortgages, include the amount of the loan, the interest rate, the length of the mortgage and the name of the lender.

4. The proceeds will be used for the following purposes:

Note - If all or part of the proceeds is to be placed in escrow, this should be set forth. Funds in escrow may only be released by further approval of the Attorney General.

5. Based on a review of the Petition and the exhibits thereto (and the additional documents and information requested by the Attorney General), and the verification of (Name of Certifier) that (Name of the Corporation) has complied with the provisions of the Religious Corporations Law and the Not-for-Profit Corporation Law applicable to the sale or other disposition of all or substantially all of its assets, and neither the Petitioner or any third party having raised with the Attorney General any objections to the proposed transaction, the transaction is approved.

6. Petitioner shall provide written notice to the Attorney General that the transaction has been completed, if it has been abandoned, or if it is still pending 90 days after approval.

Attorney General of the State of New York

By: _____

Date:

Assistant Attorney General

**Appendix F - Offices of the Attorney General
and the counties covered by each:**

ALBANY - New York State Attorney General

Charities Bureau

The Capitol

Albany, NY 12224-0341

518-473-5049

Counties: Albany, Columbia, Fulton, Greene,
Hamilton, Montgomery, Rensselaer, Saratoga,
Schenectady, Schoharie,

Warren and Washington (note: Sullivan and Ulster for
trusts and estates matters only)

BINGHAMTON

New York State Attorney General

Binghamton Regional Office

44 Hawley Street, 17th Floor

Binghamton, NY 13901-4433

607-721-8771

Counties: Broome, Chemung, Chenango, Delaware,
Otsego, Schuyler, Tioga and Tompkins

BUFFALO

New York State Attorney General

Buffalo Regional Office

Main Place Tower - Suite 300A

Buffalo, NY 14202

716-853-8400

Counties: Allegheny, Cattaraugus, Chautauqua, Erie,
Genesee, Niagara, Orleans and Wyoming

NASSAU (not for trusts & estates matters)

New York State Attorney General

Nassau Regional Office

200 Old Country Road, Suite 240

Mineola, NY 11501-4241

516-248-3302

Counties: Nassau (note: trusts and estates matters are
handled by NYC)

NEW YORK CITY

New York State Attorney General

Charities Bureau

Transactions Section

28 Liberty Street – 19th floor

New York, NY 10005

212-416-8401

Counties: Bronx, Kings, New York, Queens and
Richmond

(note: NYC also handles Dutchess, Nassau, Orange,
Putnam, Rockland, Suffolk and Westchester – trusts
and estates matters)

PLATTSBURGH

New York State Attorney General

Plattsburgh Regional Office

43 Durkee Street, Suite 700

Plattsburgh, NY 12901-2818

518-562-3288

Counties: Clinton, Essex and Franklin

POUGHKEEPSIE (not for trusts & estates matters)

New York State Attorney General

Poughkeepsie Regional Office

One Civic Center Plaza - Suite 401

Poughkeepsie, NY 12601-3157

845-485-3900

Counties: Dutchess, Orange, Sullivan and Ulster (note:
Dutchess and Orange County trusts and estates matters
are handled by NYC; Sullivan and Ulster County
trusts and estates matters are handled by Albany)

ROCHESTER

New York State Attorney General

Rochester Regional Office

144 Exchange Boulevard

Rochester, NY 14614-2176

716-546-7430

Counties: Livingston, Monroe, Ontario, Seneca,
Steuben, Wayne and Yates

SUFFOLK (not for trusts & estates matters)

New York State Attorney General

Suffolk Regional Office

300 Motor Parkway

Hauppauge, NY 11788-5127

631-231-2424

Counties: Suffolk (note: trusts and estates matters are
handled by NYC)

SYRACUSE

New York State Attorney General

Syracuse Regional Office

615 Erie Blvd. West, Suite 102

Syracuse, NY 13204

315-448-4800

Counties: Cayuga, Cortland, Madison, Onondaga and
Oswego

UTICA

New York State Attorney General

Utica Regional Office

207 Genesee Street, Room 508

Utica, NY 13501-2812

315-793-2225

Counties: Herkimer and Oneida

WATERTOWN

New York State Attorney General

Watertown Regional Office

Dulles State Office Building

317 Washington Street

Watertown, NY 13601-3744

315-785-2444

Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER (not for trusts & estates matters)

New York State Attorney General

Westchester Regional Office

44 South Broadway

White Plains, NY 10601

914-422-8755

Counties: Putnam, Rockland and Westchester (note:
trusts and estates matters are handled by NYC)



The Sale of Nonprofit Nursing Homes Pursuant to the Not-for-Profit Corporation Law

Charities Bureau
www.charitiesnys.com

Guidance Document
Issue date: November 2018

Two of the most significant measures of human civilization are the effort and resources devoted to the care of older citizens with serious medical issues that limit their ability to live independently. For a significant number of elders, a nursing facility may well be their last home and its residents and staff their final community. At the same time, running a nursing home is a challenging business. Residents may suffer from a variety of challenging physical, mental, and emotional conditions. Employees and managers must cover three shifts per day, seven days every week, through storms, power blackouts, and holidays. Revenue depends on a strange and changing mix of private pay, private insurance, Medicare, Medicaid, and donations. Physical facility requirements and patient mix have changed substantially over the past 20 years, requiring significant capital investment. Then there are regular state inspections and audits, and private lawsuits.

Background: Trend Towards For-Profit Nursing Homes

Many nursing homes, particularly in the Northeast and Upper Midwest, have traditionally been established and operated as non-profit charities. In 2009, 26.4% of nursing homes nationally were nonprofit.¹ In New York, 40.5% (257) were nonprofits in 2010; by 2014, 239

¹ CENTERS FOR MEDICARE AND MEDICAID SERV., DEP'T OF HEALTH & HUM. SERV., *Nursing Home Data Compendium* 27 (2013), available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/downloads/nursinghomedatacompendium_508.pdf.

were nonprofits.² Research suggests that, on average, nonprofit nursing homes provide better care and achieve greater patient satisfaction than for-profit facilities.³

In New York, we have seen a significant increase in efforts to sell nonprofit nursing homes to for-profit entities since 2014. Within the past few years, about 5% of New York's nonprofit nursing homes were sold to for-profits annually. Sections 510, 511, and 511-a of New York's Not-For-Profit Corporation Law ("N-PCL") direct the New York Attorney General and/or the New York Supreme Court to review the sale of substantially all the assets of nonprofits, including nursing homes. That review requires consideration and determination that the nonprofit nursing home has satisfied two factors. First, are the "consideration and terms of the sale fair and reasonable" to the (seller) corporation? This standard assures that the selling organization will receive optimal consideration for its property and that the terms of the sale do not involve excessive risks to the selling organization. The second standard is that the sale or transfer of the assets, and the terms under which the assets are sold, will promote the mission and purposes of the charity. This can be a more difficult determination. As a leading treatise states, "Usually, in order for an organization's mission to be promoted, the services it provides must be continued. In simple transactions, frequently involving the sale of property that is the organization's main asset, the court is unlikely to approve the sale if the activities or services for which the organization was formed are interrupted or foreclosed by the sale."⁴

² CENTERS FOR MEDICARE AND MEDICAID SERV., DEP'T OF HEALTH & HUM. SERV., *Nursing Home Data Compendium* 18-22 (2015), available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf.

³ Several reviews have concluded that for-profit nursing homes had poorer care quality and poorer patient and family experiences than nonprofit-owned homes U.S. Government Accountability Office. *See e.g.* Kai You et al., *Do nursing home chain size and proprietary status affect experiences with care?*, 54 MED. CARE 229 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4752885/>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-689, *CMS'S SPECIFIC FOCUS FACILITY METHODOLOGY SHOULD BETTER TARGET THE MOST POORLY PERFORMING FACILITIES, WHICH TENDED TO BE CHAIN AFFILIATED AND FOR-PROFIT* (2009); Charlene Harrington et al., *Does Investor Ownership of Nursing Homes Compromise the Quality of Care?*, 91 AM. J. PUB. HEALTH 1452 (2001); Vikram R. Comondore et al., *Quality of care in for-profit and not-for-profit nursing homes: systematic review and meta-analysis*, 339 BMJ 2732 (2009); Aline Bos et al., *Financial performance, employee well-being, and client well-being in for-profit and not-for-profit nursing homes: A systematic review*, 42 HEALTH CARE MGMT. REV. 352 (2017), available at https://www.researchgate.net/profile/Margo_Trappenburg/publication/305382614_Financial_performance_employee_well-being_and_client_well-being_in_for-profit_and_not-for-profit_nursing_homes_A_systematic_review/links/5b51de3aa6fdcc8dae30a01b/Financial-performance-employee-well-being-and-client-well-being-in-for-profit-and-not-for-profit-nursing-homes-A-systematic-review.pdf; Lisa A. Ronald et al., *Observational Evidence of For-Profit Delivery and Inferior Nursing Home Care: When Is There Enough Evidence for Policy Change?*, 13 PLOS MED. e1001995 (2016), available at <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001995>; *Non-Profit Nursing Homes: Is there a Difference in Care?*, CENTER FOR MEDICARE ADVOCACY, <http://www.medicareadvocacy.org/non-profit-vs-for-profit-nursing-homes-is-there-a-difference-in-care/> (last visited Oct. 30, 2018).

⁴ Victoria B. Bjorklund, James. J. Fishman and Daniel L. Kurtz, *New York Nonprofit Law and Practice with Tax Analysis* § 9.02(2)(c) (Matthew Bender, 3d Ed.).

Impact on Charitable Mission

However, the charitable programs of many nonprofit nursing homes do not continue after their sale. Most nonprofit nursing home corporations are single purpose entities whose mission, as defined in their charter and demonstrated by their history, is to provide nursing home care. Ensuring that the proceeds of the sale are used to further the mission of the sold nursing home is challenging. In its review of sale petitions, the Charities Bureau has found that many nonprofit nursing homes have not fully considered their responsibility to assure that their use of the proceeds will promote the mission of the charity. Some nonprofit nursing homes are sole member corporations, effectively controlled by a related health care or fraternal organization that may have its own plans for the proceeds of the sale that are only marginally related to the mission of the selling entity. In other cases, as a nursing home administrator approaches retirement, the directors may decide to use proceeds of the sale to fund a grant making foundation and provide the administrator with a lucrative position overseeing a new grant making foundation.

The board operating the nonprofit home being sold should identify the level of care and services that the purchaser is likely to provide to the nursing home's residents. If they fail to do so, there is a significant chance that they will miss an opportunity to ensure that current and future nursing home residents will receive at least the same level of care and services that the nonprofit home provided. Similarly, because delivery of high levels of care and services require adequate supervision and staffing, individuals operating the nonprofit home can ensure quality care and services by seeking commitments from the purchaser to maintain the same staffing and supervision levels as the seller.

Many nonprofit nursing homes interested in selling have been able to prepare an economic case, claiming that continued operation of an existing single facility nonprofit nursing home will not be viable in the long run, and that a sale or transfer is appropriate. In addition, well-advised boards have been able to demonstrate that the sale price terms are "fair and reasonable" to the seller.

A significant concern has arisen in our reviews concerning the effort and success by boards of nonprofit nursing homes and their advisors in evaluating whether the terms of the sale or transfer and intended use of the proceeds will promote the mission and purposes of the charity. We have had the benefit of careful and thorough work by a number of conscientious boards and their advisors to address this issue, in well-articulated sale petitions. We have also had the unfortunate experience of approving petitions for sales of nursing homes that are shortly thereafter closed by the purchasers, and sold or converted by the purchasers to condominiums or commercial developments. In other cases, the proposed purchaser has been placed in control of the facility pending the sale, with no accountability for income or expenses during the period following the execution of the agreement of sale but prior to obtaining required regulatory approvals.

Best Practices

This guidance articulates recommended best practices for a board, its management, and its advisors in considering the sale of a nonprofit nursing home including:

- factors to be evaluated in considering a sale,
- the business process for exploring requests for proposals and evaluating bidders,
- protections to be provided for the class of charitable beneficiaries (that is, current and future residents) during and after the sale, and
- use of proceeds of the sale consistent with the nursing home's charitable mission.

The best practices for considering and entering into an agreement for sale by a nonprofit nursing home should include planning for and development and submission of specific factual representations in a statement to the Charities Bureau by the selling charity. The planning should include developing a process for use by the board, management, and their professional advisors, including recognizing the importance of independent legal advice, to determine that the proposed sale is in the best interests of the charitable corporation and its beneficiaries. Where the board is considering a sale to a for-profit entity, such a statement should include:

Planning

- A five-year projection of revenues and expenditures for the nursing home under current ownership.
- Whether and how the board explored alternative or additional sources of funding to continue operations as a nonprofit nursing home.
- Whether and how the board has evaluated merger or affiliation with another nonprofit health care facility, and the results of that evaluation.
- Whether and how the board advised current residents and their family members or guardians that sale of the nursing home to a for-profit purchaser is contemplated, and what comments or responses have been received to the advice.
- Whether and how the board solicited inquiries, bids, or requests for proposals from potential purchasers, and what inquiries, bids, or requests for proposals it received and considered.
- Whether and how the board conducted its own examination of the character, competence, integrity, and ability to pay of potential purchasers, their owners, officers, and directors
- Whether and how the board determined that the transaction was done at arm's length and no person would reap any personal benefit from the transaction.
- Whether and how the board determined that compliance with all provisions of N-PCL 715 applicable to related party transactions have been met.

Continuation of Care

- Whether and how the board evaluated the ability and willingness of potential purchasers to provide quality services as required by 10 CRR-NY 415.12, and protection from abuse or neglect to current and contemplated nursing home residents, including consideration of the effect that any planned changes in staffing and/or supervision are likely to have on

patient care, and what representations to protect the residents are required to be memorialized in writing.

- Whether and how the board evaluated the ability and willingness of potential purchasers to assure continued operation of the nursing home for current residents and the specific population served by the nursing home for a period of at least five years after the sale.
- Whether and in what form the purchaser made a commitment to continue operating the nursing home for five years.
- Whether and how the board considered the need for continuity in the staff providing care for residents after the sale and the levels of staffing and supervision.
- Whether the board considered the CMS ratings of other nursing homes operated by the prospective purchasers of the home, as an indicator of the likely level of care and services residents would receive after a sale to that purchaser, and whether that would be a desirable outcome.
- Whether and how the board considered contracts with staff of the nursing home and if those considerations included negotiations with union leadership if staff are unionized.
- How the board will obtain and enforce commitments from the purchaser for conduct after the sale.

Other Provisions for the Petition

- The specifics of any items, which might disclose confidential business information, should be appropriately marked and contained in a separate document for filing with the Charities Bureau, and need not be included in the publicly available petition.
- A statement of the fair value of the assets. N-PCL § 511(a)(4). For most charities owning nursing homes, the “assets” include real estate, personal property, and the value of the ongoing business. The Charities Bureau expects that the statement of the “fair value of the assets” will reflect information and evaluation from an independent professional advisor with expertise in such evaluations.
- A statement of the amount of the corporation's debts and liabilities and how they are secured as of the date of the agreement of sale. N-PCL § 511(a)(4). The statement should be current, include the name of each payee, any security and, if past due. In addition, a copy of the corporation's most recent annual financial report (i.e., IRS Form 990 or 90-PF) or audited or unaudited financial statements should be attached as an exhibit. The Charities Bureau expects that the Board and management have and have reviewed accurate financial records of outstanding liabilities and contingencies prior to entry into an agreement of sale, and that the agreement of sale will reflect how post agreement expenditures, obligations, revenues, and claims will be allocated at closing.
- The consideration to be received by the corporation, including the timing of the planned receipt of consideration, the debts or obligations or contingent obligations to be assumed by the purchaser, and the debts or obligations or continued obligations to be retained by the seller. N-PCL § 511(a)(5). If any consideration is to be delivered other than in cash at closing, there should be evidence in the appraisal or other independent support as to the fair value of that consideration. If the consideration is less than the appraised value of the

assets, a documented explanation of why the consideration is fair and reasonable should be provided.

- The petition should include as attachments any filings concerning the facility made by the buyer with any healthcare regulatory agency and any other government agencies relevant to the transaction, and any related agency orders or communications, and all such filings by the seller concerning any proposed sale or transfer of the facility.
- A copy of the contract, including a clause that the agreement is contingent upon approval by the Supreme Court or the Attorney General to afford both seller and purchaser protections if the transaction cannot meet the “fair and reasonable” or “best interest” standards.

Use of Proceeds

- A description of the proposed use of the proceeds of the sale to honor pre-existing obligations and costs connected to the sale. N-PCL § 511(a)(5). The description should include disclosure of all existing obligations for use of the consideration, and contingent obligations. Support for all commitments for use of proceeds should be attached to the petition as exhibits (evidence of debt, invoices, and a draft closing statement).
- A description and explanation of the proposed use of the proceeds for charitable purposes. N-PCL 511(a)(5). These uses could, depending on the charitable organization’s charter, by-laws, and mission statements in the IRS 990 or elsewhere, include payments to assure continued provision of services by third parties for existing charitable beneficiaries; transfer of any proceeds received from the sale to another charitable entity; use of the proceeds for a new facility or to fund a new service; use of the proceeds for a grant making entity for grants related to its mission; creation of an endowment of restricted funds for the organization’s charitable purposes; or dissolution and distribution pursuant to Article 10 of the N-PCL. In determining distribution of proceeds for charitable purposes, the board and management should be aware that sole members of charitable corporations are not entitled to appropriate charitable proceeds from the corporation of which they are sole member unless the directors of the entity make an independent determination that such distribution and its terms are consistent with the mission and charter of the selling charitable corporation.
- A statement as to whether dissolution of the corporation is contemplated. N-PCL § 511(a)(5). In certain circumstances, the Attorney General will require that the proceeds be placed in escrow if the corporation plans to dissolve. In addition, if the corporation plans to dissolve after the sale, the legal doctrine of *quasi cy pres* requires that the net proceeds be distributed under a Plan of Dissolution and Distribution of Assets to organizations engaged in substantially similar activities.⁵

⁵ Not-for-profit corporations contemplating dissolution should consult the Attorney General's guidance on dissolution posted at <http://www.charitiesnys.com/home.jsp>. Religious Corporations should consult Religious Corporations Law § 18.

- A statement that the transaction was recommended or authorized by a vote of the directors in accordance with law, at a meeting duly called and held. N-PCL § 511(a)(7). Include the total number of directors, how the meeting was noticed (a copy of the notice is helpful), the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, should be attached as an exhibit.
- If consent of members of the selling corporation is required by law, a statement that such consent was given in accordance with law, at a meeting of the members duly called and held. N-PCL § 511(a)(8). Include the total number of members, the number of members present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the membership resolution, certified by the secretary, should be attached as an exhibit.

The Charities Bureau recognizes that the decision by a board and management to sell a nonprofit nursing home to a for-profit entity is not taken lightly. This guidance is provided to assist both board and management in the exercise of their fiduciary responsibilities to charitable beneficiaries, and to allow well-considered actions to proceed through the approval process. It should not be viewed as a substitute for advice from a corporation's attorney.

There will be circumstances where the financial situation of the charitable entity, or the ability of the nursing home to provide services to existing residents, or the licensing or regulatory status of the nursing home are in substantial jeopardy such that the process described in this guidance is not practicable or not in the best interest of charitable beneficiaries.

Other guidance for not-for-profit corporations is posted at www.charitiesnys.com. Please address questions concerning property transactions to charities.transactions@ag.ny.gov.