CLIENT MEMORANDUM

Non-Profit Revitalization Act

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AUTHOR

Elizabeth Buckley Lewis

The recently enacted New York Non-Profit Revitalization Act of 2013 (the "Act") makes significant amendments to the New York Not-For-Profit Corporation Law ("NPCL"). Most provisions of the Act become effective on July 1, 2014 and apply only to non-profits organized in New York, but some provisions also apply to non-New York entities that are registered to solicit charitable contributions in New York State. New York-organized non-profits may need to adopt additional policies and amend their by-laws as a result of the changes to the law. To assist with this process, Willkie has prepared model policies and by-law provisions that comply with the Act. A brief summary of the most significant changes follows.

Changes Applicable to All Non-Profits that Solicit Contributions in New York State (including those organized in other states)

Audited Financial Statements: All non-profit organizations that solicit charitable contributions in New York State are required to register with the New York Attorney General. Under current law, if a registered organization has gross revenue and support in excess of $100,000, it is also required to file with the Attorney General an annual financial statement accompanied by an independent certified accountant's review report, and organizations with gross revenue and support in excess of $250,000 are required to file an annual financial statement that includes an independent certified

public accountant's audit report and opinion that the financial statements are presented fairly in all material respects and in conformity with generally accepted accounting principles. The $100,000 threshold will increase to $250,000, and the $250,000 threshold will increase to $500,000 on July 1, 2014. The $500,000 threshold will increase to $750,000 on July 1, 2017, and it will increase to $1,000,000 on July 1, 2021.

Oversight of Audited Financials: The Act provides that with respect to any corporation required to file audited financials with the Attorney General, either the full board or a designated audit committee comprised solely of Independent Directors (as defined below) must oversee the accounting and financial reporting processes of the organization and the audit of its financial statements. Additional oversight is required by the board or audit committee of organizations with annual revenues in excess of one million dollars. Such oversight includes meeting with the auditor to review and discuss any material risks and weaknesses in internal controls identified by the auditor, any restrictions on the scope of the auditor's activities or access to requested information, any significant disagreements between the auditor and management and the adequacy of the organization's accounting and financial reporting processes. This change applies beginning January 1, 2015. *We recommend that an organization's by-laws or audit committee charter describe these procedures required under the Act.*

Independent Directors: The Act defines an "independent director" (of which an audit committee must be entirely comprised) as one who (i) is not, and has not been within the last three years, an employee of the organization or of an affiliate of the organization and who does not have a relative who is, or has been within the last three years, a key employee of the organization or of an affiliate; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years of the organization, more than $10,000 in direct compensation from the organization or from an affiliate of the organization (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director); and (iii) is not a current employee of, or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the organization or an affiliate of the organization for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of $25,000 or two percent of the organization's consolidated gross revenues.

Changes Applicable to Non-Profits Organized in New York

Governance: No employee of a not-for-profit corporation may serve as the chair of the board or hold any other title with similar responsibilities. This provision is effective as of January 1, 2015.

Conflict of Interest Policy: The Act requires that every not-for-profit corporation have a conflict of interest policy. The policy must (i) define circumstances that constitute a conflict of interest, (ii) provide procedures for disclosing conflicts to the board or audit committee, (iii) require that a person with a conflict not be present at or participate in any board or committee deliberation or vote on the matter giving rise to the conflict, (iv) prohibit any attempt by the conflicted person to influence improperly the deliberation or voting, (v) require that the existence and resolution of the conflict be documented

in the organization's minutes and (v) provide for procedures for disclosing, addressing and documenting Related Party Transactions (described below). The Act itself does not define what transactions constitute a conflict of interest. *If an organization does not yet have a Conflict of Interest Policy, it must adopt one by July 1, 2014. We recommend that organizations with existing policies update their policies to address Related Party Transactions.*

Related Party Transactions: The Act replaces a provision governing transactions with "interested directors and officers" with a new provision regarding "Related Party Transactions", which are defined as transactions between the organization, or any of its affiliates, and a Related Party who has a financial interest in the transaction. Related Parties include officers and directors of the organization as well as officers and directors of any affiliates of the organization. Also included are relatives of those persons and entities at least 35% owned by such persons. Depending on the facts and circumstances, an organization's founder and substantial contributors to the organization may also be considered Related Parties. It is not clear to what extent Related Party Transactions are intended to overlap with conflicts of interest, but it appears that all Related Party Transactions are likely potential conflicts of interest and that there may be additional conflicts of interest that are not Related Party Transactions.

Whistleblower Policy: The Act requires any not-for-profit with at least 20 employees and that had annual revenue in excess of $1 million in the prior year to adopt a Whistleblower Policy. The Whistleblower Policy must include (i) procedures for reporting violations or suspected violations of laws or corporate policies; (ii) a requirement that an employee, officer or director be designated to administer the policy and to report to an appropriate committee or the board; and (iii) a requirement that the Whistleblower Policy be distributed to all directors, officers, employees and volunteers who provide substantial services to the organization. *If an organization with at least 20 employees and annual revenues in excess of $1 million does not already have a whistleblower policy, it must adopt one by July 1, 2014. Note that Form 990 (which must be filed by organizations with fewer than 20 employees and revenues of less than $1 million) asks whether the filer has a whistleblower policy, and so all Form 990 filers may want to consider adopting a whistleblower policy.*

Elimination of "Types": Currently, the NPCL provides that not-for-profit corporations are generally categorized as one of four "types" – A, B, C or D. Under the Act, these categories have been eliminated, and not-for-profit corporations will be categorized as either "charitable" (most 501(c)(3) organizations) or non-charitable (generally, other organizations exempt from tax under section 501(c)).

Compensation Determinations: The Act provides that no member, director or officer who receives compensation from an organization may be present at or otherwise participate in any board or committee deliberation or vote on such compensation, provided that the board or authorized committee may request that the person to be compensated present background information or answer questions at a committee or board meeting prior to the commencement of deliberations or voting related thereto. *Note that this appears to mean that organizations that remunerate directors for attending meetings will now need to approve such remuneration on a director-by-director basis with each director recusing him or herself while his or her compensation is determined.*

Electronic Signatures: Beginning July 1, 2014, notice of meetings may be provided electronically, and directors will be able to act outside of a meeting by unanimous consent by electronic communication.

Procedural Changes: The Act provides that approval of certain actions may now be given by the Attorney General's office or by the court rather than only by the court. These actions include a sale, lease, exchange or other disposition of all or substantially all of an organization's assets and an amendment to an organization's certificate of incorporation to add, change or eliminate a purpose.

If you have any questions regarding this memorandum, please contact Elizabeth Buckley Lewis (212-728-8964, elewis@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Paris, London, Milan, Rome, Frankfurt and Brussels. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

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