



509:Hot Topics in Representing Nonprofits

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Faculty Biographies

Patrick H. Dunkley

Patrick H. Dunkley is a senior university counsel at Stanford University where he represents the University in business, tax, and technology related matters.

Prior to this position, Mr. Dunkley joined Charles Schwab & Co., Inc., a market leader in the securities broker-dealer industry where he was a vice president and senior corporate counsel. Mr. Dunkley began his legal career with Pillsbury Madison & Sutro LLP, where he started as an associate and was later promoted to partner in Pillsbury's Silicon Valley Office.

Prior to commencing his legal career Mr. Dunkley earned his undergraduate degree in Business Administration after which he earned a Certified Public Accountant license and practiced as a CPA for seven years.

Shelley Z. Green

Shelley Z. Green was until recently senior director and general counsel of The Shefa Fund, a nonprofit organization with offices in Philadelphia and Los Angeles. In this dual role, she counseled the organization on governance, strategic planning, and program design, in addition to handling legal matters in areas, including exempt organizations, fundraising, securities regulation, and intellectual property.

Previously, Ms. Green spent more than fifteen years as general counsel of the University of Pennsylvania, where she supervised a team of attorneys and advised the board and senior management on all legal issues, including compliance, civil rights, technology transfer, and human resources. She began her legal career as a litigator with the Washington, DC firm of Sutherland, Asbill and Brennan and worked in the U.S. Department of Health, Education, and Welfare.

Ms. Green chairs ACCA's Nonprofit and Professional Associations Committee, and served on the board of ACCA's Delaware Valley Chapter and on the finance committee of the National Association of College and University Counsel. She is a member of the policy board of the Jewish Community Relations Council of Greater Philadelphia.

Ms. Green received her AB from Vassar College and her JD from Harvard Law School.

James A. Woehlke

James A. Woehlke is been in-house counsel for the New York State Society of Certified Public Accountants ("NYSSCPA").

Prior to becoming counsel, Mr. Woehlke served as the NYSSCPA tax policy director. Before joining the NYSSCPA, Mr. Woehlke had been a technical manager in the AICPA's tax division. He practiced accounting with KMG/Main Hurdman, including with that firm's Washington national tax office, and law with the Wichita, Kansas, law firm of Fleeson, Gooing, Coulson & Kitch.

Mr. Woehlke holds the certified association executive designation offered by the American Society of Association Executives. He is a member of ACCA's nonprofit and association committee and the American Society of Association Executives legal section counsel.

Mr. Woehlke received his BA from Grove City College, where he graduated *cum laude*, his JD and MBA from Drake University, and his Master of Law—Taxation with distinction from Georgetown University Law Center.

Session 509: Hot Topics in Representing Nonprofits
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1. What is the extent of First Amendment protection for nonprofit organizations' fund-raising communications?

On May 5, 2003, the Supreme Court issued its unanimous decision in *Illinois v. Telemarketing Associates*. Justice Ginsburg delivered the opinion of the Court reversing a decision of the Illinois Supreme Court that had dismissed fraud claims against fund-raising corporations that had entered into contracts with VietNow National Headquarters, a charitable nonprofit corporation, under which the telemarketer retained 85% of the gross receipts.

In affirming the lower courts' dismissal, the Illinois Supreme Court relied on *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). Those decisions had invalidated states' efforts to regulate fundraisers by setting limits of various sorts on their fees.

In *Schaumburg*, a village ordinance had prohibited charitable organizations from soliciting donations unless they used at least 75 percent of the proceeds "directly for the charitable purpose of the organization," defined to exclude administrative expenses and solicitation costs. The Court found that it might be appropriate for a charitable organization primarily engaged in research, advocacy or public education to spend more than 25 percent of its receipts on fund-raising, salaries and overhead. The mechanistic regulation was unconstitutional.

In *Munson*, the Court invalidated a Maryland law that prohibited charitable organizations from soliciting if they paid or agreed to pay as expenses more than 25 percent of the amount raised. Unlike the ordinance in *Schaumburg*, the Maryland law provided for a waiver of the limitation for financial necessity. However, the waiver did not save the law, because it did not protect organizations that have high costs because of protected First Amendment activities such as disseminating information as part of their fund-raising.

In *Riley*, the North Carolina law prohibited professional fundraisers from retaining an "unreasonable" or "excessive" fee, establishing a rebuttable presumption that fees over 35 percent were unreasonable. Again, the Court found that "using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." 487 U.S. at 789. The waiver process did not save the law because it subjected fundraisers to litigation risk that could have a chilling effect on speech.

In distinguishing *Schaumburg*, the Court found that each of its prior cases on the subject had left “a corridor” open to fraud actions to protect the public against false or misleading charitable solicitations, provided that the complaint was not based solely on the percentage of funds retained by the solicitors or on their failure to advise prospective donors of the fee arrangements. Pointing to affidavits submitted as exhibits to the complaint stating that telemarketers had represented that “90% or more goes to the vets” and that there would be no “labor expenses,” the Court found that the complaint dominantly concerned affirmative misrepresentation.

The Court also endorses state and municipal regulatory schemes that require charities and professional fundraisers to register and disclose financial data.

2. What would be the effect of the Charitable Giving Act of 2003 (HR 7) on the percentage of assets private foundations are required to give away annually and on the calculation of qualifying expenses?

Under current law, foundations are required to pay out at least 5 percent of their assets annually in grants. The Charitable Giving Act of 2003, or HR 7, would, among other things, change the calculation to prohibit foundations from counting overhead toward the payout requirement. The legislation has sparked debate about the likely effects of the proposal on private foundations and their grantees.

The bill would eliminate administrative expenses from qualifying distributions, in effect increasing the payout requirement. [Other provisions of the bill would reduce the private foundation excise tax and change the rules concerning the amount of stock foundations are permitted to hold in a publicly traded corporation. Like the Care Act of 2003 (S. 476), passed by the Senate in April, the bill provides a deduction for charitable gifts by taxpayers who take the standard deduction.]

The National Committee for Responsive Philanthropy (NCRP), a research and advocacy organization that promotes public accountability of foundations, announced its support for the change in calculation of payout, estimating that foundations could direct up to \$4.3 billion more annually to nonprofit organizations without impairing their own long-term sustainability. According to NCRP, the bill would limit excessive compensation, without preventing foundations from hiring staff and incurring other appropriate administrative costs. See www.ncrp.org.

On the other hand, two membership and advocacy groups, the Council on Foundations, and Independent Sector (which includes grantees as well as foundations among its members) oppose the exclusion of administrative expenses from the payout calculation. The Council disputed NCRP's conclusions

and argued that the proposed change in the payout rule could erode endowments over time and diminish the effectiveness of foundations' grantmaking by discouraging expenditures such as community outreach and technical assistance to grantees.

Independent Sector urged Congress to pass the tax incentives for charitable giving in The Charitable Giving Act of 2003, but to hold action on the foundation administrative expense provision for further study. See www.independentsector.org.

Claiming a need for further data on the likely outcome of the proposed change, Independent Sector said it would "convene researchers, grantmakers, public charities, and others to undertake further analysis" of the issue.

3. The Sarbanes-Oxley Act of 2002 applies to companies registered with the Securities and Exchange Commission. Therefore, non-profit entities need not be concerned about its provisions, right?

Not exactly. Although Sarbanes-Oxley does not directly apply to non-profit entities, these entities cannot escape the highly publicized circumstances that gave rise to the swift enactment of this sweeping legislation. Sarbanes-Oxley was enacted in the wake of financial debacles at companies including, but certainly not limited to, Enron, WorldCom and Global Crossing; and the resulting demise of the once prominent audit firm Arthur Andersen. Sarbanes-Oxley is a means of assisting in the restoration of investor and public confidence in the information generated by public companies. It holds members of a publicly traded corporation's audit committee and its senior officials to a higher level of accountability to shareholders and the general public.

Technically, non-profit entities escape the mandates of Sarbanes-Oxley because they do not issue publicly traded securities. Non-profit entities do, however, have equally interested parties in the form of donors who contribute hundreds, thousands, even millions of dollars to financially back these entities in part in reliance on the entity's representations regarding their financial performance in furtherance of their stated mission. Moreover, many non-profit entities issue bonds or commercial paper through conduit borrowers such as state agencies. This debt is ultimately purchased by the public. In a sense, donors and purchasers of debt can be viewed as "investors" in the success of the non-profit entity equally worthy of protection as investors in public companies. The financial performance of these entities can certainly impact the ability of bondholders to receive the benefit of their investment in almost the same way the financial performance of public companies will impact investors in securities. If the public's trust in non-profit entities were to sufficiently erode, one could expect contributions to substantially diminish thereby impacting the ability of these entities to perform their missions; and resulting in an increased burden on government resources. Ultimately, the ripple effect could have a broader economic impact. Based on the foregoing, it is not difficult to see how spirit, if not the letter of the long arm of

Sarbanes-Oxley might indirectly reach not only in to the corporate board room, but may also extend into governance of non-profit entities.

There are at least two reasons why non-profits are wise to consider certain governance revisions consistent with Sarbanes-Oxley: (1) such revisions will ultimately be considered "best practices" that should be followed by entities regardless of their IRS status and (2) it is possible that state regulators may take it upon themselves to enact legislation similar to Sarbanes-Oxley (New York Attorney General, Eliot Spitzer, has already made one such attempt). While one cannot predict what legislation State governments may introduce or pass, legislators may be more inclined to deem sweeping remedial legislation unnecessary if non-profit entities voluntarily "get their houses in order." Of course, this maybe just wishful thinking, however there is little, if any, down side risk to adopting such changes.

With the above in mind, below are some steps most non-profit entities should consider when addressing the reforms prompted by Sarbanes-Oxley:

Form a Separate Audit Committee

Prior to the recent corporate governance crisis many non-profits, even very large entities, functioned without audit committees. A review of Sarbanes-Oxley reveals that the audit committee is the linchpin in the compliance scheme Sarbanes-Oxley mandates. The audit committee is tasked with, among other things, managing the relationship between the entity and outside auditors, hiring and firing outside auditors, resolving conflicts between management and outside auditors, ensuring that whistleblower complaint procedures are established and approving any non-audit services, if any, allowed to be performed by the auditors. An independent audit committee (i.e. no conflicts of interest and not otherwise compensated by the entity) is essential to compliance with "best practices."

Develop an Audit Committee Charter

The audit committee should develop a written charter that sets forth the scope of the audit committee's authority, the qualifications of its members, the frequency of its meetings, its ability to hire outside experts and any other pertinent details regarding its duties and responsibilities.

Ensure that Members of the Audit Committee are Financially Qualified

Historically, audit committees received much less exposure than they do in the current environment. Consequently, it was not uncommon for committees to be comprised of donors and other "friends" of the entity acting in ceremonial capacity.

Because of the potential high profile repercussions of accounting and auditing failures, it is more crucial than ever that audit committee members be financially literate. Sarbanes-Oxley struggled with defining financially literate and ultimately

concluded that a financial expert has each of the following attributes:

- An understanding of generally accepted accounting principles and financial statements;
- The ability to assess the general application of GAAP in connection with the accounting for estimates, accruals and reserves;
- Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the company's financial statements, or experience actively supervising one or more persons engaged in such activities;
- An understanding of internal controls and procedures for financial reporting; and
- An understanding of audit committee functions.

Under the final rules, the person must have acquired the five attributes through at least one of the following:

- Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- Other relevant experience.

While non-profits need not comply to the letter of this definition, it provides relevant guidance.

The absence of financially literate board members may (as guided by Sarbanes-Oxley) make it more difficult to appoint members to audit committees, forcing non-profit boards to perhaps consider financial literacy when selecting new board members. If there are insufficient members on the board with financial expertise, in the interim the board may wish to consider the special appointment to the audit committee of persons who possess the requisite financial expertise, yet are not members of the board. This may require an amendment to the organization's bylaws. To increase financial literacy, boards may further consider annual or more frequent training of audit committee members that can be provided by the entity's outside auditors or other consultants.

Develop and Publicize a Code of Conduct that Includes Senior Officers

Pursuant to Sarbanes-Oxley, the audit committee is the organizational member responsible for ensuring the existence of a code of conduct for officers and senior management. The code of conduct must be designed to deter wrongdoing and promote:

- Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
- Full, fair, accurate, timely, and understandable disclosure in reports and documents that the company files with, or submits to, the SEC and in other public communications made by the company;
- Compliance with applicable laws, rules and regulations;
- Prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
- Accountability for adherence to the code.

This is one area where, perhaps, prudence would dictate taking action beyond the dictates of Sarbanes-Oxley. While a code of conduct for officers and senior management is certainly important, it is also important for critical ethical responsibilities to be observed by all layers of an organization. Establishing a two-tiered code of conduct structure could send the wrong message to persons below the senior management level that they are held to a lower standard. Therefore, it may be preferable to enact a single code of conduct embracing the concepts set forth above that applies to all employees.

Establish Policies Addressing the Relationship with Outside Auditors

Sarbanes-Oxley changed the regulation of the accounting industry in areas including, but not limited to, rotation of audit firm engagement partners, hiring by clients of audit firm personnel, and use of auditors for non-audit services. The purpose behind each of these reforms is to increase auditor independence. In developing an audit committee charter consideration should be given to setting appropriate limits in each of these areas. However, because of the inherent differences in the scope of audit firm representation of for-profit and non-profit entities the limits mandated for public companies by Sarbanes-Oxley may not be advisable in the non-profit environment.

Audit firm partner rotation is one area where a different approach may be warranted. Auditors are involved on a much more frequent basis with public companies due to mandated quarterly and other periodic SEC filings. Therefore, auditors interact with management far more often, thereby, presumably creating more opportunities for a "cozy" relationship that could impair independence. On the other hand, most non-profits officially interact with their auditors once per year. As such, instead of the five (5) year audit partner rotation required by Sarbanes-

Oxley, non-profits may want to consider a longer period such as seven (7) or ten (10) years.

Other issues addressed by Sarbanes-Oxley apply equally to non-profits as they do to their for-profit cousins.

- Non-audit services – Sarbanes-Oxley provides a list of prohibited non-audit services which includes:
 - (a) Bookkeeping or similar services;
 - (b) Financial information system design and implementation;
 - (c) Appraisal or valuation services;
 - (d) Fairness opinions or contribution-in-kind reports;
 - (e) Actuarial services;
 - (f) Internal audit outsourcing services;
 - (g) Management or human resources functions;
 - (h) Broker or dealer, investment adviser or investment banking services;
 - (i) Legal services and expert services unrelated to the audit; and
 - (j) Other services later determined to be impermissible

Because of the need for auditor independence, any non-audit services should be scrutinized and subject to the approval of the audit committee. This will avoid situations that may impair auditor independence such as when auditors are asked to audit systems for which their employees have provided accounting services or which they helped to develop. It will also avoid situations where auditors provide internal audit services and then are asked to audit their own work.

- Hiring of audit firm personnel – Sarbanes-Oxley prohibits public companies from hiring senior audit engagement personnel for a period of one year after they have performed audit services for the client. It seems prudent to adopt policies consistent with the dictates of Sarbanes-Oxley in this area.

It is also worth noting that because the Sarbanes-Oxley rules apply directly to the accounting industry, accounting firms may, for administrative convenience, adopt one set of rules in some of the above areas that will apply to all clients, for-profit and non-profit.

Certifications of Financial Information

Sarbanes-Oxley requires that principal executive officers certify their system of internal controls and the accuracy of financial statements. Specifically, Sarbanes-Oxley requires that they certify:

- (a) The signing officers have reviewed the financial statements;

- (b) The financial statements are not misleading;
- (c) The financial statements fairly present the financial condition;
- (d) The signing officers are responsible for establishing and maintaining internal controls, have reviewed internal controls within 90 days of the report and have presented in the report their conclusions on the effectiveness of the controls;
- (e) The signing officers have disclosed to the auditors and the audit committee all significant deficiencies in internal controls and any fraud, material or not, involving management with a significant role in internal controls; and
- (f) Whether or not there were significant changes in internal controls after the date of their evaluation with regard to significant deficiencies or material weaknesses.

Because many non-profit entities are small and/or have insufficient administrative resources to implement the type of internal controls one might find in publicly traded companies, it may be difficult for the executives of many non-profits make the representations required by a Sarbanes-Oxley type certification. Moreover, many non-profits (particularly in higher education) are extremely decentralized thereby making certification by executives difficult because of an absence of direct knowledge regarding the activities of all business units. Consequently, absent a requirement for certified financial statements and systems of internal controls certification may not be advisable.

The full text of the Sarbanes-Oxley Act of 2002 can be found at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h3763enr.txt.pdf

4. How will New York Attorney General Elliot Spitzer's legislative initiatives affect the nonprofit arena?

In early 2003, New York Attorney General Elliot Spitzer announced a six-bill business reform package ranging from Wall Street, to the accounting profession, to the nonprofit arena. The nonprofit bill, inspired by *The Sarbanes-Oxley Act of 2002*, evolved through the 2003 legislative session in large part due to commentary from the public, including the Association of the Bar of the City of New York and the New York State Society of Certified Public Accountants.

In the end, Spitzer's nonprofit bill was introduced into the Republican-controlled Senate, but not in the Assembly which was controlled by Spitzer's own party. The Senate bill was amended to incorporate comments from the ABCNY and NYSSCPA and others, but remained in committee at adjournment. Under New York legislative rules the bill will not need to be re-introduced in the Senate in 2004, but if no action occurs the bill will be dead – will need re-introduction – after the 2004 adjournment.

The following table describes the provisions of both the original Spitzer nonprofit bill and the "A print" revision, a copy of which is included as Appendix B.

| Provision Description | Original Bill | "A-Print" |
|--|---|---|
| Verification of financial information of smaller non-profits – corporations affected | All non-profits | Corporations with less than \$3 million in assets AND receive less than \$1 million in revenue and support annually Private foundations excluded |
| Verification of annual report by smaller non-profits – Who must verify | President and Treasurer | President or CEO and Treasurer or CFO |
| Smaller non-profits – what must be verified | The officer reviewed the report and based on the officer's knowledge . . . the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading | The officer reviewed the report and based on the officer's knowledge . . . the financial information contained in the annual report fairly presents in all material respects the financial condition and results of operation of the corporation |
| Verification of financial information of larger non-profits – corporations affected | Revenue and support of at least \$250,000 | Corporations with at least \$3 million in assets AND receives at least than \$1 million in revenue and support annually Excluded are private foundations and "Type A" corporations ¹ that are not required to register and file |

¹ New York Not-For-Profit Corporation Law § 201 identifies the following types of corporations:

- Type A – A not-for-profit corporation of this type may be formed for any lawful non-business purpose or purposes including, but not limited to, any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal

| Provision Description | Original Bill | "A-Print" |
|---|--|--|
| | | an annual report with the AG's office pursuant to article 7-A of the Executive Law or section 8-1.4 of the Estates, Powers and Trusts Law |
| Larger non-profits – who must certify | President and Treasurer | President or CEO and Treasurer or CFO |
| Larger non-profits – Items to be verified | <p>1. Officer has reviewed the report and based on his or her knowledge, officer is to "certify",</p> <p>(A) the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statement made not misleading, in light of the circumstances in which the statement was made.</p> <p>(B) the financial statements fairly present in all material respects the financial condition and results of operation of the corporation for the relevant period</p> <p>AND</p> <p>(2) the signing officers are responsible for</p> | <p>1. Officer has reviewed the report and based on his or her knowledge,</p> <p>(A) the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and</p> <p>(B) the financial information included in the report fairly presents in all material respects the financial condition and results of operations of the corporation as of, and for, the periods presented in the report;</p> <p>AND</p> <p>(2) the corporation has</p> |

- husbandry, and for a professional, commercial, industrial, trade or service association.
- Type B – A not-for-profit corporation of this type may be formed for any one or more of the following non-business purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.
 - Type C – A not-for-profit corporation of this type may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective.
 - Type D – A not-for-profit corporation of this type may be formed under this chapter when such formation is authorized by any other corporate law of this state for any business or non-business, or pecuniary or non-pecuniary, purpose or purposes specified by such other law, whether such purpose or purposes are also within types A B, C above or otherwise.

| Provision Description | Original Bill | “A-Print” |
|--|--|---|
| | <p>establishing internal controls for the corporation, the internal controls were designed to make the officers aware of material information, they have reviewed the internal controls within the preceding ninety days, and presented in their report conclusions about internal controls</p> <p>AND</p> <p>The signing officers have disclosed to the auditors and audit committee all significant deficiencies in the design or operation of internal controls and any fraud, whether or not material, and whether there were any significant changes in internal controls</p> | <p>sufficient internal financial controls to ensure that the signing officer is made aware of material financial information</p> <p>AND</p> <p>The signing officers have reviewed the effectiveness of the internal financial controls within 90 days of the end of the period covered in the report</p> <p>AND</p> <p>The signing officers have disclosed to the auditors and the audit committee (or the entire board if there is no audit committee) (A) any significant deficiencies and material weaknesses in the design of the internal financial controls, (B) any fraud involving anybody who has a significant role in the internal financial controls.</p> |
| Private Foundations – who must certify | Not separately carved out of original bill | <p>The president or the CEO, and the treasurer or the CFO</p> <p>IRC § 509 definition of “private foundation”</p> |
| Private Foundations – Items to be verified | Not separately carved out of original bill | <p>The signing officer has reviewed the report, and that based on the officer’s knowledge:</p> <p>(1) the financial information included in the report fairly presents in all material respects the financial</p> |

| Provision Description | Original Bill | “A-Print” |
|---|---|---|
| | | <p>condition and results of operations of the corporation as of, and for,</p> <p>(2) the periods presented in the report; and</p> <p>(2) the corporation has complied in all material respects with the requirements and prohibitions included in the certificate of incorporation</p> |
| Changes to annual reporting requirement | Substantively the same as the A-print | <ul style="list-style-type: none"> • Annual reports must be “complete and accurate” • Failure to satisfy annual reporting requirement considered a breach of officers’ fiduciary duty – had previously listed directors, but not officers • Directors and officers subject to suit by AG, including suit for removal of officers and directors |
| Executive Committees | Corporations with \$250,000 or more in revenue and support must appoint an executive committee consisting of at least three Board members | Corporations with boards of 25 or more are required to have an executive committee of at least three board members unless the articles or bylaws provide otherwise |
| Audit committees (“AC”) | <p>Corporations with \$250,000 or more in revenue and support must appoint an audit committee consisting of at least three Board members</p> <p>If the articles or bylaws</p> | The board of a corporation with \$3 million in assets or \$1 million in gross revenue and support must designate an AC having at least three directors unless the articles or bylaws prohibit an audit committee |

| Provision Description | Original Bill | "A-Print" |
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| | <p>prohibit the creation of an audit committee, the entire Board is charged with responsibilities of the audit committee in the bill.</p> | <p>The AC is responsible for the appointment, compensation and oversight of the corporation's auditors, including resolution of disputes between the auditors and management. Auditors are to report directly to the AC.</p> <p>Each member of the AC must be a member of the board and cannot accept any compensation from the corporation OTHER THAN in his or her capacity as a director, AC member, or member of another board committee. Also must not have participated in an "interested party transaction" (see N-PCL § 715) within the previous year.</p> <p>AC must establish procedures for handling complaints about the corporation's accounting, internal controls, or auditing matters and for the handling of confidential, anonymous submissions by employees regarding same.</p> |
| <p>Interested Party Contracts ("IPCs")</p> | <p>Substantially the same in the original bill</p> | <p>IPCs are not void or voidable solely by reason of their being between the corporation and affiliates, or that directors, officers, or affiliates have a substantial interest in the contract, or that interested directors or officers are present at</p> |

| Provision Description | Original Bill | “A-Print” |
|-----------------------------------|--|--|
| | | <p>authorizing board meeting.</p> <p>However, the contract may be voided or modified by the corporation or the AG unless the interested director or officer and any approving director affirmatively demonstrate that the contract was “fair and reasonable” as to the corporation at the time the contract was entered into.</p> |
| <p>IPC – Fairness Presumption</p> | <p>Substantially the same in the original bill</p> | <ul style="list-style-type: none"> • Approved in advance by the board or committee without counting the votes of the interested parties • The material facts as to the contract, transaction, compensation, and compensation paid by an affiliate are disclosed • The director’s or officer’s interest in the transaction is disclosed • The board or committee obtained and relied upon appropriate comparability data before making the decision • The board or committee adequately documented the basis for approval at the time of approval, including <ul style="list-style-type: none"> ○ The terms ○ The members of the board or committee present during the discussion and who voted |

| Provision Description | Original Bill | “A-Print” |
|--|---|---|
| | | <ul style="list-style-type: none"> ○ The comparability data relied on to make the decision and a description of how the data was obtained ○ Any actions taken by the interested director or officer |
| IPC – Special presumption of fairness for 501(c)(3) corporations making “qualifying disbursements” | Substantially the same in the original bill | <p>Transactions of 501(c)(3) need only meet the following requirements to be presumed fair</p> <ul style="list-style-type: none"> • Approved in advance by the board or committee without counting the votes of the interested parties • The material facts as to the contract, transaction, compensation, and compensation paid by an affiliate are disclosed • The director’s or officer’s interest in the transaction is disclosed <p>And if the transaction is a grant between two 501(c)(3) corporations, only the granting corporation need meet the requirements.</p> |
| IPC – Qualifying disbursements defined | Substantially the same in the original bill | Capital contributions or subventions pursuant to subparagraph (7) of paragraph (a) of section 202 (general and special powers), donations pursuant to subparagraph (14) of paragraph (a) of section 202 (general and special powers), or private foundation grants that are |

| Provision Description | Original Bill | “A-Print” |
|--|---|--|
| | | qualifying distributions pursuant to IRC section 4942(g). |
| IPC – Remedies for failure to comply | Original bill did not extend exposure to restitution suit to approving directors | Corporation or AG can void or modify contract. Corporation or AG can recover restitution from the interested director or officer or an approving director |
| IPC – Compensation of officers and directors | Directors’ compensation must be approved by a majority of the entire board, unless a higher requirement is set in the governing documents. If compensation is paid by an affiliate of the Corporation, it must be ratified by the corporation’s Board. Same for officers, but if officers are elected by the membership, the compensation must be approved by the membership | Must be decided by the Board or a committee comprised solely of board members who are not compensated by the corporation other than as directors Compensation to serve as a board member must be set by a majority of the entire board (unless articles or bylaws set a higher threshold) Any compensation must be fair and reasonable |
| IPC – Miscellaneous | An “affiliate” is a corporation controlled by, in control of, or under common control with the Corporation. | IRC § 4958 is relied on to define “compensation”, “affiliate” If the transactions involves an amount that is the lesser of 1% of gross receipts or \$100,000, interested party rules only apply if the interested party has actual knowledge |
| Indemnification | Current law excludes indemnification where the officer or director has acted in bad faith, was | Language tightened up. Indemnification by “type B or C” corporations will apply only if the AG is notified 30 |

| Provision Description | Original Bill | "A-Print" |
|---|--|--|
| | <p>deliberately dishonest, or gained an unlawful personal advantage. Current law, however, permits the corporation to use a different indemnification standard. The bill</p> <ul style="list-style-type: none"> • limits indemnification to the standard set out in statute. • excluded indemnification involving criminal actions • requires notice to the AG's office where Type B or C corporations indemnify an officer or director | <p>days in advance and the AG does not object.</p> |
| <p>Impact on Religious Corporations</p> | | <p>See last section of bill.</p> |

Appendix A Sample Audit Committee Charters

Entity A – AUDITING COMMITTEE OF THE CORPORATION

Committee Charter

I. Mission and Scope of Activities

The Auditing Committee (“Committee”) oversees management processes to ensure:

- The reliability and integrity of financial information and related disclosures provided to external parties and other stakeholders;
- The adequacy of systems of internal control;
- The compliance with all applicable laws and regulations, and Institute policies, particularly policies that uphold ethical standards of conduct established by law, management or the Corporation.

In addition, the Committee promotes and oversees continued development of broader risk management practices.

To accomplish this Mission, the Committee carries out the following activities: reviews financial and other risk management reports and related information prepared by management; consults with the independent public accountants and internal auditors with regard to audit and management control processes related to finance, accounting, compliance, and the code of ethics; reviews issues with the Managing Director for Environmental Programs and Risk Management, and Senior Counsel on other matters as appropriate or necessary.

In carrying out its Mission, the Committee shall be guided by 's paramount commitment to education and research, and by its fiduciary responsibility to protect this irreplaceable franchise.

II. Composition and Meetings

On an annual basis, the members of the Corporation shall elect the members of the Committee and the Committee's Chair. Committee members are chosen from among the members of the Corporation, except *ex officio* members. The Committee comprises five members, each of whom shall be, in the opinion of the recommending Membership Committee, free from any relationship that would interfere with the exercise of his or her independent judgment as a member of the Committee. At least one member of the Committee should be financially literate, or have related experience in financial administration. (The lack of any such member will not invalidate or otherwise affect actions taken by the Committee.) A quorum for any meeting of the Committee shall consist of three members.

The Committee shall meet at least three times annually. To foster open communication, the Committee should meet with management, the Institute Auditor, and the independent public

accountant in separate executive sessions. The Committee should encourage discussion among these parties as part of each meeting. The Committee shall report its activities to the members of the Corporation following the annual review of the financial statements, and at the Chairman's discretion following other meetings.

III. Responsibilities of the Audit Committee

In recognition of the changing nature of the Institute's risk profile and the environment in which operates, the following responsibilities should be topics of discussion and review. *Please refer to Appendix A for details.*

In meeting its responsibilities, the Auditing Committee shall:

- Review the activities of the independent public accountants and the internal Audit Division, *as also described further in Appendix A*, and ensure that the activities of the Audit Division and the independent accountant are free of management interference.
- Evaluate the effectiveness of the independent public accountant and the internal audit function through meetings with the Institute Auditor, the independent public accountant, and management.
- Review reports on the results of audits and examinations, as well as other risk management controls; and ensure that management undertakes timely and appropriate corrective actions to significant recommendations of internal and external auditors and examiners.
- Monitor management's compliance with key Institute policies, including those pertaining to obligations of sponsored research, and also review legal and insurance matters, including the impact of such matters on the financial statements.
- Report on a timely basis to the Executive Committee on significant areas of risk, and also in the event management's actions do not effectively manage risk within reasonable tolerances.
- Perform any other activities consistent with this Charter, the Institute's bylaws, and governing law, as the Committee or the members of the Corporation deem appropriate. Such activities may include requests for special reports on any topic that may increase their understanding of the broad and varied activities of the Institute, and the attendant risks of these undertakings. If deemed necessary, the Committee may retain special counsel or hire other consultants.
- Review and update this charter periodically, as conditions dictate.

The Auditing Committee has the responsibilities and powers set forth in this Charter. In carrying out its responsibilities the Committee shall oversee the financial reporting, audit, compliance, and risk management processes as described in the Charter. However, the Committee does not assume operational responsibility, or provide assurance of accuracy or compliance; that is the domain of Institute management.

Appendix A – Responsibilities of the Auditing Committee

A. **Independent Public Accountant and Financial Reporting Processes – The Committee:**

- With input from management, nominates the independent public accountant for approval by the members of the Corporation.
- Reviews the scope of the engagement planned by the independent public accountant, discusses coverage of areas of risk, and reviews fees for audit and non-audit services.
- In consultation with management, reviews the annual financial report and audit results with the independent public accountant, as well as unaudited interim reports; considers the integrity of financial reporting processes and controls, and the independent public accountant's judgments about the quality and appropriateness of the Institute's accounting principles as applied to its financial reporting; and discusses significant financial and other risk exposures and the steps management has taken to monitor, control, and disclose such exposures.
- Reports to the members of the Corporation at their next meeting on the annual audit scope and findings, and any recommendations the Committee shall deem appropriate.

B. **Internal Audit – The Committee:**

- Recognizing that the Institute Auditor maintains a dual reporting line to the Auditing Committee and the Executive Vice President, jointly with management, appoints, evaluates, replaces or dismisses the Institute Auditor, and ensures that a succession plan exists.
- Reviews and approves the internal audit plan, ensuring that appropriate review of Institute risks is planned, and that coordination of activities with the independent public accountant and other external examiners is carried out.
- Reviews reports prepared by the Audit Division summarizing audit results, significant findings, and management's planned corrective actions; and queries management as to the status of corrective actions being taken to address significant areas of weakness, and of the Audit Division as to the nature and status of follow up.
- *Reviews with the Institute Auditor, in consultation with management, the resources allocated to the Audit function.*

C. **Other Key Responsibilities**

On an annual basis, or as needed, the Committee receives and reviews management reports on any matters of significance relative to the following topics:
Ethics/Conflict of Interest: Oversees management's system to enforce the Conflict of Interest Policy; supports the adoption of an Institute Code of Ethics and/or related standards of business conduct.

- **Environmental Health and Safety Compliance:** At least annually, reviews with the Managing Director for Environmental Programs and Risk Management, and Senior

Counsel, the status of compliance with applicable laws and regulations, and related management systems, and inquiries received from regulators or governmental agencies.

- **Sponsored Research Compliance/Other Audit Developments:** Understands and reviews management's program to ensure compliance with applicable laws and regulations, in particular areas pertaining to the obligations of sponsored research, both federal and industrial. At least annually, reviews reports prepared by management summarizing the findings of external examiners, regulators or governmental agencies, including state and federal tax authorities.
- **Property and Casualty Insurance:** On an annual basis, reviews programs in place, including self-insurance, that indemnify the Institute against property and casualty exposures.
- **Legal Matters:** At least annually, reviews with Senior Counsel, other management, and the independent public accountant the substance of any significant legal issues including litigation, contingencies, claims or assessments, and how such matters are reflected in the financial statements.

Entity B -- Role of XXXX Committees on Audit and Compliance and Budget and Finance

Following are descriptions of the roles and responsibilities for the two Committees primarily focused on XXXX's financial affairs and financial reporting. Also included are assignments for administrative staff liaisons and other senior staff support.

Audit and Compliance Committee

This Committee has primary responsibility for overseeing the internal controls of the XXXX, including both financial and operational controls.

In the area of financial control, the Committee is responsible for reviewing and approving accounting policies for the preparation of financial statements for the XXXX. This Committee is responsible for the annual review and approval of the XXXX's audited consolidated financial statements. The Committee is also responsible for the recommendations, selection and monitoring of the independent public accountants employed by the XXXX.

In the area of operational controls, the Committee is responsible for the review and monitoring of the staffing, scope and activities of the Office of Audit and Compliance. The Committee also oversees the development of enterprise-wide risk assessments as well as all compliance activities for both the XXXX and the Health System. And, it is responsible for reviewing regulatory issues and developments in regulatory policies that require compliance by the XXXX.

The primary staff liaison between the Committee and the XXXX administration is the Vice President for Audit and Compliance. Other senior staff providing support to the Committee includes the Executive Vice President of the XXXX, the General Counsel of the Chief Operating Officer of the Health System and the Chief Financial Officers.

Budget and Finance Committee

This Committee has responsibility for the review of the proposed operating budgets for the XXXX and for recommending budgets to the full Board for their approval. The Committee also reviews proposed capital budgets for XXXX, and recommends proposed expenditures on individual capital projects to the full Board for their approval on an ongoing basis.

This Committee is also responsible for monitoring the financial performance of the XXXX. This includes regular monitoring of performance against approved operating budgets, reviewing cash forecasts, cash flows and cash position, and monitoring the capital program of XXXX.

The primary staff liaison between the Committee and the XXXX administration is the Executive Vice President of the XXXX. Other senior staff providing support to the Committee includes the Chief Financial Officers, the Treasurer and the Budget Director.

Entity C -- JOINT COMMITTEE ON INSPECTION CHARTER

PURPOSE

The Joint Committee on Inspection is a committee of the XXXX's two Governing Boards. Its primary function is to assist the Governing Boards in fulfilling their oversight responsibilities by reviewing compliance, financial and operational information to be reported to various XXXX constituents and others, the systems of internal controls established within the XXXX and the audit process. In doing so, it is the responsibility of the Joint Committee on Inspection to provide an open avenue of communication among the Governing Boards, Vice President for Finance, the Controller, Office of General Counsel, general management, Risk Management and Audit Services and the independent accountants.

ORGANIZATION

- The Joint Committee on Inspection consists of four members: two representatives of the Corporation (other than the Treasurer) and two representatives of the Board of Overseers.
- The members of the Joint Committee on Inspection are appointed. The Corporation members are appointed by the President. The Overseers are appointed by the Board of Overseers. Care will be taken to stagger their years of service.
- At least one member of the Committee should be financially literate or have related expertise in financial administration. However, the lack of any such member will not invalidate or otherwise affect the actions taken by the Committee.
- The Corporation will appoint one of its members as committee Chair. It is the responsibility of the Chair to schedule all meetings of the Committee and to provide

the Committee with a written agenda.

In meeting its responsibilities, the Committee shall:

GENERAL

- Have the power to conduct or authorize investigations into any matters within the Committee's scope of responsibilities. The Committee shall have unrestricted access to members of the Administration and to relevant information. The Committee may retain counsel (in consultation with the XXXX's Office of General Counsel), accountants or others to assist it in the conduct of any investigation.
- **Ordinarily meet four times per year or more frequently as circumstances require.**
- Report Committee actions to the Corporation and to the Board of Overseers Standing Committee on Finance Administration and Management, with such recommendations as the Committee may deem appropriate.
- Periodically review and update the Committee's charter as needed.
- Meet with the Vice President for Finance and the Controller ("financial management"), the Director of Risk Management and Audit Services and the independent accountants in separate executive sessions, as appropriate, to discuss any matters the Committee or these individuals or groups believe should be discussed privately with the Committee.

More specific responsibilities of the Joint Committee on Inspection are as follows:

INTERNAL CONTROLS AND RISK ASSESSMENT

- Review and evaluate the effectiveness of the XXXX's process for assessing significant financial, operational and compliance risks or exposures and steps the Administration has taken to monitor and control such risks.
- Consider and review with financial management, the Director of Risk Management and Audit Services and with the independent accountants:
 - the effectiveness of or weaknesses in the XXXX's internal controls including the status and adequacy of information systems and security,
 - **any related significant findings and recommendations of the independent accountants and Risk Management and Audit Services together with financial management's responses, including the timetable for implementation of recommendations to correct weaknesses in the internal controls.**

- Instruct the independent accountants to communicate directly to the Joint Committee on Inspection any serious difficulties or disputes with financial management. The independent accountant is ultimately responsible to the Joint Committee on Inspection and the Governing Boards.

INTERNAL AUDITOR

- Review and approve the appointment, replacement, reassignment or dismissal of the Director of Risk Management and Audit Services.
- Evaluate the process for establishing the Risk Management and Audit Services' annual plan and focus on risk.
- Evaluate the scope and role of Risk Management and Audit Services.
- Consider and review with financial management and the Director of Risk Management and Audit Services:
 - significant findings and the Administration's response, including the timetable for implementation to correct weaknesses;
 - any difficulties encountered in the course of the audit activities such as restrictions on the scope of work or access to information;
 - any changes required in the planned scope of Risk Management and Audit Services' annual plan;
 - Risk Management and Audit Services' department budget and staffing.

COMPLIANCE WITH LAWS AND REGULATIONS

- Ascertain whether the XXXX has an effective process for determining financial, operational and compliance risks and exposure from asserted and unasserted litigation and other claims of noncompliance with laws and regulations.
- Review with the XXXX's general counsel and others any material reports from regulators and any legal, tax or regulatory matters that may have a material impact on XXXX operations, financial statements, policies and programs.
- Discuss with financial management, Risk Management and Audit Services and the XXXX's independent accountants the status and adequacy of major information systems including the significant risks and major controls over such risks.

FINANCIAL REPORTING

- Advise financial management, based upon the Committee's review and discussion, whether anything has come to the Committee's attention that causes it to believe that

the audited financial statements included in the XXXX's financial report contain an untrue statement of material fact or omit to state a necessary material fact.

- Review with financial management and the independent accountants at the completion of the annual examination:
 - the XXXX's annual financial statements and related footnotes;
 - the independent accountants' audit of the financial statements and their report;
 - any significant changes required in the independent accountant's audit plan;
 - any difficulties or disputes with financial management encountered during the audit;
 - the XXXX's accounting principles;
 - other matters related to conduct that should be communicated to the Committee under generally accepted auditing standards;
 - any other financial filings required by law or regulation.

EXTERNAL AUDITOR

- Recommend to the Governing Boards the independent accountants to be considered, review and approve fees paid to the independent accountants and review and approve the dismissal of the independent accountants.
- Receive periodic information from the independent accountants regarding their independence, discuss such information with the independent accountants, and, if so determined by the Committee, recommend that the Governing Boards take appropriate actions to satisfy themselves of the independent accountants' independence.
- Review the scope and approach of the annual audit with the independent accountants.
- Assess the independent accountants' process for identifying and responding to key audit and internal control risks

COMPLIANCE WITH POLICIES AND STANDARDS

- Review and monitor, as appropriate, with the Director of Risk Management and Audit Services and the independent accountants, the XXXX's administration of and compliance with XXXX policies.
- Monitor compliance with XXXX standards of business conduct and conflict of interest policies, including compliance by XXXX management and governing boards.

The Joint Committee on Inspection has the responsibilities and the powers set forth in this Charter. However, it is not the duty of the Committee to plan or conduct audits or to determine that the XXXX's financial statements are complete and accurate and are in accordance with generally accepted accounting principles. These are the responsibilities of financial management and the independent accountants. Nor is it the duty of the Committee to conduct investigations, to resolve disagreements, if any, between financial management and the independent accountants or to assume compliance with laws and regulations and XXXX policies.

Entity D --
Charter of Committee on Audit and Compliance

A. Authority

The Committee on Audit and Compliance ("Committee") is established pursuant to Article 4.12 of the Bylaws of XXXX (the "Board").

B. Membership

Members of the Committee on Audit and Compliance should have financial expertise in areas such as generally accepted accounting principles and procedures for financial reporting, an understanding of internal controls and financial statements, and an understanding of audit committee functions.

C. Roles and Responsibilities

The Committee on Audit and Compliance shall advise the Board in connection with the Board's responsibilities relating to the quality and integrity of the XXXX's financial reporting, compliance with government rules, and overall systems of internal control and risk mitigation. In carrying out its responsibilities, the Committee shall perform the following functions, as well as any other reviews, investigations or projects consistent with its purpose:

1. Annually appoint the independent public accountant; review and approve the planned scope of the annual financial statement audit and federal compliance audit mandated by OMB Circular A-133; approve the fees to be paid to the independent public accountant for these annual audits; and recommend to the Board the termination of the relationship with the independent public accountant if that is deemed necessary.
2. Review the annual financial statements with management and the independent public accountant, including any adjustments to those statements recommended by the independent public accountant, and any significant issues that arise in connection with the preparation of the statements. After review and resolution of any concerns, approve the annual financial statements on behalf of the Board of Trustees.

3. Review the independent public accountant's management letter comments regarding the XXXX's internal controls and accounting policies and procedures as well as management responses to those comments.
4. Recommend to the Board, when the Committee deems it advisable, that the independent public accountant engage in specific studies and reports regarding accounting procedures, auditing matters and other matters.
5. Approve in advance any exceptions to the XXXX's policy that the independent public accountant is prohibited from performing non-audit services.
6. Meet at least annually with the independent public accountant (outside the presence of management) to discuss any issues arising from the Committee's responsibilities.
7. Meet at least annually with management (outside the presence of the independent public accountant) to discuss management's evaluation of the work performed by the independent public accountant and the appropriateness of the audit fees.
8. Act as a liaison between the (1) independent public accountant and the Board of Trustees, and (2) independent public accountant and management.
9. Monitor the XXXX's policy prohibiting the hiring into a senior financial role of either the audit engagement partner or the person in charge of audit fieldwork for a period of one (1) year after such person has performed services for the XXXX.
10. Require rotation of the independent public accountant's engagement partner no less frequently than every seven (7) years.
11. Call special meetings of the Committee and request management to address specific issues within the mandate of the Committee.
12. When the Committee deems it advisable, obtain the advice of outside consultants and professionals (including but not limited to retention of special legal counsel) to advise the Committee on matters within the scope of its Charter.
13. Annually review and, as appropriate, implement changes to the Committee Charter.
14. Monitor the adequacy of policies and practices on conflicts of interest for employees and members of the Board.

15. Review current and pending litigation and regulatory proceedings to which the XXXX is a party that bear on the Committee's responsibilities.
16. Monitor the XXXX's system of internal control and the adequacy of accounting, financial and operational policies and practices on financial and significant compliance reporting.
17. Review with management and the internal auditor the annual internal audit plan and discuss the extent to which it addresses high risk areas.
18. Review the annual report on the accomplishments of the internal audit department and discuss significant issues of control with the internal auditor and management.
19. Confer with management in the hiring of the internal auditor and before any decision is made to terminate or significantly modify the responsibilities or compensation of the internal auditor.
20. Report annually to the Board a summary of the Committee's activities and significant audit findings.

Appendix B

S T A T E O F N E W Y O R K

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2003-2004 Regular Sessions

I N S E N A T E

April 23, 2003

Introduced by Sen. LEIBELL -- (at request of the Attorney General) -- read twice and ordered printed, and when printed to be committed to the Committee on Corporations, Authorities and Commissions -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the not-for-profit corporation law and the religious corporations law, in relation to protections against financial fraud and abuse, and to repeal certain provisions of the not-for-profit corporation law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Section 519 of the not-for-profit corporation law is
- 2 amended by adding five new paragraphs (d), (e), (f), (g) and (h) to read
- 3 as follows:
- 4 (D) THE PRESIDENT OR THE CHIEF EXECUTIVE OFFICER, AND THE TREASURER OR
- 5 THE CHIEF FINANCIAL OFFICER, OF ANY CORPORATION, OTHER THAN A PRIVATE
- 6 FOUNDATION, WHICH HAS LESS THAN THREE MILLION DOLLARS IN ASSETS AND
- 7 WHICH RECEIVES OR ACCRUES IN ANY FISCAL YEAR GROSS REVENUE AND SUPPORT
- 8 OF LESS THAN ONE MILLION DOLLARS, SHALL EACH SIGN THE ANNUAL REPORT, AND
- 9 SHALL THEREBY VERIFY THAT THE SIGNING OFFICER HAS REVIEWED THE REPORT,
- 10 AND THAT BASED ON THE OFFICER'S KNOWLEDGE, THE FINANCIAL INFORMATION
- 11 INCLUDED IN THE REPORT FAIRLY PRESENTS IN ALL MATERIAL RESPECTS THE
- 12 FINANCIAL CONDITION AND RESULTS OF OPERATIONS OF THE CORPORATION AS OF,
- 13 AND FOR, THE PERIODS PRESENTED IN THE REPORT.
- 14 (E) THE PRESIDENT OR THE CHIEF EXECUTIVE OFFICER, AND THE TREASURER OR
- 15 THE CHIEF FINANCIAL OFFICER, OF ANY CORPORATION WHICH HAS AT LEAST THREE
- 16 MILLION DOLLARS IN ASSETS OR WHICH RECEIVES OR ACCRUES IN ANY FISCAL
- 17 YEAR GROSS REVENUE AND SUPPORT OF AT LEAST ONE MILLION DOLLARS, SHALL
- 18 EACH SIGN THE ANNUAL REPORT, AND SHALL THEREBY VERIFY THE FOLLOWING:
- 19 (1) THE SIGNING OFFICER HAS REVIEWED THE REPORT, AND BASED ON THE
- 20 OFFICER'S KNOWLEDGE:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets { } is old law to be omitted.

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1 (A) THE REPORT DOES NOT CONTAIN ANY UNTRUE STATEMENT OF A MATERIAL
2 FACT OR OMIT TO STATE A MATERIAL FACT NECESSARY IN ORDER TO MAKE THE
3 STATEMENTS MADE, IN LIGHT OF THE CIRCUMSTANCES UNDER WHICH SUCH STATE-
4 MENTS WERE MADE, NOT MISLEADING; AND

5 (B) THE FINANCIAL INFORMATION INCLUDED IN THE REPORT FAIRLY PRESENTS
6 IN ALL MATERIAL RESPECTS THE FINANCIAL CONDITION AND RESULTS OF OPER-
7 ATIONS OF THE CORPORATION AS OF, AND FOR, THE PERIODS PRESENTED IN THE
8 REPORT;

9 (2) DURING THE PERIOD COVERED BY THE REPORT, THE CORPORATION MAIN-
10 TAINED INTERNAL FINANCIAL CONTROLS DESIGNED TO REASONABLY ENSURE THAT
11 MATERIAL FINANCIAL INFORMATION RELATING TO THE CORPORATION IS MADE KNOWN
12 TO THE SIGNING OFFICERS BY OTHERS WITHIN THE CORPORATION;

13 (3) THE SIGNING OFFICERS HAVE REVIEWED THE EFFECTIVENESS OF THE CORPO-
14 RATION'S INTERNAL FINANCIAL CONTROLS AS OF A DATE WITHIN NINETY DAYS
15 PRIOR TO THE CLOSE OF THE FISCAL YEAR COVERED BY THE REPORT, AND HAVE
16 PRESENTED IN THE REPORT THEIR CONCLUSIONS ABOUT THE EFFECTIVENESS OF
17 SUCH CONTROLS AS OF THE DATE OF SUCH REVIEW; AND

18 (4) THE SIGNING OFFICERS HAVE DISCLOSED TO THE CORPORATION'S AUDITORS
19 (IF ANY) AND THE AUDIT COMMITTEE OF THE BOARD OF DIRECTORS (OR THE
20 ENTIRE BOARD IF THERE IS NO AUDIT COMMITTEE), BASED ON SUCH OFFICER'S
21 KNOWLEDGE:

22 (A) ANY SIGNIFICANT DEFICIENCIES AND MATERIAL WEAKNESSES IN THE DESIGN
23 OR OPERATION OF THE INTERNAL FINANCIAL CONTROLS, AND

24 (B) ANY FRAUD, WHETHER OR NOT MATERIAL, THAT INVOLVES MANAGEMENT OR
25 OTHER EMPLOYEES WHO HAVE A SIGNIFICANT ROLE IN THE CORPORATION'S INTER-
26 NAL FINANCIAL CONTROLS.

27 (5) THE PROVISIONS OF THIS PARAGRAPH SHALL NOT APPLY TO ANY CORPO-
28 RATION THAT IS: (A) A PRIVATE FOUNDATION; OR (B) A TYPE A CORPORATION AS
29 DEFINED IN PARAGRAPH (B) OF SECTION 201 (PURPOSES) THAT IS NOT REQUIRED
30 TO REGISTER AND FILE ANNUAL REPORTS WITH THE ATTORNEY GENERAL PURSUANT
31 TO ARTICLE 7-A OF THE EXECUTIVE LAW OR SECTION 8-1.4 OF THE ESTATES,
32 POWERS AND TRUSTS LAW.

33 (F) THE PRESIDENT OR THE CHIEF EXECUTIVE OFFICER, AND THE TREASURER OR
34 THE CHIEF FINANCIAL OFFICER, OF A PRIVATE FOUNDATION SHALL EACH SIGN THE
35 ANNUAL REPORT AND SHALL THEREBY VERIFY THAT THE SIGNING OFFICER HAS
36 REVIEWED THE REPORT, AND THAT BASED ON THE OFFICER'S KNOWLEDGE:

37 (1) THE FINANCIAL INFORMATION INCLUDED IN THE REPORT FAIRLY PRESENTS
38 IN ALL MATERIAL RESPECTS THE FINANCIAL CONDITION AND RESULTS OF OPER-
39 ATIONS OF THE CORPORATION AS OF, AND FOR, THE PERIODS PRESENTED IN THE
40 REPORT; AND

41 (2) THE CORPORATION HAS COMPLIED IN ALL MATERIAL RESPECTS WITH THE
42 REQUIREMENTS AND PROHIBITIONS INCLUDED IN THE CERTIFICATE OF INCORPO-
43 RATION PURSUANT TO SECTION 406 (PRIVATE FOUNDATION, AS DEFINED IN THE
44 UNITED STATES INTERNAL REVENUE CODE OF 1954: PROVISIONS INCLUDED IN THE
45 CERTIFICATE OF INCORPORATION).

46 (G) FOR THE PURPOSES OF THIS SECTION, THE TERM "PRIVATE FOUNDATION"
47 SHALL MEAN A PRIVATE FOUNDATION AS DEFINED IN SECTION FIVE HUNDRED NINE
48 OF THE UNITED STATES INTERNAL REVENUE CODE OF 1986, AS AMENDED, OR ANY
49 COMPARABLE PROVISION OF ANY SUCCESSOR LAW.

50 (H) NOTHING CONTAINED IN THIS SECTION SHALL BE CONSTRUED AS CREATING A
51 PRIVATE RIGHT OF ACTION AGAINST ANY SIGNING OFFICER BASED UPON A VERIFI-
52 CATION MADE PURSUANT TO THIS SECTION, PROVIDED THAT THIS PARAGRAPH SHALL
53 NOT PRECLUDE ANY PRIVATE RIGHT OF ACTION WHICH WOULD EXIST REGARDLESS OF
54 SUCH VERIFICATION.

55 S 2. Section 520 of the not-for-profit corporation law, as amended by
56 chapter 58 of the laws of 1981, is amended to read as follows:

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1 S 520. Reports of corporation.

2 Each domestic corporation, and each foreign corporation authorized to
3 conduct activities in this state, shall from time to time file {such}
4 COMPLETE AND ACCURATE reports on its activities as may be required by
5 the laws of this state. All registration and reporting requirements
6 pursuant to EPTL 8-1.4, or related successor provisions, are, without
7 limitation on the foregoing, expressly included as reports required by
8 the laws of this state to be filed within the meaning of this section.
9 Willful OR PERSISTENT failure of a corporation to file {a report}
10 COMPLETE AND ACCURATE REPORTS as required by law shall constitute a
11 breach of the directors` AND OFFICERS` duty to the corporation and
12 shall: (A) subject the corporation, at the suit of the attorney-general,
13 to an action or special proceeding for dissolution under article 11
14 (Judicial dissolution) in the case of a domestic corporation, or under S
15 1303 (Violations) in the case of a foreign corporation; AND (B) SUBJECT
16 THE DIRECTORS AND OFFICERS, AT THE SUIT OF THE ATTORNEY-GENERAL, TO AN
17 ACTION OR SPECIAL PROCEEDING FOR SUCH REMEDIES AS MAY BE PROVIDED BY
18 LAW, INCLUDING REMOVAL IN THE CASE OF DIRECTORS AND OFFICERS OF A DOMES-
19 TIC CORPORATION.

20 S 3. Section 521 of the not-for-profit corporation law, as amended by
21 chapter 690 of the laws of 1978, is amended to read as follows:

22 S 521. Liability for failure to disclose required information.

23 Failure of the corporation to comply in good faith with the notice or
24 disclosure or reporting provisions of section 501 (Stock and shares
25 prohibited; membership certificates authorized), or paragraph (c) of
26 section 503 (Capital certificates), or paragraph (c) of section 505
27 (Subvention certificates), or paragraph (b) of section 513 (Adminis-
28 tration of assets received for specific purposes), {or section 518
29 (Reports to comptroller),} or section 519 (Annual report of directors),
30 or section 520 (Reports of corporation), shall make the corporation
31 liable for any damage sustained by any person in consequence thereof.

32 S 4. Section 712 of the not-for-profit corporation law, paragraph (e)
33 as amended by chapter 961 of the laws of 1972, is amended to read as
34 follows:

35 S 712. Executive committee and other committees.

36 (a) If the certificate of incorporation or the by-laws so {provide}
37 PERMIT, the board, by resolution adopted by a majority of the entire
38 board, may designate from among its members an executive committee and
39 other standing committees, each consisting of three or more directors,
40 and each of which, to the extent provided in the resolution or in the
41 certificate of incorporation or by-laws, shall have all the authority of
42 the board, except that no such committee shall have authority as to the
43 following matters:

44 (1) The submission to members of any action requiring members`
45 approval under this chapter.

46 (2) The filling of vacancies in the board of directors or in any
47 committee.

48 (3) The fixing of compensation of the directors for serving on the
49 board or on any committee.

50 (4) The amendment or repeal of the by-laws or the adoption of new
51 by-laws.

52 (5) The amendment or repeal of any resolution of the board which by
53 its terms shall not be so amendable or repealable.

54 (b) The board may designate one or more directors as alternate members
55 of any standing committee, who may replace any absent member or members
56 at any meeting of such committee.

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1 (c) The by-laws may provide for special committees of the board, or
2 may authorize the board to create such special committees as may be
3 deemed desirable. Unless otherwise provided in the by-laws, the members
4 of such committees shall be appointed by the chairman of the board or
5 the president of the corporation if there is no chairman of the board,
6 with the consent of the board. Special committees shall have only the
7 powers specifically delegated to them by the board and in no case shall
8 have powers which are not authorized for standing committees under this
9 section.

10 (d) Each committee of the board shall serve at the pleasure of the
11 board. The designation of any such committee and the delegation thereto
12 of authority shall not alone relieve any director of his OR HER duty to
13 the corporation under section 717 (Duty of directors and officers).

14 (e) Committees, other than standing or special committees of the
15 board, whether created by the board or by the members, shall be commit-
16 tees of the corporation. Such committees may be elected or appointed in
17 the same manner as officers of the corporation. Provisions of this chap-
18 ter applicable to officers generally shall apply to members of such
19 committees.

20 (F) IN THE CASE OF ANY CORPORATION WHICH HAS A BOARD OF DIRECTORS OF
21 MORE THAN TWENTY-FIVE MEMBERS, UNLESS PROHIBITED BY THE CERTIFICATE OF
22 INCORPORATION OR THE BY-LAWS, THE BOARD BY RESOLUTION ADOPTED BY A
23 MAJORITY OF THE ENTIRE BOARD SHALL DESIGNATE FROM AMONG ITS MEMBERS AN
24 EXECUTIVE COMMITTEE CONSISTING OF THREE OR MORE MEMBERS.

25 (G) (1) IN THE CASE OF ANY CORPORATION WHOSE FINANCIAL STATEMENTS ARE
26 AUDITED BY A PUBLIC ACCOUNTANT, OR HAS AT LEAST THREE MILLION DOLLARS IN
27 ASSETS, OR RECEIVES OR ACCRUES IN ANY FISCAL YEAR GROSS REVENUE AND
28 SUPPORT OF AT LEAST ONE MILLION DOLLARS, THE BOARD BY RESOLUTION ADOPTED
29 BY A MAJORITY OF THE ENTIRE BOARD SHALL DESIGNATE FROM AMONG ITS MEMBERS
30 AN AUDIT COMMITTEE CONSISTING OF THREE OR MORE DIRECTORS; PROVIDED,
31 HOWEVER, THAT THE PROVISIONS OF THIS SUBPARAGRAPH SHALL NOT APPLY TO ANY
32 CORPORATION WHOSE CERTIFICATE OF INCORPORATION OR BY-LAWS PROHIBIT THE
33 APPOINTMENT OF AN AUDIT COMMITTEE.

34 (2) THE AUDIT COMMITTEE (OR THE ENTIRE BOARD OF DIRECTORS IN THE CASE
35 OF ANY CORPORATION WHOSE CERTIFICATE OF INCORPORATION OR BY-LAWS PROHIB-
36 IT THE APPOINTMENT OF AN AUDIT COMMITTEE) SHALL BE DIRECTLY RESPONSIBLE
37 FOR THE APPOINTMENT, COMPENSATION, AND OVERSIGHT OF THE WORK OF ANY
38 PUBLIC ACCOUNTANT OR PUBLIC ACCOUNTING FIRM EMPLOYED BY THAT CORPORATION
39 (INCLUDING RESOLUTION OF DISAGREEMENTS BETWEEN MANAGEMENT AND THE AUDI-
40 TOR REGARDING FINANCIAL REPORTING) FOR THE PURPOSE OF PREPARING OR ISSU-
41 ING AN AUDIT REPORT OR RELATED WORK, AND EACH SUCH PUBLIC ACCOUNTANT OR
42 PUBLIC ACCOUNTING FIRM SHALL REPORT DIRECTLY TO THE AUDIT COMMITTEE (OR
43 TO THE ENTIRE BOARD, IN THE CASE OF CORPORATIONS WHOSE CERTIFICATE OF
44 INCORPORATION OR BY-LAWS PROHIBIT THE APPOINTMENT OF AN AUDIT COMMIT-
45 TEE).

46 (3) EACH MEMBER OF THE AUDIT COMMITTEE SHALL BE A MEMBER OF THE BOARD
47 OF DIRECTORS OF THE CORPORATION, AND SHALL NOT, OTHER THAN IN HIS OR HER
48 CAPACITY AS A MEMBER OF THE AUDIT COMMITTEE, THE BOARD OF DIRECTORS, OR
49 ANY OTHER BOARD COMMITTEE: (A) ACCEPT ANY CONSULTING FEE, ADVISORY FEE,
50 OR OTHER COMPENSATION OR OTHER BENEFITS FROM THE CORPORATION; OR (B)
51 HAVE PARTICIPATED IN ANY OTHER INTERESTED PARTY TRANSACTIONS WITHIN THE
52 MEANING OF SECTION 715 (INTERESTED DIRECTORS AND OFFICERS) WITHIN THE
53 PREVIOUS YEAR.

54 (4) EACH AUDIT COMMITTEE, OR THE ENTIRE BOARD OF DIRECTORS IN THE CASE
55 OF CORPORATIONS WHOSE CERTIFICATE OF INCORPORATION OR BY-LAWS PROHIBIT
56 THE APPOINTMENT OF AN AUDIT COMMITTEE, SHALL ESTABLISH PROCEDURES FOR:

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1 (A) THE RECEIPT, RETENTION, AND TREATMENT OF COMPLAINTS RECEIVED BY THE
2 CORPORATION REGARDING ACCOUNTING, INTERNAL ACCOUNTING CONTROLS, OR
3 AUDITING MATTERS; AND (B) THE CONFIDENTIAL, ANONYMOUS SUBMISSION BY
4 EMPLOYEES OF THE CORPORATION OF CONCERNS REGARDING QUESTIONABLE ACCOUNT-
5 ING, AUDITING OR OTHER FINANCIAL MATTERS.

6 S 5. Section 715 of the not-for-profit corporation law is REPEALED and
7 a new section 715 is added to read as follows:

8 S 715. INTERESTED DIRECTORS AND OFFICERS.

9 (A) NO CONTRACT OR OTHER TRANSACTION DIRECTLY OR INDIRECTLY ENTERED
10 INTO BETWEEN A CORPORATION AND ONE OR MORE OF ITS OR ITS AFFILIATES`
11 DIRECTORS OR OFFICERS, OR BETWEEN A CORPORATION AND ANY OTHER CORPO-
12 RATION, FIRM, ASSOCIATION OR OTHER ENTITY IN WHICH ONE OR MORE OF ITS OR
13 ITS AFFILIATES` DIRECTORS OR OFFICERS ARE DIRECTORS OR OFFICERS, OR HAVE
14 A SUBSTANTIAL FINANCIAL INTEREST, SHALL BE EITHER VOID OR VOIDABLE BY
15 THE CORPORATION FOR THIS REASON ALONE OR BY REASON ALONE THAT SUCH
16 DIRECTOR OR DIRECTORS OR OFFICER OR OFFICERS ARE PRESENT AT THE MEETING
17 OF THE BOARD, OR A COMMITTEE THEREOF, WHICH AUTHORIZES SUCH CONTRACT OR
18 TRANSACTION, OR THAT THE VOTES OF ANY SUCH PERSONS ARE COUNTED FOR SUCH
19 PURPOSE. NOTWITHSTANDING THE FOREGOING, SUCH CONTRACT OR TRANSACTION MAY
20 BE VOIDED OR MODIFIED BY THE CORPORATION OR THE ATTORNEY GENERAL AND
21 REMEDIES UNDER PARAGRAPH (C) SHALL BE AVAILABLE TO THE CORPORATION OR TO
22 THE ATTORNEY GENERAL UNLESS THE INTERESTED DIRECTOR OR OFFICER, AND ANY
23 APPROVING DIRECTOR, SHALL ESTABLISH AFFIRMATIVELY THAT SUCH CONTRACT OR
24 TRANSACTION WAS FAIR AND REASONABLE AS TO THE CORPORATION AT THE TIME
25 THE CORPORATION ENTERED INTO SUCH CONTRACT OR TRANSACTION.

26 (B) AN INTERESTED PARTY CONTRACT OR TRANSACTION WITHIN THE MEANING OF
27 PARAGRAPH (A), OR COMPENSATION APPROVED IN ACCORDANCE WITH PARAGRAPH (E)
28 OR (F), SHALL BE PRESUMED TO BE FAIR AND REASONABLE TO THE CORPORATION,
29 IF THE FOLLOWING CONDITIONS ARE SATISFIED:

30 (1) THE CONTRACT, TRANSACTION OR COMPENSATION WAS APPROVED IN ADVANCE
31 BY THE BOARD OR COMMITTEE ENTITLED TO VOTE THEREON AND THE MEMBERS, IF
32 ANY, ENTITLED TO VOTE THEREON, BY A VOTE SUFFICIENT FOR SUCH PURPOSE
33 WITHOUT, IN THE CASE OF A BOARD OR COMMITTEE VOTE, COUNTING THE VOTE OR
34 VOTES OF SUCH INTERESTED DIRECTOR OR OFFICER, AND THE MATERIAL FACTS AS
35 TO SUCH CONTRACT, TRANSACTION OR COMPENSATION, AND ANY COMPENSATION PAID
36 BY AN AFFILIATE OF THE CORPORATION FOR SERVICES RELATED OR SUBSTANTIALLY
37 SIMILAR TO THE SERVICES PERFORMED ON BEHALF OF THE CORPORATION, AND SUCH
38 DIRECTOR`S OR OFFICER`S INTEREST THEREIN WERE DISCLOSED IN GOOD FAITH OR
39 OTHERWISE KNOWN TO THE BOARD OR COMMITTEE OR MEMBERS, IF ANY, ENTITLED
40 TO VOTE THEREON;

41 (2) THE BOARD OR COMMITTEE OBTAINED AND RELIED UPON APPROPRIATE DATA
42 AS TO COMPARABILITY, PRIOR TO APPROVING THE CONTRACT, TRANSACTION OR
43 COMPENSATION, AND PROVIDED SUCH DATA TO THE MEMBERS, IF ANY, ENTITLED TO
44 VOTE THEREON; AND

45 (3) THE BOARD OR COMMITTEE ADEQUATELY DOCUMENTED THE BASIS FOR THE
46 APPROVAL OF THE CONTRACT, TRANSACTION OR COMPENSATION AT THE TIME OF
47 SUCH APPROVAL, WHICH DOCUMENTATION SHALL INCLUDE:

48 (A) THE TERMS OF THE CONTRACT, TRANSACTION OR COMPENSATION, THAT WAS
49 APPROVED AND THE DATE IT WAS APPROVED;

50 (B) THE MEMBERS OF THE BOARD OR COMMITTEE WHO WERE PRESENT DURING
51 DISCUSSION OF THE CONTRACT, TRANSACTION OR COMPENSATION, THAT WAS
52 APPROVED AND THOSE WHO VOTED ON IT;

53 (C) THE COMPARABILITY DATA OBTAINED AND RELIED UPON BY THE BOARD OR
54 COMMITTEE AND A DESCRIPTION OF HOW THE DATA WAS OBTAINED; AND

55 (D) ANY ACTIONS TAKEN BY THE INTERESTED DIRECTOR OR OFFICER WITH
56 RESPECT TO CONSIDERATION OF THE CONTRACT, TRANSACTION OR COMPENSATION.

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1 NOTWITHSTANDING THE PROVISIONS OF THIS PARAGRAPH, ANY QUALIFYING
2 DISBURSEMENT MADE BY ONE ORGANIZATION DESCRIBED IN SECTION 501(C) (3) OF
3 THE CODE TO ANOTHER SUCH ORGANIZATION, WHICH CONSTITUTES AN INTERESTED
4 PARTY CONTRACT OR TRANSACTION WITHIN THE MEANING OF PARAGRAPH (A), SHALL
5 BE PRESUMED TO BE FAIR AND REASONABLE AS TO ANY SUCH ORGANIZATION THAT
6 IS A CORPORATION SUBJECT TO THIS SECTION IF: (1) THE CONDITIONS OF
7 SUBPARAGRAPH (1) ARE MET WITH RESPECT TO SUCH CORPORATION; OR (2) IN THE
8 CASE OF A GRANT OR DONATION BY ONE CORPORATION DESCRIBED IN SECTION
9 501(C) (3) OF THE CODE AND SUBJECT TO THIS SECTION TO ANOTHER ORGANIZA-
10 TION DESCRIBED IN SUCH SECTION 501(C) (3), IF THE CONDITIONS OF SUBPARA-
11 GRAPH (1) ARE MET BY THE GRANTING OR DONATING CORPORATION. FOR THE
12 PURPOSES OF THIS SECTION THE TERM "QUALIFYING DISBURSEMENT" SHALL MEAN
13 CAPITAL CONTRIBUTIONS OR SUBVENTIONS PURSUANT TO SUBPARAGRAPH (7) OF
14 PARAGRAPH (A) OF SECTION 202 (GENERAL AND SPECIAL POWERS), DONATIONS
15 PURSUANT TO SUBPARAGRAPH (14) OF PARAGRAPH (A) OF SECTION 202 (GENERAL
16 AND SPECIAL POWERS), OR PRIVATE FOUNDATION GRANTS THAT ARE QUALIFYING
17 DISTRIBUTIONS PURSUANT TO SECTION 4942(G) OF THE CODE.

18 (C) IF THE INTERESTED DIRECTOR OR OFFICER OR APPROVING DIRECTOR FAILS
19 TO MEET HIS OR HER BURDEN UNDER PARAGRAPH (A), THE CORPORATION OR THE
20 ATTORNEY GENERAL MAY VOID OR MODIFY THE CONTRACT OR TRANSACTION, UNLESS
21 SUCH VOIDANCE OR MODIFICATION WOULD PLACE THE CORPORATION IN A POSITION
22 WORSE THAN THAT IN WHICH IT WOULD BE IF THE CONTRACT OR TRANSACTION WERE
23 NOT VOIDED OR MODIFIED. IN ADDITION, IF THE INTERESTED DIRECTOR OR OFFI-
24 CER OR APPROVING DIRECTOR FAILS TO MEET THE BURDEN UNDER PARAGRAPH (A)
25 OR IF THE BOARD OR COMMITTEE FAILS TO COMPLY WITH PARAGRAPH (E) OR (F),
26 REGARDLESS OF WHETHER OR NOT THE CORPORATION IS SUBJECT TO SECTION 4958
27 OF THE CODE, AND REGARDLESS OF WHETHER OR NOT THE INTERNAL REVENUE
28 SERVICE PURSUES ITS REMEDIES, THE CORPORATION OR THE ATTORNEY GENERAL
29 MAY SEEK TO RECOVER FROM THE INTERESTED DIRECTOR OR OFFICER OR APPROVING
30 DIRECTOR, RESPECTIVELY, RESTITUTION IN AMOUNTS EQUIVALENT TO THE REME-
31 DIES THAT WOULD BE AVAILABLE TO THE INTERNAL REVENUE SERVICE FROM AN
32 INTERESTED DIRECTOR OR OFFICER OR APPROVING DIRECTOR OF A CORPORATION
33 SUBJECT TO SAID SECTION, INCLUDING THE AMOUNT OF ANY COMPENSATION
34 APPROVED PURSUANT TO PARAGRAPH (E) OR (F) IN EXCESS OF AN AMOUNT THAT IS
35 FAIR AND REASONABLE, TOGETHER WITH INTEREST AT THE RATE PURSUANT TO
36 SECTION 5004 OF THE CIVIL PRACTICE LAW AND RULES ON ANY SUCH AMOUNTS.

37 (D) THE CERTIFICATE OF INCORPORATION OR THE BY-LAWS MAY CONTAIN ADDI-
38 TIONAL RESTRICTIONS ON CONTRACTS OR TRANSACTIONS BETWEEN A CORPORATION
39 AND ITS DIRECTORS OR OFFICERS OR OTHER PERSONS AND MAY PROVIDE THAT
40 CONTRACTS OR TRANSACTIONS IN VIOLATION OF SUCH RESTRICTIONS SHALL BE
41 VOID OR VOIDABLE.

42 (E) COMPENSATION OF DIRECTORS AND OFFICERS IN ANY CAPACITY (OTHER THAN
43 FOR SERVING ON THE BOARD OR ANY COMMITTEE), INCLUDING FOR SERVICE AS A
44 DIRECTOR OR OFFICER OF ANOTHER CORPORATION, FIRM, ASSOCIATION OR OTHER
45 ENTITY ON BEHALF OF THE CORPORATION, SHALL BE FIXED BY THE BOARD, OR BY
46 A COMMITTEE OF THE BOARD AUTHORIZED TO VOTE THEREON THAT IS COMPRISED
47 SOLELY OF DIRECTORS WHO ARE NOT COMPENSATED BY THE CORPORATION OTHER
48 THAN IN THEIR CAPACITY AS DIRECTORS, OR, IF THE OFFICERS ARE ELECTED BY
49 THE MEMBERS PURSUANT TO PARAGRAPH (B) OF SECTION 713 (OFFICERS), BY
50 MAJORITY VOTE OF THE MEMBERS AS PROVIDED IN PARAGRAPH (C) OF SECTION 613
51 (VOTE OF MEMBERS) UNLESS A HIGHER PROPORTION OF MEMBERS IS SET BY THE
52 CERTIFICATE OF INCORPORATION OR BY-LAWS, AND SUCH COMPENSATION SHALL BE
53 IN AN AMOUNT THAT IS FAIR AND REASONABLE, DETERMINED IN ACCORDANCE WITH
54 SECTION 4958 OF THE CODE, WHETHER OR NOT THE CORPORATION IS SUBJECT
55 THERETO.

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1 (F) COMPENSATION OF DIRECTORS FOR SERVING ON THE BOARD OR ANY COMMIT-
2 TEE SHALL BE FIXED BY THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ENTIRE
3 BOARD UNLESS A HIGHER PROPORTION IS SET BY THE CERTIFICATE OF INCORPO-
4 RATION OR BY-LAWS, AND SUCH COMPENSATION SHALL BE IN AN AMOUNT THAT IS
5 FAIR AND REASONABLE, DETERMINED IN ACCORDANCE WITH SECTION 4958 OF THE
6 CODE, WHETHER OR NOT THE CORPORATION IS SUBJECT THERETO.

7 (G) FOR PURPOSES OF THIS SECTION:

8 (1) THE TERM "CODE" SHALL MEAN THE UNITED STATES INTERNAL REVENUE CODE
9 OF 1986, AS AMENDED, OR ANY COMPARABLE PROVISION OF ANY SUCCESSOR LAW;

10 (2) THE TERM "COMPENSATION" SHALL INCLUDE SALARY AND OTHER ECONOMIC
11 BENEFITS UNDER SECTION 4958 OF THE CODE; AND

12 (3) AN ENTITY SHALL BE DEEMED AN "AFFILIATE" OF A CORPORATION IF SUCH
13 ENTITY IS A DISQUALIFIED PERSON PURSUANT TO SECTION 4958 OF THE CODE OR
14 IS CONTROLLED BY, IN CONTROL OF OR UNDER COMMON CONTROL WITH SUCH CORPO-
15 RATION.

16 (H) EXCEPT WITH RESPECT TO COMPENSATION OF DIRECTORS OR OFFICERS, THIS
17 SECTION SHALL NOT APPLY TO ANY CONTRACT OR TRANSACTION OF WHICH THE
18 INTERESTED DIRECTOR OR OFFICER HAS NO ACTUAL KNOWLEDGE AND WHICH DOES
19 NOT EXCEED THE LESSER OF ONE PERCENT OF THE GROSS RECEIPTS OF THE CORPO-
20 RATION FOR THE PRECEDING FISCAL YEAR OR ONE HUNDRED THOUSAND DOLLARS.

21 S 6. Section 724 of the not-for-profit corporation law, as amended by
22 chapter 368 of the laws of 1987, is amended to read as follows:

23 S 724. Indemnification of directors and officers by a court.

24 (a) Notwithstanding the failure of a corporation to provide indemnifi-
25 cation, and despite any contrary resolution of the board or of the
26 members in the specific case under section 723 (Payment of indemnifica-
27 tion other than by court award), indemnification shall be awarded by a
28 court to the extent authorized under PARAGRAPH (A) OF SECTION 723 AND
29 MAY BE AWARDED BY A COURT AS AUTHORIZED UNDER section 722 (Authorization
30 for indemnification of directors and officers){, and paragraph (a) of
31 section 723}. Application therefor may be made, in every case, either:

32 (1) In the civil action or proceeding in which the expenses were
33 incurred or other amounts were paid, or

34 (2) To the supreme court in a separate proceeding, in which case the
35 application shall set forth the disposition of any previous application
36 made to any court for the same or similar relief and also reasonable
37 cause for the failure to make application for such relief in the action
38 or proceeding in which the expenses were incurred or other amounts were
39 paid.

40 (b) The application shall be made in such manner and form as may be
41 required by the applicable rules of court or, in the absence thereof, by
42 direction of a court to which it is made. Such application shall be upon
43 notice to the corporation AND, IN THE CASE OF TYPE B OR C CORPORATIONS,
44 TO THE ATTORNEY GENERAL. The court may also direct that notice be given
45 at the expense of the corporation to the members and such other persons
46 as it may designate in such manner as it may require.

47 (c) {Where} UPON THE DIRECTOR'S OR OFFICER'S FURNISHING THE CORPO-
48 RATION WITH AN UNDERTAKING TO REPAY SUCH AMOUNT AS, AND TO THE EXTENT,
49 REQUIRED BY PARAGRAPH (A) OF SECTION 725 (OTHER PROVISIONS AFFECTING
50 INDEMNIFICATION OF DIRECTORS AND OFFICERS), WHERE indemnification is
51 sought by judicial action, the court may {allow a person} ORDER THE
52 CORPORATION TO PAY such reasonable expenses, including attorneys' fees,
53 during the pendency of the litigation as are necessary in connection
54 with {his} THE DIRECTOR'S OR OFFICER'S defense {therein}, if the court
55 shall find that the defendant has by his OR HER pleadings or during the
56 course of the litigation raised genuine issues of fact or law.

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1 (D) NO TYPE B OR TYPE C CORPORATION UNDER THIS CHAPTER SHALL GRANT
2 INDEMNIFICATION PURSUANT TO SECTION 721 (NONEXCLUSIVITY OF STATUTORY
3 PROVISIONS FOR INDEMNIFICATION OF DIRECTORS AND OFFICERS) UNLESS SUCH
4 CORPORATION SHALL FILE WITH THE ATTORNEY GENERAL A NOTICE OF ITS
5 PROPOSED GRANT OF INDEMNIFICATION, UPON A FORM PRESCRIBED BY THE ATTOR-
6 NEY GENERAL, AND SUCH NOTICE SHALL BE ON FILE WITH THE ATTORNEY GENERAL
7 FOR AT LEAST THIRTY DAYS WITHOUT THE ATTORNEY GENERAL NOTIFYING THE
8 CORPORATION OF ITS OBJECTIONS TO THE PROPOSED INDEMNIFICATION. FAILURE
9 BY THE ATTORNEY GENERAL TO OBJECT WITHIN THE THIRTY-DAY PERIOD SHALL NOT
10 IN ANY WAY IMPAIR THE RIGHTS AND POWERS OF THE ATTORNEY GENERAL UNDER
11 THIS CHAPTER TO OBJECT TO SUCH INDEMNIFICATION.

12 S 7. Paragraph (c) of subdivision 1 of section 2-b of the religious
13 corporations law, as amended by chapter 623 of the laws of 1992, is
14 amended to read as follows:

15 (c) The following provisions of the not-for-profit corporation law
16 shall not apply to religious corporations: subparagraph (7) and (8) of
17 paragraph (a) of section one hundred twelve, section one hundred thir-
18 teen, section one hundred fourteen, section two hundred one, section
19 three hundred three, section three hundred four, section three hundred
20 five, section three hundred six, article four except section four
21 hundred one, section five hundred fourteen, PARAGRAPHS (D), (E), (F) AND
22 (G) OF SECTION FIVE HUNDRED NINETEEN, that portion of section five
23 hundred twenty-two (b) which reads "The attorney general shall be noti-
24 fied of the application and shall be given an opportunity to be heard",
25 section six hundred five, section six hundred seven, section six hundred
26 nine, section eight hundred four, article nine except section nine
27 hundred ten, article ten except as provided in section eleven hundred
28 fifteen, section eleven hundred two, and article fifteen except para-
29 graph (c) of section fifteen hundred seven.

30 S 8. This act shall take effect January 1, 2004, and shall apply to
31 all indemnification actions taken on or after such date.

.SO DOC S 4836A

END

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