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

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I N S E N A T E

April 13, 2012

Introduced by Sen. MARCELLINO -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the executive law and the not-for-profit corporation law, in relation to compensation of executives of certain not-for-profit corporations

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

Section 1. Section 63 of the executive law is amended by adding a new subdivision 14 to read as follows:

14. PROSECUTE ALL ACTIONS IN CONNECTION WITH SECTION SEVEN HUNDRED TWENTY-SEVEN AND SEVEN HUNDRED TWENTY-EIGHT OF THE NOT-FOR-PROFIT CORPORATION LAW.

S 2. Subparagraph 12 of paragraph (a) of section 202 of the not-for-profit corporation law is amended to read as follows:

(12) To elect or appoint officers, employees and other agents of the corporation, define their duties, fix their reasonable compensation and the reasonable compensation of directors, and to indemnify corporate personnel. Such compensation shall be commensurate with services performed, AND SUBJECT, WHERE APPLICABLE, TO SECTION SEVEN HUNDRED TWENTY-SEVEN OF THIS CHAPTER.

S 3. Paragraph (a) of section 717 of the not-for-profit corporation law, as amended by chapter 490 of the laws of 2010, is amended to read as follows:

(a) Directors and officers shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. The factors set forth in subparagraph one of paragraph (e) of section 552 (Standard of conduct in managing and investing an institutional fund), if relevant, must be considered by a governing board delegating investment management of institutional funds pursuant to section 514 (Delegation of investment management). For purposes of this paragraph, the term institutional fund is defined in section 551 (Definitions). FURTHERMORE, ANY COMPENSATION PROVIDED TO DIRECTORS, OFFICERS, EMPLOYEES

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

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AND OTHER AGENTS OF THE CORPORATION SHALL BE REASONABLE AND, WHERE APPLICABLE, IS SUBJECT TO SECTION 727 (COMPENSATION OF EXECUTIVES).

S 4. Paragraph (a) of section 719 of the not-for-profit corporation law is amended by adding a new subparagraph 6 to read as follows:

(6) THE PROVISION OF EXCESSIVE COMPENSATION TO DIRECTORS, OFFICERS, EMPLOYEES AND OTHER AGENTS OF THE CORPORATION IN VIOLATION OF SECTION 727 (COMPENSATION OF EXECUTIVES), WHERE APPLICABLE.

S 5. Paragraph (d) of section 719 of the not-for-profit corporation law is amended by adding a new subparagraph 6 to read as follows:

(6) UPON REIMBURSEMENT TO THE CORPORATION OF THE AMOUNT OF ANY EXCESSIVE COMPENSATION PROVIDED IN VIOLATION OF SECTION 727 (COMPENSATION OF EXECUTIVES), TO BE SUBROGATED TO THE RIGHTS OF THE CORPORATION AGAINST A DIRECTOR, OFFICER, EMPLOYEE OR OTHER AGENT WHO RECEIVED THE EXCESSIVE COMPENSATION.

S 6. Clauses (A) and (B) of subparagraph 1 of paragraph (a) of section 720 of the not-for-profit corporation law are amended to read as follows:

(A) The neglect of, [or] THE failure to perform, or ANY other violation of his duties in the management and disposition of corporate assets committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, [or] THE failure to perform, or ANY other violation of his duties, INCLUDING VIOLATIONS OF SECTION 727 (COMPENSATION OF EXECUTIVES), PURSUANT TO SECTION 717 (DUTY OF DIRECTORS AND OFFICERS).

S 7. The not-for-profit corporation law is amended by adding a new section 727 to read as follows:

S 727. COMPENSATION OF EXECUTIVES.

(A) DEFINITIONS. FOR THE PURPOSES OF THIS SECTION, UNLESS OTHERWISE EXPRESSLY STATED OR CONTEXT CLEARLY REQUIRES:

(1) "COMPENSATION" MEANS THE AGGREGATE VALUE OF ECONOMIC BENEFITS CONFERRED IN EXCHANGE FOR THE PERFORMANCE OF SERVICES THAT ARE INCLUDED FOR PURPOSES OF DETERMINING REASONABLENESS UNDER SECTION 26 U.S.C. 4958, AS FURTHER SPECIFIED IN 26 CFR S53.4958-4(B)(II)(B), OR SUCCEEDING PROVISIONS.

(2) "EXECUTIVE" MEANS ANY PERSON WHO HAS ULTIMATE RESPONSIBILITY FOR IMPLEMENTING THE DECISIONS OF THE GOVERNING BODY OR FOR SUPERVISING THE MANAGEMENT, ADMINISTRATION, OR OPERATION OF THE ORGANIZATION, AS REFERENCED IN 26 U.S.C. S4958(F)(1)(A) AND FURTHER SPECIFIED IN 26 CFR S53.4958-3(C)(2), OR SUCCEEDING PROVISIONS.

(3) "FAMILY MEMBER" MEANS A SPOUSE, SIBLING (BY WHOLE OR HALF BLOOD), SPOUSE OF A SIBLING (BY WHOLE OR HALF BLOOD), PARENT, GRANDPARENT, CHILD, GRANDCHILD, GREAT-GRANDCHILD, AND SPOUSE OF A CHILD, GRANDCHILD, AND GREAT-GRANDCHILD.

(B) COMPENSATION EXCHANGED BY A NOT-FOR-PROFIT CORPORATION FOR THE PERFORMANCE OF SERVICES BY AN EXECUTIVE MUST BE REASONABLE CONSIDERING FACTORS INCLUDING, BUT NOT LIMITED TO: COMPENSATION LEVELS PAID BY SIMILARLY SITUATED ORGANIZATIONS, WHETHER OR NOT THEY QUALIFY AS A NOT-FOR-PROFIT CORPORATION AS DEFINED IN SECTION 102 (DEFINITIONS); THE AVAILABILITY OF SIMILAR SERVICES IN THE GEOGRAPHIC AREA OF THE APPLICABLE PROVIDER OF SERVICES; CURRENT COMPENSATION SURVEYS COMPILED BY INDEPENDENT OUTSIDE CONSULTANTS OR ENTITIES; AND ACTUAL WRITTEN OFFERS FROM SIMILAR INSTITUTIONS COMPETING FOR THE SERVICES OF THE APPLICABLE EXECUTIVE.

(1) FOR THE PURPOSES OF THIS SECTION, WHETHER AN ORGANIZATION IS SIMILARLY SITUATED SHALL BE DETERMINED BASED ON FACTORS INCLUDING, BUT NOT

LIMITED TO: GROSS ANNUAL REVENUE; GEOGRAPHIC LOCATION; AND THE DIVERSITY AND COMPLEXITY OF PROGRAMS.

(2)(A) IF A NOT-FOR-PROFIT CORPORATION RECEIVES OVER TWENTY-FIVE THOUSAND DOLLARS FROM THE STATE, THE NOT-FOR-PROFIT CORPORATION MUST ANNUALLY SUBMIT A COMPLETED INTERNAL REVENUE SERVICE FORM 990, OR A COMPARABLE FORM DEVELOPED PURSUANT TO SUBCLAUSE (I) OF CLAUSE (B) OF THIS SUBPARAGRAPH, TO THE STATE AND FILED WITH THE ATTORNEY GENERAL. SUCH COMPLETED FORM OR INTERNAL REVENUE SERVICE FORM 990 SHALL BE PUBLICLY AVAILABLE UPON REQUEST AND IF THE ORGANIZATION MAINTAINS A WEBSITE, IT SHALL BE POSTED ON THE ORGANIZATION'S WEBSITE.

(B) THE COMMISSIONERS OF DEVELOPMENTAL DISABILITIES, MENTAL HEALTH, ALCOHOLISM AND SUBSTANCE ABUSE SERVICES, CHILDREN AND FAMILY SERVICES, HEALTH, CRIMINAL JUSTICE SERVICES AND THE DIRECTOR OF THE OFFICE FOR THE AGING SHALL JOINTLY:

(I) DEVELOP A FORM FOR USE BY THOSE NOT-FOR-PROFIT CORPORATIONS WHO ARE NOT REQUIRED BY FEDERAL LAW TO COMPLETE AN INTERNAL REVENUE SERVICE FORM 990. SUCH FORM SHALL REQUIRE NO MORE INFORMATION THAN THAT WHICH MUST BE SUBMITTED ON INTERNAL REVENUE SERVICE FORM 990;

(II) PROMULGATE REGULATIONS THAT ALLOW A NOT-FOR-PROFIT CORPORATION TO SUBMIT ONE COMPLETED INTERNAL REVENUE SERVICE FORM 990, OR ONE COMPLETED COMPARABLE FORM, THROUGH THE POSTAL SERVICE OR ELECTRONICALLY, FOR DISTRIBUTION TO ALL AGENCIES THAT PROVIDE FUNDING TO THE NOT-FOR-PROFIT CORPORATION; AND

(III) ESTABLISH UNIFORM PROCEDURES FOR REVIEWING SUBMITTED FORMS; AND, UPON A DETERMINATION THAT EXECUTIVE COMPENSATION APPEARS TO BE EXCESSIVE IN VIOLATION OF THE STANDARDS ESTABLISHED IN THIS SECTION, FOR REFERRING SUCH CASES TO THE ATTORNEY GENERAL FOR FURTHER INQUIRY.

(C) ANNUAL COMPENSATION EXCHANGED BY A NOT-FOR-PROFIT CORPORATION FOR THE PERFORMANCE OF SERVICES BY AN EXECUTIVE SHALL BE CONSIDERED REASONABLE IF IT DOES NOT EXCEED LEVEL I OF THE FEDERAL GOVERNMENT'S RATES OF BASIC PAY FOR THE EXECUTIVE SCHEDULE PROMULGATED BY THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT.

(D) ANNUAL COMPENSATION EXCHANGED BY A NOT-FOR-PROFIT CORPORATION FOR THE PERFORMANCE OF SERVICES BY AN EXECUTIVE THAT DOES EXCEED LEVEL I OF THE FEDERAL GOVERNMENT'S RATES OF BASIC PAY FOR THE EXECUTIVE SCHEDULE SHALL BE PRESUMED TO BE REASONABLE IF THE FOLLOWING FOUR CONDITIONS ARE SATISFIED:

(1) THE COMPENSATION IS APPROVED IN ADVANCE BY THE GOVERNING BODY (I.E., THE BOARD OF DIRECTORS, BOARD OF TRUSTEES, OR EQUIVALENT CONTROLLING BODY) OF THE NOT-FOR-PROFIT CORPORATION THAT IS COMPOSED ENTIRELY OF INDIVIDUALS WHO DO NOT HAVE A CONFLICT OF INTEREST WITH RESPECT TO THE COMPENSATION ARRANGEMENT.

(A) FOR THE PURPOSES OF DETERMINING WHETHER THE REQUIREMENTS OF THIS PARAGRAPH HAVE BEEN MET WITH RESPECT TO A SPECIFIC COMPENSATION ARRANGEMENT, AN INDIVIDUAL IS NOT INCLUDED IN THE GOVERNING BODY WHEN IT IS REVIEWING A TRANSACTION IF THAT INDIVIDUAL MEETS WITH OTHER MEMBERS ONLY TO ANSWER QUESTIONS, AND OTHERWISE RECUSES HIMSELF OR HERSELF FROM THE MEETING AND IS NOT PRESENT DURING DEBATE AND VOTING ON THE COMPENSATION ARRANGEMENT.

(B) A MEMBER OF THE GOVERNING BODY DOES NOT HAVE A CONFLICT OF INTEREST WITH RESPECT TO A COMPENSATION ARRANGEMENT ONLY IF THE MEMBER:

(I) IS NOT AN EXECUTIVE PARTICIPATING IN, OR ECONOMICALLY BENEFITING FROM, THE COMPENSATION ARRANGEMENT; AND IS NOT A FAMILY MEMBER OF SUCH AN EXECUTIVE;

(II) IS NOT IN AN EMPLOYMENT RELATIONSHIP SUBJECT TO THE DIRECTION OR CONTROL OF ANY EXECUTIVE, OR THE FAMILY MEMBER OF ANY EXECUTIVE, PARTICIPATING IN OR ECONOMICALLY BENEFITING FROM THE COMPENSATION ARRANGEMENT;

(III) DOES NOT RECEIVE COMPENSATION OR OTHER PAYMENT SUBJECT TO APPROVAL BY ANY EXECUTIVE, OR THE FAMILY MEMBER OF ANY EXECUTIVE, PARTICIPATING IN OR ECONOMICALLY BENEFITING FROM THE COMPENSATION ARRANGEMENT;

(IV) HAS NO MATERIAL FINANCIAL INTEREST AFFECTED BY THE COMPENSATION ARRANGEMENT; AND

(V) DOES NOT APPROVE A TRANSACTION PROVIDING ECONOMIC BENEFITS TO ANY EXECUTIVE, OR THE FAMILY MEMBER OF ANY EXECUTIVE, PARTICIPATING IN THE COMPENSATION ARRANGEMENT, WHO IN TURN HAS APPROVED OR WILL APPROVE A TRANSACTION PROVIDING ECONOMIC BENEFITS TO THE MEMBER.

(2) THE GOVERNING BODY OBTAINED AND RELIED UPON APPROPRIATE DATA AS TO COMPARABILITY PRIOR TO MAKING ITS DETERMINATION.

(A) A GOVERNING BODY HAS APPROPRIATE DATA AS TO COMPARABILITY IF, GIVEN THE KNOWLEDGE AND EXPERTISE OF ITS MEMBERS, IT HAS INFORMATION SUFFICIENT TO DETERMINE WHETHER THE COMPENSATION ARRANGEMENT IN ITS ENTIRETY IS REASONABLE. RELEVANT INFORMATION INCLUDES, BUT IS NOT LIMITED TO: COMPENSATION LEVELS PAID BY SIMILARLY SITUATED ORGANIZATIONS, WHETHER OR NOT THEY QUALIFY AS A NOT-FOR-PROFIT CORPORATION AS DEFINED IN SECTION ONE HUNDRED TWO OF THIS CHAPTER; THE AVAILABILITY OF SIMILAR SERVICES IN THE GEOGRAPHIC AREA OF THE APPLICABLE PROVIDER OF SERVICES; CURRENT COMPENSATION SURVEYS COMPILED BY INDEPENDENT FIRMS; AND ACTUAL WRITTEN OFFERS FROM SIMILAR INSTITUTIONS COMPETING FOR THE SERVICES OF THE APPLICABLE EXECUTIVE.

(B) HOWEVER, FOR SMALL ORGANIZATIONS WITH ANNUAL GROSS RECEIPTS (INCLUDING CONTRIBUTIONS) OF LESS THAN ONE MILLION DOLLARS REVIEWING COMPENSATION ARRANGEMENTS, THE GOVERNING BODY WILL BE CONSIDERED TO HAVE APPROPRIATE DATA AS TO COMPARABILITY IF IT HAS DATA ON COMPENSATION PAID BY THREE COMPARABLE PROVIDERS OF SERVICES IN THE SAME OR SIMILAR COMMUNITIES FOR SIMILAR SERVICES.

(I) FOR THE PURPOSES OF DETERMINING WHETHER THE ABOVE RULE FOR SMALL ORGANIZATIONS APPLIES, AN ORGANIZATION MAY CALCULATE ITS ANNUAL GROSS RECEIPTS BASED ON AN AVERAGE OF ITS GROSS RECEIPTS DURING THE THREE PRIOR TAXABLE YEARS. IF ANY APPLICABLE NOT-FOR-PROFIT CORPORATION IS CONTROLLED BY OR CONTROLS ANOTHER ENTITY, THE ANNUAL GROSS RECEIPTS OF SUCH ORGANIZATIONS MUST BE AGGREGATED TO DETERMINE APPLICABILITY.

(II) FOR PURPOSES OF THIS PARAGRAPH, CONTROL BY AN APPLICABLE NOT-FOR-PROFIT CORPORATION MEANS:

1. IN THE CASE OF A STOCK CORPORATION, OWNERSHIP (BY VOTE OR VALUE) OF MORE THAN FIFTY PERCENT OF THE STOCK IN SUCH CORPORATION;

2. IN THE CASE OF A PARTNERSHIP, OWNERSHIP OF MORE THAN FIFTY PERCENT OF THE PROFITS INTERESTS OR CAPITAL INTERESTS IN THE PARTNERSHIP;

3. IN THE CASE OF A NONSTOCK ORGANIZATION (I.E., AN ENTITY IN WHICH NO PERSON HOLDS A PROPRIETARY INTEREST), THAT AT LEAST FIFTY PERCENT OF THE DIRECTORS OR TRUSTEES OF THE NOT-FOR-PROFIT CORPORATION ARE EITHER REPRESENTATIVES (INCLUDING TRUSTEES, DIRECTORS, AGENTS, OR EMPLOYEES) OF, OR DIRECTLY OR INDIRECTLY CONTROLLED BY, AN APPLICABLE TAX-EXEMPT ORGANIZATION; OR

4. IN THE CASE OF ANY OTHER ENTITY, OWNERSHIP OF MORE THAN FIFTY PERCENT OF THE BENEFICIAL INTEREST IN THE ENTITY.

(3) THE GOVERNING BODY ADEQUATELY DOCUMENTED THE BASIS FOR ITS DETERMINATION CONCURRENTLY WITH MAKING THAT DETERMINATION.

(A) FOR A DECISION TO BE DOCUMENTED ADEQUATELY, THE WRITTEN OR ELECTRONIC RECORDS OF THE GOVERNING BODY MUST NOTE:

(I) THE TERMS OF THE TRANSACTION THAT WAS APPROVED, AND THE DATE IT WAS APPROVED;
(II) THE MEMBERS OF THE GOVERNING BODY WHO WERE PRESENT DURING DEBATE ON THE TRANSACTION THAT WAS APPROVED, AND THOSE WHO VOTED ON IT;
(III) THE COMPARABILITY DATA OBTAINED AND RELIED UPON BY THE GOVERNING BODY, AND HOW THE DATA WAS OBTAINED; AND
(IV) ANY ACTIONS TAKEN WITH RESPECT TO CONSIDERATION OF THE TRANSACTION BY ANYONE WHO IS OTHERWISE A MEMBER OF THE GOVERNING BODY BUT WHO HAD A CONFLICT OF INTEREST WITH RESPECT TO THE TRANSACTION.
(B) IF THE GOVERNING BODY DETERMINES THAT REASONABLE COMPENSATION FOR A SPECIFIC ARRANGEMENT IS HIGHER OR LOWER THAN THE RANGE OF COMPARABILITY DATA OBTAINED, THE GOVERNING BODY MUST RECORD THE BASIS FOR ITS DETERMINATION. FOR A DECISION TO BE DOCUMENTED CONCURRENTLY, RECORDS MUST BE PREPARED BEFORE THE LATER OF THE NEXT MEETING OF THE GOVERNING BODY OR SIXTY DAYS AFTER THE FINAL ACTION OR ACTIONS OF THE GOVERNING BODY ARE TAKEN. RECORDS MUST BE REVIEWED AND APPROVED BY THE GOVERNING BODY AS REASONABLE, ACCURATE AND COMPLETE WITHIN A REASONABLE TIME PERIOD THEREAFTER.
(4) THE COMPENSATION PROVIDED TO THE EXECUTIVE BY THE GOVERNING BODY DOES NOT EXCEED THE HIGHEST COMPENSATION PROVIDED BY A SIMILARLY SITUATED ORGANIZATION FOR SIMILAR SERVICES, AS IDENTIFIED IN THE COMPARABILITY DATA, BY MORE THAN TEN PERCENT.
(E) IF THE FOUR CONDITIONS OF PARAGRAPH (D) OF THIS SECTION ARE SATISFIED, THEN THE PERSON OR ENTITY BRINGING AN ACTION FOR RELIEF PURSUANT TO SECTION SEVEN HUNDRED TWENTY OF THIS ARTICLE MAY REBUT THE PRESUMPTION THAT ARISES UNDER PARAGRAPH (D) OF THIS SECTION ONLY IF IT DEVELOPS SUFFICIENT CONTRARY EVIDENCE TO REBUT THE PROBATIVE VALUE OF THE COMPARABILITY DATA RELIED UPON BY THE GOVERNING BODY. WITH RESPECT TO ANY FIXED PAYMENT, REBUTTAL EVIDENCE IS LIMITED TO EVIDENCE RELATING TO FACTS AND CIRCUMSTANCES EXISTING ON THE DATE THE PARTIES ENTER INTO THE CONTRACT PURSUANT TO WHICH THE PAYMENT IS MADE (EXCEPT IN THE EVENT OF SUBSTANTIAL NONPERFORMANCE). WITH RESPECT TO ALL OTHER PAYMENTS, REBUTTAL EVIDENCE MAY INCLUDE FACTS AND CIRCUMSTANCES UP TO AND INCLUDING THE DATE OF PAYMENT.
(F) A NOT-FOR-PROFIT IS PROHIBITED FROM: (1) ENGAGING IN ANY ACT THAT THE INTERNAL REVENUE SERVICE DETERMINES CONSTITUTES AN "EXCESS BENEFIT TRANSACTION" UNDER SECTION 4958 OF THE INTERNAL REVENUE CODE; OR (2) ENGAGING IN ANY ACT THAT WOULD CONSTITUTE AN "EXCESS BENEFIT TRANSACTION" UNDER THE STANDARDS OF SECTION 4958 OF THE INTERNAL REVENUE CODE.
S 8. The not-for-profit corporation law is amended by adding a new section 728 to read as follows:
S 728. WRITTEN POLICY REQUIRED.
(A) THE GOVERNING BODY OF A NOT-FOR-PROFIT CORPORATION SHALL HAVE A WRITTEN POLICY ON:
(1) EMPLOYEES SERVING ON SUCH GOVERNING BODY, THEIR VOTING RIGHTS, RECUSAL FROM DECISIONS OF THE GOVERNING BODY, AND THE PERCENTAGE OF THE MEMBERSHIP OF THE GOVERNING BODY THAT MUST BE INDEPENDENT OF THE ORGANIZATION;
(2) HIRING OF FAMILY MEMBERS OF EMPLOYEES AND GOVERNING BODY MEMBERS; AND
(3) CONFLICT OF INTEREST COVERING BUSINESS INTERESTS.
(B) EMPLOYEES OF A NOT-FOR-PROFIT CORPORATION ARE PROHIBITED FROM:
(I) SERVING AS THE CHAIR OF SUCH ORGANIZATION'S GOVERNING BODY; AND
(II) SERVING AS A VOTING MEMBER OF SUCH ORGANIZATION'S GOVERNING BODY.

(C) NO PERSON WHO IS RELATED TO ANY EXECUTIVE AS DEFINED IN SUBPARAGRAPH TWO OF SUBPARAGRAPH (A) OF SECTION 727 (COMPENSATION OF EXECUTIVES) OR ANY MEMBER OF A GOVERNING BODY BY BLOOD OR MARRIAGE SHALL BE EMPLOYED BY SUCH ORGANIZATION, EXCEPT WITH THE APPROVAL OF TWO-THIRDS OF THE MEMBERS OF THE GOVERNING BODY.

(D) ALL WRITTEN POLICIES REQUIRED IN PARAGRAPH (A) OF THIS SECTION SHALL BE AVAILABLE FOR REVIEW BY THE ATTORNEY GENERAL UPON REQUEST.

S 9. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that the commissioners of the offices for people with developmental disabilities, mental health, alcoholism and substance abuse services, children and family services, health, criminal justice services and the director of the office for the aging shall immediately take the necessary actions to ensure that forms and regulations required by section seven of this act are in place on such effective date; and provided, further, whereas the authority to promulgate regulations and make rules is derived from an express or implicit statutory grant provided by the legislature, all agencies, divisions and departments of the state are hereby prohibited from promulgating regulations and making rules pursuant to section 8.38 of title 9 of the official compilation of the New York Codes, Rules and Regulations, or that otherwise address the extent and nature of a provider's administrative costs and executive compensation, except as required and necessary to implement the provisions of section six of this act.