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

5868

2015-2016 Regular Sessions

I N S E N A T E

June 9, 2015

Introduced by Sen. RANZENHOFER -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the not-for-profit corporation law, the estates, powers and trusts law and the religious corporations law, in relation to the reform of charitable corporations

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

Section 1. Subdivisions 6-a, 19, 21, 22, 23 and 25 of paragraph (a) of section 102 of the not-for-profit corporation law, as added by chapter 549 of the laws of 2013, are amended to read as follows:

(6-a) "Entire board" means the total number of directors entitled to vote which the corporation would have if there were no vacancies. If the by-laws of the corporation provide that the board shall consist of a fixed number of directors, then the "entire board" shall consist of that number of directors. If the by-laws of any corporation provide that the board may consist of a range between a minimum and maximum number of directors, AND THE NUMBER WITHIN THAT RANGE HAS NOT BEEN FIXED IN ACCORDANCE WITH PARAGRAPH (A) OF SECTION SEVEN HUNDRED TWO OF THIS CHAPTER, then the "entire board" shall consist of the number of directors within such range that were elected OR APPOINTED as of the most recently held election of directors, AS WELL AS ANY DIRECTORS WHOSE TERMS HAVE NOT YET EXPIRED.

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

(21) "Independent director" means a director who: (i) is not, and has not been within the last three years, an employee of the corporation or an affiliate of the corporation, and does not have a relative who is, or has been within the last three years, a key employee of the corporation or an affiliate of the corporation; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the corpo-

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

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ration or an affiliate of the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of section 202 (General and special powers)); [and] (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation or an affiliate of the corporation for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of twenty-five thousand dollars or two percent of such entity's consolidated gross revenues; OR (IV) IS NOT AND DOES NOT HAVE A RELATIVE WHO IS A CURRENT OWNER, WHETHER WHOLLY OR PARTIALLY, DIRECTOR, OFFICER OR EMPLOYEE OF THE CORPORATION'S OUTSIDE AUDITOR OR WHO HAS WORKED ON THE CORPORATION'S AUDIT AT ANY TIME DURING THE PAST THREE YEARS. For purposes of this [subparagraph] SUBDIVISION, "payment" does not include charitable contributions, DUES OR FEES PAID TO THE CORPORATION FOR SERVICES WHICH THE CORPORATION PERFORMS AS PART OF ITS NONPROFIT PURPOSES.

(22) "Relative" of an individual means [his or her] (i) HIS OR HER spouse[,] OR DOMESTIC PARTNER AS DEFINED IN SECTION TWENTY-NINE HUNDRED NINETY-FOUR-A OF THE PUBLIC HEALTH LAW; (II) HIS OR HER ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren[, and spouses]; OR (III) THE SPOUSE OR DOMESTIC PARTNER of HIS OR HER brothers, sisters, children, grandchildren, and great-grandchildren[; or (ii) domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law].

(23) "Related party" means (i) any director, officer or key employee of the corporation or any affiliate of the corporation, OR ANY OTHER PERSON WHO EXERCISES THE POWERS OF DIRECTORS, OFFICERS OR KEY EMPLOYEES OVER THE AFFAIRS OF THE CORPORATION OR ANY AFFILIATE OF THE CORPORATION; (ii) any relative of any [director, officer or key employee of the corporation or any affiliate of the corporation] INDIVIDUAL DESCRIBED IN CLAUSE (I) OF THIS SUBDIVISION; or (iii) any entity in which any individual described in clauses (i) and (ii) of this [subparagraph] SUBDIVISION has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.

(25) "Key employee" means any person who is in a position to exercise substantial influence over the affairs of the corporation, as referenced in 26 U.S.C. S 4958(f)(1)(A) and further specified in 26 CFR S 53.4958-3(c), (d) and (e), or succeeding provisions TO THE EXTENT SUCH PROVISIONS ARE APPLICABLE.

S 2. Paragraph (b) of section 515 of the not-for-profit corporation law, as amended by chapter 549 of the laws of 2013, is amended to read as follows:

(b) A corporation may pay compensation in a reasonable amount to members, directors, or officers, for services rendered, and may make distributions of cash or property to members upon dissolution or final liquidation as permitted by this chapter. No person who may benefit from such compensation may be present at or otherwise participate in any board or committee deliberation or vote concerning such person's compensation; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a person who may benefit from such compensation present information as background or answer questions at a committee or board meeting prior to the commencement of

deliberations or voting relating thereto. NOTHING IN THIS SECTION OR IN PARAGRAPH (H) OF SECTION SEVEN HUNDRED FIFTEEN OF THIS CHAPTER SHALL BE CONSTRUED TO PROHIBIT A DIRECTOR FROM DELIBERATING OR VOTING CONCERNING COMPENSATION FOR SERVICE ON THE BOARD THAT IS TO BE MADE AVAILABLE OR PROVIDED TO ALL DIRECTORS OF THE CORPORATION ON THE SAME OR SUBSTANTIALLY SIMILAR TERMS.

S 3. Paragraph (b) of section 702 of the not-for-profit corporation law is amended to read as follows:

(b) The number of directors may be increased or decreased by amendment of the by-laws or[, in the case of a corporation having members,] by action of the members, or of the board under the specific provisions of a by-law [adopted by the members], subject to the following limitations:

(1) If the board is authorized by the by-laws to change the number of directors, whether by amending the by-laws or by taking action under the specific provisions of a by-law [adopted by the members], such amendment or action shall require the vote of a majority of the entire board.

(2) No decrease shall shorten the term of any incumbent director.

S 4. Paragraph (d) of section 708 of the not-for-profit corporation law, as amended by chapter 173 of the laws of 1975 and as relettered by chapter 314 of the laws of 1977, is amended to read as follows:

(d) Except as otherwise provided in this chapter, the vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the board. DIRECTORS WHO ARE PRESENT AT A MEETING BUT NOT PRESENT AT THE TIME OF A VOTE DUE TO A CONFLICT OF INTEREST OR RELATED PARTY TRANSACTION SHALL BE DETERMINED TO BE PRESENT AT THE TIME OF THE VOTE FOR PURPOSES OF THIS PARAGRAPH.

S 5. Paragraph (e) of section 712 of the not-for-profit corporation law, as amended by chapter 549 of the laws of 2013, is amended to read as follows:

(e) Committees, other than committees of the board, whether created by the board or by the members, shall be committees of the corporation. [Such committees of the corporation may be elected or appointed in the same manner as officers of the corporation, but no] NO such committee shall have the authority to bind the board. Provisions of this chapter applicable to officers generally shall apply to members of such committees. [Such] MEMBERS OF SUCH committees of the corporation, WHO MAY BE NON-DIRECTORS, shall be elected or appointed in the manner set forth in the by-laws, or if not set forth in the by-laws, in the same manner as officers of the corporation.

S 6. Paragraph (e) of section 712-a of the not-for-profit corporation law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(e) Only independent directors may participate in any board or committee deliberations or voting relating to matters set forth in this section, PROVIDED THAT NOTHING IN THIS PARAGRAPH SHALL PROHIBIT THE BOARD OR DESIGNATED AUDIT COMMITTEE FROM REQUESTING THAT A PERSON WITH AN INTEREST IN THE MATTER PRESENT INFORMATION AS BACKGROUND OR ANSWER QUESTIONS AT A COMMITTEE OR BOARD MEETING PRIOR TO THE COMMENCEMENT OF DELIBERATIONS OR VOTING RELATING THERETO.

S 7. Paragraphs (e), (f), (f) and (g) of section 715 of the not-for-profit corporation law, paragraph (e) as amended and paragraphs (f), (f) and (g) as added by chapter 549 of the laws of 2013, are amended to read as follows:

(e) The fixing of [salaries] COMPENSATION of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a

majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws.

(f) The attorney general may bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of this chapter or was otherwise not reasonable or in the best interests of the corporation at the time the transaction was approved, or to seek restitution, and the removal of directors or officers, or seek to require any person or entity to:

(1) Account for any profits made from such transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property or other assets used in such transaction;

(3) Return or replace any property or other assets lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate; and

(4) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.

[(f)] (G) The powers of the attorney general provided in this section are in addition to all other powers the attorney general may have under this chapter or any other law.

[(g)] (H) No related party may participate in deliberations or voting relating to [matters set forth in this section] A RELATED PARTY TRANSACTION IN WHICH HE OR SHE HAS AN INTEREST; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a related party present information AS BACKGROUND OR ANSWER QUESTIONS concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting relating thereto.

S 8. Subdivision 3 of paragraph (b) of section 715-a of the not-for-profit corporation law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict, PROVIDED THAT NOTHING IN THIS SECTION SHALL PROHIBIT THE BOARD OR A COMMITTEE FROM REQUESTING THAT THE PERSON WITH THE CONFLICT OF INTEREST PRESENT INFORMATION AS BACKGROUND OR ANSWER QUESTIONS AT A COMMITTEE OR BOARD MEETING PRIOR TO THE COMMENCEMENT OF DELIBERATIONS OR VOTING RELATING THERETO;

S 9. Paragraph (c) of section 715-a of the not-for-profit corporation law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(c) The conflict of interest policy shall require that prior to the initial election of any director, and annually thereafter, such director shall complete, sign and submit to the secretary of the corporation OR A DESIGNATED COMPLIANCE OFFICER a written statement identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director annually resubmit such written statement. The secretary of the corporation OR THE DESIGNATED COMPLIANCE OFFICER shall provide a copy of all completed statements to the

chair of the audit committee or, if there is no audit committee, to the chair of the board.

S 10. Subdivision 3 of paragraph (b) of section 715-b of the not-for-profit corporation law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(3) A requirement that a copy of the policy be distributed to all directors, officers, employees and to volunteers who provide substantial services to the corporation. FOR PURPOSES OF THIS SUBDIVISION, POSTING THE POLICY ON THE CORPORATION'S WEBSITE OR AT THE CORPORATION'S OFFICES IN A CONSPICUOUS LOCATION ACCESSIBLE TO EMPLOYEES AND VOLUNTEERS ARE AMONG THE METHODS A CORPORATION MAY USE TO SATISFY THE DISTRIBUTION REQUIREMENT.

S 11. Paragraph (b) of section 1407 of the not-for-profit corporation law, as amended by chapter 549 of the laws of 2013, is amended to read as follows:

(b) Type of corporation.

An alumni corporation is a [non-charitable] CHARITABLE corporation.

S 12. Subdivisions 3, 4, 5, 6 and 7 of paragraph (a) of section 8-1.9 of the estates, powers and trusts law, as added by chapter 549 of the laws of 2013, are amended to read as follows:

(3) "Key employee" means any person who is in a position to exercise substantial influence over the affairs of the [corporation] TRUST, as referenced in 26 U.S.C. section 4958(f)(1)(A) and further specified in 26 C.F.R. section 53.4958-3(c), (d) and (e), or succeeding provisions TO THE EXTENT SUCH PROVISIONS ARE APPLICABLE.

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

(5) "Relative" of an individual means [his or her] (i) HIS OR HER spouse[,] OR DOMESTIC PARTNER AS DEFINED IN SECTION TWENTY-NINE HUNDRED NINETY-FOUR-A OF THE PUBLIC HEALTH LAW; (II) HIS OR HER ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren[, and spouses]; OR (III) THE SPOUSE OR DOMESTIC PARTNER of HIS OR HER brothers, sisters, children, grandchildren, and great-grandchildren[; and (ii) his or her domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law].

(6) "Related party" means (i) any trustee or key employee of the trust or any affiliate of the trust OR ANY OTHER PERSON WHO EXERCISES THE POWERS OF A TRUSTEE OR KEY EMPLOYEE OVER THE AFFAIRS OF THE TRUST OR ANY AFFILIATE OF THE TRUST; (ii) any relative of any [trustee or key employee of the trust or any affiliate of the trust] INDIVIDUAL DESCRIBED IN CLAUSE (I) OF THIS SUBDIVISION; or (iii) an entity in which any individual described in clauses (i) and (ii) of this [subparagraph] SUBDIVISION has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct ownership interest in excess of five percent.

(7) "Independent trustee" means a trustee who: (i) is not, and has not been within the last three years, an employee of the trust or an affiliate of the trust, and does not have a relative who is, or has been within the last three years, a key employee of the trust or an affiliate of the trust; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the trust or an affiliate of the trust (other than reimbursement for expenses or the payment of trustee commissions OR REASONABLE COMPENSATION as permitted by law and the governing instrument); [and] (iii) is not a current employee of or does

not have a substantial financial interest in, and does not have a relative who is a current officer of or have a substantial financial interest in, any entity that has made payments to, or received payments from, the trust or an affiliate of the trust for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of twenty-five thousand dollars or two percent of such entity's consolidated gross revenues; OR (IV) IS NOT AND DOES NOT HAVE A RELATIVE WHO IS A CURRENT OWNER, WHETHER WHOLLY OR PARTIALLY, DIRECTOR, OFFICER OR EMPLOYEE OF THE TRUST'S OUTSIDE AUDITOR OR WHO HAS WORKED ON THE TRUST'S AUDIT AT ANY TIME DURING THE PAST THREE YEARS. For purposes of this [subparagraph] SUBDIVISION, "payment" does not include charitable contributions, DUES OR FEES PAID TO THE TRUST FOR SERVICES WHICH THE TRUST PERFORMS AS PART OF ITS NONPROFIT PURPOSES.

S 13. Subdivision 5 of paragraph (b) of section 8-1.9 of the estates, powers and trusts law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(5) Only independent trustees may participate in deliberations or voting relating to matters set forth in this [paragraph] SECTION, PROVIDED THAT NOTHING IN THIS PARAGRAPH SHALL PROHIBIT THE BOARD OR DESIGNATED AUDIT COMMITTEE FROM REQUESTING THAT A PERSON WITH AN INTEREST IN THE MATTER PRESENT INFORMATION AS BACKGROUND OR ANSWER QUESTIONS AT A COMMITTEE OR BOARD MEETING PRIOR TO THE COMMENCEMENT OF DELIBERATIONS OR VOTING RELATING THERETO.

S 14. Subdivision 6 of paragraph (c) of section 8-1.9 of the estates, powers and trusts law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(6) No related party may participate in deliberations or voting relating to [matters set forth in this paragraph] A RELATED PARTY TRANSACTION IN WHICH HE OR SHE HAS AN INTEREST; provided that nothing in this section shall prohibit the trustees or designated audit committee from requesting that a related party present information OR ANSWER QUESTIONS concerning a related party transaction at a trustees or committee meeting prior to the commencement of deliberations or voting relating to the related party transaction.

S 15. Clause (C) of subdivision 2 of paragraph (d) of section 8-1.9 of the estates, powers and trusts law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(C) a requirement that the person with the conflict of interest not be present at or participate in any deliberation or vote on the matter giving rise to such conflict, PROVIDED THAT NOTHING IN THIS SECTION SHALL PROHIBIT THE TRUSTEES OR A COMMITTEE FROM REQUESTING THAT THE PERSON WITH THE CONFLICT OF INTEREST PRESENT INFORMATION AS BACKGROUND OR ANSWER QUESTIONS AT A TRUSTEES OR COMMITTEE MEETING PRIOR TO THE COMMENCEMENT OF DELIBERATIONS OR VOTING RELATING THERETO;

S 16. Clause (C) of paragraph 2 of subdivision (e) of section 8-1.9 of the estates, powers and trusts law, as added by chapter 549 of the laws of 2013, is amended to read as follows:

(C) A requirement that a copy of the policy be distributed to all trustees, officers, employees and volunteers, with instructions on how to comply with the procedures set forth in the policy. FOR PURPOSES OF THIS SUBDIVISION, POSTING THE POLICY ON THE CORPORATION'S WEBSITE OR AT THE CORPORATION'S OFFICES IN A CONSPICUOUS LOCATION ACCESSIBLE TO EMPLOYEES AND VOLUNTEERS ARE AMONG THE METHODS A CORPORATION MAY USE TO SATISFY THE DISTRIBUTION REQUIREMENT.

S 17. Subdivision 1 of section 12 of the religious corporations law, as amended by chapter 244 of the laws of 1981, is amended to read as follows:

1. A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court OR THE ATTORNEY GENERAL therefor pursuant to section five hundred eleven of the not-for-profit corporation law as that section is modified by paragraph (d-1) of [subsection] SUBDIVISION one of section two-b of this chapter OR SECTION FIVE HUNDRED ELEVEN-A OF THE NOT-FOR-PROFIT CORPORATION LAW, except that a religious corporation may execute a purchase money mortgage or a purchase money security agreement creating a security interest in personal property purchased by it without obtaining leave of the court therefor.

S 18. Severability. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which the judgment shall have been rendered.

S 19. This act shall take effect immediately.