

1 BEFORE THE NEW YORK STATE SENATE
2 STANDING COMMITTEE ON CORPORATIONS, AUTHORITIES,
3 AND COMMISSIONS

4 PUBLIC HEARING:

5 TO EXAMINE THE RE-CODIFICATION OF NEW YORK STATE'S
6 NOT-FOR-PROFIT CORPORATION LAW IN AN EFFORT TO REDUCE
7 UNNECESSARY BURDENS ON NONPROFITS AND TO ENHANCE
8 NONPROFIT GOVERNANCE AND OVERSIGHT

8 Legislative Office Building
9 181 State Street, 2nd Floor
10 Hamilton Hearing Room B
11 Albany, New York 12247

12 May 22, 2013
13 10:00 a.m. to 12:00 p.m.

14 PRESIDING:

15 Senator Michael H. Ranzenhofer
16 Chair

17 SENATE MEMBERS PRESENT:

18 Senator Jack M. Martins (RM)

19 Senator Carl L. Marcellino

20 Senator Bill Perkins

21 ASSEMBLY MEMBERS PRESENT:

22 Assemblyman James F. Brennan

23 Assemblyman Michael A. Montesano
24
25

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1 SENATOR RANZENHOFER: [Inaudible].

2 My name is Mike Ranzenhofer. I am the
3 Chairman of the New York State Senate Standing
4 Committee on Corporations, Authorities, and
5 Commissions.

6 We are here this morning to conduct a public
7 hearing on the issue of not-for-profits, dealing
8 with the issue of reform, governance.

9 And before we begin, I would like to
10 introduce the members who are up here on the panel.

11 To my right we have Senator Carl Marcellino;
12 Senator Jack Martins, the Ranking Member of the
13 Committee; Senator Perkins -- Senator Bill Perkins;

14 And to my left, we have
15 Assemblyman Michael Montesano.

16 There are other members of the Committee who
17 you can see on the placards in front of us, who will
18 be stopping in, and leaving, due to other
19 legislative assignments, responsibilities, that they
20 have today.

21 The purpose of today's hearing is to hear
22 testimony.

23 There have been a number of bills that have
24 been introduced. And even before the introduction
25 of these bills, there was a lot of work by the

1 Senate, by the Assembly, by the Attorney General's
2 Office, in terms of collecting thoughts and opinions
3 over the last couple of years.

4 So this is the beginning of the
5 public-testimony process.

6 We have a number of speakers who will be here
7 today. Each one is going to speak for ten minutes.

8 This is also the first in a series of
9 three public hearings. This will be the first one
10 today, in Albany.

11 On Friday, there will be one in
12 New York City; and on the following Tuesday, there
13 will be one in Rochester, New York.

14 So what I would like to do at this time, is
15 also thank the people that work very hard on putting
16 this together:

17 My Albany-district office staff, particularly
18 a clerk of the Committee, Randi Malman;

19 Obviously, the legal staff from my office;
20 And, also, the Senate central staff, as well
21 as the Assembly folks, and the Attorney General's
22 Office, has also worked very, very hard on this.

23 So, before we whither away the time that
24 we're allotted this morning, I would like to call
25 our first witness.

1 With us today, we have New York State Office
2 of the Attorney General, and if you could introduce
3 yourself.

4 One thing I will mention for those that are
5 here:

6 Many people have submitted written testimony.

7 I have read all of your testimony. I presume
8 a lot of the other members have read it as well.

9 So, you know, we have read it. You know,
10 it's up to you if you want to summarize it, read it,
11 but, we would also like to engage in some sort of
12 dialogue as well.

13 So, with that, we'll turn it over to our
14 first witness.

15 JASON LILIEN: Thank you, Mr. Chairman,
16 members of the Committee.

17 Thanks for this opportunity to testify.

18 I am Jason Lilien, bureau chief of the
19 charities bureau of the New York State Attorney
20 General's Office.

21 At the outset, I would like to thank, and
22 extend Attorney General Schneiderman's appreciation
23 to you, Chairman Ranzenhofer, for introducing the
24 Nonprofit Revitalization Act on behalf of the
25 Attorney General.

1 And, of course, to Senator Marcellino as
2 well, for all of your support.

3 Because of your leadership, New York State is
4 one step closer to achieving long-needed reform.

5 We thank you for convening this hearing, and
6 for all of the work that you and your staff are
7 doing to support and strengthen the nonprofit sector
8 in New York.

9 I just want to talk for a few minutes about
10 how we got to where we are, in terms of the
11 legislation.

12 This act, the Nonprofit Revitalization Act,
13 represents nearly two years worth of effort,
14 outreach, and collaboration.

15 In the spring of 2011, shortly after taking
16 office, Attorney General Schneiderman launched an
17 important new initiative aimed at reducing burdens
18 on the nonprofit sector, and ensuring the public's
19 continued confidence in nonprofits in New York.

20 As you are well aware, for the work that you
21 have done, and your staff has done, New York's
22 nonprofit laws are significantly outdated. They
23 place unnecessary burdens on New York, and these are
24 burdens that are unique to New York, that, in most
25 cases, don't exist elsewhere.

1 You know, it is too difficult for nonprofits
2 in New York to conduct transactions, hold or conduct
3 board meetings or membership meetings, to merge, or
4 even dissolve, which, you know, in this economy is
5 becoming even more pressing.

6 There are unnecessary barriers to forming and
7 starting new nonprofits in New York.

8 I mean, there's a legitimate debate about
9 whether or not there are too many nonprofits in
10 New York.

11 But, if a nonprofit needs to, wants to, form
12 in New York, there shouldn't be unnecessary
13 obstacles in its way if it's intending to provide
14 necessary services for New Yorkers.

15 And our nonprofits throughout the state must
16 spend more on compliance costs than nonprofits spend
17 in other states.

18 We in government often talk about reducing
19 the burdens on the private sector in stoking
20 economic development, which, of course, is
21 essential, but we also need to make sure New York
22 provides a friendly climate for nonprofits to do
23 business so it is easier to provide programs and
24 services to New Yorkers.

25 Now, at the same time, we have to ensure that

1 the public trust in the nonprofit sector remains
2 strong. The vast majority of nonprofit
3 organizations are operated by honest, dedicated
4 board members and staff.

5 But when scandals emerge, as they
6 unfortunately have, and in recent past they have,
7 the entire sector suffers, and taxpayers and donors
8 begin to question whether the billions of dollars
9 provided annually to nonprofits are being adequately
10 overseen.

11 That is why the Attorney General convened the
12 Leadership Committee for Nonprofit Revitalization in
13 2011, and tasked it with developing smart, focused
14 reforms, to reduce unnecessary burdens on
15 nonprofits, and to improve governance and oversight.

16 The Leadership Committee was comprised of
17 32 nonprofit leaders from across the state who
18 represented a diverse cross-section of the sector.
19 Small organizations were represented, as well as
20 large, upstate, downstate.

21 And I had led the committee's efforts, from
22 its inception through the issuance of its report
23 last year, and, in subsequently developing the
24 legislation that is the subject of today's hearing.

25 Now, throughout this process, our office has

1 strived for partnership, collaboration, and
2 outreach.

3 Rather than imposing our own views on how to
4 reform the Not-For-Profit Corporation Law, we asked
5 nonprofit leaders to share their perspectives on how
6 to best reduce burdens, cut tape -- red tape, and
7 eliminate bureaucracy.

8 It was very important that we were not trying
9 to jam down regulations on a sector, but to hear
10 from them, from the bottom up.

11 And for nearly a year, the nonprofit sector
12 and its regulators sat at the same table and
13 identified the best ways to address the most
14 pressing issues facing nonprofits, both within it
15 and outside of it.

16 And it's important to stress, this was not a
17 kitchen-sink approach.

18 We wanted to get something done. I think the
19 nonprofit sector wanted to get something done.

20 And what we asked the nonprofits was: Tell
21 us what your top 10, 15, 20 issues are. What would
22 make the most difference?

23 And that's what we focused on.

24 And, you know, we also discussed at great
25 length, the importance of board governance, and the

1 challenges the nonprofit sector, and those of us in
2 government, face in trying to improve it.

3 You know, as the governmental entity that is
4 charged statutorily with enforcing the state's
5 nonprofit laws, we, of course, have our own views on
6 accountability and oversight.

7 Now, it was through this robust process the
8 Leadership Committee ultimately made a series of
9 comments and forward-looking recommendations to
10 improve and modernize New York's nonprofit laws.

11 The committee members were able to achieve
12 remarkable consensus on most issues, and I think
13 that reflected their genuine desire to see their
14 long statutory-reform-style properly implemented.

15 And I will say, you know, the members brought
16 very different views to the table.

17 Some had very strong views, developed over
18 their careers, and their life and career
19 experiences, but I think what they tried to do, and
20 I think what we achieved through the process, is to
21 find common ground, recognizing that some, you know,
22 would inevitably believe that the reforms, you know,
23 went too far, while others believe that they didn't
24 go far enough.

25 You know, to their credit, I think the

1 committee put aside their differences and came
2 together for the betterment of the sector as a
3 whole.

4 And I think what you're going to hear,
5 hopefully today, and we're going to hear in the
6 hearings ahead, and what we certainly are hearing,
7 is that there is a real yearning on the part of the
8 nonprofit sector to see reform take effect now.

9 This has been years in the works.

10 And I think there's a lot of energy and
11 excitement that, for the first time in a long time,
12 we're very close to change.

13 Now, as you know, at the end of last year's
14 session, we -- our office drafted legislation based
15 on the Leadership Committee's recommendations.

16 Since then, we have worked with
17 Chairman Ranzenhofer, Chairman Marcellino, and your
18 staffs, to introduce the Nonprofit Revitalization
19 Act.

20 Together, we sought and received extensive
21 input from the nonprofit sector on the legislation.

22 As soon as the session ended last year, we
23 started a road show; a tour.

24 I went around and personally spoke to
25 countless organizations, had countless meetings, to

1 get the broad view of where the nonprofit sector was
2 on the legislation we drafted last year.

3 And we received substantial input, and those
4 changes are reflected in the revised version of the
5 bill that's being discussed today.

6 Now, this bill, the Nonprofit Revitalization
7 Act, is essential to maintaining New York's
8 nonprofit sector as the most vibrant in the country.

9 The reforms will -- that are contained in the
10 bill will save nonprofits significant time and
11 money, and allow organizations to focus on what is
12 most important: performing their mission as
13 effectively as possible.

14 For every dollar that is spent on unnecessary
15 compliance, on pushing paper around, for every hour
16 that is spent on doing that, money and time is being
17 taken away from critical programs and services.

18 And that's why we're behind this legislation.

19 Now, in a few key areas, I'll just -- you
20 know, they're in my testimony, you're going to hear
21 from others, you know, simply, in simple terms, the
22 Nonprofit Revitalization Act will bring New York's
23 nonprofit laws into the twenty-first century, by
24 embracing technology, by allowing e-mail, and video
25 conferencing, to conduct meetings and votes.

1 You know, no longer will you have to have
2 staff manually stuff hundreds of envelopes to be
3 mailed out to members for a meeting, when they can
4 be shared electronically at a fraction of the time
5 and cost.

6 And no longer will nonprofits seeking to
7 merge, or sell significant assets, which they may
8 need to do because of this economy, have to face
9 unnecessarily long, cumbersome, and overlapping
10 procedures, many of which are unique to New York,
11 which are costing them untold amounts in added legal
12 fees and other expenses.

13 No longer will new nonprofits seeking to form
14 in New York have to face these unnecessary
15 roadblocks I discussed earlier.

16 No longer will we hear lawyers -- lawyers
17 advising their clients to incorporate in other
18 states, like Delaware, to avoid the burdens and red
19 tape resulting from our statute.

20 When that happens, when you have lawyers
21 saying, "Incorporate in Delaware to avoid New York
22 statute," what happens is, not only do you have
23 revenue shifting to the other states, because of
24 filing fees filed elsewhere -- paid elsewhere, but
25 you also have a confused regulatory-and-oversight

1 picture: which state's laws applies -- apply?

2 You know, what we instead look forward to
3 hearing, is that New York -- New York's
4 Not-For-Profit Corporation Law is the model state
5 for the nation.

6 Now, as I've said, and as you know, the
7 Nonprofit Revitalization Act not only seeks to
8 reduce burdens, but importantly, also to improve
9 governance and accountability.

10 And I will just say this:

11 Improving nonprofit governance has been a
12 historic challenge, and will continue to be.

13 There are, I believe, limits as to what can
14 be done by statute.

15 But what was made clear from the discussions
16 among the Leadership Committee, and I know from my
17 own experience, my own experience as a
18 private-sector lawyer advising boards, as a board
19 member of both small and large organizations, as
20 well as my government experience, is that a few
21 meaningful and -- meaningful but balanced changes to
22 New York law will encourage more active and
23 effective oversight by boards of directors.

24 And I just want to emphasize, the board of
25 directors is, and must be, the focal point of

1 nonprofit governance.

2 The board is the entity that is charged with
3 overseeing how charities spend the billions of
4 dollars that flow through them each year.

5 It is the board that gives confidence to
6 donors and to taxpayers that money that has been
7 entrusted to a nonprofit is being put to proper and
8 effective use.

9 And to inspire that confidence, it is
10 essential that boards engage in certain baseline
11 responsibilities.

12 Boards of charities that are required to
13 obtain a financial audit, for example, need to be
14 engaged in overseeing the financial-audit process
15 for it to have value, and procedures need to be put
16 in place to prevent improper self-dealing.

17 You know, the reality is, that New York law
18 today provides very little guidance to board members
19 in these critical areas.

20 So, for example, while New York law requires
21 charities above a certain size to obtain a financial
22 audit, the statute is silent.

23 It is silent about what should be done with
24 the audit when it's completed. There is no express
25 requirement that the board review the audit's

1 findings with the outside auditors.

2 Too often -- too often, the relationship is
3 between the outside auditor and the executive
4 director, so the board doesn't get engaged.

5 And that discussion is critical, so the board
6 can understand the yellow flags, the warning signs,
7 before they become red flags.

8 And I will just say, as you I'm sure well
9 know, the law needs to be strong on self-dealing
10 transactions.

11 Unfortunately, it does not expressly provide
12 guidance on how boards should handle self-dealing
13 transactions, and it is not expressly required that
14 boards, in fact, determine that a transaction is
15 fair, reasonable, or in the best interests of the
16 corporation.

17 Let me just say, that the requirements that
18 we are proposing seek to provide the clarity that
19 doesn't currently exist in New York, to give boards
20 a roadmap as to what baseline responsibilities are
21 expected of them, to help them to make responsible
22 decisions, and to protect their reputations, as well
23 as the organization's assets.

24 Now, let me just say this, and it's very
25 important, that these are baseline responsibilities:

1 While I believe that the
2 Nonprofit Revitalization Act would result in the
3 strongest governance framework in the country, I
4 recognize that much of governance needs to be left
5 to voluntary practice.

6 Indeed, good corporate governance requires
7 boards to adopt a range of voluntary practices that
8 necessarily go beyond what should, and can be,
9 mandated by law.

10 In most cases, governance, especially in the
11 nonprofit sector, does not lend itself to a
12 one-size-fits-all solution, and boards should have
13 the discretion to determine for itself, what is the
14 most appropriate.

15 So while it's essential that a -- you know,
16 we help create a framework of good corporate
17 governance statutorily, ultimately, good governance
18 comes down to people: who is on the board; and
19 whether they have the skills, the time, the
20 commitment, the capacity, to serve as effective
21 directors.

22 And I just want to, before I conclude, say
23 that, outside of the statute -- outside of the
24 statute, our office is addressing this by launching
25 two very important new initiatives, that I believe

1 will compliment these new reforms, and significantly
2 improve governance of the nonprofit sector.

3 We focus on two aspects:

4 One is on director recruitment -- enhancing
5 director recruitment;

6 And also on director training and education.

7 The first initiative is called
8 "Director's View."

9 It's a voluntary program aimed at helping
10 board members improving their understanding of their
11 role and responsibilities.

12 It's a statewide initiative that will provide
13 free or low-cost training on good-governance
14 practices through, both, online programs, and
15 materials and in-person trainings.

16 It's a partnership between our office and the
17 nonprofit sector, and, top colleges and
18 universities, that include, Rockefeller College
19 right here in Albany, Cornell, NYU, Columbia,
20 Binghamton, and others. They've all agreed to help.

21 And I think what is important here, is that
22 board members not only know what their
23 responsibilities, understand what their role is,
24 they have a comfort level, so they become more
25 actively engaged.

1 The second important initiative is a
2 recruitment initiative called "New York On Board,"
3 which will be a partnership between the business
4 community in New York and the nonprofit sector.

5 This program will recruit diverse and
6 experienced nonprofit directors, and then match them
7 to nonprofits throughout the state.

8 The reality is, the need for directors to
9 serve as the directors is great.

10 And from our review, our research, and our
11 conversations on this issue, it has become clear
12 that there is a talent pool that exists out there
13 today, that are not currently serving on nonprofit
14 boards.

15 So the goal is to create a new pipeline of
16 directors who are serving with the full support and
17 encouragement of their employers.

18 So, in conclusion, you know, I think it's
19 apparent what we are taking here, is a multi-faceted
20 approach to address this historic issue of nonprofit
21 governance.

22 With a mix of new laws and private-sector
23 initiatives, supported by the business community,
24 supported by the nonprofit sector, and supported by
25 the Attorney General as the regulator, I believe we

1 will improve governance substantially, and increase
2 public confidence and trust in our nonprofit sector.

3 Again, let me thank Chairman Ranzenhofer for
4 introducing the act.

5 I believe -- I do believe we share a common
6 goal in helping New York's nonprofits become
7 stronger, more accountable, and better positioned to
8 carry out their important work.

9 We look forward to continue to work with you,
10 and your staffs, in the weeks ahead.

11 I'm happy to answer any questions you may
12 have.

13 SENATOR RANZENHOFER: Thank you very much for
14 your -- [audio difficulties].

15 Thank you very much for your testimony.

16 And before we move forward, I would just like
17 to introduce Assemblyman Brennan, who is the sponsor
18 of this legislation in the Assembly. He's been
19 working very, very hard over the last couple of
20 years on this issue, as well as his staff.

21 You know, we've been in almost constant
22 contact, talking about this bill, the law-revision
23 bill, and all the different bills that are out
24 there.

25 So I wanted to welcome him, and thank him for

1 all of his efforts so far, and continuing efforts
2 into the future.

3 Jason, thank you for your testimony and your
4 comments, and all the work that you have done over
5 the last couple of years; and, again, for appearing
6 here today.

7 What I'd like to do at this time, if any of
8 the members of the Committee have any questions?

9 Senator Marcellino?

10 SENATOR MARCELLINO: Jason, thank you for
11 coming.

12 And, give the Attorney General our regards.

13 Just so we have a clear perspective of who
14 we're talking to, and what the audience is: How
15 many not-for-profits are there in this state?

16 JASON LILIEN: There are 103,000 nonprofits
17 in New York State, about 65,000 of them which are
18 registered with the Attorney General's Office.

19 There are a number of exemptions in the
20 statute, the largest among them is religious
21 organizations who are not required to register with
22 us.

23 But there are also, of course, trade
24 associations, and other organizations, that are not
25 required to register with us as well, because

1 they're not operating for charitable purposes.

2 SENATOR MARCELLINO: Now, when did you your
3 investigation:

4 How did you break them down?

5 Where did you start?

6 Did you deal with all 200,000 of them at
7 once, or did you segregate into different groups?

8 JASON LILIEN: I think it's a great question.

9 I think, in terms of -- you know, on the
10 burden side of the statute, I think most of the
11 provisions that -- in our statute would benefit the
12 nonprofit community across -- you know, regardless
13 of the type of nonprofit they were: public
14 charities, private foundations, trade associations,
15 et cetera.

16 We are -- it is important to create a more
17 hospitable climate for nonprofits irrespective of
18 the particular type they may have been formed as.

19 On the governance side, we spent a lot of
20 time on identifying which provisions should apply to
21 which entities.

22 On issues such as audits, for example, under
23 current law, only those entities that are soliciting
24 the public for charitable purposes, and have
25 revenues, under current law, of \$250,000, are

1 required to obtain an outside CPA audit.

2 So when the statute -- when we were having
3 discussions among the Leadership Committee, as well
4 as others, about which new audit-oversight
5 provisions should apply, it was logically -- there
6 was a lot of discussion that they should apply to
7 those who are required to get an audit; that we
8 should not be imposing new burdens on organizations
9 that are not currently required to get an audit.

10 However, with respect to related-party
11 transactions, and the requirement that there exists
12 conflict-of-interest policies, those provisions, and
13 the issues that have caused these provisions to be
14 included in our bill, relate more broadly across the
15 nonprofit sector.

16 And I think -- so -- so there are some
17 provisions, including the
18 "related-party transactions" sections of our new
19 bill, as well as our -- the conflict-of-interest
20 policies, would apply more broadly, because the
21 issues affect the sector more broadly.

22 SENATOR MARCELLINO: You also mentioned the
23 boards.

24 I'm familiar with some, I won't name them,
25 organizations with boards, where, the accountant on

1 the board does the accounting;

2 The travel agent on the board handles any
3 travel that the board might do for their purposes;

4 The lawyer represents them legally;

5 And so forth. It goes on and on like that.

6 I can see, and I know several, where this
7 posed serious conflicts of interest and serious
8 problems.

9 Why don't we just ban it completely?

10 If you're on -- why don't we just ban that
11 sort of thing completely; if you're on a board, you
12 can't do business with the agency?

13 JASON LILIEEN: Well, I will say, that point
14 that you're raising, Senator, is a point that is
15 shared.

16 There are those who have advocated for that.

17 You know, I -- there's -- the counter to it,
18 which we heard throughout our Leadership Committee
19 process, is that there are some good related-party
20 transactions.

21 There are transactions that are truly, you
22 know, beneficial to nonprofit, because they provide
23 services that are free or low-cost or below-market,
24 with, really, no benefit to -- to it -- to an
25 insider.

1 You know, I think what we've tried to do in
2 our bill, is to take a balanced approach to this
3 issue.

4 Although our statute would not be -- our bill
5 would not be banning related-party transactions, it
6 is requiring that boards make a determination, an
7 affirmative determination, that those transactions
8 are fair, reasonable, and in the best interests of
9 the organization; consider whether alternative
10 transactions exist that might be more beneficial;
11 and document their decision, so they're on record as
12 to why they -- why this transaction is beneficial to
13 the organization; and the person, or individuals,
14 who may benefit from these transactions cannot
15 participate in those decisions.

16 You're right, some have advocated, you can go
17 one step further, but I think, as a starting point,
18 this would make a significant difference.

19 SENATOR MARCELLINO: Thank you.

20 I'll have more questions, but we'll share
21 time.

22 SENATOR RANZENHOFER: Senator Perkins?

23 SENATOR PERKINS: Thank you very much.

24 First, I would like to thank the Chairman
25 [inaudible].

1 I have to learn how to get this thing turned
2 on.

3 Can you hear me?

4 SENATOR MARCELLINO: Yes.

5 SENATOR RANZENHOFER: Yes.

6 SENATOR PERKINS: Okay, very good.

7 So, you know, I have a few quick concerns I
8 want to ask. I want to follow up on the last
9 question that my colleague was asking, in terms of
10 it; so, I guess it's the conflict of interest.

11 I'm on a board, I have a business.

12 The board that I'm on does business with the
13 company, or some related family member, or otherwise
14 shady arrangement.

15 Does this speak to prohibiting that, or
16 somehow other curbing that, or outing it, or, you
17 know, making it -- if it is that kind of
18 relationship, that it should be reported,
19 explicitly, quickly, regularly, or anything in that
20 vein?

21 JASON LILIEEN: So, it's a good question.

22 So New York law, currently, we have a very
23 weak statute in this regard; a weak statute in a
24 number of areas.

25 One is, it does not require that boards

1 engage in a discussion as to whether or not this
2 transaction that benefits an insider is in the best
3 interests of the organization, or fair or
4 reasonable.

5 Our law would require that.

6 Our law -- our statute would also require
7 that boards engage in a process to determine whether
8 or not there are alternatives to this transaction
9 that exist, and whether they would be more
10 beneficial.

11 And, significantly, I think what is important
12 in our proposed legislation, is that it makes
13 clear -- it makes clear, the Attorney General has
14 the authority to go into court and seek to unwind
15 these transactions.

16 Under current law, you know, although we
17 would argue we have that power to do it, it is not
18 expressed in the statute.

19 And I think what's very important to give the
20 public, give taxpayers, [unintelligible] the
21 confidence their money is not being used to benefit
22 private interests, but to benefit the public, is to
23 ensure that its representative, the
24 Attorney General, can go into court and unwind these
25 transactions when necessary.

1 SENATOR PERKINS: And if I may, Mr. Chairman?
2 And how does this law trigger the
3 responsibility of the Attorney General to actually
4 do that?

5 Because, the attorney general, you know, they
6 don't mean to turn a blind eye necessarily, but they
7 have other things to deal with.

8 And I'm concerned, that if it requires the
9 Attorney General to take an action, then it may
10 act -- not happen.

11 And, so, how does the public and other
12 related interests get protected?

13 Because, this is a very -- this is not an
14 unusual practice for a lot of the boards that I'm
15 familiar with. They are composed of individuals
16 that have a stake in the business of the board.

17 And, it sours the community's perception of,
18 what is actually supposed to be a good thing, being
19 a feather-nesting kind of opportunity, versus, a
20 community benefit.

21 JASON LILIEN: Senator, I couldn't agree with
22 you more.

23 You know, when these transactions come to
24 light, when they're reported on, when they're
25 prosecuted on, it really casts a cloud over the

1 sector and it hurts everyone.

2 What we're trying to do with this provision,
3 requiring active board engagement and approval of
4 related-party transactions, and through -- and
5 through requirements regarding conflict -- new
6 conflict-of-interest policies, or requiring
7 whistle-blower policies, is to ensure that boards
8 take the proactive steps they need to take, so it
9 doesn't come before our office.

10 I mean, what is happening today, because the
11 statute is -- lacks the guidance, lacks the roadmap,
12 lacks the clarity, that we need in statute, we
13 have -- there's confusion, there's uncertainty, and,
14 areas of vulnerability; areas, for those who want to
15 do wrong, to take advantage of.

16 And what I think we're trying to do with the
17 statute, is to make sure that boards understand
18 clearly what their responsibilities are, what is
19 expected of them.

20 And, ideally, what we're striving for here,
21 is if they take these steps, if boards consider
22 whether these transactions really benefit the
23 nonprofit, or do they benefit the individual, and
24 consider whether alternatives exist, and document
25 them, put on paper, "Why? How did you get there?"

1 and have conflict-of-interest policies that are
2 overseen by an audit committee, or other -- another
3 committee of the board, that we will have stopped in
4 the tracks many of these transactions.

5 But when the procedures haven't worked, that
6 is when we would hope to have the authority to go
7 into court and protect owners and taxpayers, and
8 unwind these transactions.

9 SENATOR PERKINS: Thank you.

10 And, again, Mr. Chair, if I may?

11 So when there is this sort of gross
12 misconduct, and the type that we're talking about,
13 who is accountable?

14 The individual -- the gross individual, or,
15 the individuals who are in cahoots?

16 The board?

17 The leadership?

18 All?

19 Or -- how do --

20 JASON LILIE: It can be all.

21 SENATOR PERKINS: -- how does this relate to
22 that?

23 JASON LILIE: Senator, it can be all.

24 Clearly, the individual which -- who is --
25 may have been engaged in improper self-dealing, in

1 bad faith, could be held, and should held,
2 accountable.

3 But if the board failed in its oversight
4 responsibilities; if the board turned a blind eye,
5 and failed to become -- failed to fulfill their
6 fiduciary responsibilities, the board itself could
7 be held accountable. And, quite frankly, should be.

8 SENATOR PERKINS: And this bill explicitly
9 acknowledges that?

10 JASON LILIEN: I believe it's -- the bill is
11 clear as to what the board's responsibilities are,
12 yes.

13 SENATOR PERKINS: Okay, so long as -- I just
14 want to be sure.

15 So, I recognize a group of top colleges and
16 universities were involved, including
17 Rockefeller College, so on and so forth.

18 So, what happened to the City University of
19 New York?

20 JASON LILIEN: Oh, I'm sorry. I didn't
21 include Baruch.

22 Baruch is the representative for
23 New York City -- for CUNY.

24 I apologize.

25 UNKNOWN SPEAKER: It was just taken for

1 granted.

2 JASON LILIEEN: And Baruch, by the way --

3 SENATOR PERKINS: I don't want them to be
4 taken for granted. I just wanted to be sure.

5 JASON LILIEEN: -- they are one of the leaders
6 in this area.

7 So we -- it's a much larger list, what you
8 have.

9 SENATOR PERKINS: Oh, Okay.

10 For the record, the City University is a part
11 of this --

12 JASON LILIEEN: Absolutely.

13 SENATOR PERKINS: -- this reform --

14 JASON LILIEEN: City and State universities.

15 SENATOR PERKINS: -- and joins other
16 universities.

17 Thank you very much.

18 I want to express my appreciation for the --
19 for this giant step that we're taking.

20 One final question:

21 You know, a lot of the groups that I work
22 with are not -- are small not-for-profits, somewhat
23 inconsequential by comparison to the giants that we
24 are more familiar with, like, I guess, the Red Cross
25 is considered a not-for-profit, and things of that

1 nature.

2 So, how does this relate to those smaller
3 entities that very often are -- operate under the
4 radar, but, nevertheless, become big front-page
5 scandals when, you know, big corruption takes place?

6 Does this -- how does this [unintelligible]
7 those into --

8 JASON LILIEN: Well, Senator, the
9 self-dealing provisions we were just discussing
10 would apply to the small ones as well as the large
11 ones.

12 The conflict-of-interest requirements, the
13 interest -- the policy requirements, would apply to
14 small and large.

15 And, certainly, the voluntary programs that
16 we're talking about, both the board-recruitment
17 programs and the governance -- the
18 director-education programs, will, in many ways, be
19 targeted to those smaller organizations because,
20 often, they need the education the most.

21 SENATOR PERKINS: So the AG's Office is
22 equipped to focus in that direction as well?

23 JASON LILIEN: Oh, absolutely.

24 And we're spearheading on these two programs.
25 We are actively working on rolling those programs

1 out.

2 We've -- we're working on them on a daily
3 basis, and we hope to launch them soon.

4 With -- I mean to say, we also have a broad
5 representation of the nonprofit sector working with
6 us in those programs.

7 It is not AG's Office that are doing --

8 SENATOR PERKINS: Okay, great to hear that,
9 because, again, there is an army of not-for-profits,
10 small community-based organizations, involving great
11 work, good work, social-service work in many
12 instances. And -- but every once and a while,
13 fingers get sticky, and tax dollars and other
14 resources that are intended to help somebody, with a
15 problem, or provide some kind of service, you know,
16 gets misused.

17 JASON LILIEEN: On that point, let me just --

18 SENATOR PERKINS: And very often, they go
19 under the radar until there's a huge scandal. And
20 by that time, the culprits may have, you know,
21 gotten in the wind.

22 JASON LILIEEN: -- and I think what's
23 important -- an important point that I would like to
24 highlight, is that, the nonprofit sector, I think,
25 in this instance, has stood up and recognized that

1 it's time that we improve the perception, if not
2 reality, of nonprofit governance in New York.

3 And they have helped support and draft and
4 formulate a lot of the governance initiatives that
5 are now incorporated in this legislation.

6 I think they represent -- you know, they
7 recognize, and you'll hear from them today, and your
8 future hearings, the importance in taking steps,
9 that we don't have negative press articles, we don't
10 have donors questioning whether they should be
11 giving and supporting New York nonprofits.

12 SENATOR PERKINS: Thank you very much.

13 JASON LILIE: Thank you.

14 ASSEMBLYMAN BRENNAN: Thank you,
15 Senator Ranzenhofer; and let me express my
16 appreciation to you for sponsoring hearings on this
17 important concern.

18 Following up on Senator Perkins' question,
19 the "related-party" elements of this legislation,
20 there are no thresholds for that.

21 You have a threshold change for outside
22 audits, in terms of revenues, for the.

23 Not-for-profit, but, the obligation to do a
24 conflict-of-interest statement or policy for the
25 board, and then to do the -- follow the procedures,

1 has no threshold?

2 No matter how small you are, you got to do
3 that?

4 JASON LILIEEN: That's correct.

5 ASSEMBLYMAN BRENNAN: Okay.

6 I just wanted a quick clarification:

7 This legislation does not apply to housing
8 cooperatives?

9 I mean, they are not-for-profit
10 organizations.

11 JASON LILIEEN: There is a small -- right.

12 I -- that's -- well, it depends.

13 There are some -- there's a very small
14 handful, I would have to check this, that are
15 membership-based cooperatives that are formed under
16 the Not-For-Profit Corporation Law, and would be
17 treated as corporations for purposes of the statute.

18 Most are not formed under the
19 not-for-profit -- the vast majority of them are not
20 formed, and this would not apply.

21 ASSEMBLYMAN BRENNAN: Do you have some sense
22 of how many people might be affected by the
23 membership-type in housing co-ops?

24 JASON LILIEEN: We can get you that data.

25 We'll have that -- we can get you that.

1 ASSEMBLYMAN BRENNAN: But you think it's
2 pretty small?

3 JASON LILIEN: My understanding, it is small.
4 And these aren't necessarily housing co-ops.
5 I think they were largely created, initially,
6 more in the food co-op-type environment.

7 ASSEMBLYMAN BRENNAN: All right, so what
8 about a membership food cooperative that was
9 incorp -- would that -- this would apply to them?

10 JASON LILIEN: If they're food -- this
11 statute applies -- remember, we're talking about
12 which provisions apply. Right?

13 So, for the provisions that apply broadly to
14 corporations that are formed under the
15 Not-For-Profit Corporation Law, if that entity was
16 formed under the Not-For-Profit Corporation Law,
17 certain sections would apply. And, you know, it is
18 unlikely those entities would be subject, for
19 example, to the audit-committee requirement, because
20 those entities, presumably, would not be soliciting
21 the public for charitable dollars, which is the
22 threshold requirement for registration, and hence
23 the need for an audit.

24 ASSEMBLYMAN BRENNAN: But your related-party
25 transactions, and things like that, that would?

1 JASON LILIEEN: Right, it would -- right,
2 there is no carve-out for those organizations under
3 the current statute.

4 ASSEMBLYMAN BRENNAN: Okay, thank you.

5 JASON LILIEEN: You're welcome.

6 But let me -- may I just, Senator?

7 Also, I didn't get a chance to thank you, and
8 acknowledge your efforts, and thank you for
9 introducing the bill in the Assembly as well.

10 So, thank you, Assemblyman.

11 SENATOR RANZENHOFER: One final question.

12 ASSEMBLYMAN MONTESANO: On the -- you gave a
13 breakdown earlier about the not-for-profit
14 corporations that have to register, and then they
15 don't register.

16 Notwithstanding the fact that they're not
17 required to register with the Attorney General's
18 Office, they're still going to be covered by this
19 new statute, as far as the reportings?

20 JASON LILIEEN: Certain provisions would.
21 Right?

22 So, the audit-oversight provisions would not
23 apply -- would not apply.

24 But, the related-party transactions,
25 protecting -- you know, protecting against improper

1 self-dealing transactions, requiring
2 conflict-of-interest policies, they would apply more
3 broadly, you know, across the board.

4 ASSEMBLYMAN MONTESANO: Thank you.

5 SENATOR RANZENHOFER: Well, Jason, thank you
6 very much for your -- not only your testimony here
7 today, and answering the questions, but for the work
8 that you and the Attorney General have done over the
9 last couple of years in bringing this issue to the
10 forefront.

11 Of those 103 not-for-profit organizations,
12 you know, 99 percent of them, you know, are doing --
13 probably even higher than 99 percent, are just doing
14 great work.

15 And, you know, again, I just appreciate you
16 being here today, testifying, and providing the
17 input that you did.

18 So, thank you very much.

19 JASON LILIEN: Thank you.

20 SENATOR RANZENHOFER: We're now going to hear
21 from Peter Kiernan, who is the chair of the
22 Law Revision Commission.

23 And as Peter is walking up, I also want to
24 acknowledge and thank him. He has also worked very,
25 very hard, and very, very closely, his entire group,

1 with me, with our staff, in dealing with this issue.

2 Same two years that the Attorney General has
3 been working on this issue, you've been working on
4 this issue with your group as well, and I'm sure
5 with the Assembly.

6 So, again, and one other thing I want to
7 mention:

8 You know, we're here for this public hearing.

9 There are two bills that have been
10 introduced:

11 One is the Attorney General bill that we just
12 heard about, introduced by Assemblyman Brennan and
13 myself;

14 And there's also a law-revision version of
15 this bill, which I have introduced.

16 So we are here to discuss both bills, and,
17 again, to solicit comments and input on all the
18 suggestions that are out there.

19 So, Peter, I want to thank you, in advance,
20 for all the work that you've done thus far, and,
21 again, I'm looking forward to hearing your comments,
22 and listening to you answering questions today.

23 Thank you for being here today.

24 PETER KIERNAN: Well, thank you, Senator.

25 I'm grateful for your invitation to testify

1 about not-for-profit law reform.

2 Chairman Brennan, members of the Legislature,
3 I just want to make three fundamental points.

4 My testimony, I believe, is part of the
5 record, but the first is:

6 With respect to the need for reform, as has
7 been mentioned, there are more than 100,000
8 not-for-profit corporations in the state.

9 It needs to be emphasized --

10 I missed part of Mr. Lilien's testimony,
11 maybe he mentioned this.

12 -- but, it is important to recognize the
13 economic significance of the not-for-profit
14 corporation sector of our community.

15 There are -- these in excess of
16 100,000 corporations represent about 1.25 million
17 employees. That's 14 percent of the New York State
18 workforce;

19 They have annual revenues in excess of
20 \$150 billion a year;

21 They hold assets that are worth hundreds of
22 billions of dollars;

23 And the not-for-profit sector is growing.

24 There has been efforts at reform,
25 comprehensive reform, that should be noted, that the

1 last time there was a comprehensive reform of the
2 state's Not-For-Profit Corporation Law was in 1970,
3 and before then, it was 1896.

4 So there has been some sporadic efforts, some
5 concentrated as well, in the last couple of years.

6 The New York State Bar Association had
7 submitted legislation several years ago. Unhappily
8 it hasn't been able to move. I think there are
9 reasons for that.

10 The Attorney General had a bill last year
11 that did not move, and has been working hard on this
12 issue, as we recognize, and as you've just heard.

13 The reason the Law Revision Commission got
14 involved, was that there was a lack of consensus on
15 many important issues.

16 We noted that the New York City Bar
17 Association submitted more than 100 pages of
18 comments to the State Bar Association's bill. There
19 was a tremendous lack of agreement.

20 So Law Revision Commission, and this is very
21 consistent with its mission, decided to take up the
22 matter reform in an effort to arrive at consensus on
23 the key issues.

24 And I think on the major issues we have
25 achieved that.

1 And, Senator Ranzenhofer I'm very grateful
2 for you for introducing S3755, the Law Revision
3 Commission's bill.

4 I do want to emphasize, that the Law Revision
5 Commission is totally non-partisan. We have no
6 agenda, other than to see reform achieved, and all
7 we want to do is serve as a vehicle for consensus.

8 Another reason why there is a need, is that
9 the current statute is confusing, it's cumbersome,
10 it's unwieldy, and it's counterproductive.

11 The interaction between the not-for-profit
12 community and the government, with respect to
13 incorporation or merger of two not-for-profits, or
14 dissolution of an entity, produces confusion, and
15 oftentime [sic] resentment.

16 We heard a lot -- "we" being the Law Revision
17 Commission -- a lot of anecdotal evidence that it
18 can take us a much as a year just to incorporate a
19 not-for-profit corporation.

20 It can take even longer than that to dissolve
21 one, even if it doesn't have any assets.

22 Now, by contrast, one can form a
23 not-for-profit corporation in Delaware, literally,
24 overnight.

25 So, that's bad for business for New York.

1 We find, increasingly, and not surprisingly,
2 that most not-for-profit corporations that are
3 formed now are formed in Delaware.

4 That escapes, as Mr. Lilien indicated, much
5 of New York's regulatory purview.

6 So, that is why there's a need.

7 I think, though, my second point is, that it
8 can be a mistake to liken not-for-profit
9 corporations and the not-for-profit law to business
10 corporations and the business-corporation law.

11 It's true that not-for-profit corporations,
12 like business corporations, merge. They enter into
13 joint ventures. They acquire and dispose of assets.
14 They have to dissolve on occasion. They enter into
15 financing arrangements.

16 But, they're not like business corporations.

17 Business corporations have owners, and
18 shareholders, and their responsibility is to mind
19 the bottom line.

20 But, the not-for-profit corporation enjoys
21 the extraordinary privilege of tax -- of being
22 tax-free. And in exchange for that privilege, it
23 has to promote the public interest, due the public
24 good, and be mindful of that at all times.

25 Now, mindful of that, we -- our statute,

1 which you introduced, contains themes that are
2 consistent with these concerns, particularly with
3 respect to the public good, and also the fact that
4 many not-for-profit corporations, increasingly so,
5 do the work of government, and that's particularly
6 in the areas of social services, and providing
7 assistance to the vulnerable.

8 So we, in our effort, tried to simplify the
9 statute, make it easier to incorporate, make it
10 easier to merge, make it easier to dissolve, by
11 streamlining the regulatory steps that have to be
12 encountered to form a corporation.

13 For example, currently in the statute there
14 are four types. This is an extraordinary source of
15 confusion.

16 We reduce that to two types: charitable
17 corporations, and what we call
18 "beneficent corporations" -- "beneficent
19 corporations."

20 Those two categories cover the entire range,
21 including housing cooperatives; the entire range of
22 tax-free organizations in New York State.

23 With respect to consents, we greatly reduced
24 the need to achieve -- to attain [sic] consents from
25 various regulatory agencies.

1 We didn't eliminate the need for consent in
2 the so-called "budget-busters," which are hospitals,
3 and things that the Regents -- universities and
4 colleges that get chartered by the Regents, those
5 still would require consent.

6 But almost all other instances, consent is
7 not required.

8 And, like the Attorney General, we enacted --
9 or we propose to enact, we include it in our bill,
10 conflict-of-interest provisions,
11 related-transactions provisions, related-party
12 transactions; also the needs for audits,
13 compensation committees, and compensation
14 procedures, whistle-blower procedures.

15 Now, we noted, and we heard, the argument
16 many times, that the traditional upstate-downstate
17 divide prevents the achievement of agreement here.

18 And we don't believe that.

19 I think there is not an east-west or a
20 north-south division; rather, the division is
21 between large not-for-profits/very substantial
22 not-for-profits, and small not-for-profits.

23 The New York City region has enormous numbers
24 of small not-for-profits.

25 Western New York and northern New York have

1 substantial large not-for-profits.

2 The division really is between large ones and
3 small ones.

4 There isn't any doubt that very substantial
5 not-for-profit corporations should have
6 audit-reporting requirements, and outside audit
7 requirements. They should have compensation
8 guidelines. They should have whistle-blower
9 provisions.

10 And all not-for-profit corporations should
11 have related-party transaction guidance and
12 conflict-of-interest guidance.

13 The way to handle that division, as was
14 mentioned in the questioning earlier, is to have
15 thresholds.

16 There's no need, on very small corporations,
17 to require them to have outside audits, or to retain
18 legal advice or financial advice, where their assets
19 get wasted on compliance matters rather than doing
20 the public good.

21 But large corporations, large entities, have
22 the assets, and have the responsibility, to meet
23 regulatory requirements.

24 There is, of course, the very troubling issue
25 of related-party transactions, conflicts of

1 interest, which occupied some of the attention in
2 the questioning, and occupied a lot of our attention
3 in our discussions with interested parties.

4 I think it's important to recognize that
5 there is such a thing as a good conflict of
6 interest.

7 In a small community, maybe a small
8 not-for-profit corporation, it's important to have
9 prominent individuals serve on the boards.

10 There are occasions, for -- I'm just making
11 as an example, you may have the bank president on
12 the board. That's a good thing;

13 And it may be that the liquid assets of the
14 corporation are held by that bank.

15 That's a conflict, on its face, but it can be
16 a good conflict, and it can be dealt with by
17 adequate disclosure and transparency, and recusal
18 when necessary, and the knowledge of everyone on the
19 board.

20 That permits that kind of activity, which we
21 would endorse.

22 Finally, I just want to note that, in its
23 deliberations over the last two years, the
24 Law Revision Commission met regularly, and had close
25 contact with the major bar associations of this

1 state, with the Attorney General, with the
2 not-for-profit community, with many interested
3 practitioners.

4 We held -- we don't have hearings, but we
5 held, say, what we call "a roundtable." We
6 circulated drafts.

7 We formed a consensus, based on a lot of
8 opinions that were offered to us.

9 We also had expert advice.

10 One of the jobs of the chair of the
11 Law Revision Commission, is to recruit pro bono
12 assistants.

13 We were assisted by Professor James Fishman
14 at Pace Law School, who teaches not-for-profit law,
15 and is widely published as a widely published
16 scholar in that area of the law;

17 And, Bill Josephson, who's on your witness
18 list, who, under Attorney General Spitzer, was head
19 of the charities bureau for five years and made
20 several significant reforms.

21 And we also have law professors that serve on
22 the board of the commission.

23 So, thank you, Senator. I'm very grateful.
24
25

1 SENATOR RANZENHOFER: The question that I
2 have for you --

3 And, Peter, thank you for your testimony
4 today, and as I mentioned earlier, for your
5 involvement with -- personal involvement, and the
6 involvement of your group, over the last several
7 years.

8 -- what are your group's, or your thoughts,
9 with respect to those thresholds that you mentioned
10 for audits, in terms of dollar amount, and in terms
11 of number of members in the organization, and
12 employees?

13 PETER KIERNAN: Well, we have thoughts on
14 that.

15 SENATOR RANZENHOFER: That's why I asked.

16 PETER KIERNAN: We think that there -- first
17 of all, there should be a threshold.

18 Now, any time you pick a threshold that's
19 somewhat arbitrary, we believe that all corporations
20 that have more than \$500,000 of annual revenue
21 should undergo an audit.

22 Certainly, with respect to their executives,
23 if they have more than \$2 million in annual
24 revenues, they should have compensation guidelines.

25 Our important message, is that there should

1 be audits -- or, excuse me, there should be
2 thresholds. That's the way to bridge the divide and
3 have the law applicable to all corporations --
4 not-for-profit corporations.

5 The selection of the audit is data-driven in
6 many respects -- the selection of the thresholds,
7 rather, is data-driven, and we can determine how
8 many not-for-profit corporations have in excess of
9 \$500,000 of income, or, \$200,000 of annual revenues,
10 in respect of putting additional scrutiny on their
11 key employees and executives.

12 But the important thing, is to have
13 thresholds.

14 The same is true of whistle-blowers.

15 We thought that a whistle-blower policy was
16 required if a not-for-profit corporation had more
17 than a million dollars of annual revenue.

18 SENATOR RANZENHOFER: Okay, one other
19 question I have for you, with respect to the
20 conflict of interest that you mentioned in the
21 example that you gave in a small community of, a
22 bank president serving on a not-for-profit, and the
23 proceeds or the assets of that not-for-profit being
24 held in his bank.

25 I mean, is there any way that you would

1 define, you know, what type of conflict of interest
2 would be permissible, and what type of conflict of
3 interest would not be permissible, in terms of
4 drafting language for a statute?

5 PETER KIERNAN: What we provide for in the
6 statute is very similar to what the
7 Attorney General's bill, that followed ours,
8 provides, but it -- one, the transactions have to be
9 looked at by the entire board. They have to be fair
10 and reasonable; they have to be for the benefit of
11 the corporation, not for the benefit of any private
12 entity.

13 The -- a person on the board that may be
14 affected by the conflict of interest must be -- must
15 recuse herself or himself in any decisions involving
16 that.

17 And, we heard anecdotal evidence and
18 argumentation about, Well, a certain board member's
19 cousin could own the dry-cleaning service that
20 provides some assistance to the not-for-profit; or,
21 the cleaning services that clean their offices.

22 I mean, you can't legislate, in our view,
23 rules with respect to that, but you can provide
24 common, sensible guidelines and standards of conduct
25 in the legislation.

1 And that's what we recommend --

2 SENATOR RANZENHOFER: So you could --

3 PETER KIERNAN: -- as opposed to, Senator,
4 saying nothing, which is a mistake.

5 The argumentation has been heard that there's
6 lots of jurisprudence under the business corporation
7 law about what directors can and can't do. Let that
8 suffice.

9 But, not-for-profit corporations don't
10 necessarily have the sophistication, nor the legal
11 advice or the fiduciary advice, that members of
12 boards of business corporations have.

13 And it's prudent, and we believe wise, to
14 have guidelines in the Not-For-Profit Corporation
15 Law itself.

16 SENATOR RANZENHOFER: Thank you.

17 Senator Marcellino?

18 SENATOR MARCELLINO: Stay with this threshold
19 business, for whom --

20 First of all, thank you very much for your
21 testimony, thanks for participating, thank you for
22 coming here today.

23 I know this is never easy to do, and it's
24 always a -- some kind of inconvenience to everybody
25 that's involved, but we appreciate your involvement

1 and your input.

2 This threshold business, and the term
3 "fair and reasonable":

4 I'm not a lawyer. I'm a simple school
5 teacher.

6 And the terms "fair and reasonable" seem to
7 be as wide as the Grand Canyon in definition.

8 Is there any way we can narrow that down, so
9 that we don't have every member of the board
10 participating in some way in the business of the
11 not-for-profit?

12 I understand the banker.

13 Well, if he's the only one, okay.

14 But if the lawyer is providing the legal
15 services, if the travel agent is providing the blah,
16 blah, blah, and I could go on naming others, so that
17 every member of the board is in some way, shape, or
18 form involved, I don't think that's fair and
19 reasonable.

20 PETER KIERNAN: Well, I agree, Senator,
21 completely.

22 And I didn't mean to say that "fair and
23 reasonable" covered all sins, or all things that are
24 not wise.

25 The board should have -- a board, any board,

1 should have a conflict-of-interest policy, should
2 have a related-transactions policy.

3 We define in our draft what are considered to
4 be "related parties", that mirrors what the IRS has
5 in its regulations.

6 I think that a conflict-of-interest policy
7 should provide that no one should be on the board to
8 benefit their own business.

9 I mean, a travel agent should not be
10 providing travel-agent services, nor should the
11 lawyers, or the accountants, or other professionals.

12 Now, there is such a thing as "pro bono," and
13 there's such a thing as "low bono," where -- where
14 the -- some services are provided at favorable rates
15 for the -- or no rates, for the entity, that may be
16 of paramount benefit, particularly if the
17 not-for-profit is rubbing nickels together, or
18 something like that.

19 But the principle should be, that no one
20 should serve on a board for the purpose of promoting
21 their own business.

22 They should serve on the board to promote the
23 public interest.

24 And I think, by the way, we would certainly
25 be happy to submit for the record, some detailed

1 views on -- in response to your question.

2 And some of those things sometimes can be
3 addressed through legislative history, and other
4 means, but I would agree with you that catch phrases
5 aren't solutions.

6 SENATOR MARCELLINO: If -- is there any
7 value, in your mind, to setting some type of
8 threshold for administrative costs versus providing
9 service?

10 I have seen some not-for-profit charities,
11 where 60 percent of the money earned goes into
12 administration, and only 40 percent actually gets
13 into the actual service provider.

14 Should there be some kind of level?

15 PETER KIERNAN: Well, that's a -- I don't
16 know if that necessarily would be appropriate for
17 the statute. It might be.

18 But I understand your concern.

19 I mean, sometimes --

20 SENATOR MARCELLINO: Yeah, I have a slightly
21 different bill going in, which is --

22 PETER KIERNAN: -- it takes a dollar to raise
23 a dollar. And people that are -- that happens a
24 lot. And people that make contributions aren't
25 aware of the fact that a large percentage of what

1 they're -- of the dollar they're contributing is
2 going to pay the salary of the person that's asking
3 them for the contribution.

4 And I think some guidance there might be
5 useful.

6 That would be very hard, it seems to me, to
7 control.

8 It could be a subject of annual reporting.
9 And, if there were to be some guideline thresholds,
10 and if the reporting, in an audit, or otherwise,
11 were to indicate that it's out of hand, or it's out
12 of balance, then maybe there should be a regulatory
13 remedy.

14 SENATOR MARCELLINO: Thank you.

15 SENATOR RANZENHOFER: I just want to follow
16 up with one question.

17 You're satisfied with the
18 "conflict-of-interest" definition and the
19 "related-party" definitions in the
20 Attorney General's bill?

21 PETER KIERNAN: Well, I think ours is a
22 little bit broader.

23 I mean, we don't -- I don't quarrel with it.

24 SENATOR RANZENHOFER: Okay.

25 PETER KIERNAN: I just think -- for instance,

1 our division between charitable and beneficent
2 corporations covers -- as I indicated in my earlier
3 remarks, it covers the entire range of
4 not-for-profit, tax-free entities in the state.

5 I think the Attorney General's doesn't
6 necessarily cover them all.

7 And that should be the goal.

8 But, I mean, our differences would be on the
9 margins.

10 SENATOR RANZENHOFER: Okay.

11 Thank you very much, Peter.

12 I appreciate, again, all the hard work up
13 till now, and, again, for providing testimony today.

14 So thank you for being here.

15 PETER KIERNAN: Well, thank you for your
16 attention.

17 SENATOR RANZENHOFER: The next witness --
18 well, not witness, but the next person to testify
19 today is Michael de Freitas, representative from the
20 New York State Bar Association, Business Law
21 Section.

22 And as Michael is walking down here, I just
23 want to make a preliminary statement, that the
24 New York State Bar Association, as well as the
25 New York City Bar Association, has been very, very

1 helpful to our Committee, to the Assembly Committee,
2 and also to the Law Revision Commission and the
3 Attorney General's Office.

4 I want to thank you, and your members of the
5 subcommittees, and the sub-subcommittees, that look
6 at the, you know, minutia and the details of these
7 particular legislative issues that we're studying.

8 And, again, when you got a bunch of lawyers
9 in the room, as I well know, you know, it's hard to
10 get consensus on anything.

11 So, again, I want to thank you and your
12 association for all of your hard work;

13 And, again, for appearing here today to
14 provide your comments on these bills that we're
15 discussing.

16 So, thank you.

17 MICHAEL de FRIETAS: Thank you very much,
18 Senator. I appreciate those remarks.

19 I'm very pleased to be here today to speak
20 before you on one of the legislative priorities of
21 the New York State Bar Association.

22 Our member attorneys represent not-for-profit
23 organizations of all sizes, all types, and in all
24 fields, and all across the state; thus, we bring a
25 broad range of diversity and opinion.

1 Nearly ten years ago, through our
2 subcommittee on nonprofit corporations, we began the
3 process of studying the Not-For-Profit Corporation
4 Law with a view towards modernizing its provisions.

5 We proceeded deliberately, really, and
6 reached out to many practitioners, academics, state
7 government bodies, and other interested persons
8 across the state, and even across the country,
9 seeking thoughts, ideas, and views for improving and
10 modernizing the statute.

11 Our work product, as mentioned earlier, was
12 first introduced as a bill in 2009, I believe, with
13 the expectation that it be instrumental in focusing
14 attention on the need to update and improve the
15 statute.

16 And, of course, we're very grateful to, along
17 with many others, the members of this Committee,
18 legislators in both houses, the State Law Revision
19 Commission, and the Attorney General and his
20 charities bureau, for their willingness over the
21 recent years, and months, to work through and
22 discuss the complex issues -- as we have seen
23 already, the complex issues involved in this area,
24 and for working very hard on their proposals for
25 change.

1 While public attention tends to emphasize
2 governance and financial scandals in recent years,
3 publicly, it seems, much less attention has been
4 devoted to the many operational issues that affect
5 the day-to-day activities of New York
6 not-for-profits.

7 And the proposals that have been made, the
8 bills that are out there, deal with those issues.

9 We, therefore, appreciate these hearings, and
10 your committees focusing on these issues.

11 We believe that the bills of both the
12 Attorney General and Law Revision Commission's work
13 product both make great strides towards improving
14 the not-for-profit law's governance provisions, as
15 well as dealing with some of those operational
16 issues that are both costly and time-consuming.

17 For example, it's long past time for New York
18 to join the mainstream of states across the country
19 that have two simple classifications of corporations
20 instead of our confusing four types of corporations.

21 It will also be good that the proposals would
22 reduce the burden of obtaining state-agency consents
23 to corporate transactions, such as incorporations
24 and mergers, that slow down, and increase the
25 expense of, corporate transactions, and would

1 streamline the process of review and approval by the
2 Attorney General and the court of those major
3 corporate transactions.

4 And we believe that the changes in these
5 bills will clarify the current confusion and make
6 the formation process of nonprofits more efficient,
7 and it will encourage incorporation in New York,
8 which has already been commented on, will be of
9 benefit to our state.

10 We do, however, have serious reservations
11 over some matters.

12 Both bills' proposals to extend court and
13 Attorney General supervision, and to enhance
14 fiduciary duties, applicable to non-charitable
15 corporations, those institutions that are private
16 and have members, are of concern.

17 These mutual-benefit corporations, trade
18 associations, recreational and social clubs, private
19 clubs, in their essence many times, don't solicit
20 charitable contributions, and few, if any, even
21 receive State funds.

22 We believe the existing Not-For-Profit
23 Corporation Law governance provisions are
24 appropriate for such organizations, and that the
25 members of these private entities provide sufficient

1 oversight over the transactions within those
2 entities.

3 Further, we have some suggestions to enhance
4 the ability of not-for-profit corporations to
5 recruit and maintain directors, and are concerned
6 that one of the proposed revisions to the
7 indemnification provisions of directors may be
8 counterproductive in that respect.

9 But in our view, the Attorney General's bill
10 in particular, addresses many of our concerns, and
11 we would appreciate continued dialogue with the
12 Attorney General's charities bureau, and other
13 interested parties, and you and your staffs, in
14 order to provide suggestions that we believe will
15 best accomplish the goal of protecting the interest
16 of the public, and avoiding time-consuming and
17 expensive procedures that don't have corresponding
18 benefit.

19 For example, we appreciate the reforms in the
20 current bills with respect to compensation and
21 conflict-of-interest transactions.

22 However, we believe that they should, in a
23 number of respects, better reflect the provisions of
24 the Internal Revenue Code, which provide for public
25 safeguards and enhanced fiduciary responsibility,

1 and which are proven to be valuable for more than a
2 decade since the IRS regulations were adopted. And,
3 in fact, longer than that, since the federal statute
4 on which those regulations are based, date back to
5 the 1990s.

6 We would be remiss if we didn't commend the
7 Attorney General's Office in its outreach programs,
8 in educating the not-for-profit sector regarding
9 applicable fiduciary obligations, a very important
10 function, critical to the community, in my view.

11 The charities-bureau website contains
12 extremely valuable information regarding best
13 practices and guidance.

14 In closing, on behalf of the New York State
15 Bar Association, I thank you for holding these
16 hearings on a subject of significant importance to
17 New York, and its citizens who receive services from
18 not-for-profit corporations.

19 We commend everyone who has contributed to
20 these bills, And we welcome the opportunity to do
21 our part, to continue our dialogue with interested
22 parties, and the Attorney General, and you and your
23 staffs.

24 I'd be pleased to answer any questions.
25

1 SENATOR RANZENHOFER: Okay, well, again,
2 thank you very much for your testimony, and also for
3 your very specific critique on some of the issues.

4 And with those specific critiques, I have
5 some specific questions.

6 One is, that you had suggested that it would
7 be better for not-for-profit corporations to not
8 have to get these preapprovals from agencies.

9 And there was some testimony earlier, that
10 that was a suggestion as well, with the exception of
11 the health field and the colleges and universities.

12 Do you have an opinion on that?

13 Or, do you feel that's a worthwhile
14 preapproval to get?

15 Or, do you feel that that should also be
16 included in your testimony, that that's a
17 preapproval that's not necessarily needed, and it
18 may be cumbersome?

19 MICHAEL de FRIETAS: That was a feature of
20 our work product of the 2009 bill. It was a subject
21 of extensive discussion, in all those discussions we
22 had.

23 Reflecting the practice of the many thousands
24 of lawyers and the thousands of nonprofits they
25 represent, it seems to us that, in many cases, the

1 consent process isn't serving a significant public
2 interest, because, in many cases, it is a knee-jerk,
3 check-off option.

4 Department of State staff, for example, may
5 simply be insisting, because of a single word that
6 may appear in a "Purpose" clause, that, "Why don't
7 you go and get that agency's consent," even though
8 nothing the corporation is doing is subject to
9 licensure or regulation.

10 So, there are cases of it taking the better
11 part of a year, merely to assemble such consents for
12 corporations that are not even regulated by the
13 agencies whose consents are being sought.

14 And also, anecdotally, in some of these
15 individual cases, we have conversations with agency
16 counsel who say things, like: Well, we don't know
17 why you're asking us for consent, but, sure, we'll
18 issue it.

19 And you then press, and a few weeks later,
20 et cetera.

21 SENATOR RANZENHOFER: So you would eliminate
22 consents for all, the preapproval consents?

23 MICHAEL de FRIETAS: Yes.

24 And in more than that, though, with
25 protections, with safeguards.

1 You know, we recognize that it is very
2 legitimate to have regulatory oversight.

3 So corporations that are subject to
4 regulation and licensure should not be -- have the
5 authority, implicitly or explicitly, to be
6 conducting regulated activities without getting the
7 necessary license.

8 And some of the language we developed made
9 that expressly clear, so that we separate the
10 corporate-formation process from the licensing
11 process.

12 Corporate formation is important, to enable
13 time-consuming tasks, such as IRS tax exemption, and
14 fundraising, to go forward while licensing
15 compliance also goes forward.

16 SENATOR RANZENHOFER: Okay.

17 Then we were talking about, do you have an
18 opinion, or does your association have an opinion,
19 with respect to the audit thresholds that were
20 mentioned earlier today?

21 MICHAEL de FRIETAS: We do. And I think we
22 agree with the comments that you've been hearing
23 this morning, that those audit thresholds are
24 appropriate.

25 I would add that, anecdotally, again, that

1 the cost of audits isn't going down.

2 For a variety of reasons, changes in
3 accounting rules, changes in public expectations,
4 audit work is more intensive; and, therefore, more
5 expensive.

6 So what may have been, you know, a \$2,000
7 audit expense when the \$250,000 threshold was
8 enacted decades ago, might be a \$15,000 audit
9 expense, or a 30,000 or a 40,000 dollar, or more,
10 for organizations.

11 SENATOR RANZENHOFER: Do you feel the
12 \$500,000 level is appropriate?

13 MICHAEL de FRIETAS: We'd like to see a
14 million dollars, if not \$2 million.

15 We think that organizations that size have
16 razor-thin administrative margins.

17 It is difficult to afford five- and
18 six-figure audits for organizations that are below
19 a million, or two million.

20 SENATOR RANZENHOFER: Now, your comments
21 about the enhanced fiduciary responsibilities, and I
22 know you make a distinction between the charitable
23 and the other.

24 Explain, in your judgment, how the existing
25 law is appropriate, as opposed to what's being

1 proposed, in terms of greater disclosure of conflict
2 of interest, or the like.

3 MICHAEL de FRIETAS: Certainly.

4 I think three distinct points:

5 One is, that to the extent that the standards
6 would differ from standards already being followed,
7 either existing New York law and IRS rules, we would
8 be effectively creating a second level of compliance
9 tasks for the nonprofits that may differ from
10 compliance they're doing for other purposes, such as
11 IRS.

12 So the costs, the increased cost of
13 compliance, for a broad range of organizations --

14 SENATOR RANZENHOFER: Let me just stop you.

15 MICHAEL de FRIETAS: Sure.

16 SENATOR RANZENHOFER: So do you feel, if
17 there was language which said, that you had to have
18 compliance pursuant to the IRS regulations, do you
19 think that would satisfy?

20 MICHAEL de FRIETAS: Yes, that would be my
21 second point, that the IRS standards are
22 longstanding, well-established, and, frankly, highly
23 detailed, and take into account many of the
24 questions that have been raised, actually, in this
25 very hearing, very useful definitions of the

1 transactions that require review, and how they are
2 to be reviewed.

3 And they also apply to more than just
4 charities. They apply to what are also called
5 "social-welfare organizations," a larger class than
6 just charities.

7 So, it would apply to more than just 60,000
8 that are registered in New York.

9 SENATOR RANZENHOFER: Now, one of the things
10 that you mentioned, is that, and I appreciate this,
11 that you and your staff are willing to offer other
12 thoughts and suggestions.

13 Now, what I'm looking to do, is to get those
14 other thoughts and suggestions now, so that if there
15 is going to be a bill, hopefully, that will be
16 enacted, that we know what those other thoughts and
17 suggestions are.

18 So, as you're sitting here now, are there any
19 other thoughts and suggestions that you have to make
20 it better a bill for not-for-profit industry?

21 MICHAEL de FRIETAS: Sitting at this table, a
22 laundry list would be difficult to go through.
23 I don't think it's a long list.

24 We have been in regular contact with the
25 Law Revision Commission, and Jason Lilien from the

1 charities bureau.

2 We are actually eager to continue that
3 dialogue, which is why I mentioned it. And they
4 are, too, I believe.

5 And I think that, that, and with your staffs,
6 will get us to where we need to be, because,
7 frankly, from my point of view, with the nonprofit
8 sector our members represent, they're crying out for
9 this kind of reform, to make it easier for them to
10 do their jobs.

11 That really is, I believe, how they look at
12 this law.

13 SENATOR RANZENHOFER: Okay, great.

14 Thank you.

15 Any members have any questions?

16 SENATOR MARCELLINO: Just one.

17 You talked about these mutual-benefit
18 corporations, and you felt that they perhaps should
19 be outside the purview of the Attorney General's
20 supervision, or what, because they don't take State
21 money.

22 Do they not get tax credits, tax write-offs,
23 tax benefits?

24 MICHAEL de FRIETAS: Yes, they get exemption
25 from tax. And in exchange for that, federal and

1 state tax rules extensively regulate what they do.

2 Since it's a tax benefit being given, it's
3 appropriate for the tax authorities to attach
4 conditions to that exemption. And they do.

5 SENATOR MARCELLINO: But it's not appropriate
6 for the Attorney General?

7 MICHAEL de FRIETAS: Oh, it would be new to
8 the law of this state. The Not-For-Profit
9 Corporation Law hasn't. Those provisions being
10 extended to non-charitable corporations in these
11 bills have not heretofore applied to those
12 corporations.

13 I think, philosophically, the underlying
14 rational, is that those kind of organizations have a
15 strong constituency.

16 Someone mentioned that business corps have
17 owners, nonprofits don't.

18 Well, more precisely, these kind of
19 organizations, the private clubs, and such, have a
20 closely involved constituency: their own members.

21 They exercise owner-like investment and
22 authority in the organization, except it's not a
23 financial investment.

24 But it's, nonetheless, a personal commitment
25 and involvement, and they exercise that pretty

1 effectively.

2 And that is what we would be changing by
3 introducing, for the first time under New York law,
4 government oversight over what has heretofore been
5 private-member oversight.

6 SENATOR MARCELLINO: Thank you.

7 SENATOR RANZENHOFER: Okay.

8 Well, again, thank you very much for
9 appearing today, and for your testimony.

10 MICHAEL de FRIETAS: Thank you, Senators.

11 ASSEMBLYMAN BRENNAN: Senator Ranzenhofer,
12 the Assembly has been in session for a while, so I'm
13 going to need to leave, but, my office's counsel is
14 here, and will be listening for the remainder of the
15 hearing.

16 And, I'm going to endeavor to see you next
17 week in New York City, to participate -- I'm sorry,
18 Friday. Okay.

19 And -- well, in that case, I won't be seeing
20 you.

21 But, at any rate, our offices will be working
22 together, as the session progresses, in this
23 important legislation.

24 And thank you for holding these hearings.

25 SENATOR RANZENHOFER: I also want to just

1 thank you for your involvement, and your staff's
2 involvement. You've been a very, very able and
3 helpful partner in trying to push this forward.

4 So, thank you.

5 ASSEMBLYMAN BRENNAN: And ditto to you,
6 Senator.

7 Thank you.

8 SENATOR RANZENHOFER: The next person to
9 testify is JoAnne Sullivan, who is the president of
10 the New York State Association of Cemeteries.

11 And as JoAnne is walking down here, there
12 have been a number of not-for-profits that have been
13 involved.

14 Obviously, we talked about the
15 Attorney General. We talked about Law Revision
16 Commission. We talked about the bar associations.

17 But I would be remiss, if not just thanking,
18 generally, all the not-for-profits groups and
19 associations that have been so involved over the
20 last couple of years, and for those that are here
21 today.

22 So, JoAnne, thank you for being here on
23 behalf of the Association of Cemeteries. I look
24 forward to hearing your testimony.

25 JOANNE SULLIVAN: Thank you very much.

1 Good morning, Chairman Ranzenhofer, and
2 distinguished members of the Committee.

3 I want to thank you for the opportunity to
4 present testimony today regarding proposed changes
5 to New York State's Not-For-Profit Corporation Law.

6 My name is JoAnne Sullivan, and I am the
7 director of the Cemetery of the Highlands located in
8 southeast Orange County, in Highland Mills,
9 New York.

10 Our small not-for-profit cemetery has been
11 serving many generations of families for over
12 175 years.

13 I'm also honored to serve as president of the
14 New York State Association of Cemeteries.

15 The association, also known as "NYSAC,"
16 founded in 1928, represents all cemeteries in
17 New York's 62 counties.

18 The association is the only statewide trade
19 association representing the nearly
20 1800 not-for-profit cemeteries located in nearly
21 every subdivision of government.

22 The association works to protect these highly
23 regulated entities for the benefit of the individual
24 cemetery members, to advance public policy for the
25 benefit of consumers, and to ensure the insolvency

1 of not-for-profit cemetery organizations.

2 Cemeteries as not-for-profits are quite
3 unique.

4 That is why an entire article, Article 15 of
5 the Not-For-Profit Corporation Law, relates to
6 cemetery governance.

7 Additionally, unlike other not-for-profits,
8 under state law, should a cemetery fail, they become
9 the financial ward of the municipality in which they
10 are located.

11 Since 1990, more than 160 cemeteries
12 regulated by the New York State Cemetery Board have
13 failed.

14 In most cases, their insolvency has led to
15 the turnover to municipalities as a burden on their
16 taxpayers.

17 The association has responded to these
18 challenges within the existing regulatory and
19 legislative structures to specifically address
20 public policy relating to cemeteries and the
21 crematory operations.

22 Working with you, our state representatives,
23 our association has successfully advocated numerous
24 changes to the Not-For-Profit Corporation Law, to
25 assist our membership in sustaining viability in an

1 ever-evolving death-care industry and in the face of
2 continuing economic stagnation.

3 These efforts have included statewide
4 protection of the full complement of cemetery
5 services relating to the burial -- excuse me,
6 involving the disposal or burial of deceased human
7 remains by cremation or interment.

8 I would like to thank you,
9 Senator Ranzenhofer, and the members of this
10 Committee, for all you have done in recent years to
11 address this growing public policy and financial
12 crisis.

13 Working together, significant strides have
14 been made to directly transform a not-for-profit
15 corporation law to one that provides both modern
16 consumer protections while meeting the needs of
17 organizations that provide a valuable service, such
18 as my cemetery, and those other members of our
19 association.

20 Streamline processes that provide adequate
21 protections while reducing costs are vital to the
22 survival of New York's not-for-profit cemeteries.

23 The recent proposals by the Attorney General,
24 and the efforts put forth by Senator Ranzenhofer,
25 deal with streamlining regulation for New York's

1 not-for-profits.

2 The association strongly supports such
3 efforts. In, fact we believe that these efforts are
4 the keys to success of New York's not-for-profits.

5 However, due to the uniqueness of our
6 entities and critical services they provide, we
7 would suggest that this board ensure that they are
8 truly implementing changes that will promote the
9 survival of New York cemeteries.

10 Our member organizations are quite diverse.
11 They represent the spectrum of not-for-profits in
12 New York.

13 Some of our volunteer organizations have
14 tens of millions dollars in assets, while majority
15 of them are small volunteer organizations.

16 Their oversight and their needs need to be
17 approached with this diversity in mind.

18 An example of red tape, or burdens, on our
19 industry, is the fact that a not-for-profit cemetery
20 with trust funds and/or assets of a million dollars,
21 but nearly no income, is required to expend multiple
22 thousands of dollars for the same expansive audit
23 that a cemetery with \$50 million in revenue and
24 assets does; the same type of audit required of a
25 publicly-traded for-profit company.

1 Misdirected requirements such as these are
2 financially damaging to New York's small
3 not-for-profits that are forced to direct these
4 funds away from their mission to meet these
5 obligations.

6 This is just one example of the complexity of
7 not-for-profit governance.

8 While our organizations are diverse, so are
9 our boards. They may be group of neighbors in a
10 remote section of Jefferson County, or experts in
11 accounting, investment, and law in New York City.

12 Our association strongly supports legislative
13 efforts currently before the Committee to streamline
14 procedures for mergers and acquisitions.

15 It is vital that New York's not-for-profits
16 are able to spend money on their dedicated mission,
17 and not on fees and expenses as a result of red
18 tape.

19 NYSAC has worked with regulators to ease
20 burdens on not-for-profit consolidation, which
21 enhances consumer services while aiding declining
22 organizations.

23 For instance, the association recently saw
24 changes to allow struggling or nearly abandoned
25 cemeteries with no resources or funds, but

1 significant land suitable for burial purposes, to be
2 merged with successful cemeteries that are highly
3 solvent and possess active boards, but have no land
4 for burial.

5 To date, these recent changes have aided both
6 sides of the equation and produced stronger
7 not-for-profits with a secure future.

8 These impending insolvencies and burdens on
9 local taxpayers have been avoided by assisting in
10 the completion of these orderly transactions.

11 In the details of many of these transactions,
12 the approval of regulators and their input were
13 important.

14 However, just as important and vital for the
15 success of these -- such transactions, is the
16 prudent streamlining of the process to ensure
17 sustainability of the organizations.

18 NYSAC believes that these consolidation
19 efforts are a model for other not-for-profits, and
20 we commend our efforts proposed in this current
21 legislation to ease regulatory burdens and partially
22 model successful cemetery efforts.

23 Senator Ranzenhofer has dealt with many of
24 these areas in one of his current bills,
25 Senate 4324.

1 NYSAC was pleased to see this bill
2 unanimously passed by the Senate on Monday.

3 This legislation relates to the regulation of
4 cemetery trust funds and finances by the State
5 Cemetery Board.

6 In essence, this legislation strips away
7 numerous steps necessary to be completed by
8 not-for-profit cemeteries after their applications
9 have been approved by the State Cemetery Board.

10 The State Cemetery Board, as you will recall,
11 is composed of the Secretary of State,
12 Attorney General, and the Commissioner of Health.

13 Under current not-for-profit laws, even after
14 these distinguished regulators have approved an
15 application, even more red tape and applications are
16 necessary to complete these fairly simple
17 transactions.

18 This red tape costs more money and more time
19 which, in turn, saps the resources from the mission
20 of not-for-profits.

21 One area that we feel may need greater
22 attention in legislative efforts is the easing of
23 the process to eliminate defunct not-for-profits.

24 The elimination of no-longer-functioning
25 not-for-profits from state rolls will enable our

1 regulators to focus on oversight and protection of
2 those entities on the edge or in need of protection.

3 New York cemeteries know all too well of such
4 matters.

5 In many instances, particularly New York's
6 urban areas, cemeteries are close to capacity for
7 burials.

8 Burial space is important because it
9 continues revenue streams for the cemetery; however,
10 many of these large old cemeteries have large tracks
11 owned by now-defunct burial societies.

12 These once vibrant not-for-profits hold large
13 numbers of unused graves, and there is no
14 organization left to arrange for the transfer of
15 these graves, or to arrange for families with
16 families interred in the area to arrange for burial.

17 This not only repeats [ph.] the success of our
18 cemeteries, but is a disservice to New York's
19 consumers.

20 If the legislative proposals before us today
21 focused in greater detail on dealing with defunct
22 organizations, while also streamlining the process
23 to get these assets into use by the general public,
24 a significant public good would be accomplished.

25 In conclusion, we hope that testimony

1 provided today, and some additional work on the
2 legislation before this Committee, will yield public
3 policy to aid the vast variety of the Empire State's
4 not-for-profits.

5 As you conclude this good work, please
6 remember our membership.

7 Our 1800 not-for-profits in every corner, and
8 in many cases, remote corners of New York, that have
9 defined volunteers willing to serve and meet the
10 needs of the public.

11 This is always a challenge.

12 Sometimes it's the local maintenance guy that
13 also fills the board seat. Sometimes it's the local
14 accountant, PTA member, or a librarian.

15 In all you do to address the updates to these
16 statutes, please remember how difficult it is today
17 to find individuals willing to serve the general
18 public for free, and to protect the heritage that is
19 represented by our not-for-profit cemeteries.

20 Please recognize that in good not-for-profit
21 board governance, there is this diversity of large
22 organizations, to neighbors sitting around a kitchen
23 table, trying to figure out how to get the grass
24 mowed for another year.

25 Balance and the protection of public service

1 are vital.

2 Again, thank you for the opportunity to
3 testify today.

4 The New York State Association of Cemeteries
5 stands ready to be a continued resource for this
6 Committee as you work on these important issues.

7 SENATOR RANZENHOFER: Well, thank you very
8 much for your testimony this morning, JoAnne.

9 And the question that I have, you had talked
10 about in your testimony, about making it easier to
11 dissolve defunct corporations.

12 What's the process right now, and what would
13 make it easier for that to take place?

14 JOANNE SULLIVAN: I'm not familiar with the
15 full process, so I'd have to get back to you on
16 that.

17 SENATOR RANZENHOFER: Okay.

18 JOANNE SULLIVAN: I will be learning it very
19 soon. In Orange County, I've got two cemeteries
20 that I am currently working with. One is going to
21 be turned over to the municipality; the other one
22 we're trying to save.

23 SENATOR RANZENHOFER: Okay.

24 Okay, you if can get back to me on that, I
25 would appreciate it.

1 JOANNE SULLIVAN: I certainly will.

2 SENATOR RANZENHOFER: Well, thank you very
3 much.

4 JOANNE SULLIVAN: Thank you.

5 SENATOR RANZENHOFER: The next person we're
6 going to hear from is Mark Thomas, who is the
7 general counsel to the Healthcare Association of
8 New York State, also known as "HANYIS."

9 So, as Mark is walking down, I want to thank
10 you for appearing today.

11 And, again, just to reemphasize the work that
12 all the nonprofits have done, in working with our
13 Committee, the Assembly, the bar associations, the
14 Law Revision Commission, and the Attorney General.

15 And one of the things that I'll just mention
16 before you begin, for those who may have arrived
17 late:

18 We have -- some of you have a lot of the
19 testimony in advance. We've read the testimony.

20 So, if you like, you can read it, but, you
21 know, just, basically, we want to you summarize the
22 highlights of the points that you would like to
23 leave with us. And then, you know, if there are any
24 questions, you know, just leave some time for that.

25 So, you can proceed as you wish.

1 You can read your testimony, but I do want to
2 let you know that we've read it in advance, so we
3 know what your position is.

4 So, looking forward to hearing from you.

5 MARK THOMAS: Good morning, Senator, and
6 Senator Marcellino.

7 We appreciate the invitation --

8 SENATOR MARCELLINO: Just bring that just a
9 little closer, because we can barely hear you.

10 MARK THOMAS: We appreciate the opportunity
11 to speak here today.

12 And I want to say that I'm here representing
13 the Healthcare Association of New York State, which
14 represents all but a very small handful of the
15 not-for-profit and publicly-sponsored hospitals in
16 the state, as well as, virtually, all the
17 not-for-profit hospital-sponsored nursing homes,
18 home-health agencies, and other affiliates.

19 And the health-care trustees is a bit of a
20 different organization. It is an organization, an
21 unincorporated membership association, that
22 represents governing bodies of these health-care
23 organizations.

24 Now, the trustee organization primary focus
25 is on good-governance practices, providing

1 education, guidance, and best-practice information
2 to health-care-provider trustees, and boards in
3 general.

4 So, we are bringing a prospective, both from
5 executive management, as well as boards of
6 directors, today.

7 When we speak about amending -- making
8 extensive amendments to the Not-For-Profit
9 Corporation Law, we're talking about something that
10 impacts virtually the entire hospital community and
11 the majority of nursing homes, home-health agencies,
12 et cetera, in the state.

13 You may be aware that New York is the only
14 state in the country that prohibits publicly-traded
15 organizations from owning or operating hospitals,
16 nursing homes, and clinics.

17 The result is, that probably of all the
18 hospitals, for example, 90 to 95 percent are
19 not-for-profits.

20 The rest are publicly sponsored, such as
21 Erie County Medical Center, New York City Health and
22 Hospitals Corporation, and there may be two or three
23 small closely-held for-profits left.

24 Because of the overwhelming not-for-profit
25 membership of these organizations, I wanted to

1 mention that, in 2004, the organizations jointly
2 published a "Nonprofit Corporate Accountability
3 Guidebook," which I just handed to you.

4 And it was a guidebook assembled, sort of
5 similar to the way the Attorney General went about
6 his process.

7 We assembled a group of leading attorneys,
8 accountants, health-care executives, and, of course,
9 directors, to provide -- to identify the major
10 issues --

11 This was in the wake of Sarbanes-Oxley.

12 -- and to identify and provide guidance on
13 the significant issues that not-for-profits, we
14 believe, should embrace.

15 And we are struck today, that while that was
16 published in 2004, almost ten years ago, the table
17 of contents of that book reads like the table of
18 contents of your legislation, both the
19 Attorney General's and the Law Revision. I'll refer
20 to it as "a Senate bill."

21 So we greatly laud the process that has been
22 followed by you, by the Attorney General, the
23 Law Revision Commission; the thrust, the provisions
24 that you're addressing, and the way you address
25 them.

1 And I want to say that we greatly appreciate,
2 particularly from the health-care sector, where we
3 are used to seeing statutes and regulations that are
4 ladened with a heavy fist of regulation.

5 We are very pleased to see that we have a
6 proposal that has meaning, that will have a strong
7 effect, and, yet, is aimed at guiding principles,
8 meaningful changes, things that should be in
9 statute, but, avoids the temptation to regulate by
10 statute, or even, we hope, to invite further
11 regulation.

12 These are highly principled things I think we
13 all agree on.

14 And I think it's important to mention, too, I
15 want to reiterate what Mr. Lilien said, because
16 we've had problems in the health-care sector.

17 And one of -- and the primary source of the
18 problems that we have had are, that there are
19 individuals who take advantage and exploit their
20 not-for-profit status of charitable providers.

21 And it appears that the Attorney General, and
22 perhaps the Department of Health, simply hasn't had
23 the statutory armament to take decisive action to
24 intervene and stop the exploitation.

25 Now, as -- in a side note, I will say that,

1 in a related area, the issue of Medicaid, Medicaid
2 fraud, appropriate Medicaid transparency, in 2006,
3 HANYS proposed -- and this was not in the
4 legislation, but HANYS proposed that there should be
5 mandatory corporate-compliance programs imposed on
6 every entity that participates in the Medicaid
7 program.

8 We also propose that, if the Department of
9 Health, or, as the legislation turned out, the
10 Office of the Medicaid Inspector General, found that
11 the mandatory program was not being followed, the
12 provider could be summarily tossed out of the
13 Medicaid program.

14 That's the kind of thing that has some
15 meaning, and yet the statute itself, while it had
16 the basic elements of a compliance program, didn't
17 go on for pages and pages of detail.

18 That is what we are hoping, with legislation
19 such as this, the Attorney General will be able to
20 do.

21 Because I can say, on behalf of the members
22 of HANYS, as well as the governing bodies of
23 trustees, it is just as upsetting to them to see the
24 headlines in the newspapers about the ripoffs of
25 public, and we'll say, community organizations, by

1 people who have no interest in the community's
2 well-being, but are making substantial profits in
3 the process.

4 So that, the related-party-transaction
5 provision, we think is most appropriate, because it
6 doesn't ban, categorically, related-party
7 transactions. It requires a meaningful, thoughtful
8 process.

9 Same thing, of course, with
10 conflict-of-interest policy.

11 The executive-compensation-oversight
12 provision, which is in the Law Revision bill, and a
13 similar provision in a separate Attorney General
14 bill, we believe, while it doesn't closely hue to
15 exactly what's in the Internal Revenue Code, and we
16 would have no objection if it did --

17 And I believe that, Senator Marcellino,
18 you're actually carrying some legislation that does
19 exactly that.

20 -- but we think that's the right approach in
21 dealing with executive compensation, as opposed to
22 some other proposals that we are now waiting to see
23 the outcome of.

24 And when I speak of these issues, I do want
25 to emphasize that, I represent organizations that

1 are \$4 billion-plus organizations;

2 And I represent organizations that are
3 one-bed critical-access hospitals. Basically,
4 they're a clinic in a rural area because they're the
5 only place for people to go.

6 So to try to regulate or legislate some
7 one-size-fits-all, and we're talking just the
8 health-care sector, will be either inequitable
9 treatment of one side or the other.

10 And so, therefore, we think the focus of the
11 legislation throughout all these issues,
12 particularly executive comp, is on the process that
13 must be followed, and the insistence and the
14 requirement that there be transparency.

15 Now, our testimony includes a few items of
16 concern.

17 And what we'd like to do -- and I understand
18 that it is May 22nd, and the session won't go on
19 forever -- but what we'd like to do is, fairly soon,
20 provide a detailed list of some of our comments on
21 the legislation.

22 And, unfortunately, we haven't been part of
23 the process up until now, so we're playing a bit of
24 catch-up.

25 But coming to a couple of the questions asked

1 of the bar association speaker about membership
2 organizations, I'm going to address this a little
3 differently, and it's not just membership
4 organizations, but it's also small not-for-profits.

5 We're concerned that the definition of an
6 "independent director" is a bit too narrow.

7 The reason for that, is that an independent
8 director is not someone who can be an employee of an
9 entity that has any sort of substantial -- or,
10 frankly, insubstantial payment to or receipt of
11 payment from a not-for-profit.

12 That's what every membership corporation
13 director is: They pay dues.

14 And we want the CEOs of those dues-paying
15 members on the board, and we want them as overseers.
16 Frankly, as the other speaker said,
17 semi-shareholders. We don't want them eliminated.

18 Similarly, for very small providers. And I
19 have some in my private practice, where they have
20 two member sponsors, if you will. Two corporate
21 members.

22 The boards of those organizations are made
23 up, at least in great measure, by employees of those
24 two members.

25 And for them to assemble at a group of even

1 three independent directors, to make the
2 compensation decisions, et cetera, would be
3 extremely difficult.

4 So what we would prefer is, instead of using
5 the much broader "independent director" definition,
6 we look to the more specific, and we think more
7 appropriate, IRS definition of what is -- I believe
8 it's called an "interested director."

9 We think that's a much better definition for
10 these sorts of things.

11 We have -- and I realize this may not sound
12 popular to begin with -- we have concerns that there
13 are new whistle-blower provisions in both of these
14 bills.

15 I can't speak for other sectors, but I can
16 say, the health-care community is -- at a minimum,
17 lives under three sets of whistle-blower state laws.

18 Labor Law 740, 741, and as part of the
19 corporate compliance statute,
20 Social Services 363(d), all whistle-blower laws, all
21 say different things.

22 One is regulated by the OMIG;

23 One is regulated by the Department of Labor;

24 And if we have a new one, it will be
25 interpreted and regulated by the Attorney General.

1 And that is just the tip of the iceberg
2 because we have many, many more whistle-blower laws
3 on the federal level.

4 We would suggest, that if a whistle-blower
5 provision is in the statute, and it is most
6 appropriate, we must have whistle-blower protection,
7 it apply to those entities that simply are not
8 governed by any whistle-blower statute now, rather
9 than another redundant statute subject to differing
10 interpretation.

11 Finally, on more of a detailed note:

12 The two bills address the issue of board
13 committees somewhat differently.

14 We would urge that we come down the middle,
15 if you will, that there at least be statutory
16 recognition, or an allowance, for there to be
17 standing committees, as opposed to others.

18 But we do not believe --

19 SENATOR RANZENHOFER: As opposed to what?

20 MARK THOMAS: As opposed to others.

21 I think in the -- is it the AG's bill that
22 refers to standing committees versus corporate
23 committees? Or is it the Law Revision?

24 I get them mixed up.

25 There should be a recognition for standing

1 committees, but in terms of their ability to bind
2 the board, we would suggest that the language say:
3 That unless otherwise provided in the certificate of
4 incorporation or bylaws, a standing committee cannot
5 bind the board.

6 The reason for that phrase, is that many
7 executive committees, by the bylaws, do, in fact,
8 have the power to bind the board to act when the
9 board is unable to convene.

10 So we want to let that continue to happen,
11 but have it be specifically spelled out.

12 Couple of areas that we would -- we were a
13 bit disappointed, to see that there are no
14 provisions in any legislation that we've seen, and
15 that is, we have six sections that are, I'll admit,
16 very tough to read and understand about
17 indemnification of directors and officers.

18 Frankly, I've had more than one person say:
19 They go on and on like the state of Texas.

20 It may be just too much to try to clean those
21 provisions up, but they are extremely confusing.
22 And it just doesn't seem that we need so much statue
23 on that one limited topic.

24 Secondly, just a little clean up, and that
25 is, with regard-- the Not-For-Profit Corporation Law

1 is actually fairly lean on the notion of a
2 membership annual meeting.

3 It simply says: That the members, annually,
4 will direct the board -- will appoint the board of
5 directors and conduct other business.

6 Unfortunately over in the Article 7, there's
7 a provision that says: The bylaws or certificate of
8 incorporation can provide for the election of
9 directors.

10 And so it's not exactly clear, at least in
11 the statute, which is which.

12 And we have boards that go both ways.

13 I think there just needs to be some
14 coordination between those two provisions.

15 And I'll stop there.

16 I know some of the questions you asked of
17 other speakers may be of interest, particularly in
18 the health-care sector, so I'd be very happy to
19 respond.

20 SENATOR RANZENHOFER: Well, thank you for
21 your very detailed testimony.

22 And the first question that I have is, there
23 was some testimony earlier about preapproval for
24 agencies.

25 And there were some -- you know, some

1 suggestion that universities and hospitals and
2 health-care folks should be excluded. Others
3 thought they should not be excluded.

4 Representing the health-care industry, can
5 you just give me your view on that?

6 MARK THOMAS: As we were reading the new
7 legislation, read first line and we got very
8 excited, and then we were so disappointed to see the
9 exception for Article 28s.

10 We believe that -- and along with what the
11 bar association suggested -- we believe that health
12 providers, or at least Article 28s, which is
13 hospitals, nursing homes, and clinics, should be
14 able to incorporate, but, of course, there be very
15 clear language, that you could not engage in the
16 licensed activity without permission of the
17 Department of Health.

18 And I can't speak for other regulatory
19 agencies, but, typically, because of attrition, and
20 the extraordinary workload, the Department of Health
21 is not able to process an application like this for
22 an average of 12 to 18 months.

23 So, we think it would be very beneficial,
24 and, frankly, save a lot of legal fees, if a
25 corporation could incorporate, and then have to go

1 through, obviously, the regulatory process.

2 One thing I will say, on executive comp, I
3 meant to mention this:

4 If your legislation eventually includes it,
5 we would strongly urge, we think it's imperative,
6 that in the legislation it is crystal clear, that
7 the legislation is paramount, in terms of the
8 State's treatment of executive compensation. And
9 that without statutory basis for other
10 executive-compensation proposals, they're void.

11 SENATOR RANZENHOFER: Okay.

12 SENATOR MARCELLINO: "Thresholds."

13 You, I'm sure, heard me talk to one of the
14 previous people about their thresholds.

15 What's your thought on that?

16 MARK THOMAS: Senator, I'm probably the wrong
17 person to ask, because, while we do represent the
18 one-bed critical-access hospital, they probably
19 would exceed any kind of threshold.

20 But we recognize, that when the AG's offices,
21 there are 63,000, it may be of interest to have a
22 run of what the cutoff at different stages is: how
23 many not-for-profits would fall under it, how many
24 above it.

25 I'll give you an example of, the

1 corporate-compliance mandate.

2 The Office of the Medicaid Inspector General
3 was given the authority to determine -- other than
4 the statutory mandatory categories, to determine
5 what other providers should have a mandatory
6 corporate-compliance program.

7 They did a run of Medicaid expenditures, and
8 concluded, that if you're over 500,000, the Medicaid
9 revenues, you have to have one.

10 And they explained that, because they said:
11 500,000 and over is 10 percent of the Medicaid
12 providers, but it represents 90 percent of the
13 Medicaid expenditures.

14 Maybe that's the kind of thing that might be
15 worthwhile for to you know to be able to make that
16 kind of judgment call.

17 SENATOR MARCELLINO: Thank you.

18 MARK THOMAS: Thank you.

19 SENATOR RANZENHOFER: Let me ask you a
20 question about your comments about -- well, at least
21 your testimony, I don't know if I heard your
22 comment, about the conflict-of-interest policy.

23 It's your feeling that there should not have
24 to be conflict-of-interest policy for the
25 not-for-profits that are governed by Article 28, or

1 the health -- you know, in the health-care industry?

2 MARK THOMAS: There absolutely must be.

3 Certainly for health-care providers.

4 And as you see in the guidebook, that's
5 basically what we said: You need to have one.

6 For the other organizations, the sort of
7 member organizations, I believe that, as
8 appropriate. I don't know if it needs to be
9 legislated.

10 All I can say, is that I represent four trade
11 associations, all health associations, and they all
12 have conflict-of-interest policies, and they've had
13 them for about a decade.

14 I don't see what's wrong.

15 SENATOR RANZENHOFER: In terms of -- oh,
16 okay.

17 So you think that because you already have
18 the conflict-of-interest policies, that you should
19 not have to have a conflict-of-interest policy under
20 the statute?

21 MARK THOMAS: Well, I don't think that there
22 is any harm in having a statute that, frankly,
23 requires a conflict-of-interest policy.

24 Right now, if you're a 501(c)(3), you have
25 to have one.

1 And the IRS has a very good model that they
2 published, actually years ago.

3 So, we're talking about the
4 non-501(c)(3)s that really would be affected by
5 a statute.

6 SENATOR RANZENHOFER: Okay.

7 Any questions?

8 Okay.

9 Well, thank you very much.

10 MARK THOMAS: Thank you very much.

11 SENATOR RANZENHOFER: We appreciate your
12 testimony today.

13 The next person that we're going to hear from
14 is Susan Hager, president and CEO of the United Way
15 of the state of New York.

16 And as Susan is walking down, I again want to
17 thank her, and all the not-for-profits, for their
18 involvement in the process, with both of the
19 Legislature, the Senate and Assembly, and also with
20 the Law Revision Commission and the
21 Attorney General's Office.

22 And, Susan, thank you for appearing today,
23 and look forward to hearing from you.

24 SUSAN HAGER: Thank you.

25 Good morning.

1 SENATOR RANZENHOFER: Good morning.

2 SUSAN HAGER: I represent United Ways all
3 across the state of New York. Collectively, they
4 invest over \$157 million annually in health and
5 human services across the state.

6 They fund thousands of not-for-profit
7 organizations, and so we have great interest in this
8 topic.

9 First of all, we want to make it clear that
10 we support both of the bills that have been
11 submitted, Senate Bill 5198 and Senate Bill 5197
12 that you have both co-sponsored. We think they're
13 terribly important.

14 It's time to get this done, and we appreciate
15 your leadership.

16 And, of course, we appreciate the leadership
17 of the Attorney General who requested this
18 introduction.

19 I should say that, you all recognize that
20 there is already a high level of regulation of the
21 not-for-profit sector.

22 You've heard some of this alluded to.

23 On an annual basis, we file a detailed report
24 to the Internal Revenue Service, fondly referred to
25 as "the 990."

1 It is extensive, it's comprehensive, it's
2 detailed; and we do that on an annual basis.

3 We also, of course, file a report, a related
4 report, the CHAR500, to the state's
5 Attorney General.

6 We are required to have annual financial
7 audits or financial reviews. And, of course, if we
8 receive money from a state agency, we have the
9 oversight of those agencies, and, again, the
10 Attorney General and State Comptroller's Office.

11 So it is not a sector that is new to
12 regulation.

13 These bills, however, represent, in our
14 opinion, a responsible and very carefully chosen
15 path forward to modernize state law, to do away with
16 outdated requirements, as well as to raise the bar
17 for oversight for boards of directors.

18 We think that's extremely important.

19 And it should come as no surprise that
20 United Way believes strongly that charitable boards
21 of directors should take their oversight role very
22 seriously.

23 A charity's integrity is its most important
24 asset.

25 Their leadership must understand the

1 importance of their role in protecting that asset
2 within the framework of a legal statutory
3 requirement instead of simply a recommended best
4 practice.

5 As a practical matter, we must ensure that
6 board leaders pay attention to the mission and
7 stewardship of the finances that are under their
8 care.

9 By way of brief background, we note, and you
10 heard much of this from Jason Lilien this morning,
11 that the Leadership Task Force of over 30 experts
12 convened by the Attorney General in 2011 resulted in
13 a report examining current law and practice,
14 including recommendations for changes in state
15 policy.

16 This report has been available for public
17 discussion and dialogue for over a year.

18 And I think, Senators, that's a very
19 important point, because it's a model for how an
20 open and transparent policy process should occur.

21 We appreciate as well that this bill -- both
22 these bills have bipartisan sponsorship in both
23 Houses, a recognition, we think, by the Legislature
24 of the importance of the not-for-profit sector in
25 New York State.

1 And it's not the first time we have seen that
2 kind of support from the Legislature.

3 We want you to know that we appreciate it.

4 I will just summarize the proposals that we
5 support in this bill.

6 Among those are, first of all, the
7 expectation for a stronger role for boards in audit
8 oversight.

9 Just yesterday, we had our quarterly meeting
10 of our statewide board of directors.

11 At that meeting, our auditor presented, in
12 detail, his just-completed financial audit of the
13 organization, as well as the 990.

14 This was preceded several weeks ago by a
15 similar meeting with our audit committee, in which
16 they reviewed those materials.

17 And in both cases, following the
18 presentation, staff was excused so that the board of
19 directors and the auditor can have a frank and
20 explicit conversation about any issues or concerns.

21 Happily, there were none, but this is the
22 model for the way this process should be conducted.

23 It is not onerous. It is not difficult. You
24 need good people at the table who are willing to
25 give the organization the time to participate in

1 this important process.

2 It can also be, and I think it should be, an
3 important way for not-for-profit boards of directors
4 to better understand their financial condition, and
5 how they are going to meet their commitment to the
6 mission of their organization.

7 A second proposal we support are the
8 requirements for both conflict-of-interest and
9 whistle-blower policies, which you've already heard
10 referred to.

11 We are asked about the existence of these
12 every year in the 990.

13 And we assume that request, "Do you have
14 one?" means that the IRS expects to see, yes, that
15 we do have one.

16 So we think it's entirely appropriate that
17 this also be enshrined in state law.

18 We support establishing the expectation that
19 the board will set and approve executive
20 compensation and benefits. And those are dealt
21 with, again, more extensively in Senate Bill 5197.

22 Obviously, the State may also have a role in
23 this issue if there are government funds being
24 contracted to not-for-profit organizations.

25 There was a broad debate about this last

1 year.

2 Senator Marcellino, you had hearings about
3 this, and we appreciated that.

4 But as separate and distinct issues, we think
5 the board of directors should be involved
6 affirmatively in approving and setting compensation
7 whether or not the organization is receiving public
8 funds.

9 We support raising the audit and financial
10 review thresholds for charities, while allowing the
11 Attorney General to request a full audit if one is
12 needed.

13 I should note here, that funders may require
14 a lower threshold.

15 I would not be surprised if many of our local
16 United Ways might continue to use the
17 quarter-of-a-million-dollar threshold if an agency
18 comes to them expecting funding from the United Way.

19 These are choices that the State of New York
20 may make, that United Way or other foundations may
21 make.

22 Is it useful to have the threshold in state
23 law? Yes, it is, but I think that other
24 organizations that provide funding may continue with
25 the existing thresholds.

1 We support expediting the approval of mergers
2 through action by the Attorney General.

3 We have had proposals for United Way mergers
4 languish in the courts, not because they're not
5 interested, but because of workload considerations.

6 Allowing the attorney to take --
7 Attorney General to take action is important, while
8 preserving for the charity, the right to challenge
9 in court that determination if they don't agree with
10 it.

11 We support requiring a majority board vote in
12 related-party transactions -- something you've
13 talked about a lot this morning -- and that the
14 decisions and rationale involved in those votes be
15 documented.

16 This helps to ensure the integrity of the
17 decision-making by the charity's board.

18 We support allowing E-filing of reports to
19 the Attorney General. This is consistent with the
20 way we file our reports already to the IRS. This
21 increases for both donors and funders, transparency.

22 And we permit the -- we support permitting
23 use of E-communications for board notices, and video
24 conferencing, which not only is a potential
25 cost-saving, but there's no loss of accountability.

1 So I need to ask to you bear in mind two
2 additional points:

3 The need to consider outreach and training
4 for not-for-profit leadership on any new
5 requirements enacted in to law.

6 We hope that legislators would partner with
7 the Attorney General and other charitable
8 federations to offer these on a regional basis.

9 You need to understand that board leadership
10 often changes every year or two, so some ongoing
11 mechanism is needed for this training.

12 There were other issues raised in the
13 Leadership Task Force Report from 2011 that this
14 legislation does not address, nor should it, but I'd
15 urge to you keep it in mind, since you have become
16 leaders on this topic.

17 There have been downturns in the economy and
18 years of back-to-back disasters which have
19 compromised giving to many charities, except for
20 disaster-related work.

21 And some of these same forces have conspired
22 to cut state and federal funding for charitable
23 programs, an issue that you as legislators deal with
24 every single budget season.

25 These trends have made, unfortunately, the

1 fact that there's been a continued and
2 unconscionable delay in payments by state government
3 to not-for-profit services, a virtual nightmare for
4 many of our agencies.

5 These delays continue to defy state law that
6 this Legislature enacted, and passed unanimously,
7 and only adds to the sector's stress.

8 I hope that you'll review those issues, and
9 next session, consider hearings, regional forums, or
10 further legislative action.

11 In conclusion, I would say, as I said,
12 there's been a year's worth of public discussion on
13 the Attorney General's report.

14 You've both clearly been working diligently
15 with a host of other groups.

16 You can continue talking about these issues
17 for another two or three years and probably never
18 exhaust all of the details.

19 However, we'd urge to you move expeditiously
20 to pass these bills before the end of this session.

21 We could debate the details endlessly, but
22 there has already been a substantial amount of
23 dialogue.

24 Let's get this done.

25 I'm open for your questions.

1 SENATOR RANZENHOFER: Do you have some
2 questions?

3 SENATOR MARCELLINO: Yeah.

4 You just mentioned something that tweaked my
5 interest, amongst a lot of other things that you
6 talked about: the lack of payment, or the delayed
7 payment, by State.

8 I'm trying to figure out, what's the time
9 period?

10 What would constitute the delay; how much
11 time?

12 SUSAN HAGER: There are specific time frames
13 in state statute, when a not-for-profit organization
14 has either a new contract with the State;

15 Or is in what we call "a renewal situation."
16 They've been providing the services year after year,
17 have multi-year contract.

18 The State Comptroller has documented over the
19 last five or six years, delays that amount -- that
20 range between 60 and 90 percent of the time,
21 contracts are being approved late.

22 Unless the contract is approved, payment is
23 not forthcoming.

24 If you asked the not-for-profits in your
25 district what their experience in this regard, you

1 will get an earful.

2 I see Senator Ranzenhofer nodding.

3 You've already got the law on the books.

4 Unfortunately, there is no sanction, no
5 realistic sanction, for a state agency to pay late.

6 There is a requirement, that when it's late,
7 an interest penalty be paid, but, unfortunately, the
8 impetus for the interest payment must also come from
9 the state agency.

10 They must say: We were late. This
11 organization is now owed an interest penalty.

12 The Comptroller's reports have also found
13 that, unfortunately, these payments are also not
14 always being paid as required.

15 It's a very significant issue.

16 We hope you'll look into it.

17 SENATOR RANZENHOFER: Do you have any idea
18 how much money we're talking?

19 Gross.

20 SUSAN HAGER: I wouldn't want to speak off
21 the top of my head.

22 It's significant.

23 If 60 to 90 percent of the contracts are not
24 being approved on time, it's a significant amount of
25 money.

1 Let me cite you one example.

2 A subsidiary corporation of ours,
3 211 New York, provided services during the storm.
4 People were able to call a simple-to-remember
5 three-digit number if they needed help.

6 Services provided on Long Island and the
7 Hudson Valley, primarily for the purposes of
8 "Sandy."

9 Contract with the State was from the end of
10 October, when the storm occurred, through the end of
11 January.

12 The contract was not approved until
13 March 3rd.

14 Payment was only received a few weeks ago.

15 So you have a situation where I had
16 organizations on the ground, Long Island and the
17 Hudson Valley, provided the services, had to front
18 the money.

19 Frankly, we advanced -- United Way of
20 New York State advanced some money to them for cash
21 flow in order to provide these services.

22 This is not a once -- this is not an anomaly.
23 This is the practice.

24 And if you go back, there are sections in the
25 Attorney General's Leadership Task Force Report that

1 specifically deal with this set of issues, and some
2 recommendations.

3 Not only do the time frames need to be
4 tightened, and perhaps some penalty, but we also
5 propose that there be a revolving loan fund.

6 If you can't -- ideally, you fix the problem.

7 But if you can't, create a revolving loan
8 fund that's operated outside of state government, to
9 help these agencies with their cash flow, until the
10 contracts are approved and the payments are made.

11 SENATOR MARCELLINO: Thank you.

12 We'll be in touch.

13 SUSAN HAGER: You're welcome.

14 SENATOR RANZENHOFER: You actually raised a
15 very good point.

16 We actually had some discussion about that
17 last night, dealing with the prompt payment. And
18 not only does it affect not-for-profits, but it also
19 affects a lot of municipalities. The same thing
20 with late payments.

21 And I just want to harken back to something
22 else that you said, about: Let's try to get
23 something done. There's been dialogue and
24 discussion for a long time.

25 In your judgment, would that -- this needs to

1 be done, but to include it in this bill, do you
2 believe that that would negatively impact this bill
3 out, or you'd like to see it in separate
4 legislation?

5 SUSAN HAGER: I think -- I would not want to
6 see this bill held up to take up this set of issues.

7 I think it's appropriate, though, for the
8 Legislature to take the issue up, take a fresh look
9 at it.

10 SENATOR RANZENHOFER: Got you.

11 SUSAN HAGER: And act on it.

12 We were involved, the United Way was one of
13 the partners that worked with the business council
14 to enact the original prompt-payment statute.

15 SENATOR RANZENHOFER: Right.

16 SUSAN HAGER: The beauty of that statute is
17 when -- is if the payment is late -- over 30-days
18 late, and it's not the not-for-profit's fault, the
19 State Comptroller's Office is invested with the
20 authority to automatically tack the interest payment
21 on.

22 SENATOR RANZENHOFER: Right, in that first
23 payment --

24 SUSAN HAGER: I don't really -- I don't -- I
25 have to tell you, most not-for-profits are not

1 interested in the interest penalty.

2 They're interested in getting the time frames
3 done right.

4 Otherwise, you spend lot of time chasing the
5 paper, and there's no reimbursement for that.

6 SENATOR MARCELLINO: Right.

7 One question I wanted to ask you:

8 You had mentioned about the whistle-blower
9 policy.

10 And there was some testimony earlier about,
11 that there are some agencies that are already
12 governed by other whistle-blower provisions.

13 And there were some agencies that are already
14 governed by certain regulations, that are also
15 included in my bill and the Attorney General's bill.

16 I just wanted to know if you had an opinion,
17 if there are already -- if different not-for-profit
18 agencies are already governed by some of these
19 requirements which are in either one of the two
20 bills, and I'll just use whistle-blower, for
21 example, do you think that statute should be --
22 should reflect, that if you're already governed by
23 whistle-blower provisions, that's sufficient?

24 Or do you believe that there should be an
25 additional whistle-blower provision?

1 And for United Way, I don't know if you are
2 already governed under statutes and regulations that
3 you have to live by, whether you already have
4 certain whistle-blower provisions that apply to you,
5 or would this be the only whistle-blower provision
6 that would apply to you?

7 SUSAN HAGER: We consider ourselves covered
8 by whistle-blower provisions, as I said, in the 990.

9 The 990 asks you for -- we set -- the
10 expectation is set for you to have it.

11 Our global entity, United Way Worldwide, also
12 includes in their membership requirements to be a
13 United Way, the expectation that you will have
14 conflict-of-interest and whistle-blower policies.

15 So I have to say to you, in my reading of the
16 statute, is that you have to have one.

17 I think the concern that you're already
18 covered by another one, I don't see that as being
19 inconsistent.

20 If you have one, because you're covered by
21 another one, then you have one.

22 SENATOR RANZENHOFER: Okay.

23 SUSAN HAGER: I didn't -- I felt that the
24 Attorney General's trying to be less prescriptive in
25 detailing that particular requirement, but saying:

1 We want to be consistent with the federal
2 requirement. We should have one in state law.

3 SENATOR RANZENHOFER: Okay.

4 Thank you very much for your testimony, and
5 for appearing here.

6 SUSAN HAGER: Thank you very much.

7 SENATOR RANZENHOFER: The next person that
8 we're going to hear from is Doug Sauer.

9 Doug is the CEO of the New York Council of
10 Not-For-Profits [sic], Incorporated.

11 And, again, as Doug is walking down here, I
12 just want to reiterate the comment that I made
13 before, and just thank all the not-for-profits for
14 their involvement with the Senate, with the
15 Assembly, with the Attorney General's Office, with
16 the Law Revision Commission.

17 So, welcome, Doug. I appreciate your being
18 here today, and look forward to hearing from you.

19 DOUG SAUER: Good morning -- or now it's,
20 good afternoon, I guess.

21 SENATOR RANZENHOFER: But even though it's
22 afternoon, we still want to hear from you, so...

23 DOUG SAUER: Well, thank you for conducting
24 the hearing, and thanks for your legislation, and
25 interest in this topic, and the nonprofit community.

1 I'm going to try to keep my remarks brief,
2 because you do have more testimony, and perhaps I
3 might give some added views, based on testimony I've
4 heard.

5 Our organization represents over
6 3,000 nonprofit organizations, largely, small to
7 moderate size; the average community-based
8 organization.

9 So, we're not representing the hospitals or
10 the universities.

11 We're the average organization, and we're
12 spread throughout the state pretty proportionally,
13 and in your communities.

14 And we are in those board rooms; and,
15 literally, every day, our staff is in there.

16 So I'm going to talk a bit about the impact
17 of some of what we've been talking here.

18 Actually, on those organizations, and the
19 processes that go on.

20 And I have to say, I'm not an attorney, so,
21 coming at it from the point of view of more of a,
22 sort of, practitioner with the nonprofits.

23 The -- we support the cleaning up, if you
24 will, of making it easier for nonprofits to form
25 because of, you don't need unnecessary consent.

1 We support that, because it's bureaucratic
2 and unnecessary.

3 However, the premise of, "We need more
4 nonprofits because we want to regulate them," as
5 opposed to, "We want better, stronger nonprofits,
6 not more," we challenge that.

7 And I think if you go across, and I do this
8 regularly in virtually every group I speak to, I ask
9 them to raise their hands in the nonprofit funding
10 community, and, do they think they need more
11 nonprofits in their community?

12 And you rarely will get more than one or two
13 people out of a group of a hundred saying yes.

14 So the notion that we have to regulate more,
15 we have to create more regulations, there's a lot of
16 responsibility, but on the front end, we want to
17 create more, and we might make it easier.

18 And then, on the back end, even with the
19 provisions that are talked about with the AG's bill,
20 it still costs thousands of dollars, and take a year
21 or more to dissolve or merge these organizations.

22 So we're opening the door for many to come
23 in, and then imposing a lot of regulations on how
24 they form.

25 Many of these new nonprofits at the

1 community-base level don't know what they're doing,
2 in terms of forming. And then we're making it
3 difficult for them to go away.

4 Thus, we have thousands, if not tens of
5 thousands, that are, literally, on the shelf, that
6 don't exist, but, they could be activated to raise
7 money, or other things, if opportunities go there.

8 So, we would suggest that there does need to
9 be a closer look at the state level, about the
10 process of creating, not from the point of view, we
11 just need to have them faster, and make it easier
12 for them to create, but we need to have nonprofits
13 that are responsible at the point of creation as
14 well.

15 I can tell you, because we're very involved
16 in incubating nonprofits, and a lot of folks come to
17 us to incorporate, in the last couple years, I would
18 say half of them are because somebody's look for a
19 job, and they're feeling, "I'm going create my own
20 corporation."

21 And then they find out they can't get money
22 after they create their corporation. There's no
23 attraction to that, and then we got this corporation
24 sitting out there.

25 And, so, I challenge that notion of the

1 premise, that we just need to have more, or we need
2 to regulate them, or it's good for business, because
3 they'll go to Delaware.

4 That's not what's going on in local
5 communities.

6 And I -- virtually, every United Way,
7 community foundation, and local nonprofits will tell
8 you that.

9 Related to that, is the notion of the mergers
10 and dissolutions' process.

11 And we support what the bills say regarding
12 making that easier.

13 However, that by no means solves the problem.

14 The problem is a problem that rests with
15 Board of Regents;

16 The problem rests with the state agencies,
17 and the executive branch;

18 The problem rests with the Attorney General,
19 who has a very decentralized approach. You can go
20 to any regional attorney general office, and they're
21 going to handle it differently, what forms in
22 different order, and by and far, they don't have the
23 capacity to process what they have now.

24 So, we have a concern, that this process
25 really needs to be streamlined much more than we're

1 talking about. I mean, to be put online.

2 Unnecessary regulatory processes need to be
3 eliminated beyond the Attorney General's Office.

4 There needs to be a standardization of who do
5 you need to have approvals [unintelligible].

6 There needs to be some entity, or an entity
7 identified, on the case-by-case basis, on who's
8 going to shepherd these through an amazingly complex
9 array of bureaucracies that happen at the state
10 level, because you can't even try to doing a
11 non-chartered with a chartered organization, which
12 is becoming frequent now, because of the differences
13 between the Department of Education and the
14 AG's Office.

15 That issue, to us, is primary right now, as a
16 priority.

17 The state of New York, and you've talked
18 about Medicaid agencies, and there's a lot of room
19 to form and to restructure and to merge, it's
20 becoming an obstacle.

21 Most people avoid it.

22 And to be honest with you, if they can avoid
23 going to the AG's Office, they will, by forming
24 subsidiary corporations, or something else, because
25 that's can happen quickly. That can happen in a

1 couple of months. That can happen internally
2 without a lot of regulatory oversight.

3 And they don't want to do anything that's
4 going to cause the Comptroller to throw their
5 contracts out to bid, that's going to cause the
6 licensed program not to be assigned or moved over to
7 another organization, or contracts not being able to
8 be assigned to another partner.

9 So, that needs to be looked at, I think,
10 outside of what's being proposed here, which is part
11 of the solution, but by no means the entire.

12 When it comes down to conflicts of interest
13 in policies, as we noted in the testimony, policies
14 are just majority-board vote, or a majority
15 executive-committee vote, on, Here's our policies.

16 And I've been in rooms when there's
17 conflict-of-interest situations, and merging an
18 organization, and they turn around and they suspend
19 their policy, to engage in that activity.

20 So, a policy is only as good as your ability
21 to consistently implement the policy.

22 So we suggest, particularly with conflict of
23 interest, and possibly whistle-blower, and we've
24 always strongly encouraged this, that it actually be
25 in the bylaw of the corporation, and actually be a

1 legal requirement, where they cannot put outside the
2 bylaws.

3 Now sister to that is, there's no requirement
4 in New York State for a prenotification or advanced
5 notification of board members of changes in the
6 bylaws.

7 So we would say, bylaw changes should require
8 advanced written notification of the board members,
9 and all board members attending that meeting, so
10 that it's there. And some will allow bylaws to be
11 changed, very few, but allow bylaws to be changed at
12 the board meeting itself, or by an
13 executive-committee meeting.

14 So we would like to strengthen those
15 policies, what are currently policies, and actually
16 put them in bylaws.

17 Conflicts of interest, what some previous
18 testimony said is true.

19 There are -- there can be conflicts with a
20 board member and an organization, where it's in the
21 interest of the organization, particularly when you
22 get into small rural communities, where a printer is
23 on the board, and will just say, I will pay you --
24 just pay me for the supplies and I'll donate the
25 printing costs, et cetera.

1 However, it seems, and -- it seems, from our
2 perspective, that this issue is becoming so serious,
3 the scandals and the problems, whether it's a small
4 organization or a large organization, is becoming so
5 publicized, that it's really eroding basic support
6 and public trust for the not-for-profit corporation.

7 We would be in favor of trying to eliminate
8 as much as possible, conflicts, to begin with,
9 rather than having complex laws and regulations, and
10 needing to have lawyers come in, and cost dollars,
11 on how you can paper-up the conflict, and how you
12 can make it look like it looks fair and reasonable,
13 and then it's going to be debatable on the other
14 end.

15 To be quite frank again, from
16 Attorney General's perspective, they aren't involved
17 in the average case. They don't have the capacity
18 to get involved in the average case.

19 They get involved, usually, in the worst-case
20 scenario, and the horse is out of the barn, and the
21 problem is in the community, and the problem is with
22 the nonprofit.

23 So when it comes to material conflicts or
24 board members' self-dealing, and you have to picture
25 yourself being at a board room, where the board is

1 actually trying to deal with that issue, which is
2 divisive in and of itself. It's not like they have
3 a process, and it kind of goes nicely, and they vote
4 to manage it. It ends up becoming very divisive.

5 We would actually prefer that not exist,
6 because I think it's gotten to the point now, where
7 it's much more detrimental to nonprofits than it is
8 to their benefit, in many cases.

9 And if somebody wants to do business with the
10 organization, then they'll be on the board of
11 directors.

12 And there's not just one bank in any
13 community and you're only doing business with one
14 bank.

15 That bank does -- if I'm the board chair, I
16 don't need necessarily to be the person managing the
17 money.

18 And most boards, and I will say, probably
19 90 percent of boards, have -- don't allow that to
20 happen.

21 So, why the state law will allow it to
22 happen?

23 And when state law allows it to happen,
24 you're opening the gate for those that will engage
25 in these conflicts, and then needing to have lots of

1 rules and regulations on how to manage it, and
2 needing legal consultation on how best to manage it,
3 and how best to have paper, make it look better than
4 it is, sometimes.

5 With that, and as something that has not been
6 addressed here, and was not addressed in the
7 legislation, and is something, certainly, Jason and
8 I have had many conversations about during the
9 Leadership Committee, is the notion of compensated
10 board members.

11 Why do we have board members, voting members
12 of the board of directors, voting officers of the
13 board of directors, paid by the organization for
14 their services?

15 Less than 1 percent of all board members are
16 in that circumstance, and when you look at that
17 circumstance, you see inherent conflicts.

18 And any time you look at
19 excessive-compensation issues, for instance,
20 St. John's just happened, and a scandal, you will
21 see paid board members, in many cases, or the CEO
22 being paid.

23 The logic there is, and if you talk to
24 executives, and I'm an executive, and I talk to my
25 peers, they'll say: Well, a status. Or it gives me

1 influence. Or it makes sure I have some control
2 over the organization.

3 Exactly what you don't teach in good
4 governance.

5 You want to be about a balance between
6 governance and management; and who's the employer,
7 and who's the employee; and not have employees of
8 the corporation serving on the board of directors at
9 the same time.

10 I mean, it just defies logic and sense, and
11 then you have to develop a whole sense of -- a whole
12 array of different kinds of regulations on how
13 you're going to manage that relationship.

14 Again, that's not prominent in the field by
15 no means, but it's prominent when you see problems
16 and scandals and excessives and abuse.

17 And from our perspective, it hurts us as a
18 sector. It hurts the average not-for-profit.

19 The bill talks about the CEO not serving as
20 chair.

21 Now, we're going back to the notion of being
22 compensated, in the first place, by the organization
23 as an employee, and then being able to serve on the
24 board.

25 But, it allows the CEO to be treasurer. It

1 allows the CEO to be secretary in charge of the
2 corporate records that we're talking about that's
3 necessary.

4 And you have to ask, Why?

5 In many cases, some of the arguments will be,
6 and, again, this is not the average not-for-profit
7 corporation, they'll say:

8 Well, you know, I've heard people say, well,
9 you know, if the CEO really knows what's going on,
10 or, the CEO understands the industry, and really
11 needs to have that kind of power and that kind of
12 control.

13 We would -- we again would say:

14 CEOs being paid should not be a voting
15 member of the board;

16 CEO being paid should not be the treasurer of
17 the board;

18 Nor should the CEO who's being paid, be the
19 secretary in charge of corporate records.

20 The board itself needs to have its officers
21 that monitor, and hold in check, management.

22 And then you have committee processes as
23 well.

24 Again, that is what over 90, 95 percent of
25 nonprofits do.

1 Allowing that to happen opens up the vehicles
2 for abuse.

3 And, generally, again, when you see this, and
4 you see the scandals, you ask those questions, and
5 you'll see those kinds of factors playing into it.

6 I'll just -- some quick little things that we
7 noted regarding e-mail notice and voting.

8 We support that fully, except there's no time
9 limit on that. You could put it out for consensus,
10 and it could last five months.

11 There should be a quick timeline.

12 We suggest, like, five days, because
13 circumstances can change around that vote.

14 Regarding the board audit:

15 We support what's in there about the board
16 audit, with the exception of, some added controls in
17 budgets over \$1 million, mostly, because we just see
18 that as unnecessary.

19 And I think, in the accounting profession,
20 that's good -- a lot of that's best practices that
21 the accounting profession does anyway, so I don't
22 understand, exactly, why that needs to be a law.

23 We do support the \$500,000 threshold for
24 audits.

25 As Susan was talking about, a lot of private

1 funders would require audits anyway.

2 When you give money, a lot of state and
3 federal grants require audits.

4 You know, the one issue around that is, that
5 you're not necessarily -- five hundred can be a lot
6 of money for a nonprofit organization. You're not
7 exactly encouraging people to maintain good books.

8 And then if they didn't have an audit, and
9 they have 500,000, and once they hit that threshold,
10 what's the shape that their book's in?

11 And one of the values of an audit, is the
12 audit letter, is the management letter, that really
13 makes a comment on internal controls.

14 And in a lot of ways, that's more valuable,
15 in terms of how money is managed, and necessarily
16 what the picture is, financially, but we do support
17 that.

18 Board size wasn't touched in any of the
19 legislation.

20 It's three people to be on a board of
21 director directors.

22 You can have \$100 million budget, and have
23 3 people be on the board of directors.

24 We think that that's too few, and suggest
25 that whatever the audit threshold is, once an

1 organization is required to have an audit, that that
2 number go up to five.

3 So there's a substance there.

4 And, again, the smaller the boards are, the
5 more likely you're going to have conflicts, and the
6 more likely you're gonna have other kinds of issues
7 arise.

8 Committees, as Mr. Thomas was kind of
9 alluding to, it's confusing.

10 We don't see any reason why changing the
11 titles of committees -- some standing committees,
12 to, committees to the board, or, committees of
13 corporation.

14 "Standing committees" is well known within
15 the sector. Everybody's got that in their bylaws.

16 They understand that changing it to kind of
17 more legal mumbo-jumbo, it's harder to even explain
18 or say, it doesn't make sense.

19 People know what "standing committees" are.

20 They know what "ad hoc committees" are.

21 So that seems to be just an unnecessary thing
22 that I think actually would -- will create some
23 confusion, and need a lot of education in the
24 community.

25 There is a requirement under current state

1 law that wasn't touched, that you have to have three
2 people to be on the standing committee. Three
3 people from the board.

4 So you have three people on the board as a
5 minimum, and three people on the board as a standing
6 committee.

7 And a lot of average nonprofits have facility
8 committees, fundraising committees, nominating
9 committees, underboard of directors, and they're
10 increasingly going out and getting other people to
11 join committees, as resource people.

12 And that's also a way that people may get
13 trained and oriented to be on the board of
14 directors.

15 And they have a difficult time having three
16 people on every standing committee that they want to
17 have.

18 We suggest that number perhaps be lowered to
19 two, because what they'll do is, they'll not make it
20 a permanent committee in their bylaws, and then
21 create it as an ad hoc, when it really should be a
22 permanent committee.

23 That is something that just didn't jive with
24 the number.

25 Excessive comp, finally: The excessive comp,

1 this -- you know, with the Governor's executive
2 order, and with the IRS regulations, quite frankly,
3 we don't need a third system out there right now.

4 It's confusing as it is, in terms of what's
5 going on.

6 If there's going to be legislation on this,
7 or it's going to be in the Not-For-Profit
8 Corporation Law, we want to as aligned as possible
9 with the IRS regulations.

10 And, if there's an amount that's going to be
11 in there, make it aligned with what the Governor
12 has -- is recommending, around the federal executive
13 level of a hundred nine nine.

14 Therefore, there's not difficult numbers out
15 there, there's not different thresholds out there,
16 and it's going to be a lot easier for nonprofits to
17 manage that.

18 Regarding the whistle-blower, we would
19 support the notion of it. If an organization is
20 under some funding requirement, required
21 [unintelligible] whistle-blower, there's no need to
22 create another -- another process.

23 That certainly is a problem in the sector
24 with OMIG, and everybody else.

25 They're creating their own regulations, that

1 end up with a not-for-profit organization need to
2 manage multiple different procedures and
3 definitions.

4 So I'll close with that, and thank the
5 Committee, and welcome any questions or comments you
6 have.

7 SENATOR MARCELLINO: Just one quick question.
8 You mentioned the numbers of not-for-profits.
9 Do you feel there are too many?

10 DOUG SAUER: Pardon?

11 SENATOR MARCELLINO: Do you feel there are
12 too many?

13 DOUG SAUER: There's too many corporations
14 out there that are non-functional.

15 It's easier --

16 SENATOR MARCELLINO: [Unintelligible] think
17 there are too many not-for-profits right now?

18 DOUG SAUER: Yes. I do.

19 And if I was the chamber of commerce, I would
20 say there's never enough businesses.

21 Coming from the nonprofit community, there's
22 duplication. There's saturated fundraising markets.

23 Virtually every private funder will say,
24 Why don't you relate to someone else?

25 Why don't you become under the umbrella of

1 someone else for your special program, what your
2 activity doing?

3 And there's -- right now, in these days,
4 there's too many that need to close and dissolve,
5 that are struggling, and don't even have the money
6 to afford the legal costs of being able to do so.

7 So if you ask me if there's too many
8 nonprofits, I would say yes.

9 SENATOR MARCELLINO: I agree.

10 SENATOR RANZENHOFER: So you think we need to
11 make it easier to dissolve some of the ones that are
12 existing, and there are too many impediments to that
13 happening right now?

14 Is that --

15 DOUG SAUER: Exactly.

16 SENATOR RANZENHOFER: I get the sense that
17 it's too difficult for some of these ones that are
18 no longer functioning, to be able to kind of get out
19 of the business.

20 Do you think that needs to be streamlined and
21 made less expensive?

22 DOUG SAUER: That, and mergers.

23 Because, actually, a number of them wouldn't
24 have to dissolve if it was easier for them to merge
25 or affiliate with someone else, without losing their

1 contracts or losing their license.

2 A lot of them wait until they are at that
3 period where they need -- they've burned their
4 bridges, and they're dissolved.

5 And there's other solutions there, but those
6 solutions can be just as difficult with dissolution
7 sometimes, because every state agency that's funding
8 them or regulating gets involved. It's a very
9 decentralized process.

10 So that's why I say, the whole system needs
11 to be looked at on how that's navigated, because
12 there's a lot of fingers in that pie.

13 SENATOR RANZENHOFER: Thank you very much.

14 I appreciate it.

15 DOUG SAUER: Thank you.

16 SENATOR RANZENHOFER: We have two more
17 speakers.

18 The next speaker is Kevin McCoy, from the
19 New York State Society of Certified Public
20 Accountants.

21 So, Kevin, welcome, and appreciate your
22 perspective and your testimony today.

23 KEVIN MCCOY: Thank you.

24 In addition to being chairman of the
25 legislative task force for the New York State

1 Society of CPAs, I'm a practicing CPA here in
2 Latham, and Queensbury. We have two offices.

3 We service approximately 250 nonprofit
4 organizations in this marketplace, as well as
5 throughout the state.

6 We provide audit services, tax services, and,
7 actually, a fair amount of consultation in the
8 set up and establishment of nonprofits and their
9 books and records.

10 This legislation certainly is important, and
11 as it relates directly to the accounting profession
12 and our interaction with our clients, I thought I
13 would focus on a few areas, and then, obviously, if
14 have you have any questions.

15 The first area that we feel is important is
16 what's been discussed before, and that's the
17 conflict-of-interest statements.

18 As was alluded to, the Form 990 has a
19 question about conflict-of-interest statements, and
20 "Do you have one?"

21 The -- most of our clients have adopted them,
22 and we assist many of them in connection with the
23 developing an appropriate conflict-of-interest
24 statement.

25 The one area that we find is weakest, is that

1 there is not --

2 SENATOR MARCELLINO: Just before you do that,
3 where do they get their language for these --
4 conflict of interest, where do they get the language
5 from?

6 KEVIN MCCOY: There is sample language that's
7 available out on many websites from more
8 associations of nonprofits, as well as, the IRS has
9 suggested language.

10 We've put together for our clients, and for
11 people we consult with, our prototype language that
12 we can share with many of them.

13 SENATOR MARCELLINO: All right.

14 KEVIN MCCOY: So there is an accepted
15 language. It varies, based on the individual
16 organization, but it is readily available, and not
17 very costly to adopt one.

18 SENATOR RANZENHOFER: Could that be included
19 in either the certificate of incorporation or the
20 bylaws, some sort of standard-form language dealing
21 with conflict of interest?

22 KEVIN MCCOY: We normally don't see it in the
23 bylaws, because most of the bylaws have been
24 established well before conflict-of-interest
25 statements became popular. But, recently, any --

1 any of those that have recently established, usually
2 do include it.

3 But, as Doug pointed out, to revise bylaws is
4 a rather tenuous process; and, so, just the board
5 has the right to adopt a conflict-of-interest, and
6 that's what we see most commonly occurs.

7 SENATOR RANZENHOFER: So that's easier than
8 revising bylaws?

9 KEVIN MCCOY: I'm sorry?

10 SENATOR RANZENHOFER: That's easier than
11 revising something that's already --

12 KEVIN MCCOY: Yes, it is easy. Yes.

13 SENATOR RANZENHOFER: Okay, thank you.

14 KEVIN MCCOY: So we think that's very
15 important, and it also helps the audit process,
16 because part of our audit work involves
17 related-party transactions.

18 And so the clear definition here of
19 "related parties" makes it a little easier for us to
20 decide whether or not they fall under the purview of
21 related parties, and, also, whether those conflicts
22 have been vetted, and whether the appropriate
23 documentation has been put together.

24 So, our clients are working on that. It's an
25 evolution.

1 It's only a couple of years old that the IRS
2 has put this question on the tax return. And as
3 they progress, I think we'll get much better
4 documentation.

5 Certainly, this legislation will help that as
6 well.

7 The second area, whistle-blowers, we find
8 that that's also a very appropriate policy to have
9 put in place.

10 The one area that we would like to see
11 considered, is that the whistle-blower contact
12 individual be someone on the board, because, one of
13 the things that we have found, is that, you know,
14 when there's instances of collusion, or in
15 particular, instances where someone decides, well,
16 that's not really that important, or it's been a
17 long-term employee, the board doesn't often find out
18 about that.

19 And as a result, our communication with the
20 board, in the first instance, is to discuss whether
21 they're aware of any problems or issuance -- issues
22 of fraud that may have occurred in the organization.

23 And if they are never made aware of any
24 whistle-blower issues, they can't communicate that
25 to us.

1 And we work for the board.

2 Although it's commonly thought that we work
3 for the client, the nonprofit, our actual reporting
4 requirements, and those that hire us, are supposed
5 to be the board of directors or trustees.

6 So, our direct communication with them is
7 really imperative, to make sure the audit process
8 goes appropriately.

9 So, I'm on the board of a small nonprofit
10 organization here in Albany.

11 And when we put in a whistle-blower policy, I
12 was the one that volunteered to be the contact
13 person, so I'm am posted as the one the employees
14 contact, as opposed to the executive director,
15 because I felt, and the board agreed, that it was
16 more appropriate to not report to someone who may be
17 involved in that same situation.

18 So, that's something we would ask you to
19 consider as well.

20 The provision regarding thresholds, it's a
21 tough situation for us.

22 We are looking at a circumstance, where
23 you're gonna certainly cut the revenue stream to our
24 profession. At the same time, we recognize the
25 practical aspects of it.

1 We can't do an audit for \$2,000.

2 We can't do one for \$4,000.

3 And to spend that kind of money on a \$250,000
4 budget is often not practical.

5 What we don't really have, and haven't vetted
6 through our organization yet, is something that was
7 brought up before:

8 It would be nice to have some of the sizes
9 that are governed, the funding, and how many fall
10 below the threshold, and above.

11 We know that there are a lot of audits.

12 As I mentioned, I think my firm alone
13 probably does over a hundred, and -- throughout the
14 state.

15 And as a result of that, there are
16 circumstances where it's just not appropriate, or an
17 audit is not necessary.

18 I had one organization that, one year,
19 received one major contribution of 250,000, and had
20 never received that much money in the past. They
21 were faced with an audit for that particular year.

22 Fortunately, in conversation with the
23 AG's Office, they were willing to waive that
24 requirement, because it was an unusual circumstance.

25 So we think the threshold is certainly

1 logical, and whether or not it covers enough is our
2 question.

3 Two issues related to that:

4 One, there is a part of this bill that also
5 says that the Attorney General's Office, in
6 reviewing a financial statement that's sent to them,
7 may decide to upgrade the service to a review -- or,
8 to an audit, from a review, and require the
9 organization to file within 60 days that audited
10 report.

11 Practically, that's just not possible in most
12 instances.

13 For us to go in and do an audit with only
14 60 days' notice, and be able to complete it and file
15 it, it's just not practical.

16 The process shouldn't have a time limit.

17 If they have a reason that there's an audit
18 required, chances are, it's going to be some reason,
19 if we need to look a little deeper into the
20 operations or the financial information.

21 SENATOR RANZENHOFER: You say no time limit,
22 or it should be a longer time limit?

23 KEVIN MCCOY: I don't know that you can set a
24 specific time limit.

25 I would suggest that the time limit be set

1 similar to what it is now; that the filing
2 requirement for an audit is the date that is the
3 furthest extension for the Form 990.

4 So, as long as we can file that report in the
5 same period of time that the 990 is required to be
6 filed, I think that would be sufficient.

7 That never exceeds a one-year period of time.

8 SENATOR MARCELLINO: Are any of your
9 clients -- do any of your clients contract with
10 state government?

11 KEVIN MCCOY: Contract with, who?

12 SENATOR MARCELLINO: State government.

13 KEVIN MCCOY: Oh, yes. Many of our clients
14 contract with state government.

15 I would say, 80 to 90 percent of our clients
16 are involved in some kind of reimbursement program
17 through the State, either through the Health
18 Department, or OASIS, or some --

19 SENATOR MARCELLINO: Are you aware of any of
20 them having problems with delayed payments?

21 KEVIN MCCOY: Yes.

22 I mean, I'm involved with agencies, I'm on
23 board, that -- that, again, they'd rather -- we'd
24 rather get the money than have the interest.

25 So it's -- it would certainly be a better

1 mechanism to be funded more quickly.

2 But there are oftentimes questions that the
3 State has that are genuine about why they're
4 reimbursing certain things.

5 The one thing I do want to caution you on,
6 with lowering the limit of the audit, is, when you
7 look at most of the instances of fraud that happen
8 today, and you read the paper, without a doubt, any
9 week, there's another little league fire district,
10 or some type of organization, that's been subjected
11 to fraud, our opinion is, that's not really
12 audit-related, or the need to have an audit.

13 It's really the involvement with the board,
14 and they're not governing the treasurers or the
15 people that are involved.

16 And so we think that these things that you've
17 put in here, that require a board involvement, are
18 very good towards those particular concerns that we
19 have.

20 Finally, the section -- one of the sections
21 that we think needs to be reexamined, is something
22 that was brought up before as well, and that is:

23 That when we help a nonprofit set up their
24 organization, there's, many times, a short period of
25 time where that can be a significant operation.

1 And to have to go through the entire process
2 of getting all the approvals necessary to operate
3 can be quite burdensome.

4 And I guess a quick example I'll give you is:

5 If you look at what happened over in Boston,
6 and how quickly they needed to have an organization
7 established to accept contributions; and, yet, the
8 Form 1023 to the IRS could not have possibly been
9 filed and approved. Those take as much as a year.

10 And, so, in order to have that capability of
11 raising money for an event or a circumstance, or
12 operate in a short period of time when disaster
13 hits, or some circumstance occurs, we really think
14 that it would be important to have retroactive
15 allowances for applications for approval for the
16 Form 1023, and the granting of tax-exempt status.

17 One last comment, regarding conflict of
18 interest, I want to be sure that -- you mentioned
19 something, Senator, about having the accountants
20 involved with the board.

21 I just want to reiterate, that any accountant
22 that provides a review or audit service cannot be on
23 the board.

24 It is required that we are independent and we
25 have no relationship with that client, other than

1 through the audit process.

2 If we provide any what's called "non-audit,
3 non-attest services" -- the preparation of tax
4 returns or consulting or computer consulting -- the
5 board is required to approve that before we're
6 engaged for that purpose.

7 SENATOR RANZENHOFER: Okay, well, thank you
8 very much for appearing here today.

9 I appreciate your testimony.

10 KEVIN MCCOY: Thank you.

11 We have a final speaker, William Josephson,
12 from the Law Revision Commission. He is the
13 consulting counsel.

14 And we have met with Mr. Josephson before.

15 And, again, I appreciate your coming here
16 today to close the hearing.

17 Welcome.

18 WILLIAM JOSEPHSON: Senator Ranzenhofer,
19 Senator Marcellino, happy to be here today.

20 It's been a long hearing, a rich hearing.

21 I want to confine my remarks, in view of the
22 shortness of time, to a few very brief comments.

23 First, the philosophy of the
24 Law Revision Commission in its approach to this
25 bill, as Peter testified, was to try to achieve a

1 consensus.

2 We consulted with everyone that we could find
3 who was interested in consulting with us.

4 We consulted extensively with the
5 Attorney General's Office, for example. And
6 Jason Lilien participated in one of the meetings of
7 the Law Revision Commission.

8 I am impressed by the degree of commonality
9 between the Law Revision Commission's bill and the
10 Attorney General's bills.

11 We, obviously, did not have an opportunity to
12 comment on the bills that have just been introduced
13 subsequent to the introduction of our bill.

14 We were working off the Attorney General's
15 bill that was introduced at the last session; and,
16 therefore, I'm still even more impressed by the
17 extent of commonality.

18 That doesn't mean that there are not some
19 areas of disagreement, at least I have, with the
20 Attorney General's approach to certain issues.

21 On the other hand, the philosophies of the
22 Attorney General and of the Law Revision Commission
23 I think are very similar, compared to the philosophy
24 of the original bar association bill, which was much
25 more a business corporation-law conformity bill, and

1 it included, you may remember, a provision that
2 would have authorized the board, in its certificate
3 of incorporation, to completely exculpate directors
4 and offices from any liability.

5 That obviously runs counter to current
6 thinking, it runs counter to the testimony here,
7 which is unanimously in favor of strengthening
8 fiduciary duties, strengthening the board's
9 obligation.

10 I'm sympathetic to many of the comments that
11 I have heard here today.

12 For example, the gentleman from the
13 Certified Public Accountants Association makes the
14 very valid point, that, for example, under the
15 American Institute of Certified Public Accountants'
16 nonprofit toolkit, whistle-blowers ought to record
17 report to audit committee or to the board.

18 There is concern, particularly expressed by
19 Senator Marcellino, about whether there are not --
20 there are too many nonprofits.

21 You may or may not remember that there was a
22 time when a nonprofit could not be incorporated in
23 New York without judicial approval.

24 I don't know whether you're suggesting we go
25 back to that, but it's an interesting idea.

1 And let me give you two facts that might
2 support Doug Sauer's view, and what I infer from
3 your comment.

4 When I took over the charities bureau --
5 You may remember, I was the head of the
6 charities bureau from 1999 to 2005.

7 -- we merged, finally, the databases for
8 professional fundraisers and the charity
9 registration, and we did a sample of charities that
10 had not registered for more than two years.

11 20 percent turned out to be defunct.

12 Similarly, at the federal level, the
13 Pension Protection Act of 2006 required all
14 nonprofits, traditional charities, the (c)(3)s, to
15 file something.

16 If you didn't file a 990 or a 990-PF or a
17 990-EZ, you had to file a 990-N, which was simply a
18 postcard.

19 So when this requirement came into effect,
20 there were a million-two determined exempt
21 organizations in that category.

22 Now there are about 800,000. That's on a
23 nationwide basis.

24 That's almost consistent with our experience
25 with nonprofits that have ceased to function.

1 I'm very sympathetic with the comments of the
2 representative of the cemetery association.

3 That's an issue that the
4 Law Revision Commission chose not to tackle, but it
5 needs tackling.

6 And I would hope that the Committee would put
7 it on its legislative agenda for the future.

8 As she noted, the Attorney General serves on
9 this Cemetery Board.

10 It was enlightening to me, to understand, and
11 try to deal with, the problems our cemeteries face,
12 which are very serious. They probably don't get
13 enough attention.

14 I would be strongly in favor of the Committee
15 giving that serious consideration in the future.

16 Another issue that Senator Marcellino, in
17 particular, has raised, is board independence;

18 And Doug Sauer has raised the question of
19 board size.

20 Should the statutes require that a majority
21 of all nonprofit boards be independent?

22 Should the statutes limit the size of
23 nonprofit boards?

24 You have many nonprofit boards that have more
25 than 20, 30, 40, 50 people.

1 The notion of fiduciary responsibility in
2 that situation is absurd.

3 Responsibility cannot be pinpointed, and
4 those boards do not focus and they do not function.

5 I would like to submit, on behalf of
6 Mr. Kiernan and myself, with your permission, more
7 detailed comments on the differences between the
8 Law Revision Commission bill and the
9 Attorney General's bill.

10 I think there are some provisions in the
11 Attorney General's bill that, frankly, are
12 unworkable, and impractical.

13 And -- but that needs more thoughtful
14 consideration than I am able to give it, on
15 something that was introduced only a few days ago.

16 Similarly, I would like to have time to
17 reflect on many of the comments made in the hearing
18 today.

19 For example, I am struck by the fact that the
20 representative of the hospital association thinks
21 that we could, in fact, dispense with prior
22 Health Department consent to incorporation.

23 As Peter said, in framing the
24 Law Revision Commission's bill, we felt that if
25 major consents on what we call the "budget-buster"

1 agencies were eliminated, then the executive, when
2 the bill finally came to the Governor, would get
3 25 veto recommendations.

4 It seems to me that it's time to have a
5 conversation with the Executive about what the
6 Executive's position on consents, is.

7 We have started that conversation.
8 Obviously, we need to continue it.

9 So that's highlights of my reaction to
10 today's valuable session, for which I really
11 appreciate.

12 And, thank you.

13 SENATOR MARCELLINO: Thank you.

14 SENATOR RANZENHOFER: Well, thank you very
15 much.

16 Thank you for providing the closing
17 testimony.

18 And one of the things that we would ask for,
19 because, obviously, you would like to submit a more
20 detailed response, based on what you've heard today,
21 and we would look forward to getting that, and we
22 would look forward to getting it quickly, so we can
23 incorporate --

24 WILLIAM JOSEPHSON: As quickly as we can
25 manage.

1 SENATOR RANZENHOFER: Well, everything is
2 relative.

3 So, again, I appreciate --

4 WILLIAM JOSEPHSON: Well, some things, I
5 hope, are not relative, like fiduciary duty.

6 SENATOR RANZENHOFER: Well, thank you for
7 being here today. I appreciate it.

8 WILLIAM JOSEPHSON: Thank you very much.

9 SENATOR RANZENHOFER: That concludes today's
10 hearing.

11 I want to thank the representative from the
12 Attorney General's Office, William and Peter from
13 the Law Revision Commission, the State Bar
14 representatives, and, then, representatives from all
15 the not-for-profits that were here, from the
16 CPA Association, Cemetery Association.

17 I want to thank media services for helping us
18 today; Senate Special Events staff; Senate
19 photography; the staffs of Assembly Member Brennan,
20 who has sat through this diligently and patiently;
21 the staffs of Senator Marcellino's Office; my
22 office; central staffs as well; who did a lot of
23 work in putting this together, particularly my
24 Senate Committee Clerk, Randi Malman; and, again,
25 all the people who have participated today.

1 As I said earlier when we started, this is
2 the first of a series of three hearings.

3 We're going to have another one on Friday in
4 New York City, and then one on the following Tuesday
5 in Rochester.

6 The thought is, that, as many people
7 testified, this issue has been discussed for a very,
8 very long period of time, and we are trying to get
9 some legislation passed this year.

10 So, as we talked about whether things are
11 relative or not relative, if people have additional
12 comment or concerns, if you can get them to us as
13 quickly as possible, so we can consider them, that
14 would be greatly appreciated.

15 So, again, thank you, everybody, for being
16 here today.

17 And that concludes our Committee hearing
18 today.

19 Thank you.

20 (Whereupon, at approximately 12:48 p.m.,
21 the public hearing held before the New York State
22 Senate Standing Committee on Corporations,
23 Authorities, and Commissions concluded, and
24 adjourned.)

25 ---oOo---