TESTIMONY OF

Lisette Camilo,

Director of the Mayor's Office of Contract Services and City Chief Procurement Officer, and

Tracey Knuckles, Deputy Commissioner and General Counsel, Department of Cultural Affairs

Before the New York City Council Committees on Contracts

September 25, 2015

Good afternoon, Chair Rosenthal, members of the City Council Committee on Contracts and Council Member Crowley. My name is Lisette Camilo and I am the Director of the Mayor's Office of Contract Services (MOCS) and the City Chief Procurement Officer (CCPO). Thank you for the opportunity to testify today regarding proposed Introduction 288-A of 2014 (Intro 288-A), regarding conflict of interest disclosures from executives of city-funded nonprofit organizations.

Intro 288-A would amend Section 111 of the New York City Charter to require those in leadership positions at certain nonprofit organizations to submit financial disclosures to the City. While the Administration supports the apparent goals of the present legislation to guard against conflicts of interest in City-funded nonprofits, there are a number of recently enacted provisions of State law and protections at the City level that attend to the concerns this bill seeks to address.

Conflicts of Interest Protections in the New York State Not-for-Profit Corporation Law, Non-Profit Revitalization Act, and Public Authorities Accountability Act

Section 111 of the City Charter was enacted in 1978 and predates much modern regulation of nonprofits, particularly recently-enacted requirements related to conflicts of interest. In fact, Section 111 has origins going back much further than 1978; it reflects policies of the Board of Estimate that apparently date back to the City's 1913 budget. The age of this provision is reflected by its reference to the charitable institutions budget, a section of the budget that has not existed for decades.

Given the substantial changes to the legal scheme regulating nonprofits since Section 111 of the Charter was enacted, any effort to address or alter the City's current approach to conflicts of interest at City-funded nonprofits must take into account recent developments and enactments.

Currently, issues related to conflicts of interest for directors, officers, and key employees are covered by an extensive scheme in the Not-for-Profit Corporation Law, as amended and strengthened by the Non-Profit Revitalization Act (NPRA). The important policies reflected in Section 111 are also now addressed in provisions of the Public Authorities Law, as amended by the Public Authorities Accountability Act (PAAA), and the City's standard contracts.

The recent NPRA, which was enacted in 2013, made significant changes to State law requirements regarding nonprofit governance, with the State Legislature focusing in particular on integrity and accountability, which were of particular concern. The NPRA notably strengthened provisions related to interested directors by adding important new requirements and procedures related to what it termed "related party transactions," meaning any transaction, agreement or other arrangement involving the nonprofit in which a person or entity closely related to the nonprofit, including directors, officers, key employees, and their relatives, has a financial interest. The NPRA also empowered the Attorney General to enjoin, void, or rescind any such transaction that violates the requirements of the law or is otherwise not reasonable or in the best interests of the nonprofit.

The NPRA further added a requirement that nonprofits must adopt conflict of interest and whistleblower policies, and set forth a list of the minimum elements of those conflicts of interest policies, which seek to ensure proper disclosure of conflicts and recusal of conflicted persons, as well as requiring written annual disclosures of key information by directors. The NPRA further enhanced corporate governance by requiring that only independent directors could serve on the audit committee or oversee the adoption, implementation of, or compliance with the conflict of interest or whistleblower policies.

For nonprofits that are affiliated with, sponsored by, or created by the City, the Public Authorities Law, as amended by the Public Authorities Accountability Act, sets forth its own rigorous requirements related to transparency and accountability. The boards of such nonprofits, which are defined as "local authorities" by PAAA, must adopt a whistleblower policy and an ethics policy applicable to each director, officer, and employee that meets standards set forth in the Public Officers Law. Local authorities must also have a governance committee and an audit committee, both of which must include a majority of directors who do not have a financial interest in the local authority. Furthermore, directors, officers, and employees of local authorities must receive training on their fiduciary duties and file annual financial disclosures with the Conflicts of Interest Board.

Conflicts of Interest Protections in the Contracting Process

The City has taken additional steps to address the concerns about corporate conflicts and integrity with respect to nonprofits that receive City funds. Following enactment of the

NPRA, the City revised its form human services and discretionary fund contracts to strengthen existing conflicts provisions. Among the revisions was a mandate that contractors maintain a conflict of interest policy as required by the NPRA that would include, among other things, procedures addressing related party transactions. While related party transactions can be beneficial to nonprofits, our goal is to use the contracting process to hold organizations accountable to state law governing these transactions and ensure that all such transactions are conducted in a transparent and appropriate manner. If a nonprofit expends any City contract funds via a related party transaction that does not adhere to the legal requirements, the City may recoup those funds.

I'd like to turn the testimony over to Tracey Knuckles, Deputy Commissioner and General Counsel of the Department of Cultural Affairs (DCLA) to talk about DCLA oversight of nonprofit cultural organizations and then I will finish giving my testimony.

DCLA Oversight of Nonprofit Cultural Organizations

The Department of Cultural Affairs has procedures for oversight of cultural institutions receiving City funding. For the 33 institutions on City-owned property known as the Cultural Institutions Group or CIG, the DCLA Commissioner serves as an *ex officio* member of the CIG boards of directors and attends or sends delegates to board meetings, public programs, and community activities. DCLA may also conduct in-depth reviews of specific concerns identified during the course of monitoring of the institutions' operations. CIGs are required to submit detailed reports to the agency on an annual basis known as Obligation Plans and Final Reports which detail, among other things, the uses slated for City funding, public programming, fundraising goals and activities, and attendance numbers. In addition, in 2007, DCLA instituted the CultureStat evaluation tool for members of the CIG to promote good governance and financial management. Among the requirements of CultureStat are the existence of a written Code of Ethics, Conflicts of Interest Policy, Whistleblower Procedures, and Document Retention schedule. Documentation of responsible budgeting, including timely planning of expense and income projections for upcoming capital projects, is also a requirement.

For organizations receiving funding through DCLA's Programs Services Unit, the agency requires a grant application with a detailed scope of cultural services to be supported by City funding and a corresponding budget and details about organizational governance and capacity, which includes: term limits for members of the board of directors, the existence of an active committee structure – including the existence of audit or finance committee, and the level of board participation in board giving as a percentage of operating income. In addition, as part of its report to the agency on City-funded public services, cultural organizations must certify that no directors, officers, employees, subcontractors, or outside service providers have any personal interest, either direct or indirect, that conflicts with the performance of the City-funded public service. In addition, DCLA requires organizations to be in good standing with respect to annual filings by the State Attorney General and Internal Revenue Service, thus ensuring that City-funded organizations are up-to-date with state and federal regulatory oversight requirements.

MOCS's Oversight of Nonprofit Organizations

There are more than 1,400 nonprofit vendors with open human services contracts. The overwhelming majority are organizations that have truly dedicated leadership and staff and perform excellent work on behalf of the City. While there may be a few bad apples, we should not let those bad apples taint the human service sector. The State, through its various laws, and the City have done much work to further the aim of ensuring that our nonprofit partners are exercising best practices in governance.

MOCS has made significant investments in its oversight of the nonprofit organizations that the City does business with. Since 2007, the Capacity Building and Oversight (CBO) unit at MOCS has worked with City and community partners to address concerns about the capacity and integrity of nonprofit organizations. CBO has conducted approximately 500 proactive CBO Reviews of nonprofits that have significant business with the City. As part of these reviews, CBO examines the organization's bylaws, board structure, audited financial statements, IRS 990, and key policies, including the conflict of interest policy and annual disclosure statements. The conflicts of interest policies must adhere to state law, which requires that the policy state the definition of a conflict; procedures for disclosing conflicts; a requirement that conflicted parties recuse themselves from deliberations; documentation of the deliberations; and procedures for disclosing, addressing, and documenting related party transactions. The organization must also require directors, offices, and key employees to annually disclose conflicts of interest. Where deficiencies are found, CBO makes recommendations to the organization to remedy those deficiencies and follows up to ensure compliance. For example, if the organization indicates in the CBO review questionnaire that the board does not review the CEO's credit card statements, CBO will recommend that the board adopts a policy that requires the board to review the CEO's credit card statements.

During a recent CBO Review, the team discovered through its review of an organization's IRS 990 that there were improper related party transactions. The 990 is a nonprofit's annual tax return. The IRS requires exempt organizations to disclose related party transactions in their 990s, including the names of the related parties and the amounts of the transactions. Through this disclosure, which is legally mandated, CBO discovered an improper transaction and held the organization accountable for the wrongdoing. During another recent CBO review, the team discovered that an organization that required annual conflicts of interest disclosures was not adequately documenting the audit committee's consideration of those disclosures. Through the CBO Review process, CBO discussed this deficiency with the organization and will ensure the board properly documents its related party transactions going forward.

Some of these reviews have resulted in Department of Investigation (DOI) referrals. Where MOCS has found an instance of self-dealing that affects the integrity of an otherwise high-quality service provider, CBO has worked with the agencies, DOI, and the organization's leadership to institute corrective measures. One enforcement mechanism is to develop a citywide Corrective Action Plan (CAP) with a number of conditions and requirements that the nonprofit must abide by in order to continue working with the City. MOCS monitors and oversees compliance throughout the term of the CAP. In instances where the City has determined that the integrity of a nonprofit vendor requires more drastic actions, the CAP may include terms that require dismissal of key employees or, working with DOI, an assigned integrity monitor. The most drastic measure can include contract termination and an assignment of the contract to another provider.

CBO also looks at organizations beyond the competitive procurement portfolio since the clearance of City Council line item awards go through the unit. CBO staff regularly vet more than 2,000 community based organizations for legal compliance and integrity.

CBO regularly offers free trainings for nonprofit board and staff members on the New York State Not-for-Profit Corporation Law, as well as contract requirements and management and governance best practices. The City Council funds full-day trainings in each borough every year which are designed and conducted by our office's CBO staff to ensure that community based organizations understand their legal obligations. CBO maintains the NYC Nonprofits website (www.nyc.gov/nonprofits) with standards and information about compliance and best practices in nonprofit management and governance and refers nonprofits to capacity building resources. CBO also operates the NYC Nonprofits Help Desk (phone and email) and answers approximately 10,000 requests per year. When the NPRA was passed and new conflicts of interest requirements for nonprofits became law, CBO ensured a notice when to all nonprofit vendors notifying them of the change to the law and the City's expectation that they adhere to it.

Conclusion

The de Blasio Administration is committed to strengthening the governance and management capacity of the City's nonprofit partners, supporting the provision of essential community services, and the responsible stewardship of public funds. We look forward to continuing to work with the City Council to find new ways to achieve these goals. At this time, I would be happy to answer any questions the committee may have.

Testimony

To the New York City Council

Committee on Contracts

With respect to proposed Legislation

Int. No. 288-A

By

Virginia P. Louloudes

Executive Director

Alliance of Resident Theatres/New York

Friday, September 25th, 2015

Good afternoon. My name is Virginia Louloudes (though I go by Ginny) and I am the Executive Director of the Alliance of Resident Theatres/New York, the leadership and advocacy organization for New York City's 350+ not-for-profit theaters. Our members range from the Roundabout Theatre, the largest non-profit theatre in the country to National Black Theatre in Harlem, the Chocolate Factory in Queens, Irondale Ensemble in Brooklyn, Pregones in the Bronx, and Sun Dog Theatre in Staten Island.

As the Executive Director of a growing nonprofit, I would like to explain why I respectfully oppose Proposed Legislature No. 288-A.

My concerns are twofold:
First, non-profit organizations in New York City already comply with the stringent disclosure and compliance requirements mandated under New York Nonprofit Revitalization Act as well as the US Internal Revenue Service's (IRS) requirement that 501(c)(3) organizations annually file a 990 report. Furthermore, non-profits that receive financial support from the City are subject to an additional layer of oversight from the Mayor's Office of Contract Services. Together, the Nonprofit Revitalization Act, the IRS and the Mayor's Office of Contract Services collect and monitor much of the information that Int. 288-A would seek to collect from persons in leadership positions at non-profit institutions. Further complicating

matters, while New York State and the IRS already collect data regarding self-dealing actions by non-profits, they use different measures than proposed in Int. 288-A to determine when such actions must be reported. Mandating another, duplicative disclosure requirement would add significant administrative burden to the City's non-profit community.

Second, philanthropic gifts, foundational support, and State and Federal grants are fundamental to ensuring fiscal soundness for most of the City's non-profit theatres. These critical non-City resources not only support the direct services provided by the non-profit community but also provide funding to support the necessary administrative operations that keep non-profits operational, including in many cases, salaries of employees in leadership positions. By requiring non-profits to receive approval from the City before entering into third-party contracts or transactions that directly or indirectly benefit employees in leadership positions, Int. 288-A would undermine the ability of non-profits to solicit private funds, apply for foundational support, and compete for third-party contracts.

Section 111.1 will Require non-profits receiving funding from the City to disclose to and receive approval of the applicable City agency (which for cultural non-profits I would assume to be The New York City Department of Cultural Affairs - DCLA) the material terms of *any* *contract or transaction, direct or indirect, between an institution and a person in a leadership position at the non-profit,* any partnership of which such person in a member or any corporation in which such person holds 10% or more of the outstanding common stock.

The information that would be disclosed by the employees that would be covered under Int. 288-A, is already required by the IRS when organizations file annual 990 reports, which requires disclosure of excess benefit transactions.

Non-profits are also required to disclose this information under the **Nonprofit Revitalization Act,** which requires the boards (including the chief operating officer if they are on the board, as am I) to disclose any material or perceived conflicts of interest. In fact, according to a document distributed by Sullivan & Cromwell[1], which has an office in New York City:

"The Act substantially clarifies and strengthens provisions ... addressing conflicts of interest, adding as a new defined term under both laws "related party transaction", meaning any transaction, agreement, or other arrangement in which a related party has a financial interest and in which the corporation or trust or any affiliate of the corporation or trust is a participant. "Related party" means any director, officer, trustee, or key employee of the corporation or trust or any affiliate of the corporation or trust, any

relative of such persons, or any entity in which such a person or a relative has a 35% or greater ownership or beneficial interest, or, if the entity is a partnership, a direct or indirect ownership exceeding 5%."

Moving on to Section 111.2:

This proposed legislation would preclude any member of the board or anyone in a leadership position from sharing (directly or indirectly) in the proceeds from any contract or transaction entered between an institution and a third party, unless approved by an agency.

Again, if the terms "contract" or "transaction" include grants made by foundations, corporations, non-City government agencies or individual donors, A.R.T./New York and its smaller members will be spending substantial time and resources requesting DCLA to approve grants that benefit their employees in leadership positions or their general operating budgets which indirectly support the personnel cost for these employees.

This seems to meet the requirements of the Nonprofit Revitalization Act, which requires that we have a Conflict of Interest Policy which addresses such actions. Again, Sullivan & Cromwel[1] explain:

"The Act adds "independent director" and "independent trustee" as defined terms under the N-PCL and EPTL, respectively, meaning a director or trustee (i) who is not, and has not in the last three years been, an employee of the organization or any of its affiliates; (ii)

who has not received more than $10,000 in direct compensation from the organization or affiliate in any of the last three years (other than reimbursement for expenses reasonably incurred as a director or trustee or reasonable compensation for services as a director as permitted under NPCL Section 202(a) or trustee commissions as permitted by law and the governing instrument); (iii) who is not a current employee of and does not have a substantial financial interest in any entity that has made payments to or received payments from the organization or an affiliate -7- The New York Nonprofit Revitalization Act of 2013 December 20, 2013 for property or services with value exceeding either $25,000 or 2% of the organization's gross revenue; and (iv) who does not have any relative who is described in (i), (ii) or (iii). For these purposes, "payment" does not include charitable contributions. Only independent directors or trustees may participate in deliberations or voting by the board or a committee relating to financial oversight and audit matters."

Finally, Section 111.3, as currently written "requires each person in a leadership position... to submit to the agency each year a disclosure of "business interests" from which such person or such person's spouse or domestic partner received income equal to or greater than ten per cent of their aggregate gross income during the previous year.

This poses a tremendous problem for the hundreds of A.R.T./New

York members and their staff, including employees in leadership positions, who do not make a livable wage through their theatre company. More than half of our members have annual operating budgets below $100,000. This money covers the rent of a performance space, and the cost to produce a show (sets, lights, costumes, props, press agents, marketing, and to pay the artists a small fee) leaving few resources available to support the leadership at these small non-profits. This leaves many employees, including those in leadership positions, to work "survival jobs" to help them pay their rent, utilities, groceries, and clothing! While these second jobs often comprise more than 10% of an individual's annual income, trust me, no one at these theatres is getting rich from their survival job. At best, they are teaching at the area colleges and universities; others work as waiters, bartenders, legal assistants, nannies, academic tutors and teaching artists for other theatre companies. In fact, A.R.T./New York's own board member, Deadria Harrington, Producing Artistic Leader of Harlem's Movement Theatre Company works at the Tenement Museum to cover her living costs.

Finally, while not included in the scope of Int. 288-A, we have significant concerns with the current Charter mandated reporting requirements for transactions / contracts that directly or indirectly benefit the members of non-profit governing boards. For example, 76% of our 350 members have annual operating budgets of under $500,000. 53% have budgets below $100,000. In these cases grants sometimes make up 40-60% of the organizations' income, and sometimes that income covers the cost of the salary of the Artistic

Director (who, in addition to selecting plays, defining and overseeing the mission, often directs each and every show).

To cite another example, A.R.T./New York is a membership organization whose board consists of the leaders of member theatres as well as individuals from the philanthropic and business communities. We receive grants for our Nancy Quinn Fund, which A.R.T./New York re-grants to companies with annual operating budgets below $100,000. Some of our Theatre Board members are the recipient of these grants, and we report this to the Finance Committee, in the Board Financial Report, and in our Annual Report, which is available on our website, as is required by the Nonprofit Revitalization Act. We also receive a grant for the Harold & Mimi Steinberg Theatre Leadership Program, which provides free consulting (which the grant helps A.R.T./New York cover) to member companies. In the past, some of our Theatre Board Members have benefitted from these consultancies, and they are reflected in the same manner as our Nancy Quinn Fund grants.

Furthermore, in 2000 we received a $1,000,000 grant from the Andrew W. Mellon Foundation to create a revolving Cash Flow Loan Fund. This Loan Fund proved critical to our members in the aftermath of 9/11; the fiscal crisis of 2008 and Hurricane Sandy. It remains active today. When members of our board receive these loans, they are reported to the Board in our monthly financials and in our Annual Report.

On behalf of A.R.T./New York and our 350 member companies, I strongly urge the City Council Committee on Contracts to reconsider this legislation. I also urge you and your staff to consult the Nonprofit Revitalization Act of 2013 and the updates distributed by Sullivan & Cromwell, which help to illustrate the duplicative nature of this legislation with a law that is already in practice among all nonprofits.

Thank you.

[1] Link for Nonprofit Revitalization Act information:
https://www.sullcrom.com/siteFiles/Publications/SC_Publication_The_New_York_Nonprofit_Revitalizaton.pdf

Lawyers Alliance for New York

Connecting lawyers, nonprofits, and communities

September 25, 2015

Testimony of Lawyers Alliance for New York Before
the New York City Council Contracts Committee
in Opposition to Int. 288A

by Laura Abel, Senior Policy Counsel

On behalf of Lawyers Alliance for New York, I respectfully submit this testimony in opposition to Int. 288A, which would amend section 111 of the City Charter.

Lawyers Alliance is the leading provider of business and transactional legal services to nonprofit organizations that are improving the quality of life in New York City neighborhoods. Each year our legal staff, joined by more than 1,500 volunteer attorneys from more than 125 law firms and corporate legal departments, serves thousands of nonprofits working in all five boroughs. Lawyers Alliance provides legal assistance to help nonprofit corporations operate ethically and transparently to further their charitable purposes. We also run workshops and webinars to educate nonprofit executives about their governance obligations.

We oppose Int. 288A because it would duplicate, and in some instances contradict, federal and state laws already in effect. We urge:

- *Reject* the requirements that nonprofits must disclose the material terms of a self-dealing transaction to the City and obtain approval from both the City and 2/3 of the organization's board should be rejected.
  Alternative proposal: Reserve the right in funding contracts to require recipients to reimburse the City for a transaction that is unfair or unreasonable in violation of the related party transaction provisions of the New York Not-for-Profit Corporation Law.
- *Reject* the requirement that nonprofits must disclose the home address and sources of income of board members and the president or CEO.
  Alternative proposal: Require nonprofit and for-profit funding recipients to disclose the amount of time above twenty hours per week that the CEO or president spends in any employment or consulting position outside the organization.

As an initial matter, it is unclear that Int. 288A would have any effect, because City Charter § 111 is not currently in force. Charter § 111 applies to a "charitable institution" receiving any funding from the "New York city charitable institutions budget." Currently, there is no such budget line and there are, accordingly, no nonprofits receiving such funding. However, even if Int. 288A did apply to some nonprofits, we would oppose it for the reasons explained below.

I. Approval

A. Board Approval

Int. 288A's requirement that "self-dealing" transactions must be approved by 2/3 of the organization's board should be rejected because it conflicts with the State's recently enacted Nonprofit Revitalization Act of 2013, which requires majority approval.[1] Notably, the City has embraced the State standard in its human services contracts, which reserve the right to recoup any overpayments that result from a related party transaction that violates the NY Not-for-Profit Corporation Law.[2] Majority approval is sufficient to ensure that insider transactions are fair and reasonable, particularly since all board members are obligated to act in the organization's best interests, the interested person is barred from deliberations and voting on the transaction, and for transactions in which the interested person's interest is substantial the board must consider alternative transactions whenever possible.[3] The State law is enforced by the Attorney General's Charities Bureau, which can unwind the transaction, require the insider to pay up to double the amount of any benefit improperly obtained, and remove board members or officers who approved the transaction.[4] Int. 288A's requirement of approval by 2/3 of the board is thus entirely unnecessary.

Transactions with well-intentioned insiders can be extremely beneficial for a nonprofit organization. A board member may provide office space at a far-below-market rent. Another board member's catering company may provide free food preparation and waitstaff for the organization's gala, charging only the actual cost of the raw ingredients. Indeed, 58% of small nonprofits report that they obtain below market goods and services from their board members.[5]

The City should not make these desirable transactions unnecessarily difficult. A 2/3 approval requirement would make it impossible for nonprofits to enter into such transactions in a timely manner, particularly when board members are scattered around the state or country or the full board meets only once or twice each year.

B. City Approval

Int. 288A's requirement of prior approval by the City should be rejected because it is unnecessary and unworkable. More than 2,100 nonprofits receive City funding.[6] Without an enormous infusion of resources, City personnel will not have the time to assess and approve appropriate transactions with each one in a timely manner.

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[1] NY Not-for-Profit Corporation Law ("N-PCL") § 715(a).

[2] *See* Human Services Performance Based Standard Contract (June 2014), §§ 1.01(J), 4.07, http://www.nyc.gov/html/hhsaccelerator/downloads/pdf/Human%20Services%20Performance%20Based%20Standard%20Contract%20June%202014.pdf.

[3] N-PCL §§ 715(b), (g), 717.

[4] *Id.* § 715(f).

[5] Francie Ostrower, Nonprofit Governance in the United States: Findings on Performance and Accountability from the First National Representative Study (2007), p. 8, http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411479-Nonprofit-Governance-in-the-United-States.PDF.

[6] Mayor's Office of Contract Services, Procurement Indicators FY 2014, p. 29, http://www.nyc.gov/html/mocs/downloads/pdf/2014%20Annual%20Procurement%20Indicators.pdf.

Moreover, it is inappropriate for a funder such as New York City to oversee transactions by independent organizations that do not involve City funding. Nonprofit organizations frequently receive funding from multiple federal, state and municipal government bodies, as well as from foundations and private individuals. If each funder were to undertake to review and approve all of the organization's insider transactions, the organization would be forced to spend enormous amounts of time seeking each approval, diverting staff time from the organization's core charitable mission.

Instead, we urge an approach similar to the approach already taken in the City's model human services contract: reserve the right in City contracts and grant agreements to require the funding recipient to reimburse the City, or to withhold for the purposes of set-off any monies due to the funding recipient under the agreement, resulting from a related party transaction that violates the Not-for-Profit Corporation Law because it is unfair or unreasonable to the nonprofit.

Allowing the City to use State law as a basis to recoup misspent City funds makes much more sense than imposing yet another set of standards on nonprofit contractors. By reducing confusion, this approach will increase compliance. It will also reduce nonprofits' administrative costs associated with compliance, allowing them to fulfill their government contracts more efficiently and effectively.

II. Disclosure of Transactions

Int. 288A's requirement that "self-dealing" transactions must be disclosed should be rejected because the IRS Form 990 already requires annual disclosure of "excess benefit transactions" and other transactions with insiders. This form is disclosed publicly on www.guidestar.org. For charitable organizations administering charitable assets or soliciting donations in New York State, the 990 is also available on the Attorney General's Charities Bureau website.[7] In addition, nonprofits with City human services contracts must make all documents related to transactions with insiders available to the City funding agency upon request.[8]

Not only would Int. 288A duplicate this disclosure, but because it uses different definitions than both the IRS and NY State it would require nonprofits to track and disclose an additional set of transactions. This would increase nonprofits' administrative expenses, without any corresponding increase in useful information. For instance, Int. 288A would require nonprofits to track small, routine transactions that benefit the corporation; nonprofits do not need to track or disclose those transactions to comply with state law or to fill out the IRS 990.[9] Likewise, Int. 288A would require nonprofits to track transactions with entities in

[7] *See* http://www.charitiesnys.com/RegistrySearch/search_charities.jsp.

[8] *See* Human Services Performance Based Standard Contract (June 2014), § 5.01, http://www.nyc.gov/html/hhsaccelerator/downloads/pdf/Human%20Services%20Performance%20Based%20Standard%20Contract%20June%202014.pdf.

[9] *See* Instructions to IRS 990 Sched. L, http://www.irs.gov/pub/irs-pdf/i990sl.pdf (requiring reporting of business transactions involving interested persons only if all transactions with that person exceed $100,000 in a year, or if a single transaction exceeds $10,000 or 1% of the organization's revenue; requiring reporting of transactions with "disqualified persons" only if the disqualified person receives an excess benefit as a result);

which a person in a leadership position holds 10% or more of the common stock; for the most part, the State law and IRS 990 apply only to entities in which the person has a 35% or more ownership or beneficial interest.[10]

III. Disclosure of Sources of Compensation

Finally, Int. 288A would require disclosure of "business interests" from which the individual, or the individual's spouse or domestic partner, received 10% or more of their aggregate gross income during the previous year. The phrase "business interests" is vague, and it is unclear if the 10% calculation should be made with reference to the income of a single person, or with reference to the combined incomes of the organization's leader and his or her spouse or domestic partner.

More importantly, the home address and income of a volunteer board member are completely irrelevant and a requirement to disclose them would deter many potential board members from volunteering for organizations receiving City funds. Home addresses are likewise irrelevant for CEOs and presidents of nonprofits.

We recognize that the amount of time a CEO or president spends on outside work may provide some indication about the extent of that employee's work for the organization. This concern is, of course, equally relevant to for-profit organizations providing services to the City. However, the amount of outside income is the wrong indicator: a psychiatrist or lawyer can earn a large amount of money for just a few hours of outside work, while another CEO may spend much more time on outside work but earn less. Instead, the City could require contractors to disclose the amount of time that the CEO or president spends working outside of the organization, above a minimal level (such as 20 hours per week) that would not interfere with his or her ability to perform full-time duties for the organization.

For these reasons, Lawyers Alliance urges the Committee to vote against Int. 288A.

NYS Charities Bureau, Conflict of Interest Policies Under the Nonprofit Revitalization Act of 2013 (April 13, 2015), pp. 5-6, http://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf (discussing de minimis and routine transactions).

[10] Instructions to IRS 990 Sched. L, *supra*; NY N-PCL § 102(a)(23) (requiring a 35% interest unless the entity is a partnership or professional corporation, in which case a 5% interest applies).

Human Services Council

TESTIMONY
New York City Council
Committee on Contracts
Hearing on Introduction No. 0288-A
Friday, September 25, 2015

Good afternoon, Chairwoman Rosenthal, Council Member Crowley, and members of the New York City Council Committee on Contracts. I am Michelle Jackson, Associate Director and General Counsel of the Human Services Council of New York ("HSC"), and I thank you for the opportunity to testify regarding Introduction No. 288-A ("Intro. 288-A"). In short, while HSC understands the need for accountability with respect to public funds, we believe that imposing additional approval and reporting requirements on City-funded organizations will adversely affect their ability to carry out their missions. For the reasons set forth below, we respectfully oppose Intro. 288-A and urge the Committee to vote against it.

HSC is a membership association representing nearly 200 of New York State's leading nonprofit human services organizations, including direct service providers and umbrella and advocacy groups. Our members are involved in such areas as early childhood education, youth development, health, mental health, employment services, and services for seniors, immigrants, and individuals involved in the justice system. The City relies heavily on such organizations to deliver essential supports to individuals and communities in need. Unfortunately, human services organizations are hamstrung by a combination of regulatory burdens that draw resources away from service delivery. Intro. 288-A would add to those burdens.

HSC supports efforts to improve nonprofit governance and transparency, and we commend you for taking action on the issue of conflicts disclosure. Our experience, however, is that unfunded mandates such as Intro. 288-A increase administrative and financial burdens on nonprofit organizations without achieving their purpose. In addition, the disclosure requirement is duplicative of existing requirements, and, as Laura Abel of Lawyers Alliance for New York explains, the two-thirds vote requirement is contrary to State law.[1] Furthermore, Intro. 288-A would unfairly subject nonprofit organizations to heightened oversight without subjecting for-profit organizations to the same requirements, notwithstanding the fact that many for-profit contractors receive significant public funding. Finally, Intro. 288-A would discourage qualified individuals from taking leadership positions at covered nonprofit organizations because the disclosure that it would require is intrusive, complex, and voluminous.

Intro. 288 is an unfunded, unworkable mandate that would compound the already high administrative and financial burdens on nonprofit organizations.

Nonprofit organizations that operate in New York are subject to numerous reporting and approval requirements, including VENDEX questionnaires; the prequalification process in HHS

[1] As Laura Abel has explained, the two-thirds board vote requirement for related-party transactions is in direct conflict with the Nonprofit Revitalization Act, which requires only majority approval.

Accelerator; program and fiscal audit on every City contract; independent audited financial statements or OMB Circular A-133; the IRS Form 990; program and budget approval by the City; and oversight by federal agencies and the State Charities Bureau. Intro. 288 would broaden the application of Section 111 of the New York City charter to include the president or chief executive officer ("CEO") of "[a]ny charitable institution which receives any payment from the New York city charitable institutions budget."[2] Section 111 requires government and board approval of related-party transactions and annual disclosure of board members' and executives' personal financial information, including their business interests. There is no funding to support the expansion of these requirements.

Nonprofit human services organizations engage in myriad transactions each year, and in many instances, their board members or executives are parties to (or have an interest in) these transactions. Often, these transactions save organizations time and money as they obviate the need for "shopping around" and result in deeply discounted goods and services. Given the Spartan nonprofit funding environment, it is not difficult to see why organizations undertake such transactions to begin with. Not only would Intro. 288-A significantly increase the workload of City agency staff, but it would also slow down critical business processes that in many cases are urgent and precipitated by the failure of government to fund programs adequately and pay providers on time. Government agencies simply do not have the capacity to review related-party transactions in a timely manner, and for many nonprofit boards, a supermajority vote is a fantasy.

Nonprofit organizations that receive funds from the City operate in a harsh regulatory environment that precludes agile decision-making and opportunity-taking. Some organizations undergo more than 100 audits per year, and even de minimis expenditures and budget modifications that do not affect a program's bottom line can be subject to lengthy approval processes. This, coupled with chronic underfunding and late payment on the part of City agencies, has been devastating for human services organizations. Adding another layer of approval and reporting will only further destabilize the sector. A better approach would be to rely on existing disclosure requirements for related-party transactions and improve enforcement mechanisms.

Intro. 288-A will not achieve the desired outcome, and it is duplicative of existing requirements.

Intro. 288-A was introduced in response to the behavior of the former Chief Executive Officer ("CEO") and former Chief Operating Officer ("COO") of the Queens Borough Public Library ("QBPL"). A formal investigation by the Office of the Comptroller determined that:

1. the CEO and COO[3] used their QBPL credit cards for more than $310,000 in prohibited expenses, including about $115,000 in purchases that appear to be taxable, undeclared

[2] As explained by Laura Abel, however, there are currently no organizations receiving funds from the charitable institutions budget. Despite the lack of clarity regarding application of the law, HSC is concerned about its potential implications for the nonprofit human services sector.

[3] The former CEO, Thomas W. Galante, was placed on paid administrative leave by the Board of Trustees on September 11, 2014. His employment was terminated on December 17, 2014. The former COO, Bridget Quinn-Carey, is now serving as interim CEO.

income, in circumstances suggesting a significant likelihood of fraud and/or embezzlement;[4]

2. the CEO's records of time spent performing part-time consulting services for another public employer—the Elmont Union Free School District ("Elmont")—conflict with his QBPL work schedule, suggesting that either these records were not accurate or that he performed his outside consulting work on Library time;[5] and

3. the CEO ***made false statements in government filings by failing to disclose additional outside businesses and a federal tax lien on his VENDEX forms, a possible violation of law and noncompliance with the CEO's employment contract with the QBPL.***[6]

Unfortunately, none of this behavior could have been prevented by the annual disclosure requirement of Intro. 288-A. The bill would require disclosure of a board member's or executive's "name, home address, principal occupation and business interests from which such person or such person's spouse or domestic partner received income equal to or greater than ten per cent of their aggregate gross income during the previous year." The CEO of QBPL *was already subject to disclosure requirements* in the form of the VENDEX Principal Questionnaire[7] the IRS Form 990,[8] and his employment contract, but these obligations did not deter his behavior.[9] The current disclosure framework (which is more of a patchwork of redundant forms and procedures) captures sufficient information to trigger further investigation. What is needed is not another form, but rather a streamlining and consolidation of existing forms, along with coordination among agencies.

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[4] City of New York, Office of the Comptroller. *Report of the Comptroller's Investigation into Possible Misconduct Revealed by the Audit of the Queens Borough Public Library.* New York: Office of the Comptroller, 2015.
http://comptroller.nyc.gov/wp-content/uploads/documents/QBPL_Investigative_Report_Final.pdf.

[5] *Id.*

[6] *Id.*

[7] For example, the VENDEX Principal Questionnaire includes the following questions:

5. Within the past three (3) years, have you been a principal owner or officer of any entity other than the submitting vendor?
8. Do you presently serve, or have you within the past five (5) years served, as:
   a. an elected or appointed official or officer?
   b. a full or part-time employee in a New York City agency or as a consultant to any New York City agency?
   c. an officer of any political party organization in New York City, whether paid or unpaid?
   d. as a consultant or advisor to a New York City agency that is or was involved in the solicitation, negotiation, operation and/or administration of contracts on which the submitting vendor will work during this three year VENDEX cycle?

[8] Question 25 asks, "Did the organization engage in an excess benefit transaction with a disqualified person during the year?" If the answer is "Yes," the organization must provide details. An "excess benefit transaction" is one that unreasonably benefits an officer or director of the organization.

[9] The VENDEX form does not elicit information about corporate credit card expenditures—nor should it. Expenditures are the province of the many audits that nonprofit organizations undergo. The VENDEX form is not a timesheet, either. It requires disclosure of alternate sources of income, which may trigger further scrutiny of records such as timesheets. It is also important to note that much of the information required by Intro. 288-A is already required elsewhere, such as on income tax returns and VENDEX forms.

Intro. 288 unfairly targets nonprofit organizations.

A key belief underlying Intro. 288-A is that organizations that accept public funds should be accountable to the public for those funds. HSC could not agree more. For some reason, however, the bill does not address for-profit entities that receive funding from the City. The City spends billions of dollars on contracts with for-profit entities, procuring services including transportation, waste management, construction, and utility delivery.[10] It is unfair to single out nonprofit organizations for additional scrutiny when for-profit organizations have the same potential for misuse of public funds.

Not only does Intro. 288-A discriminate against nonprofit organizations, but in effect, it likens them all to public libraries. "Charitable institutions" is a broad term that encompasses arts and cultural organizations, research institutions, advocacy and umbrella groups, human services providers, and others. QBPL, however, is a quasi-governmental nonprofit entity. As such, it is distinct. Unlike other nonprofit organizations, QBPL has a Board of Trustees that is alternately appointed by the Mayor and the Queens Borough President. The Mayor, the Public Advocate, the Comptroller, the Speaker of the City Council, and the Borough President are *ex officio* board members.[11] Other nonprofit organizations do not have this level of government control.[12]

The City has a tendency to treat nonprofit organizations—and in particular, human services providers—as public entities with respect to regulatory *burdens* but not with respect to *benefits*. Employees of these organizations do not receive the same salaries, benefits, or cost-of-living adjustments that City employees receive, but they are subjected to many of the same obligations. Intro. 288-A would further this detrimental double-standard.

Intro. 288 would discourage qualified individuals from taking leadership positions at covered nonprofit organizations.

In 1991, scores of government officials across the State revolted against the introduction of the Annual Disclosure form, which they saw as burdensome and intrusive. These officials, many of them volunteers, chose to resign from their positions rather than divulge their personal information.[13] Today, Intro. 288-A seeks to expose the private information of *nonpublic* officials, many of whom receive only a miniscule portion of their compensation from City funding sources.[14] Board members receive no compensation at all. Instead of deterring nonprofit leaders from engaging in corruption, Intro. 288-A would discourage individuals from seeking nonprofit leadership roles in the first place. Nonprofit organizations typically pay lower salaries than for-profit companies. This means that potential candidates could make more money *and*

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[10] See City of New York, Mayor's Office of Contract Services. *Agency Procurement Indicators Fiscal Year 2014*. New York: MOCS, 2014. http://www.nyc.gov/html/mocs/downloads/pdf/2014%20Annual%20Procurement%20Indicators.pdf.

[11] Even with this de facto government involvement, the CEO of QBPL is suspected of engaging in illegal activity.

[12] It is important to note that much of the funding awarded by City agencies actually comes from *federal* sources, with the City acting as a conduit.

[13] Sack, Kevin. "New York Ethics Law Leads Local Officials to Quit Posts." *The New York Times* 18 May 1991. http://www.nytimes.com/1991/05/18/nyregion/new-york-ethics-law-leads-local-officials-to-quit-posts.html.

[14] As mentioned above, government agencies do not pay realistic indirect cost rates. As such, it is unlikely that a nonprofit executive salary would be funded by significant City dollars.

avoid the Annual Disclosure requirement by working in the for-profit realm. This would be particularly destabilizing for human services organizations.

Recommendations

HSC recognizes the need for sound leadership and strong accountability systems for organizations that receive taxpayer dollars. In fact, earlier this year, we established the Commission to Examine Nonprofit Human Service Organization Closures, a group of professionals from the nonprofit, for-profit, government, and philanthropic sectors, to explore best and worst practices in governance, leadership, financial and infrastructure management, transparency, and contracting. Like you, we were deeply disturbed by the corruption at QBPL.

In order to police the use of public dollars and guard against corruption, the City should undertake a comprehensive review of the disclosures that nonprofit leaders are currently required to make (on any form at the City, State, and federal levels), and work on streamlining these forms to reduce redundancy and ensure that the information sought is truly relevant. If the current disclosures are not sufficient, questions should be *added* to *existing* forms such as the VENDEX questionnaires or the Doing Business Data Form. Furthermore, rather than adding forms to the hodgepodge of existing reporting requirements and imposing additional approval requirements on service providers, the City should develop a robust enforcement framework that puts both nonprofit leaders *and government officials* on notice that there will be meaningful consequences for unethical or illicit behavior.

HSC looks forward to working with Council Member Crowley at the Contracts Committee to address your legitimate concerns regarding transparency and accountability. We believe that together we can strike a balance between adequate oversight of public dollars and flexibility for the City's nonprofit sector. Our sector delivers billions of dollars in essential services to New Yorkers in need each year and employs hundreds of thousands of City residents. It is important that they be able to focus on service delivery without unnecessary administrative obstacles. Thank you for your consideration.

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New York
COMMON CAUSE
Holding Power Accountable

TESTIMONY OF PRUDENCE KATZE
RESEARCH & POLICY MANAGER, COMMON CAUSE/NY
BEFORE THE NEW YORK CITY COUNCIL COMMITTEE ON CONTRACTS
RE: INT 0288 - 2014
September 25, 2015

Good afternoon. My name is Prudence Katze and I am the Research and Policy Manager at Common Cause New York. We provide a voice for citizens in support of open, honest and accountable government at all levels. We work to strengthen public participation and confidence in our institutions of government, ensure that government and the political process serve the public interest rather than special interests, and ensure that our public tax dollars are being disbursed and spent in a fair and transparent manner.

Common Cause NY supports Intro 288 of 2014, a bill that calls for "persons in leadership positions at charitable institutions" to submit yearly statements that includes their occupation and business interests outside of their non-profit leadership position and to also report if they are a shareholder of 10% or more of a company's stock. This disclosure requirement would also apply to the non-profit leader's spouse.

This simple disclosure requirement would only apply to organizations that receive at least half of their funding through New York City public dollars and it is a useful and objective way to determine that our tax dollars are being disbursed in a responsible manner while also diminishing the possibility of undue favoritism or conflicts of interest on the part of the non-profit.

This bill will serve to clarify and strengthen our laws on how our public dollars go to support not-for-profit institutions. In 2006, this City Council implemented necessary reforms on the "discretionary funds" allocated to non-profit and community-based social service. There is no question that Council Member Discretionary spending, along with other New York City contracts and grants to not-for-profit organizations, helps to fulfill necessary services in communities throughout our five boroughs. Intro 288 would complement existing conflict of interest reporting protocol to ensure that our not-for-profits are spending their publicly allocated dollars in the best and most responsible way possible and would head off potential self dealing and conflict of interests where someone in a leadership position is putting their own financial interests or those of friends, business associates or family over the communities that they are charged to serve.

The necessary form can be filled out online and is only due on an annual basis. We do not see compliance with this request as burdensome, particularly in light of unfortunate past problems of self-dealing and fraudulent conduct involving charities in New York City.

Thank you for giving me this opportunity to testify.

THE SOCIETY FOR THE ARCHITECTURE OF THE CITY

Disclosure Requirements for Non-Profit Institutions

City Council Hearing of the Committee on Contracts, September 25, 2015

We would support increased disclosure from city financed not for profit institutions. From the Gotham Gazette account we understand that the proposed legislation is not entirely finalized but was inspired by the recent problems at the Queens Public Library. The blame for the irregularities there, reported by Comptroller Stringer, falls not only on CEO Galante but equally on the trustees who failed to supervise expenditures, and indeed the Comptroller's report notes that some library trustees must have winked at and benefited personally from the improper credit card charges for lavish meals. Libraries have not ordinarily been regarded as a locale for corruption, and indeed the public relations image they cultivate often invokes childhood memories of severe spinster librarians demanding silence. However, the circumstances of the sale of the Donnell branch library by the trustees of New York Public might have been easier to unravel if there had been disclosure requirements for the officers and trustees. Indeed the loss of that branch (the smaller replacement has not yet opened seven years after demolition) and the profits made by the investors who bought the site appear to be out of line with the 59 million dollar sale price. Just the penthouse of the Baccarat is on the market for 60 million, and the hotel section of the tower was recently sold to Chinese investors for 230 million. These numbers, potentially so much larger than the losses occasioned by the actions of the Queens library, were never scrutinized by the city because the land the Donnell stood on was a bequest to the library and not city owned. It would be helpful to raise public awareness of the very large salaries common in the non-profit sector and the potential conflicts of interest involved in many transactions which are theoretically non-profit.

Submitted by Christabel Gough, Secretary

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CITIZENS UNION OF THE CITY OF NEW YORK
Testimony to the NYC Council Committees on Contracts
Regarding Int. No. 288-A
September 25, 2015

Good morning Chair Rosenthal, Contracts Committee members, and Council Member Crowley. My name is Talia Werber, and I am the Policy and Research Manager for Citizens Union of the City of New York. Citizens Union is a nonpartisan good government group dedicated to making democracy work for all New Yorkers, and to improving government efficiency, transparency, and accountability.

Thank you for holding this hearing today. We commend the Council for working to ensure meaningful oversight of nonprofit organizations which accept payments from New York City by expanding conflicts of interest disclosures for leadership of such organizations.

Contractual relationships between the City of New York and nonprofit organizations have increased tremendously in recent years, as these organizations provide services on behalf of the city. These relationships can overcome the common bureaucratic challenges of projects solely run by the city.

While it is important to preserve the agility of the city's relationship with nonprofit organizations, these entities which take taxpayer money and other city resources must be governed with appropriate oversight – which begins with greater transparency.

Intro. 288-A is a significant step in improving transparency and oversight of the leadership of nonprofits accepting payments from New York City.

Existing local law provides basic safeguards against a defined portion of nonprofit board members engaging in self-dealing, such as:

- requiring financial disclosures to the city's administering agency if the board member holds ten percent or more of outstanding common stock;
- requiring financial disclosures regarding any occupation or business interest from which the board member and spouse or domestic partner receive ten percent or more of their income;
- and precluding board members from benefiting from contracts between the organization and the city.

Intro. 288-A would extend these safeguards beyond those board members, to also include presidents and chief executive officers of nonprofit organizations that accept payments from the city. Broadening the definition of organizational leadership to whom these safeguards apply is critical to ensuring that individuals responsible for the management decisions of nonprofits use taxpayer money to benefit their institutions and through them the city – rather than benefiting themselves.

For these reasons, Citizens Union supports Intro. 288-A and urges its passage, to compel leaders of New York City's nonprofit organizations to serve as stewards of their institutional missions, and of the public trust.

Paula Glatzer   Testimony to NYC Council Contracts Comm.   9-25-15

On September 19, the New York Public Library announced the architects for its $300 million renovation of Mid-Manhattan and the 42nd Street Library. Unfortunately, the news came with complete lack of transparency in either the selection process or the renovation plans.

Fully half of the $300 million is a contribution from New York City, so the public should be involved and our elected officials should exercise oversight.

This is the same public-private partnership that fostered the secret Central Library Plan, which was finally rejected by the current administration. But NYPL wasted almost $20 million on the architectural plans, though some estimates are as high as twice that amount.

Do you remember the plans for the 9/11 memorial? The process was transparent and aboveboard. The plans of the finalists were presented in our newspapers and the models were on display in the World Financial Center. The openness was part of the healing process.

I commend Councilmember Crowley's conflict of interest proposal. If the members of the Contracts Committee, and the full City Council, can shed any light on the management of our public libraries, and open it up to public scrutiny and legislative oversight, you will accomplish a great public service.

December 20, 2013

The New York Nonprofit Revitalization Act of 2013

SUMMARY

On December 18, 2013, Governor Cuomo signed into law the New York Nonprofit Revitalization Act of 2013 (the "Act"), which makes significant changes to the New York Not-for-Profit Corporation Law (the "N-PCL"), the Estates Powers & Trusts Law (the "EPTL"), and Article 7-A of the Executive Law ("Article 7-A"), among others, intended to simplify and improve the efficiency of administrative procedures for nonprofit organizations and to strengthen nonprofit governance and oversight, effective July 1, 2014. The Act applies to any nonprofit organization that is incorporated in New York or operates or solicits charitable contributions in New York. The text of the Act is based on recommendations made by the Leadership Committee for Nonprofit Revitalization convened by the Office of the New York Attorney General after gathering input from nonprofit leaders, legal and accounting practitioners, and government officials, with critical consideration of a number of antiquated provisions and procedures. The Act is the first substantial overhaul of New York's nonprofit laws in more than 40 years. This memorandum discusses key aspects of the Act relating to (i) changes in the reporting requirements applicable to charitable organizations required to register under Article 7-A; (ii) several express grants to the Attorney General of additional authority to enforce the laws governing nonprofit organizations; (iii) the simplification of the N-PCL and processes considered to be outdated or burdensome to nonprofit corporations or which act as barriers to entry for early-stage organizations; and (iv) increased requirements for governance policies and controls to ensure continued public trust in New York charitable corporations and trusts.

Nonprofit and charitable organizations will need to review existing internal controls, by-laws, policies, and committee charters, if any, to ensure that the changes introduced by the Act are appropriately implemented. Specifically, and as described in more detail below, nonprofit corporations and charitable trusts formed or conducting activities in New York, regardless of value of assets or type of activities, must have in place a conflict of interest policy. In some circumstances such organizations must adopt whistleblower policies. Corporate by-laws and charitable trust operating procedures must reflect the

strengthened oversight requirements for audit oversight and related party transactions, and organizations required to register under Article 7-A should be aware of the changed reporting requirements. Finally, nonprofit corporations should ensure that their by-laws comply with, and may wish to avail themselves of, certain of the changes to the N-PCL made by the Act, including provisions relating to voting requirements, board committees, and electronic communications.

CHANGES TO ANNUAL REPORTING REQUIREMENTS

Under Section 172 of Article 7-A of the Executive Law, charitable organizations (and any organization registered or required to register under Article 8 of the EPTL, which governs charitable trusts) that intend to solicit contributions from any person or government agency in the State of New York must register with the Attorney General. The Act increases the thresholds for the heightened financial review requirements for organizations registered under Section 172 as set forth in the following table:

Gross Revenues	Unaudited Financial Report on Form Provided by AG	Independent CPA Review Report	Independent CPA Audit Report
Current	$100,000 or less	More than $100,000 but not more than $250,000	More than $250,000
Effective July 1, 2014	$250,000 or less	More than $250,000 but not more than $500,000	More than $500,000
Effective July 1, 2017	$250,000 or less	More than $250,000 but not more than $750,000	More than $750,000
Effective July 1, 2021	$250,000 or less	More than $250,000 but not more than $1,000,000	More than $1,000,000

In addition, notwithstanding the threshold revenue levels, after review of an independent CPA review report, the Attorney General may require that an organization obtain and file with the Attorney General an independent CPA audit report. The Act authorizes the Attorney General to allow or require that organizations' submissions pursuant to the requirements of Article 7A or EPTL Article 8 be made electronically. The Act also increases the fee payable to the Attorney General upon filing of the required reports for organizations required to submit either the unaudited financial form alone or the unaudited form with a review report to $25 (from $10).

ADDITIONAL AUTHORITY FOR THE ATTORNEY GENERAL TO ENFORCE THE LAWS GOVERNING NONPROFIT ORGANIZATIONS

The Act implements a number of provisions in the N-PCL and the EPTL which provide the Attorney General's office additional tools to carry out more effectively its responsibility of oversight of nonprofit and, in particular, charitable organizations.

- The Act expressly grants the Attorney General the authority to enjoin, void, or rescind any related party transaction (as herein defined) involving a nonprofit corporation or charitable trust, or seek additional damages or remedies, including the ability to (i) seek the injunction or rescission of the transaction, (ii) seek restitution, accounting, or damages including up to double the amount of any benefit improperly obtained in the case of willful and intentional conduct, and (iii) seek the removal of directors, trustees, or officers. The Act substantially clarifies and strengthens provisions of the N-PCL and EPTL addressing conflicts of interest, adding as a new defined term under both laws "related party transaction", meaning any transaction, agreement, or other arrangement in which a related party has a financial interest and in which the corporation or trust or any affiliate of the corporation or trust is a participant. "Related party" means any director, officer, trustee, or key employee of the corporation or trust or any affiliate of the corporation or trust, any relative of such persons, or any entity in which such a person or a relative has a 35% or greater ownership or beneficial interest, or, if the entity is a partnership, a direct or indirect ownership exceeding 5%. An additional term, "relative" is defined to mean a person's (i) spouse, (ii) ancestors, (iii) siblings (whether full or half), (iv) children, grandchildren, and great-grandchildren (including adopted), (v) spouses of (iv) and (v), and (vi) domestic partner.
- For any corporation that is required to obtain approval or provide notice of formation pursuant to N-PCL Section 404 (Approvals, notices and consents) the Act adds the requirement that such corporation must be in compliance with the registration and reporting requirements of Article 7-A and EPTL Article 8 before soliciting any contribution in New York. Also, where the Attorney General formerly could bring an action or proceeding at the request of the officer or agency authorized to grant the approval required under Section 404, the Attorney General may now, on its own initiative, bring an action against any corporation which has not obtained or submitted the required consent or notice or which has not complied with the Article 7 and EPTL Article 8 registration requirements.
- Under the N-PCL as modified by the Act, any non-domiciliary of New York who becomes a director, officer, key employee, or agent of a corporation formed under the N-PCL is subject to the personal jurisdiction of the Supreme Court of New York, and in any action or proceeding by the Attorney General under the N-PCL process may be served on such person.
- Any application to a court for indemnification from a nonprofit corporation must be made upon notice to the Attorney General.

SIMPLIFICATION OF THE N-PCL AND NONPROFIT CORPORATIONS' ADMINISTRATIVE PROCESSES

Elimination of Concept of Type

Under current law, each organization formed under the N-PCL is required to be categorized as a Type A, B, C, or D corporation. The Act replaces that construct with a simpler approach -- that a nonprofit corporation is either charitable or non-charitable. The Act defines "charitable purposes" under N-PCL as charitable, educational, religious, scientific, literary, cultural, or for the prevention of cruelty to children or animals, and all corporations formed for such purposes are charitable corporations; all other nonprofit corporations formed under the N-PCL are non-charitable. To effect the change in nomenclature, the Act provides that all corporations formed under the N-PCL prior to July 1, 2014 as Type A nonprofit corporations are deemed as of that date to be non-charitable corporations, and all Type B or C nonprofit corporations are deemed to be charitable corporations. Type D nonprofit corporations formed for charitable purposes are charitable corporations, and all other Type D nonprofit corporations shall be deemed to be non-charitable corporations. The Act also implements conforming changes to other New York laws to reflect the elimination of the concept of "Type" under the N-PCL.

To Improve Efficiency in Operation of Nonprofit Corporations

- *Electronic delivery of notices, consents, waivers, proxies, and financial statements.* The Act updates the N-PCL to permit the following communications to be delivered by e-mail or facsimile:
  - notices of meetings sent to members, which under current law must be written or delivered in person or by mail;
  - waivers of notice of meetings by members and directors, which currently can only be effected by signed waiver or attendance without protest;
  - consent to corporate actions by member vote;
  - consent to a decision taken without a board meeting; and
  - authorization of members' proxies.

In each case, written communications must have affixed the signature of the member or director, which may be a facsimile signature. E-mails must contain or be accompanied by information reasonably showing authorization by the member or director sending the message. The Act also authorizes the distribution of financial statements to members by any means, not just by personal delivery or mail, and empowers the Attorney General to make rules and regulations permitting or requiring electronic submissions and electronic signatures under the EPTL.

- *Videoconference attendance at board meetings.* The Act will allow directors to participate in board or committee meetings through video screen communication in addition to conference telephone, so long as all participants can hear each other at the same time and can participate in all matters, including proposing, objecting to, and voting on actions to be taken.
- *Reduced vote for purchase, sale, mortgage, lease or other disposition of real property.* The Act reduces the required vote of directors for the purchase, sale, mortgage, lease, or other disposition of real property, from two-thirds of the entire board to a majority of the entire board, unless the purchase or disposition constitutes all or substantially all of the assets of the corporation. The term "entire board" is redefined to mean the total number of directors entitled to vote if there were no vacancies; if the by-laws provide for a fixed number of directors, that number shall constitute the entire board; if the by-laws provide that the number of directors shall be within a range, then the entire board shall be composed of the number of directors elected at the most recent election of directors.
- *Simplified committee types.* Under the Act, committees are now either committees of the board (comprised only of directors) or of the corporation (which may include directors and non-directors), dispensing with the distinction between standing and special committees. The Act also expressly provides that no committee of the corporation and, therefore, only a committee of the board, shall have the authority to bind the board.

Certain acts of charitable corporations may be approved by the Attorney General rather than by petition to the New York Supreme Court (the "Supreme Court").

Disposition of all or substantially all assets. The Act amends the N-PCL to allow charitable corporations seeking to dispose of all or substantially all assets to petition the Attorney General, instead of the Supreme Court, for approval. Such a petition must set forth (i) all information that would be required in a court petition, (ii) a statement of solvency, and (iii) a statement as to whether any persons have objected or may reasonably object. The Attorney General may authorize such transactions if fair and reasonable to the corporation. A corporation may use this procedure unless (i) it is insolvent or would become insolvent as a result of the transaction, or (ii) the Attorney General concludes that a court should review the petition. A corporation may also choose to seek court approval at any time, on notice to the Attorney General.

Mergers and consolidations. The Act also allows the Attorney General, instead of the Supreme Court, to approve mergers or consolidations[1] of charitable corporations, unless the Attorney General concludes that a court should review the application. Applications to the Attorney General must contain (i) all information required for court applications, (ii) consents and approvals required under Section 404, and (iii) a statement as to whether any persons have objected or may reasonably object. A corporation may also seek court approval of a merger or consideration at any time, on notice to the Attorney General, under substantially the same procedure as currently available.

Dissolution of charitable corporations. To reduce the costs and possible delays of dissolution, so that assets held for charitable purposes may be redirected more efficiently, the Attorney General may approve the plan of dissolution for charitable corporations and non-charitable N-PCL corporations holding assets legally required to be used for a particular purpose. If the Attorney General does not approve the petition, or concludes that court review is appropriate, then the corporation may apply to the Supreme Court for approval, on notice to the Attorney General. The procedure for dissolution of corporations with minimal assets without court (or Attorney General) approval is deleted.

Number of directors. The Act amends the N-PCL to provide that corporations without members may now fix the number of directors by action of the board under a specific provision of the by-laws or with a range set forth in the by-Laws. Accordingly, corporations without members no longer must amend by-laws in order to change the number of directors.

To reduce barriers to entry for new nonprofit corporations

The Act streamlines the incorporation of organizations that include education as a purpose. Under current law, any certificate of incorporation that includes a purpose for which a corporation might be chartered by the Regents of the University of the State of New York must be endorsed with the consent of the Commissioner of Education before it may be filed by the Department of State. The Act will continue to require that the certificate of incorporation of a corporation that will operate a school, college, or university or other entity providing post-secondary education, a library, or a museum or historical society obtain consent from the Commissioner of Education (or, in the case of a college or university, the Board of Regents). Going forward, however, any corporation whose certificate includes any other purpose for which a corporation may be chartered by the Board of Regents may be incorporated under the N-PCL without the prior consent of the Commissioner of Education, but with a certified copy of the certificate of

1 Under the N-PCL, a merger is the combination of two or more corporations into a single corporation which is one of the constituent corporations; a consolidation is the combination of two or more corporations into a new corporation.

incorporation provided to the Commissioner of Education within 30 days of incorporation. A statement in a certificate of incorporation that the corporation's purposes do not include any purposes described in paragraphs (a) to (v) of N-PCL Section 404 (Approvals and Consents) shall be sufficient to satisfy the approval and notice requirements of that Section, so long as such statement is accurate as of the date the certificate of incorporation is filed.

The Act also amends the N-PCL to expressly provide that the certificate of incorporation of a nonprofit corporation must state the corporate purposes and may, but need not, describe the activities the corporation will undertake or otherwise state how the purposes will be achieved.

Although earlier versions of the Act proposed to eliminate the requirement that New York private foundations annually publish notice of availability of Form 990-PF for public inspection, the Act in the form passed by the Assembly and Senate does not end the publication requirement.

INCREASED REQUIREMENTS FOR GOVERNANCE POLICIES AND CONTROLS

Strengthened audit requirements for charitable corporations and trusts

The Act introduces audit oversight requirements applicable to corporations and trusts that are required to file an independent CPA's audit report with the Attorney General under Section 172-b of the Executive Law (as noted in the chart above, effective July 1, 2014, organizations that solicit charitable contributions and that have gross receipts exceeding $500,000). A grace period is provided for organizations with annual revenues of less than $10,000,000 in the last fiscal year ending before January 1, 2014, for which the requirements become effective on January 1, 2015. The reporting obligations under EPTL Article 8 for all charitable trusts (which term in that context includes charitable nonprofit corporations) continue unchanged.

Oversight of an organization's accounting and financial reporting processes and the audit of its financial statements must be performed by a designated audit committee of the board or trustees, comprised of at least three independent directors or trustees, and may comprise the entire board of the organization, so long as only independent directors or trustees attend and participate in audit committee matters. If an audit committee performs these duties, the committee must report to the board or the trustees. The Act adds "independent director" and "independent trustee" as defined terms under the N-PCL and EPTL, respectively, meaning a director or trustee (i) who is not, and has not in the last three years been, an employee of the organization or any of its affiliates; (ii) who has not received more than $10,000 in direct compensation from the organization or affiliate in any of the last three years (other than reimbursement for expenses reasonably incurred as a director or trustee or reasonable compensation for services as a director as permitted under NPCL Section 202(a) or trustee commissions as permitted by law and the governing instrument); (iii) who is not a current employee of and does not have a substantial financial interest in any entity that has made payments to or received payments from the organization or an affiliate for property or services with value exceeding either $25,000 or 2% of the organization's gross revenue; and (iv) who does not have any relative who is described in (i), (ii) or (iii). For these purposes, "payment" does not include charitable contributions. Only independent directors or trustees may participate in deliberations or voting by the board or a committee relating to financial oversight and audit matters.

Each year, the board, trustees, or audit committee must retain or renew the retainer of an independent auditor to conduct the audit, and must review the results of the audit and any related management letter with the independent auditor.

For organizations with revenues in excess of $1,000,000 in the prior year or expected in the current year, the Act imposes additional requirements or the board, trustees, or audit committee:

- reviewing the scope and planning of the audit with the independent auditor;
- reviewing and discussing with the independent auditor (a) any risks or weaknesses in the organization's internal controls prior to the commencement of the audit, (b) any restrictions on the auditor's activities or access to information, (c) any significant disagreements between the auditor and organization management, and (d) the organization's accounting and financial reporting processes; and
- annually considering the performance and independence of the independent auditor.

The board, trustees, or audit committee are also responsible for the adoption of any whistleblower and/or conflict of interest policy and the implementation of and compliance with such policy, unless such responsibility is already the charge of a committee of the board or trustees comprised solely of independent directors or trustees. As noted below, a conflict of interest policy is now mandatory for all charitable trusts and nonprofit corporations, and a whistleblower policy is mandatory for such organizations meeting threshold revenue or employee requirements.

Restrictions on related party transactions for nonprofit corporations and charitable trusts.

The Act tightens restrictions on related party transactions (as defined above) involving nonprofit corporations and charitable trusts (under N-PCL Section 715 and EPTL Section 712(e), respectively), generally prohibiting any related party transaction, unless the board or the trustees determine that it is fair, reasonable, and in the organization's best interest. When contemplating a related party transaction, the board, the trustees, or an authorized committee of the board, as applicable, must (i) consider alternative transactions, (ii) approve the transaction by no less than a majority vote of the directors, trustees, or committee members present at the meeting, and (iii) contemporaneously document the basis for its approval.

Any director, officer, trustee or key employee who has an interest in a related party transaction must (i) disclose the material facts concerning such interest in good faith and (ii) refrain from participating in deliberations or voting relating to matters in which he or she is interested, although such person may present information at a board, trustee, or committee meeting. Similarly, the Act prohibits any person who may benefit from the payment of compensation by a nonprofit corporation to a member, director or officer from attending or participating in any deliberation or vote concerning such person's compensation (but such person may present background information or answer questions prior to any such deliberation or vote). The Act also amends the N-PCL to prohibit an employee of a nonprofit corporation from serving as chair of the board or holding any other title with similar responsibilities. For both nonprofit corporations and charitable trusts, related party transactions may be subject to additional restrictions as set forth in the trust instrument, certificate of incorporation, any policies adopted by the board, and the bylaws.

Petitions regarding misappropriation, diversion, and *ultra vires* activities by the corporation may be brought by directors and officers (in addition to members or creditors) of the corporation, and may be brought against members and key employees (in addition to the corporation, its directors, officers, and agents).

Mandatory conflicts of interest policy for corporations and charitable trusts.

The Act requires every nonprofit corporation and charitable trust to adopt a conflict of interest policy, to ensure that directors, trustees, officers, and key employees act in the corporation's best interests and comply with legal requirements.

Any conflict of interest policy must include:

- a definition of circumstances constituting a conflict of interest;
- procedures for disclosing conflicts to the audit committee or the board or trustees;
- a requirement that conflicted persons not be present at or participate in board, trustee, or committee deliberations or voting on the matter giving use to the conflict;
- a prohibition against any attempt by a conflicted person to influence deliberations or votes on the matter giving use to the conflict;
- a requirement that the existence and resolution of the conflict be documented in the organization's records;
- procedures for disclosing, addressing, and documenting related party transactions; and
- a requirement that directors and trustees, before initial election or appointment and annually thereafter, must disclose certain potential conflicts of interest. The Act provides the safe harbor that compliance with laws substantially consistent with the Act's provisions would be deemed to be compliance with the Act.

Mandatory whistleblower policy for corporations and estates.

Nonprofit corporations and charitable trusts with (i) twenty or more employees and (ii) revenue of more than $1,000,000 in the prior fiscal year must adopt a whistleblower policy to protect persons who report suspected improper conduct from retaliation.

A whistleblower policy must prohibit retaliation against any director, trustees, officer, employee, or volunteer reporting in good faith any action or suspected action, taken by or within the corporation or trust, that is illegal, fraudulent, or in violation of any adopted policy. A whistleblower policy must include:

- provisions for the reporting of suspected violations of laws or corporate or trust policies, including procedures for preserving the confidentiality for such reported information,
- the requirement that a director, trustee, officer, or employee be designated to administer the policy and to report to the audit committee, other committee of trustees or the board, or the trustees or board, and
- the requirement that the policy be distributed to all directors, trustees, officers, employees, and volunteers, with instruments regarding how to comply with the procedures set forth in the policy.

Text of the Act is available at http://open.nysenate.gov/legislation/bill/S5845-2013.

* * *

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☑ in favor ☐ in opposition

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Name: CHRISTABEL GOUGH

Address: 45 TUDOR CITY PLACE #1815 NY NY 10017

I represent: SOCIETY FOR THE ARCHITECTURE OF THE CITY

Address: 45 CHRISTOPHER ST NY NY 10014

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Name: Paula Glatzer

Address: 215 W. 78 St.

I represent:

Address: NYC 10024

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Name: Ginny Louloudes

Address:

I represent: ART/NY

Address:

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Name: Michelle Jackson

Address: 130 East 59th St., NewYork, NY 10022

I represent: Human Services Council

Address: 130 East 59th St., NY NY 10022

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Name: Talia Werber

Address: 299 Broadway Suite 700 NY NY

I represent: Citizens Union

Address: ______

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Name: Maggie Cancar on behalf of Ms Delgado

Address: ______

I represent: Ms Delgado

Address: ______

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Name: TRACEY KNUCKLES
Address: NYC DEPT OF CULTURAL AFFAIRS
31 CHAMBERS ST, 2ND FL NY NY 10007
I represent: " "
Address:

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Name: Lisette Camilo
Address: 253 Broadway
I represent: MOCS
Address:

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Name: Laura Abel
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I represent: Lawyers Alliance for NY
Address: 171 Madison Ave., NY NY 10016

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(PLEASE PRINT)

Name: John DiRosilly

Address: 39-67 43rd St, Sunnyside NY 11104

I represent: Self

Address: ______

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Name: Prudence Katze

Address: 80 Broad, 27th Floor

I represent: Common Cause / NY

Address: ______

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