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TO: ALL NEW YORK NOT-FOR-PROFIT CEMETERIES
FROM: LEWIS A. POLISHOOK, Director, Division of Cemeteries
DATE: June 30, 2014
RE: Non-Profit Revitalization Act

On December 18, 2013, the Governor signed into law the Non-Profit Revitalization Act (the Act), 2013 N.Y. Laws ch. 549, a bill designed to overhaul the regulation of not-for-profit corporations in New York. This memorandum highlights the most important changes for not-for-profit cemeteries: It is not intended as a comprehensive review of the Act.¹ Additionally, the Division of Cemeteries (the Division) cannot provide legal advice to not-for-profit cemeteries. Any questions concerning the Act should be directed in the first instance to your own cemetery's attorney.

Unless otherwise noted, these changes take effect July 1, 2014. Act § 132.

CONFLICTS OF INTEREST

The Act makes several changes to the Not-for-Profit Corporation Law (N-PCL) that fall under the broad heading of addressing issues of conflicts of interest and self-dealing. The most salient ones are discussed below.

¹ Because this memorandum is written from the perspective of informing not-for-profit cemeteries as to their obligations under the Act, it omits several areas of major changes included in the Act, such as enhanced enforcement powers granted to the Attorney General and revised procedures for incorporation of not-for-profit corporations.

Related Party Transactions

Section 29 of the Act defines a “related party transaction” as “any transaction, agreement or any other arrangement in which a related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant,” and defines “related party” as

- (i) any director, officer or key employee of the corporation or any affiliate of the corporation;
- (ii) any relative of any director, officer or key employee of the corporation or any affiliate of the corporation; or
- (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.

N-PCL § 102. The Act defines a “key employee” as “any person who is in a position to exercise substantial influence over the affairs of the corporation, as referenced in 26 U.S.C. § 4958(f)(1)(A) and further specified in 26 CFR § 53.4958–3(c), (d) and (e), or succeeding provisions.”

Section 74 of the Act prohibits a not-for-profit corporation from “enter[ing] into any related party transaction unless the transaction is determined by the board” of the corporation “to be fair, reasonable and in the corporation’s best interest at the time of such determination.” The Act further requires that “[a]ny director, officer or key employee who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.” N-PCL § 715(a).

Before engaging in a related party transaction, the not-for-profit corporation’s board must:

- (1) . . . consider alternative transactions to the extent available;
- (2) Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and
- (3) Contemporaneously document in writing the basis for the board or authorized committee’s approval, including its consideration of any alternative transactions.

N-PCL § 715(a).

Conflict of Interest Policy

Section 75 of the Act requires adoption of a conflict of interest policy for “directors, officers and key employees,” that must “at a minimum” include “the following provisions”:

- (1) a definition of the circumstances that constitute a conflict of interest;
- (2) procedures for disclosing a conflict of interest to the audit committee or, if there is no audit committee, to the board;
- (3) a requirement that the person with the conflict of interest not be present at or

participate in board or committee deliberation or vote on the matter giving rise to such conflict;

(4) a prohibition against any attempt by the person with the conflict to influence the deliberation or voting on the matter giving rise to such conflict;

(5) a requirement that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and

(6) procedures for disclosing, addressing, and documenting related party transactions in accordance with section seven hundred fifteen of this article.

N-PCL § 715(a)(a-b). The directors of the not-for-profit corporation must, upon becoming directors and annually thereafter, sign a written statement disclosing any potential conflicts. Id. § 715-a(c).

Compensation of Board Members, Directors, and Officers

Section 58 of the Act requires recusal from discussions of one's own compensation:

No person who may benefit from such compensation may be present at or otherwise participate in any board or committee deliberation or vote concerning such person's compensation; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a person who may benefit from such compensation present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto.

N-PCL § 515(b).

Board Chair May Not Be an Employee

Section 73 of the Act provides that "[n]o employee of the corporation shall serve as chair of the board or hold any other title with similar responsibilities." N-PCL § 713(f). This provision currently is scheduled to take effect on January 1, 2015. Act § 132. However, the Legislature has passed a bill, S7799-A, that will, if signed by the Governor, delay implementation of this provision until January 1, 2016.

Whistleblower Policy

Section 75 of the Act requires that not-for-profit corporations that employ at least 20 people and have annual revenue of over \$1 million must also "adopt a whistleblower policy to protect from retaliation persons who report suspected improper conduct." N-PCL § 715-b(a). The whistleblower policy must at a minimum include "the following provisions"

(1) Procedures for the reporting of violations or suspected violations of laws or corporate policies, including procedures for preserving the confidentiality of reported information;

(2) A requirement that an employee, officer or director of the corporation be designated to administer the whistleblower policy and to report to the audit committee or other committee of independent directors or, if there are no such committees, to the board; and

(3) A requirement that a copy of the policy be distributed to all directors, officers, employees and to volunteers who provide substantial services to the corporation.

Id. § 715-a(b).

AUDIT OVERSIGHT

If a not-for-profit cemetery "solicit[s]"² "contribution[s]"³ totaling at least \$25,000 annually, as these terms are defined in Article 7-A of the Executive Law, and has annual revenue in excess of \$500,000, it must comply with certain audit oversight requirements. Executive Law §§ 171-a(10), 171-a(2)(d); N-PCL § 712-a. Stated differently, the following requirements do not apply to not-for-profit corporations that: (1) do not solicit contributions (as defined by the Executive Law); (2) do not solicit at least \$25,000 in contributions; or (3) do not have at least \$500,000 in annual revenue. Charging fees for services does not generally constitute solicitation of contributions.

² "Solicit" is defined as:

To directly or indirectly make a request for a contribution, whether express or implied, through any medium. A "solicitation" shall be deemed to have taken place whether or not a contribution is made. For purposes of this article, a "solicitation" or a "solicitation of contributions" includes any advertising which represents that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization. Provided, however, that the printing and the mailing of a written solicitation for funds or any other thing of value to benefit a charitable organization shall not alone constitute soliciting on the part of persons who printed and mailed such solicitation if such persons do not otherwise solicit, receive or have access to contributions.

³ A "contribution" is defined as:

The promise or grant of any money or property of any kind or value, whether or not in combination with the sale of goods, services, entertainment or any other thing of value, including a grant or other financial assistance from any agency of government, except payments by members of any organization for membership, for services or other benefit, other than the right to vote for directors or trustees, elect officers, or hold offices.

N-PCL § 171-a(2).

For those not-for-profit corporations to which these statutory provisions do apply, Section 72 of the Act and Article 7-A of the Executive Law now require a not-for-profit corporation's board or audit committee to "oversee the adoption, implementation of, and compliance with any conflict of interest policy or whistleblower policy adopted by the corporation if this function is not otherwise performed by another committee of the board comprised solely of independent directors." N-PCL § 712-a(c).

Section 72 of the Act also adds new provisions to the N-PCL concerning audit oversight. Act § 72, N-PCL § 712-a.⁴ This section requires that an audit committee or the independent members of the not-for-profit corporation's board review and discussion of the auditors' annual report and retention (the committee can include all independent members of the board). Id. In this context, "independent director" and independent trustee" are defined as a director or trustee

who: (i) is not, and has not been within the last three years, an employee of the corporation or an affiliate of the corporation, and does not have a relative who is, or has been within the last three years, a key employee of the corporation or an affiliate of the corporation; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the corporation or an affiliate of the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of section 202 (General and special powers)); and (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation or an affiliate of the corporation for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of twenty-five thousand dollars or two percent of such entity's consolidated gross revenues. For purposes of this subparagraph, "payment" does not include charitable contributions.

The same committee is charged with oversight of a whistleblower policy. N-PCL § 712-a(c).

BOARD OPERATIONS

The Act permits boards to conduct meetings by videoconferencing unless prohibited by the certificate of incorporation. N-PCL § 708(c). The board may also act without a formal meeting if the board members consent to the action in a signed writing (which can be transmitted by fax or email). N-PCL § 708(b).

JUDICIAL APPROVAL STILL REQUIRED FOR COMMON CEMETERY TRANSACTIONS

Sections 53-56 of the Act eliminate the requirement that many not-for-profits obtain approval of both the Attorney General and a court for certain types of transactions. Rather, the Act provides that the not-for-profit corporation may petition either the Attorney General or a court to approve the transaction. N-PCL §§ 509 - 511-a.

⁴ Note that this provision will not apply to charitable corporations with annual revenues of less than \$10 million until July 1, 2015. Act § 132.

This provision of the Act does not change the obligations of not-for-profit cemeteries to obtain approval of both the New York State Cemetery Board and a court before purchasing or selling land (N-PCL § 1506(a, i)) or using trust funds as permitted by N-PCL § 1507(a).

Taken together, these provisions mean that not-for-profit cemeteries no longer must seek judicial approval of a merger, consolidation, or dissolution, but may choose to apply for approval of these transactions to the New York State Cemetery Board and the Attorney General.

CHANGE IN NOMENCLATURE

The N-PCL defines not-for-profit cemeteries as "Type B corporations." N-PCL § 1505(c). The Act abolishes the types of not-for-profit corporations. Section 37 of the Act provides that former Type B corporations are now referred to as "charitable corporations," N-PCL §§ 102(3-a), 102(3-b), 201.

PRIVATE LITIGATION AGAINST A NOT-FOR-PROFIT CORPORATION

The Act provides that actions "may be brought against one or more directors, officers, or key employees" to:

compel the defendant to account for his official conduct in the following cases:

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

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

(3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.

N-PCL § 720(a)(1). Previously, only directors or officers could be made defendants in such actions. As noted above, key employees include "any person who is in a position to exercise substantial influence over the affairs of the corporation, as referenced in 26 U.S.C. § 4958(f)(1)(A) and further specified in 26 CFR § 53.4958-3(c), (d) and (e), or succeeding provisions." N-PCL § 102(25).