

CURRENT NONPROFIT LAW DEVELOPMENTS IN NEW YORK
STATE

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Chapter 549 of the 2014 New York Laws and Chapter 466 of the 2016 New York Laws made many changes in the Not-for-Profit Corporation Law (“NPCL”) and related changes to sections of the Estates, Powers & Trust Law (“EPTL”) that govern charitable trusts, corporations, and other charitable entities. This article highlights these recent changes and offers suggestions for further changes to make the provisions of New York’s new statute governing not-for-profit corporations consistent, coherent, and useful.

Part I of this article briefly describes the recent changes. Part II describes further NPCL changes that the New York State Law Revision Commission¹ believes should be made to strengthen nonprofit governance, as well as proposed NPCL technical changes to improve the law. Last, Part III concludes by discussing other related developments in the law in 2016.

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¹ “The Law Revision Commission was created by Chapter 597 of the Laws of 1934[,] which enacted Article 4-A of the Legislative Law.” *About the Commission*, N.Y. ST. L. REVISION COMM’N, <https://lawrevision.state.ny.us> (last visited Mar. 19, 2017). “It consists of the chairpersons of the Committees on the Judiciary and Codes of the Senate and Assembly, as members ex officio, and five members appointed by the Governor, each for a term of five years.” *Id.*; see also N.Y. LEGIS. LAW § 70 (McKinney 2017) (providing the specific statutory language). In its eighty-three years of existence, the Commission has undertaken numerous studies, developed recommendations for change, and crafted proposed legislation on a wide variety of subjects. Background information about the Commission can be viewed on its website. See *About the Commission, supra*.

I. BACKGROUND

Nonprofit corporations form a major part of the economic engine of New York State. The state comptroller's office reported that New York had approximately thirty-one thousand registered nonprofits as of 2012;² in 2011, when the number was closer to twenty-seven thousand, the annual revenue was almost \$148 billion.³ These organizations employ approximately 1.25 million people—about eighteen percent of the state's workforce—and offer a wide array of services and programs from art, to culture and humanities, to education, and research and human services, that touch the lives of New Yorkers every day.⁴ As of 2013, however, despite the influence of the work of not-for-profits, the NPCL had not been amended in more than forty years.⁵ The law was unduly opaque, imposing inefficient, costly, and unnecessary regulatory burdens.⁶ Among the more significant burdens were choosing between four types of not-for-profits corporations,⁷ and securing state agency approval prior to the formation of a corporation.⁸

Financial scandals that had roiled the not-for-profit sector were

² See OFFICE OF N.Y. STATE COMPTROLLER, PROFILE OF NONPROFIT ORGANIZATIONS IN NEW YORK STATE 2 (2016), http://www.osc.state.ny.us/reports/economic/nonprofits_in_nys.pdf [hereinafter PROFILE OF NONPROFIT ORGANIZATIONS IN NEW YORK STATE].

³ See OFFICE OF N.Y. STATE COMPTROLLER, NEW YORK STATE'S NOT-FOR-PROFIT SECTOR: DELAYED STATE CONTRACTS AND LATE PAYMENTS HURT SERVICE PROVIDERS 1 (2011), <http://www.osc.state.ny.us/reports/nfp/nfpreport11-2011.pdf> [hereinafter DELAYED STATE CONTRACTS AND LATE PAYMENTS HURT SERVICE PROVIDERS].

⁴ See PROFILE OF NONPROFIT ORGANIZATIONS IN NEW YORK STATE, *supra* note 2, at 2–3.

⁵ See Peter J. Kiernan et al., Amending the Not-for-Profit Corporation Law—the Beginning, N.Y.L.J., July 23, 2013, at 1, col. 1.

⁶ See LEADERSHIP COMM. FOR NONPROFIT REVITALIZATION, REVITALIZING NONPROFITS RENEWING NEW YORK: REPORT TO ATTORNEY GENERAL ERIC T. SCHNEIDERMAN 1 (2012), [https://ag.ny.gov/sites/default/files/NP%20Leadership%20Committee%20Report%20\(2-16-12\).pdf](https://ag.ny.gov/sites/default/files/NP%20Leadership%20Committee%20Report%20(2-16-12).pdf).

⁷ See DEP'T OF STATE, N.Y. STATE, NOT-FOR-PROFIT INCORPORATION GUIDE 6–7 (2014), https://www.dos.ny.gov/forms/corporations/1511-f-1_instructions.pdf. The then-current law classified nonprofit corporations into four types: A, B, C, and D. *See id.* at 6–7. The Type A corporation was a member organization which existed for the benefit of its members. *See id.* at 6. The Type B corporation had charitable and public benefit purposes which generally overlapped with the purposes listed under section 501(c)(3) of the Internal Revenue Code. *See id.* The Type C corporation had a charitable purpose and engaged in commercial activities in furtherance of that purpose. *See id.* at 6–7. The Type D corporation was a nonprofit that was authorized under other laws. *See id.* at 7.

⁸ See OFFICE OF THE N.Y. ATTORNEY GEN. CHARITIES BUREAU, PROCEDURES FOR FORMING AND CHANGING A NEW YORK NOT-FOR-PROFIT CORPORATION 14 (2015), https://www.charitiesnys.com/pdfs/how_to_incorporate.pdf. Then-section 404 provided that a nonprofit corporation had to seek the consent from the state agency or other governmental body that regulated the activities in which it engages for any of its Department of State filings, including incorporation, merger, sale of assets, and dissolution. *See id.*; *see also* N.Y. NOT-FOR-PROFIT CORP. LAW § 404 (McKinney 2017) (providing the specific statutory language).

also a cause for concern.⁹ The public has the right to expect that boards of directors of nonprofits will ensure that an organization is using its private and public funding to carry out its mission rather than to line its own pockets and those of its executives and key employees.¹⁰ While many boards of directors carry out their responsibilities in a manner that ensures the public trust, the NPCL was a trap for the unwary because it did not provide sufficient guidance for board members, leaving them to guess how to act regarding a conflict of interest, what role they should play in assessing the financial integrity of the organization, and how to monitor the activities of an organization without micro-managing.¹¹

Additionally, the important role of government oversight that the New York State Office of the Attorney General plays has been challenged in recent years: by court rulings that have undercut its traditional regulatory role; by the effects of its own bureaucracy; and by the fact that many not-for-profits operating in New York were formed in Delaware, a state with a more hospitable corporate law, such as no prior state agency approval, no registration required with the attorney general, and “[p]ermissive, rather than prescriptive, corporate governance.”¹²

A February 16, 2012, report entitled: “Revitalizing Nonprofits Renewing New York: Report to Attorney General Eric T. Schneiderman,” issued by the Leadership Committee for Nonprofit Revitalization,¹³ had two major objectives: (1) “reducing burdens on

⁹ See Bob Carlson, *Protection and Regulation of Nonprofits and Charitable Assets*, in STATE ATTORNEYS GENERAL POWER AND RESPONSIBILITIES 203, 204 (Emily Myers & Lynne Ross eds., 3d ed. 2013); see generally COLUM. L. SCH., AGS AND THE CHARITABLE SECTOR: IN THE NEWS, <http://www.law.columbia.edu/attorneys-general/ags-news/ags-and-charitable-sector-news> (last visited Mar. 6, 2017) (citing various charities’ settlements with the New York State Office of the Attorney General in the past several years).

¹⁰ See Russ Buettner, *State Panel to Review Pay of Leaders at Nonprofits*, N.Y. TIMES (Aug. 3, 2011), <https://cityroom.blogs.nytimes.com/2011/08/03/pay-for-heads-of-nonprofit-groups-will-be-scrutinized/?rref=collection%2Ftimestopic%2FNonprofit%20Organizations>.

¹¹ See LILA HAN & HEATHER MYERS, RUSSELL INV., GOVERNANCE IMPLICATIONS OF NEW YORK’S NON-PROFIT REVITALIZATION ACT 2 (2013), <http://www.institutionalinvestor.com/images/416/White%20Paper/governance-implications-of-ny-non-profit-revitalization-act-.pdf>.

¹² See J.J. Harwayne Leitner & Leanne C. McGrory, *The “Delaware Advantage” Applies to Nonprofits, Too*, AM. BAR ASS’N: BUS. L. TODAY (Nov. 2016), http://www.americanbar.org/publications/blt/2016/11/01_leitner.html.

¹³ See LEADERSHIP COMM. FOR NONPROFIT REVITALIZATION, *supra* note 6. The thirty-two-person Leadership Committee for Nonprofit Revitalization (“Leadership Committee”) is representative of nonprofit corporations from all parts of New York State, and was established in 2011. See *id.* Some, but not all, of the recommendations of the Leadership Committee’s February 16, 2012, report made it into law. Compare LEADERSHIP COMM. FOR NONPROFIT REVITALIZATION, *supra* note 6 (describing the Leadership Committee’s proposals), with Assemb. B. 8072, 236th Reg. Sess. (N.Y. 2013) (enacted) (providing the actual provisions that were passed into law).

nonprofits,”¹⁴ which included addressing the outdated statutory and regulatory scheme as well as delays in approval and payment of state contracts,¹⁵ and providing immediate cash flow loans to nonprofits threatened by state contract delays;¹⁶ and (2) “enhancing governance and maintaining the public trust” in not-for-profit corporations.¹⁷

The Nonprofit Revitalization Act of 2013 (“Act”), Chapter 549 of the Laws of New York effective July 1, 2014,¹⁸ focused on updating the statutory and regulatory scheme and enhancing governance and accountability,¹⁹ at the same time aiming for “a more business-friendly environment.”²⁰ The aim of helping not-for-profits survive the state contracting process that provides them with funds in a timely manner was not accomplished, though—perhaps because the Governor intends to keep executive control over the nonprofit contracting and grant process, as hinted at via his veto memorandums of certain bills.²¹

¹⁴ LEADERSHIP COMM. FOR NONPROFIT REVITALIZATION, *supra* note 6, at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ N.Y. Assemb. B. 8072; *see* N.Y. NOT-FOR-PROFIT CORP. LAW § 201 (McKinney 2017).

¹⁹ *See* SPONSOR’S MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. B. 8072 (2013) [hereinafter SPONSOR’S MEMORANDUM FOR A.8072]. On May 14, 2013, Attorney General Schneiderman proposed both a Nonprofit Revitalization Act and an Executive Compensation Reform Act. *See* Jerald A. Jacobs & Dawn Crowell Murphy, *Proposed Reform of New York’s Charities and Nonprofits Laws Would Ease Burdens*, PILLSBURY L. (June 4, 2013), <https://www.pillsburylaw.com/en/news-and-insights/proposed-reform-of-new-york-charities-and-nonprofits-laws.html#>. Neither bill moved. Although a Nonprofit Revitalization Act thereafter became law, the ultimate legislation was an amalgam of bills proposed by the Attorney General (both A.7337 (2013) and A.7338 (2013)). *See* Press Release, N.Y. State Off. of the Att’y Gen., A.G. Schneiderman, Senate and Assembly Committee Chairs Propose Groundbreaking Legislation to Reform New York’s Charities Laws (May 14, 2013), <https://ag.ny.gov/press-release/ag-schneiderman-senate-and-assembly-committee-chairs-propose-groundbreaking>. The Executive Compensation bill was not thereafter considered, as some sources outline. *See, e.g.*, Peter J. Kiernan et al., *Amending the Not-for-Profit Corporation Law: The Next Steps*, N.Y.L.J., Oct. 7, 2013; Peter J. Kiernan et al., *supra* note 5, at 1, col. 1; Coleen Friel Middleton & Mark Thomas, *Nonprofit Law Overhaul Changes the Landscape for New York Charities*, N.Y. L.J., Nov. 4, 2013, at 9, col. 1; C. Raymond Radigan & David R. Schoenhaar, *Modernizing New York’s Non-Profit Law*, N.Y.L.J., Sept. 9, 2013, at 3, col. 1; Francis J. Serbaroli, *Changes to Not-for-Profit Law Impact Health Care Sector*, N.Y.L.J., Jan. 28, 2014, at 3., col. 1. The Summer 2014 issue of the New York State Bar Association’s *Trusts and Estates Law Section Newsletter* contains another piece. *See* Robert R. Lyons & Sean R. Weissbart, *The Effect of the New York Non-Profit Revitalization Act of 2013 on Incorporating New York-Based Charities in Delaware*, 47 N.Y. ST. BAR ASSN. TR. & EST. L. SEC. NEWSL. 10 (2014).

²⁰ SPONSOR’S MEMORANDUM FOR A.8072, *supra* note 19.

²¹ *See, e.g.*, VETO MEMORANDUM NO. 235, S. B. 5189, 236th Reg. Sess. (N.Y. 2013) (“[S.5189 would have established] that not-for-profit organizations . . . shall be entitled to all prompt contracting interest due from a state agency at the time of the first payment.”); VETO MEMORANDUM NO. 518, S. B. 6482, 237th Reg. Sess. (N.Y. 2014) (indicating that S.6482 of 2014 was akin to S.5189 of 2013); VETO MEMORANDUM NO. 575, Assemb. B. 9599, 237th Reg. Sess. (N.Y. 2014) (indicating that A.9599 would have provided New York State grants gateway

A. Regulatory Changes

With the passage of the Act in 2013, key changes to the regulatory burden were made with respect to formation, sales and exchanges of real property, mergers, consolidations, and dissolutions.²²

The number of types of corporations that could be formed was reduced from four to two: charitable²³ and non-charitable corporations.²⁴ The prior approval by the State Education Department of Department of State filings, including incorporation, merger, sale of assets, and dissolutions was retained only for schools, colleges, universities, entities providing post-secondary education, libraries, museums, and historical societies;²⁵ all other nonprofit corporations having an educational component now need not obtain prior approval.²⁶ Transactions involving the sale of less than all the assets of a nonprofit corporation can now be approved by a vote of the majority of the members of the board rather than a two-thirds vote to reduce the burden on ordinary business transactions.²⁷ The nonprofit corporation can seek approval of the sale of substantially all of its assets,²⁸ a merger,²⁹ or a dissolution³⁰ through a one-step process of attorney general approval rather than a two-step process involving approval by the attorney general and the court.³¹ The use of technology to carry out board notifications and board meetings was made permissible.³² The revenue threshold for requiring a nonprofit corporation to obtain an independent certified public accountant audit was raised to eliminate the financial burdens on nonprofit

procedures). The problems with the state contracting process have continued. See Ruth McCambridge, *Serious Contracting Problems Place Nonprofits at Risk in New York*, NONPROFIT Q. (May 4, 2017), <https://nonprofitquarterly.org/2017/05/04/serious-contracting-problems-place-nonprofits-risk-new-york/>; see also Glenn Blain, *N.Y. State has Shortchanged Nonprofit Social-Service Organizations by at Least \$1B over Past Six Years, Campaign Argues*, N. Y. DAILY NEWS (March 23, 2017), <http://www.nydailynews.com/news/politics/nonprofit-orgs-urge-cuomo-state-funding-social-services-article-1.3005073> (discussing the claim that state contracts rarely cover the full cost of services).

²² See N.Y. Assemb. B. 8072.

²³ See N.Y. NOT-FOR-PROFIT CORP. LAW § 201. A charitable corporation is defined as one with purposes that are “charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.” *Id.* § 102(3-b).

²⁴ See *id.* § 102(9-a). A “non-charitable corporation” is defined as any corporation formed under the NPCL, other than a charitable corporation. *Id.*

²⁵ See SPONSOR’S MEMORANDUM FOR A.8072, *supra* note 19.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

corporations with lower revenues.³³ The Act also made conforming amendments to other statutes with provisions relating to not-for-profit corporations.³⁴

B. Governance Change

The key features of the governance changes included guidance for conflicts of interest, director and officer responsibilities, whistleblower protections, and audit committee responsibilities.³⁵ All nonprofit corporations are now required to adopt conflict of interest policies;³⁶ in addition to the statutory rules, the certificate of incorporation or board policy could add additional requirements.³⁷ Corporations with twenty or more employees and annual revenues in excess of one million dollars are required to adopt a whistleblower policy.³⁸ Related party transactions in which a member of the board or someone related to a board member has a financial interest also came under stricter scrutiny.³⁹ The attorney general was given specific authority to unwind a transaction that violated the rules.⁴⁰ And the new law requires that a corporation establish an audit committee composed of independent directors.⁴¹

The 2013 changes in the NPCL resulted in more effective, clear, and commonsensical requirements that eliminated or reduced the burdensome procedures for incorporating while at the same time provided guidance for board members regarding conflicts of interest, director and officer responsibilities, whistleblower protections, and audit committee responsibilities—all aimed at preventing abuse.⁴²

When the Governor signed Chapter 549, though, he stated that the

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* If a corporation already had adopted a whistleblower policy required by federal, state, or local laws that was substantially consistent with the provisions of the new section, the NPCL requirement would be satisfied. *See id.*

³⁹ *See* N.Y. NOT-FOR-PROFIT CORP. LAW § 102(a)(24) (McKinney 2017); SPONSOR'S MEMORANDUM FOR A.8072, *supra* note 19.

⁴⁰ *See* NOT-FOR-PROFIT CORP. LAW § 715(f)–(g); SPONSOR'S MEMORANDUM FOR A.8072, *supra* note 19.

⁴¹ *See* NOT-FOR-PROFIT CORP. LAW § 712-a(a); SPONSOR'S MEMORANDUM FOR A.8072, *supra* note 19.

⁴² *See* SPONSOR'S MEMORANDUM FOR A.8072, *supra* note 19. The law also enacted conforming amendments to the Education Law; the EPTL; Executive Law; General Business Law; Insurance Law; the Mental Hygiene Law; the Public Authorities Law; the Private Financing Housing Law; the Public Lands Law; Religious Corporations Law; and the Surrogate Court Procedure Law. *See id.*

bill “contains certain technical defects and barriers to implementation.”⁴³ Some additional changes were therefore enacted as Chapter 23 of the 2014 Laws.⁴⁴ As implementation of the Act occurred, it became apparent that certain provisions of the Act should be refined to better ensure their desired effect, namely, compliance with both federal and state requirements to achieve transparency and accountability without undue burden. Repair efforts ensued⁴⁵ to align the Act’s provisions with relevant provisions of the Internal Revenue Code, in order to make the NPCL provisions regarding good governance, such as related party transactions and audit requirements, more practical and less burdensome on small nonprofits and family run private foundations.⁴⁶ The repair effort continued into 2016, resulting in the enactment of Chapter 466 on June 16.⁴⁷

Perhaps the most significant change appearing in Chapter 466 is the amendment of the definition of “key employee” into a new definition of “key person,” to reflect the fact that the term is intended to cover non-officers, non-directors, and non-employees who are nevertheless able to exercise substantial influence over the affairs of a corporation.⁴⁸ Recent scandals associated with not-for-profit

⁴³ APPROVAL MEMORANDUM NO. 12, Assemb. B. 8072, 236th Reg. Sess. (N.Y. 2013).

⁴⁴ See SPONSOR’S MEMORANDUM IN SUPPORT OF LEGISLATION, S. B. 6249, 237th Reg. Sess. (N.Y. 2014) [hereinafter SPONSOR’S MEMORANDUM FOR S.6249].

⁴⁵ See Sharon L. Klein, NY’s Latest Legislative Session: What Passed, What Didn’t, What’s Next, N.Y.L.J., Aug. 29, 2016, at 52. The details of the revisions are described in the *Supplementary Practice Commentary*, published in the 2016 pocket part to the McKinney’s Not-for-Profit Corporation Law, and two articles published in the *New York Law Journal* in 2015 provide additional detail. See Roger Cohen & Ellen Moskowitz, Attorney General Issues Guidance on State Not-for-Profit Law, N.Y.L.J., July 31, 2015, at 4, col. 1; Jason R. Lilien, Nonprofit Revitalization Act One Year Later, N.Y.L.J., Aug. 7, 2015.

⁴⁶ See Pamela Landman & Paul W. Mourning, *Additional Clarifying Amendments to the Nonprofit Revitalization Act Signed Into Law*, NAT’L L. REV. (Nov. 30, 2016), <http://www.natlawreview.com/article/additional-clarifying-amendments-to-nonprofit-revitalization-act-signed-law>.

⁴⁷ *Id.*; see Klein, *supra* note 45; see also *Assembly Bill A.10365B*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2015/a10365/amendment/b> (last visited Apr. 29, 2017) (showing, on the Senate’s website, the date the bill passed both houses). The *Supplementary Practice Commentary* in the 2016 pocket part to the McKinney’s Not-for-Profit Corporation Law describe these amendments, and the amendments are also summarized in two recent *New York Law Journal* articles. See Klein, *supra* note 45; Francis J. Serbaroli, Revising the 2013 Reforms to the Not-for-Profit Corporation Law, N.Y.L.J., Jan. 24, 2017, at 3, col. 1. Chapter 466 resulted from the efforts of the New York State Bar Association; the Association of the Bar of the City of New York; the New York Nonprofit Coordinating Council; the Lawyers Alliance; and the Law Revision Commission. See Memorandum from Cadawalader, Wickersham & Taft LLP to Clients and Friends, regarding Additional Clarifying Amendments to the Nonprofit Revitalization Act Signed into Law (Dec. 21, 2015), <http://www.cadwalader.com/resources/clients-friends-memos/clarifying-amendments-to-the-nonprofit-revitalization-act-signed-into-law>.

⁴⁸ See Landman & Mourning, *supra* note 46.

corporations in New York called attention to the need for ensuring that persons who are not directors, officers, or employees, but who exercise control over a not-for-profit corporation, are subject, among other requirements, to conflicts of interest, director and officer fiduciary responsibilities, whistleblower protections, and audit committee responsibilities.⁴⁹ The activities of former New York State Senator Pedro Espada and his family are an example of the conduct⁵⁰ that this law seeks to regulate though the expansion of the term “key person.”

II. LAW REVISION COMMISSION PROPOSALS

While the recent legislative changes have modernized the NPCL, there are still outstanding issues, discussed below.

A. *Consistency with the Internal Revenue Code*

One recurring theme heard during the 2013 hearings prior to the passage of the Act was the need for New York’s definitions in the NPCL to be consistent with the language of the Internal Revenue Code.⁵¹ Inconsistencies in language can lead to confusion and potential failure to comply with federal requirements through reliance on New York law.⁵² While the Act and the follow-up amendments do accomplish much in that regard, some areas still need to be addressed.

Specifically, paragraph (3-b) of NPCL section 102(a) (“[d]efinitions”) should redefine “charitable purpose” to be consistent with section 501(c)(3) of the Internal Revenue Code. For example, “testing for public safety and national or international amateur sports competitions” were unaccountably omitted when “charitable” was defined by the Act.⁵³ Because the definition of “non-charitable

⁴⁹ See Lilien, *supra* note 45.

⁵⁰ See, e.g., Mosi Secret, *Espada Sentenced to 5 Years for Stealing from Nonprofit*, N.Y. TIMES (June 14, 2013), <http://www.nytimes.com/2013/06/15/nyregion/espada-sentenced-to-5-years-for-stealing-from-nonprofit.html>.

⁵¹ See *To Examine the Re-Codification of New York State’s Not-for-Profit Corporation Law in an Effort to Reduce Unnecessary Burdens on Nonprofits and to Enhance Nonprofit Governance and Oversight: Hearing Before the N.Y. State S. Standing Comm. on Corps., Auths., and Comm’ns*, 236th Reg. Sess. 95 (2013) (statement of Mark Thomas, General Counsel, Healthcare Association of New York State).

⁵² See *id.*

⁵³ Memorandum from Peter J. Kiernan et al. to the Hon. Michael H. Ranzenhofer and Hon. James F. Brennan (Mar. 13, 2014), <https://lawrevision.state.ny.us/not-for-profit-corporation-law-2/march-2015-memorandum-proposed-amendments-to-npr-act/>; see N.Y. NOT-FOR-PROFIT CORP. LAW § 102(a)(3-b) (McKinney 2017).

corporation” in NPCL section 102(9-a) includes “athletic” purposes, this amendment is important to nonprofit organizations like the United States Olympic Committee and Special Olympics International.⁵⁴

Indeed, a practitioner has reported that the Secretary of State will not file an athletic organization’s certificate of incorporation as “charitable,” because prior to Chapter 549, athletic organizations were Type A’s (i.e., not charitable), and Chapter 549 failed to change that.⁵⁵ The same practitioner also reported that a not-for-profit corporation certificate of incorporation filer may check, consistent with NPCL section 402(a)(2-a), a box on the Secretary of State’s not-for-profit incorporation form that provides that the proposed corporation’s purpose is “any charitable purpose.”⁵⁶ Yet, the Internal Revenue Service will not accept this as meeting either the organizational or operational tests for charitable tax exemption.⁵⁷ As such, NPCL section 402(a)(2-a) should be repealed.

B. Protection of Non-Charitable Restricted Assets

Non-charitable not-for-profit corporations may have assets legally required to be held for endowment or other restricted purposes. NPCL sections 907-a(c) and 907-b(d) (mergers and consolidations),⁵⁸ 1001(d)(3) and 1002-a(c)(1) (dissolution),⁵⁹ 1109(c) (judicial dissolution),⁶⁰ and 1202(b) (receivership)⁶¹ provide for special protection of such assets.⁶² Sections 114 (“[v]isitation of supreme court”),⁶³ 510 (“[d]isposition of all or substantially all assets”), and 715 (“[r]elated party transactions”),⁶⁴ which are currently silent on this issue, should be amended to protect similarly any not-for-profit corporation restricted assets.

⁵⁴ See NOT-FOR-PROFIT CORP. LAW § 102(a)(9-a).

⁵⁵ See *The Non-Profit Revitalization Act of 2013 Overhauls New York Nonprofit Corporation Law*, MCGUIREWOODS (Oct. 3, 2013), <https://www.mcguirewoods.com/Client-Resources/Alerts/2013/10/NY-Non-Profit-Revitalization-Act-2013.aspx>.

⁵⁶ See Robert Pigott, *The Death of Charitable Corporate Purposes*, N.Y.L.J., July 1, 2014, at 4, col. 1.

⁵⁷ See *id.*

⁵⁸ N.Y. NOT-FOR-PROFIT CORP. LAW §§ 907-a(c), 907-b(d).

⁵⁹ *Id.* §§ 1001(d)(3), 1002-a(c)(1).

⁶⁰ *Id.* § 1109(c).

⁶¹ *Id.* § 1202(b).

⁶² *Id.* §§ 907-a(c), 907-b(d), 1001(d)(3), 1002-a(c)(1), 1109(c), 1202(b).

⁶³ *Id.* § 114.

⁶⁴ *Id.* §§ 510, 715.

C. Strengthen Attorney General Oversight

Another concern is the fact that the important role of government oversight that the Office of the Attorney General plays has been challenged in recent years by court rulings that have undercut its traditional regulatory role.⁶⁵ Certain amendments to the NPCL can correct that problem. An amendment to NPCL section 112(a) (“[a]ctions or special proceedings by attorney-general”) should restore the *parens patriae* authority of the attorney general—an essential common law authority—eliminating any doubt created by *People v. Grasso*.⁶⁶ The opinion of Chief Judge Kaye in *Grasso* is not easy to understand. In the case, the Attorney General pleaded common law causes of action in addition to statutory ones.⁶⁷ Only the former was at issue. The crucial sentence in the opinion is: “Here, however, as the dispositive defect stems from the inconsistency between the two sets of claims, we need not and do not reach the scope of *any such* [*parens patriae*] authority.”⁶⁸ Nevertheless, the Court of Appeals affirmed the dismissal of the common law claims.⁶⁹ The statutory claims “rest on the fault-based provisions enacted by the Legislature [in the NPCL]. . . . [T]he four nonstatutory causes of action are devoid of any fault-based elements and, as such, are fundamentally inconsistent with the N-PCL.”⁷⁰

As a result of this rule, the question arises: is the Attorney General better advised not to plead statutory claims? Or do the words “any such” foretell the demise of the *parens patriae* authority, despite the court’s citation of the cases upholding it?⁷¹ Because none of them are the nonprofit cases cited by the Attorney General as also upholding the *parens patriae* authority of that office.⁷²

Also, neither the Attorney General nor the Court of Appeals appear to have considered the Attorney General’s highly generalized

⁶⁵ See, e.g., *People v. Grasso*, 893 N.E.2d 105, 110 (N.Y. 2008).

⁶⁶ *Id.* at 108–09; see N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a); Robert Pigott, Enforcement of Charities Laws in a Post-‘Grasso’ World, N.Y.L.J., Aug. 4, 2008.

⁶⁷ See Pigott, *supra* note 66.

⁶⁸ *Grasso*, 893 N.E.2d at 108 (emphasis added).

⁶⁹ *Id.* at 110.

⁷⁰ *Id.* at 109.

⁷¹ See *id.* at 108–09 (citations omitted).

⁷² See, e.g., *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 757–59 (N.Y. 1985); *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435–36 (App. Div. 2001).

regulatory authority in section 8.1-4(i)⁷³ and (m)⁷⁴ of the EPTL.

Recent examples of approved endowment invasions, such as the Othmer Endowment of Long Island College Hospital and the New York City Opera,⁷⁵ that were supposed to lead to the endowments' survival and replenishment but did not, also support strengthening the responsibilities of the attorney general and the courts. Section 555 of the NPCL (“[r]elease or modification of restrictions on management, investment, or purpose”) should be amended to require that the attorney general should explicitly determine, and the court should find, that the proposed endowment invasion, deviation, or restriction modification is fair and reasonable, is likely to lead to the survival of the corporation and, if practicable, includes security for the restoration or restriction of the endowment.

Next, Chapter 466 amended NPCL section 715, as proposed by the attorney general at the last minute, to add a new subdivision (j) of statutory defenses for when a third party or the attorney general challenges a related party transaction.⁷⁶ Should these defenses also limit the attorney general's powers under NPCL section 112 (“[a]ctions or special proceedings by attorney-general”), which authorizes the attorney general to “enjoin, void or rescind any related party transaction, seek damages and other appropriate remedies, in law or equity,”⁷⁷ and his similar powers under sections 715(b) and 720(b)?

⁷³ N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(i) (McKinney 2017) (“The attorney general may investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered. The attorney general, his or her assistants, deputies or such other officers as may be designated by him or her, are empowered to subpoena any trustee, agent, fiduciary, beneficiary, institution, association or corporation or other witness, examine any such witness under oath and, for this purpose, administer the necessary oaths, and require the production of any books or papers which they deem relevant to the inquiry.”).

⁷⁴ *Id.* § 8-1.4(m) (“The attorney general may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies. The powers and duties of the attorney general provided in this section are in addition to all other powers and duties he or she may have. No court shall modify or terminate the powers and responsibilities of any trust, corporation or other trustee unless the attorney general is a party to the proceeding, but nothing in this section shall otherwise impair or restrict the jurisdiction of any court with respect to the matters covered by it. The failure of any trustee to register or to file reports as required by this section may be ground for judicial removal of any person responsible for such failure.”).

⁷⁵ See, e.g., Mary Frost, *Complex Fortis Closing on LICH Site in Brooklyn Partially Complete*, BROOKLYN DAILY EAGLE (Sept. 8, 2015), <http://www.brooklyneagle.com/articles/2015/9/8/complex-fortis-closing-lich-site-brooklyn-partially-complete>; James B. Stewart, *A Ransacked Endowment at New York City Opera*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/business/ransacking-the-endowment-at-new-york-city-opera.html>.

⁷⁶ See Landman & Mourning, *supra* note 46.

⁷⁷ N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a)(10) (McKinney 2017).

Last, paragraph (1) of subdivision (b) of section 112 governing actions and special proceedings should be amended to eliminate any possibility that the right to trial by jury could be broader than that conferred by Article 1, section 2 of the New York State Constitution or the Civil Practice Law and Rules section 4101.

D. Strengthen Audit Requirements

Board and officer responsibility issues are raised by governance and possible audit failures as demonstrated by well-known examples such as the Federation Employment and Guidance Services, Steinway Child and Poverty Services, the Othmer Endowment of Long Island College Hospital, New York City Opera, Metropolitan Council on Jewish Poverty, New York Legal Assistance Group, Dunbar Association in Syracuse, and the many nonprofits across the nation that lost money to Bernie Madoff's Ponzi scheme.⁷⁸ NPCL section 519 ("[a]nnual report of directors") should be amended to require submission to the board and members, if any, and the attorney general, of audited financial statements and management letters from independent certified public accountants consistent with Executive Law Article 7-A, as amended by the Act, and EPTL section 8.9, as added by the Act.

Next, Section 172-b of the Executive Law permits a parent corporation and its affiliates, with the permission of the attorney general, to file consolidated financial reports,⁷⁹ which enables parents and their affiliates to not disclose transactions between or among them.⁸⁰ The resulting problem of this is well-illustrated by

⁷⁸ See, e.g., Reuven Blau, *\$10M in Debt Sinks Kids Mental Health Charity in Queens*, N.Y. DAILY NEWS (Feb. 1, 2016), <http://www.nydailynews.com/new-york/queens/10m-debt-sinks-kids-mental-health-charity-queens-article-1.2515818>; Michael Cooper & Robin Pogrebin, *The Frenzied Last-Act Effort to Save City Opera*, N.Y. TIMES (Oct. 4, 2013), <http://www.nytimes.com/2013/10/05/arts/music/the-frenzied-last-act-effort-to-save-city-opera.html>; Mary Frost, *Shocker: How SUNY Lost More Than \$100M Mismanaging LICH*, BROOKLYN DAILY EAGLE (Aug. 5, 2014), <http://www.brooklyneagle.com/articles/2014/8/5/shocker-how-suny-lost-more-100m-mismanaging-lich>; Seth Lipsky, *The Met Council Scandal & NY's Nonprofit Nightmare*, N.Y. POST (Sept. 25, 2013), <http://nypost.com/2013/09/25/the-met-council-scandal-nys-non-profit-nightmare/>; James T. Mulder, *Dunbar Association's Director Steps Down As Nonprofit Works Through Financial Problems*, SYRACUSE NEWS (Feb. 10, 2011), http://www.syracuse.com/news/index.ssf/2011/02/dunbar_associations_director_s.html; Laura Nahmias et al., *The Wrecking of a Blue-Chip New York Nonprofit*, POLITICO (Mar. 13, 2015), <http://www.politico.com/states/new-york/albany/story/2015/03/the-wrecking-of-a-blue-chip-new-york-nonprofit-087679>; Josh Nathan-Kazis, *New York Jewish Legal Aid Group Rocked by Scandal*, FORWARD (Feb. 6, 2015), <http://forward.com/news/214298/new-york-jewish-legal-aid-group-rocked-by-scandal/>; Stephanie Strom, *Wall St. Fraud Leaves Charities Reeling*, N.Y. TIMES (Dec. 15, 2008), <http://www.nytimes.com/2008/12/16/business/16charity.html>.

⁷⁹ See N.Y. EXEC. LAW § 172-b(4)(a) (McKinney 2017).

⁸⁰ See, e.g., *id.*

the example of the Federation Employment and Guidance Services (“FEGS”).⁸¹ In 2015, FEGS filed for Chapter 11 bankruptcy after nearly a \$20 million budget deficit was disclosed.⁸² Its bankruptcy filing revealed transactions between or among it and subsidiaries and affiliates,⁸³ yet how they exactly arrived at their deficit is difficult to determine because FEGS filed consolidated financial statements and reports.⁸⁴ The Internal Revenue Service generally requires separate 990 reports from parents and from their affiliates, thus potentially avoiding situations like FEGS.⁸⁵ Changing the Executive Law would make it consistent with the provisions of the Internal Revenue Service’s code and regulations that require separate financial statements for parents and their affiliates.⁸⁶ The change would also allow more scrutiny of publicly supported charities’ financial affairs and would reduce the potential for problems such as those that arose with FEGS.⁸⁷

Last, the definition of “[i]ndependent auditor” should include references to NPCL section 519 and EPTL section 8.9. The term “[i]ndependent auditor” relates only to audits required by Executive Law Article 7-A, which is regarding the registration of professional fundraisers.⁸⁸ Yet audits and/or other *financial reports* are referred to in other NPCL and EPTL sections.⁸⁹ The definition should, therefore, not be so limited, but should include New York State licensed certified public accountants. NPCL section 712-a (“[a]udit oversight”) should be amended to make it consistent with the proposed amendment of section 519.

⁸¹ See Nahmias et al., *supra* note 78.

⁸² See *id.*; *Demise of Jewish Charity under Federal Investigation*, JEWISH TELEGRAPHIC AGENCY (Oct. 9, 2015), <http://www.jta.org/2015/10/09/news-opinion/united-states/fegs-bankruptcy-under-federal-investigation>. FEGS’ creditors are seeking permission from the U.S. Bankruptcy Court to sue FEGS former president and vice president as well as the company’s accounting firm. See Josh Nathan-Kazis, *EXCLUSIVE: FEGS Creditors Plan to Sue Failed Charity Execs—And Accounting Firm*, FORWARD (Feb. 14, 2017), <http://forward.com/news/363051/exclusive-fegs-creditors-plan-to-sue-failed-charity-execs-and-accounting-fi/>.

⁸³ See Nahmias et al., *supra* note 78.

⁸⁴ See *id.*

⁸⁵ See, e.g., Treas. Reg. § 1.6033-2(a)(1), (a)(2)(i) (2016); Stephen Franciosa, *FEGS: Is the Nonprofit’s Collapse a Debacle, or a Cautionary Tale?*, ACCT. TODAY (May 8, 2017), <https://www.accountingtoday.com/opinion/fegs-debacle-or-cautionary-tale>.

⁸⁶ See, e.g., Treas. Reg. § 1.6033-2(a)(1), (a)(2)(i) (2016).

⁸⁷ See, e.g., Nahmias et al., *supra* note 78.

⁸⁸ See N.Y. NOT-FOR-PROFIT CORP. LAW § 102(a)(20) (McKinney 2017); N.Y. EXEC. LAW § 172-b(1) (McKinney 2017).

⁸⁹ See Andrew S. Katzenberg, *New York Law Update: Non-Profit Revitalization Act of 2013*, 47 N.Y. ST. BAR ASS’N TR. & EST. L. SEC. NEWSL. 4, 4 (2014).

E. Simplify Indemnification

Testimony before the Senate Corporations, Authorities and Commissions Committee in 2013 demonstrated that the NPCL indemnification sections 721, 723, 724, 725, and 726 needed consolidation and simplification.⁹⁰ The Law Review Commission's indemnification provision would make only one substantive change: NPCL section 722(d) would overrule *Spitzer v. Soundview Health Center*,⁹¹ one of the "Espada cases."⁹² The court construed the "undertaking" for advanced indemnification to be as little as a naked promise to repay.⁹³ This exposes not-for-profit corporation assets to loss.⁹⁴ It is also inconsistent with section 2501 of the Civil Practice Law and Rules, which defines "[u]ndertaking" either as "[a]ny obligation [to pay,] . . . which contains a covenant by a surety to pay the required amount," or "[the] deposit . . . of the required amount in legal tender,"⁹⁵ and General Construction Law section 14, which defines "[b]ond and undertaking" as the same.⁹⁶ The decision is also inconsistent with how a similar Business Corporation Law section has been applied.⁹⁷

In addition to these substantive changes, certain technical changes are necessary. Specifically, NPCL section 404 ("[a]pprovals, notice, and consents") should be amended to require that each agency, public officer, organization, or person to whom a notice of incorporation is sent, or from whom a consent to incorporation must be obtained, identify the representative designated to receive them. In addition, corrections to sections 509 ("[p]urchase, sale, lease and mortgage of real property"), 712(a) ("[a]udit oversight"), 713 ("[o]fficers") and 717 ("[d]uty of directors and officers") are needed.

⁹⁰ See *To Examine the Re-Codification of New York State's Not-for-Profit Corporation Law in an Effort to Reduce Unnecessary Burdens on Nonprofits and to Enhance Nonprofit Governance and Oversight: Hearing Before the N.Y. State S. Standing Comm. on Corps., Auths., and Comm'ns*, 236th Reg. Sess. (2013) (general testimony).

⁹¹ *Spitzer v. Soundview Health Ctr.*, No. 401432/04, 2005 N.Y. Misc. LEXIS 3249 (Sup. Ct. Jan. 27, 2005).

⁹² See *id.* at *1–2.

⁹³ See *id.* at *3–4, *9.

⁹⁴ See *id.* at *9.

⁹⁵ N.Y. C.P.L.R. § 2501(1)–(2) (McKinney 2017).

⁹⁶ N.Y. GEN. CONSTR. LAW § 14 (McKinney 2017).

⁹⁷ See, e.g., *Pillpiak v. Keyes*, 729 N.Y.S.2d 99, 100 (App. Div. 2001); *Donovan v. Rothman*, 677 N.Y.S.2d 327, 329, 330 (App. Div. 1998); *Schlossberg v. Schwartz*, No. 014491-11, 2014 N.Y. Misc. LEXIS 2188, at *5, *14, *23–24, *26 (Sup. Ct. May 14, 2014) (analyzing difficulties raised by New York's Business Corporation Law ("BCL") indemnification and, therefore, by the NPCL).

III. RELATED DEVELOPMENTS

First, Chapter 360, signed September 29, 2016, amends article 5-a of the General Municipal Law to add a new section 109-c to authorize not-for-profit corporations providing services to a county to purchase or contract for certain services through the county.⁹⁸ The sponsors' memorandum states that the law's purpose is to "allow not-for-profit corporations to also procure goods and services collaboratively with local governments, [in order] to minimize the cost of providing services."⁹⁹

Second, on June 17, 2016, A.10742 was introduced at the request of the Governor, was passed just before the legislature adjourned for the year, and was signed by the Governor on August 24, 2016, as Chapter 286, via approval memorandum number four.¹⁰⁰ The bill relates to coordinated independent expenditures during election campaigns.¹⁰¹ The new Executive Law provisions are complex and should be read in their entirety.

In particular, though, Part F "relates to [the] disclosure of certain donations by charitable nonprofit entities" and Part G "[relates] to disclosure of certain activities by non-charitable, nonprofit entities."¹⁰² More specifically, Part F requires reports of certain in-kind donations and donations, as deferred, by Internal Revenue Code section 501(c)(3) tax exempt organizations, to the Law Department under Executive Law section 172.¹⁰³ Section 172 applies only to organizations that solicit contributions from New Yorkers, though, including organizations based outside of New York State, and not to charitable entities that do not solicit but are required to register with the Law Department under the EPTL.¹⁰⁴ Part F's coverage thus appears incomplete; for example, the Trump Foundation¹⁰⁵ is registered under the EPTL, but not section 172.¹⁰⁶ Part F is also

⁹⁸ See N.Y. GEN. MUN. LAW § 109-c (McKinney 2017).

⁹⁹ See SPONSOR'S MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. B. 4292A, 239th Reg. Sess. (N.Y. 2016) [hereinafter SPONSOR'S MEMORANDUM FOR A.4292A].

¹⁰⁰ See Assemb. B. 10742, 239th Reg. Sess. (N.Y. 2016) (enacted).

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See N.Y. EXEC. LAW § 172(1) (McKinney 2017).

¹⁰⁵ See, e.g., Linda Sugin, *An Uncharitable Foundation*, N.Y. TIMES (Sept. 20, 2016), https://www.nytimes.com/2016/09/30/opinion/an-uncharitable-foundation.html?_r=1.

¹⁰⁶ See, e.g., David A. Fahrenthold, *Trump Foundation Lacks the Certification Required for Charities That Solicit Money*, WASH. POST (Sept. 29, 2016), https://www.washingtonpost.com/politics/trump-foundation-lacks-the-certification-required-for-charities-that-solicit-money/2016/09/29/7dac6a68-8658-11e6-ac72-a29979381495_story.html?utm_term=.bb7dd7c84f37.

similar to NPCL section 712-a, as amended by the 2013 Act.¹⁰⁷ Its audit requirements apply only to NPCL section 172 registrants, though, not also to EPTL registrants.¹⁰⁸

Part G applies to Internal Revenue Code section 501(c)(4) tax exempt organizations and is particularly complex.¹⁰⁹ The *New York Law Journal* reported that Citizens Union of the City of New York and its Foundation sued in the United States District Court for the Southern District of New York, contending that those provisions violate their donors' and their First Amendment rights.¹¹⁰ The American Civil Liberties Foundation, the New York Civil Liberties Union, and its Foundation filed a separate suit in the same court on December 21, 2016, challenging the donor disclosure provisions.¹¹¹ Attorney General Schneiderman agreed to stay enforcement.¹¹² New York's pre-existing disclosure rule was upheld in 2016.¹¹³

Third, the appellate courts have not yet resolved the conflicting decisions with respect to the effectiveness of Governor Cuomo's Executive Order 38, limiting certain nonprofit executive compensation and state agency regulations thereunder that were to take effect on July 1, 2013. The issues and cases are ably discussed in Francis J. Serbaroli's article, entitled: "Courts Split on Executive Order 38 Limiting Executive Compensation."¹¹⁴

Fourth, a plaintiff's implied cause of action based on the whistleblower policy provisions of NPCL section 715-b was upheld in *Pietra v. Poly Prep Country Day School*.¹¹⁵ Section 715-b, effective at the time *Pietra* was decided, provided:

¹⁰⁷ See Katzenberg, *supra* note 89, at 4; compare N.Y. Assemb. B. 10742, with N.Y. NOT-FOR-PROFIT CORP. LAW § 712-a(a)-(b) (McKinney 2017).

¹⁰⁸ See NOT-FOR-PROFIT CORP. LAW § 712-a(a)-(b).

¹⁰⁹ See N.Y. Assemb. B. 10742.

¹¹⁰ See Joel Stashenko, Civil Liberties Groups Join Opposition to Donor ID Rules, N.Y.L.J., Dec. 27, 2016.

¹¹¹ See *id.*

¹¹² See Christine Simmons, AG Delays Enforcement of New Disclosure Rules, N.Y.L.J., Jan. 12, 2017.

¹¹³ See *Citizens United v. Schneiderman*, No. 14-CV-3703(SHS), 2016 U.S. Dist. LEXIS 115495, at *1-2 (S.D.N.Y. Aug. 29, 2016).

¹¹⁴ Francis J. Serbaroli, Courts Split on Executive Order 38 Limiting Executive Compensation, N.Y.L.J., Nov. 25, 2015. LeadingAge New York, Inc., a plaintiff in one of the cases discussed in the Serbaroli article, appealed the decision of the Supreme Court in Albany County and arguments were heard in the Third Department on March 29, 2017. See St. N.Y. Sup. Ct., App. Division Third Jud. Dep't, *Session Calendar for Wednesday March 29, 2017*, <http://www.albanylaw.edu/about/news/2017/Documents/03-29-17%20SESSION%20CALENDAR.pdf>. As of the date of publication of this article no decision has been announced.

¹¹⁵ *Pietra v. Poly Prep Country Day Sch.*, No. 506586/2015, slip op. at 2, 4, 7 (N.Y. Sup. Ct. Oct. 7, 2016).

[N]o director, officer, employee or volunteer of a corporation¹¹⁶ who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence.¹¹⁷

The section is silent as to whether a private party can invoke its protection.¹¹⁸

The court used a well-established three-pronged test to examine whether section 715-b gives rise to an implied cause of action: “(1) [p]laintiff must be in the class of people for whose particular benefit the statute was enacted; (2) [r]ecognition of such a right must promote the legislative purpose for which the statute was enacted; and (3) ‘[w]hether creation of such a right would be consistent with the legislative scheme.’”¹¹⁹ The court concluded that Ms. Pietra, an employee of the defendant school who was allegedly harassed and fired for reporting to school officials that her supervisor had engaged in alleged misconduct, was within the class of persons that the statute expressly intended to benefit.¹²⁰ The other two factors were also satisfied because the statute creates an enforcement mechanism and accords the persons who report misconduct certain rights.¹²¹ Unless the decision is appealed, it will stand as precedent for other claims.

¹¹⁶ Section 715-b(a) limits the requirement of a whistleblower policy to nonprofits having twenty or more employees with annual revenue exceeding one million dollars in the prior fiscal year. See N.Y. NOT-FOR-PROFIT CORP. LAW § 715-b(a) (2017) (effective until May 27, 2017). This limitation continues after May 27, 2017. See *id.* (effective after May 27, 2017).

¹¹⁷ *Id.* (effective until May 27, 2017). Minor changes were thereafter made to section 715-b but they did not affect the portion regarding whistleblowers. Section 715-b(a) currently provides:

Such policy shall provide that no director, officer, employee or volunteer of a corporation who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence.

Id. (effective after May 27, 2017).

¹¹⁸ See *id.* (effective after May 27, 2017).

¹¹⁹ *Pietra*, slip op. at 5 (citations omitted).

¹²⁰ See *id.* (citing the language in section 715-b that discusses the purpose of a whistleblower policy).

¹²¹ See *id.* at 7 (citing section 715-b(a)).