

**NEW YORK
CITY BAR**

**COMMITTEE ON
NON-PROFIT ORGANIZATIONS**

September 21, 2012

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Re: Attorney General Program Bill - S.B. 7431

Dear Mr. Lilien:

On behalf of the Committee on Non-Profit Organizations of the New York City Bar Association (the "Committee"), I am writing to provide preliminary comments on the Attorney General's Program Bill, S.B. 7431, The Non-Profit Revitalization Act. While the Committee as a whole looks forward to offering more detailed comments in the future, at present we wish to make only a few initial but, we believe, important points.¹

First, we thank you for your willingness to meet with us to discuss the proposed legislation. We look forward to further discussions.

Second, we applaud the work of the Charities Bureau and the Attorney General's Committee to Revitalize Nonprofits (the "AG's Committee") in proposing steps to simplify and modernize aspects of New York's Not-for-Profit Corporation Law ("N-PCL"). Provisions that would, for example, eliminate unhelpful corporate "types" and instead treat nonprofits based on more commonsensical "purposes," streamline procedures for forming corporations, including the elimination of the need for certain pre-formation consents, and expressly permit the use of electronic communications for corporate proceedings, are very welcome. We will, individually and collectively, suggest further changes to some of the bill's provisions,

¹ A number of members of the Committee have submitted or will be submitting comments in their individual capacity. These individual comments are not meant to reflect the views of the Committee or the Association of the Bar of the City of New York.



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but we wish to be clear that we consider your efforts to be important steps towards making New York a better home for existing not-for-profit corporations and a more attractive location for the formation of new nonprofits. As you know, many New York lawyers now encourage nonprofits to organize in more charity-friendly states, such as Delaware, to avoid the extraordinary and sometime capricious burdens of current New York law and procedure; we would like to be able to tell our clients that they no longer need to follow such procedure.

Third, we also share the goals you espouse with the new governance aspects of the bill, including the proposed amendments to §715 (Related Party Transactions) and proposed new §§712-a (Audit Committee), 712-b (Compensation Committee) and 715-a (Conflict of Interest and Whistleblower Policies) of the N-PCL. But we are concerned that certain aspects of these proposals may create new, substantial and, for many nonprofits, unwarranted burdens on New York charities, particularly smaller charities.

These proposals of course build on U.S. Internal Revenue Service guidance and IRS Form 990 questions that encourage similar efforts to support appropriate board oversight, manage conflicts of interest, and ensure that compensation is reasonable. But, as you acknowledge, the IRS promotes such efforts by requiring disclosure and offering safe harbors if certain procedures are followed, while the bill would mandate that many nonprofits follow IRS-style procedures, in many cases without regard to the size (and resources) of the charitable entity or the magnitude of the transaction involved. For example, the proposed compensation rules would require a full compensation review even if an organization paid no one more than an obviously low salary. The proposed revisions to the conflicts rules would require a review by the full board (even when a proposed transaction is clearly below market or *de minimis*); for example, such procedures would appear to require a college to perform a full review before buying for its library a single book written by the President or a highly compensated faculty member. Further, the requirement that the full board consider alternative transactions even if the transaction at issue is clearly below market, *de minimis* or the result of a competitive selection process will result in delays and potentially missed opportunities. We suspect that this is not what the AG's Committee or the Charities Bureau intended.

Whether mandating detailed "best practices" is appropriate is something as to which there can be reasonable disagreement. We suspect that New York would be unique among the states in enacting such requirements and wonder if that will not further discourage nonprofits from forming in this state, a problem which your other proposed reforms address.

In the spirit evidenced in the recommendations of the AG's Committee and the changes that the bill proposes to existing provisions of the N-PCL to relieve needless burdens from nonprofits, we encourage you to revamp these governance provisions to avoid their being needlessly burdensome and to make them more entity-appropriate. We look forward to the opportunity to further review any redraft.

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Again, we thank you for the time that you have already spent with us and look forward to working with you towards achieving true reform of the N-PCL.

Very truly yours,



David W. Lowden