



NEW YORK
CITY BAR

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**REPORT BY THE NON-PROFIT ORGANIZATIONS COMMITTEE ON
PART Q OF A.3008-B/S.2608-B, WHICH WOULD ENACT INTO LAW MAJOR
COMPONENTS OF LEGISLATION NECESSARY TO IMPLEMENT THE
TRANSPORTATION, ECONOMIC DEVELOPMENT AND ENVIRONMENTAL
CONSERVATION BUDGET FOR 2013-2014**

On behalf of the Committee on Non-Profit Organizations of the New York City Bar Association, we write to comment on Part Q (captioned “Facilitate an online corporate filing system and reduce costs and regulatory burdens on the State’s business”) of A.3008-B/S.2608-B, a bill to enact into law major components of legislation necessary to implement the transportation, economic development and environmental conservation budget for 2013-2014.

Subpart A of Part Q would modify the New York Not-for-Profit Corporation Law (the “N-PCL”) to eliminate the word “type” in describing various forms of nonprofit corporations that can be formed under the N-PCL, as well as make certain other changes to the N-PCL.

We are writing to recommend that the provisions of Part Q amending the N-PCL be dropped from the overall budget bill. We make this recommendation so the proposals can be studied in a more measured manner, in conjunction with other bills proposed (or, we understand, to be proposed) to amend the N-PCL, including a bill drafted by the New York State Bar Association to substantially amend the entire N-PCL (S.3755/A.5422), a redraft of the bill introduced last session (S.7431-2012) to revise many provisions of the N-PCL and a bill being currently prepared by the Law Revision Commission for introduction in this session.

By way of background, the Committee on Non-Profit Organizations (NPOC) is a diverse 42-member committee of the New York City Bar Association. Some of us are law firm attorneys representing nonprofits, some are in-house counsel for charitable organizations, and a few are legal scholars. We represent multi-million dollar institutions and tiny charities, institutions in many parts of the charitable sector, and institutions that have been serving New York for more than a century as well as groups now seeking to incorporate as non-profits in New York or elsewhere.

We are pleased to see that the Governor’s office recognizes the problems that exist under the N-PCL with the system of “types” for nonprofits. Currently the law establishes four types: A, B, C and D. Type B and Type C corporations are generally analogous to corporations recognized by the IRS as charitable under Internal Revenue Code Section 501(c)(3), and are usually subject to oversight by the IRS as well as the New York Attorney General. Type A corporations are non-charitable and are usually formed for the benefit of their members or a limited universe of beneficiaries; they are generally subject to a lesser level of Attorney General

and IRS supervision. Type D corporations are a type formed under other laws, such as corporations formed under the Private Housing Finance Law. The N-PCL heavily regulates Type Bs and Cs and regulates As and Ds to a lesser fashion. Currently, there is substantial confusion in New York regarding Types B and C, especially since Types C must include special language in their certificate of incorporation and be subject to certain requirements (*e.g.*, they must have members) not applicable to Type Bs. It would be beneficial if the N-PCL were to be revised to create two categories of nonprofits – charitable corporations and non-charitable corporations (in some other states, called public benefit and mutual benefit corporations).

Part Q purports to eliminate types but it does not. While it eliminates the word “types,” it leaves in place the four categories of types, requiring that references to those forms of nonprofits instead be to the N-PCL section where they are described (*e.g.*, “a corporation formed for the purposes specified in subparagraph two of paragraph (b) of section two hundred one of this chapter”), rather than by short-hand references to types. This wording change does not solve the problem of types under the N-PCL; in fact, it makes the statute more complicated. By purporting to fix the problem of types without truly fixing such problem, it creates greater confusion. Further legislative drafting needs to be done to properly eliminate the current “type” problem.

Many of the changes proposed by Part Q merely reflect the elimination of the word “Type” in most (but not all – *e.g.*, Section 716) of the N-PCL provisions where it appears. But Part Q also proposes a few other changes (*e.g.*, allowing all nonprofits to not have members, allowing all types of nonprofits to engage in budget planning, liberalizing the provisions regarding mergers by various types, and modifying certain exemptions of foreign corporations from N-PCL governance provisions). We understand that other organizations (*e.g.*, Lawyers Alliance for New York) have commented on such other provisions.

Accordingly, we recommend that that Subpart A be eliminated from the bill so that the problems which it proposes to address, and the solutions that it proposes, can be studied in a more thorough manner. These provisions do not have a significant budgetary impact and can be more appropriately addressed outside of the budget bill.

Non-Profit Organizations Committee
David W. Lowden, Chair
New York City Bar Association

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