

Client Alert

Amendments to New York NPCL Affect Sole Member Not-for-Profits: Singles Get Ready to Mingle

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On December 21, 2018, Governor Cuomo signed into law Chapter 411 of the Laws of New York of 2018 amending Section 601 (Members) of the New York Not-for-Profit Corporation Law (NPCL). Effective July 1, 2019, Section 601(a) will increase the minimum number of individual members that a not-for-profit membership corporation is required to have from one to three. The scope of the provision is limited in various ways.

First, this requirement does not apply to non-membership not-for-profit corporations. The Nonprofit Revitalization Act of 2013 created the classification of “charitable” and “non-charitable” corporations and amended Section 601(a) to require all “non-charitable corporations,” defined in Section 102(9-A), to have members. A “charitable corporation,” defined in NPCL § 102(3-a), may continue to have a self-perpetuating governing board without members.

Second, a not-for-profit corporation may continue to have a corporation, joint-stock association, unincorporated association, or partnership as a sole member, provided that the entity that is the sole member is owned or controlled by no fewer than three persons. Although there is no legislative history or guidance as to what constitutes “owned or controlled by,” where the sole member is a not-for-profit corporation, it has been suggested that the Board of Directors of the not-for-profit corporate member is in control. Because NPCL § 702 requires a minimum of three Directors, it is arguable that a not-for-profit non-membership corporation would satisfy the requirements of revised Section 601.

The legislature’s stated purpose for amending Section 601(a) was to address a “significant loophole” in the NPCL allowing one individual member of a charitable corporation to elect the Board. The current law authorizes an individual member of a charitable not-for-profit to elect and remove the Board of Directors as well as approve material undertakings, such as the sale of substantially all of the assets of the corporation. By prohibiting a single individual from controlling a charitable nonprofit, the legislature hopes to “prevent abuse by individuals who may try to use a charitable nonprofit for his or her own private interest.”

The prohibition added to Section 601(a) is drafted in a manner that indicates that it applies to both newly formed and existing not-for-profit corporations. Existing not-for-profit corporations will therefore be required to reconsider their current structures, and may be required to amend their Certificates of Incorporation and/or By-laws to add individual members or a corporate member that is controlled by not less than three persons.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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