

**REGULATION AND SUPPORT OF  
FOUNDATIONS  
PHILANTHROPY NEW YORK 1/25/17**

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# Our Commitment



New York State Attorney General  
**Eric T. Schneiderman**

***“OUR JOB AS A REGULATOR ISN’T JUST TO GO OUT AND CATCH BAD GUYS, IT’S ALSO TO HELP THE GOOD GUYS CONDUCT THEIR BUSINESS EFFICIENTLY AND EFFECTIVELY.”***

# New York Foundations

- Aggregate Fiscal Data of Independent Foundations in New York, 2014
- Total No. of Foundations-9,116 (10% of US)
- Total Giving-\$8,214,100,771 (14% of US)
- Total Assets- \$135,984,640,088 (14% of US)
- Source:<http://data.foundationcenter.org/#/foundations/independent/state:NY/total/list/2014>

# REGULATION AND SUPPORT OF FOUNDATIONS

- The birth of foundations-the Rockefeller five year federal charter fight-1908-1913
- Egalitarians-threat to democracy?
- Visionaries-"the Gospel of Wealth"
- The New York legislature granted the Rockefeller Foundation a state charter by Special Act in 1913 –no limits on endowment or term of corporation; no veto power by electeds on board appointments

# DIFFERENT STATE MODELS

- NY-focus on independence of charities - donor intent and duties of fiduciaries for prudent management of assets, provide for mission and class of charitable beneficiaries
- Pa. –focus on public character of charities-the Hershey Trust effort to diversify assets by selling Hershey Foods-for support of the Hershey School
  - Court can consider “adverse . . .impact if a sale takes place, . . .its effect . . .on Derry Township.”
  - New Pa. statute-trustees must show by clear and convincing evidence that change in control is necessary “to maintain the economic viability of the (Hershey) corporation . . .”

# WHY NEW YORK SUPPORTS INDEPENDENT FOUNDATIONS AND CHARITIES

- Opportunities for innovation, risk taking, pilot development
- Longer time horizon than government or for-profit
- Nudge to self-perpetuating nonprofit boards
- Diversity of ideas and opinions
- Magnet for talented, committed people
- Voluntary funds for good causes and results

# CHALLENGES TO INDEPENDENT FOUNDATIONS

- Public allocation of private assets: Central Park Conservancy Proposal; The CUNY Foundations Proposal
- Competition from Donor-Advised Funds
- Explicit political activity, expenditure, or involvement of principals
- Future changes in tax code

# NEW YORK Not-for-Profit LAW PRIORITIES

- Importance of donor intent (Paul Smiths College)
- Directors and officers-Duties of loyalty, prudence, fidelity to mission
- NYPMFA-prudence in investment, use of institutional funds
- Avoidance of private benefit or private inurement See Section 406 of NPCL



# Non-Profit Revitalization Act

- From Duty to Rule
- From-“you are violating your duty”
- To-“NPRA requires that we have a record of what we did, what we considered and who participated.”

# New York's regulatory approach-from duty to rule

- Primary regulation by private parties
- Positive obligations with consequences
  - Registration, annual reporting, including IRS 990 reporting
  - Fundraising reporting
  - Related party transactions requirements NPCL 715
  - Prohibits loans to officers-NPCL 716, 719
  - Conflict of interest reporting NPCL 715-a
  - Whistleblower protection NPCL 715-b
  - Compensation to officers must be reasonable, set in advance
  - Liability of directors-719
  - Actions by Attorney General for negligence-720-a

# GOVERNANCE RULES UNDER NPRA

- Limits on related party transactions
- Formal **conflict of interest policy** in bylaws
- Formal whistleblower policy consistent with requirements-(limited to entities with 20 or more employees)
- Independent Audit Committee (no member is employee of organization) (only if filing of audit is required under 712-a)
- Conflicts of interest or whistleblower deliberations and determinations by “independent directors”

# RELATED PARTY TRANSACTIONS

- In any transaction involving a New York charitable nonprofit corporation and in which a “related party” has a “substantial financial interest” the board or an authorized committee of the board must:
- Prior to entering into the transaction, consider alternative transactions to the extent available;
- Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and
- **Contemporaneously document in writing the basis for the board or authorized committee’s approval, including its consideration of any alternative transactions.**
- **If the organization engages in a transaction in violation of these requirements, the Attorney General is empowered to unwind the transaction.**

# CONFLICTS OF INTEREST

- Charities Bureau Guidance: Conflicts of Interest Policies Under the Nonprofit Revitalization Act of 2013 Guidance Document issued April 13, 2015
- Significant discretion in Board to define conflicts of interest
- IRS 990 – are conflicts of interest requirements reported in Part VI? Consistently enforced? Described in Schedule O?

# Predictable crises in nonprofit life

- alleged fraud, embezzlement  
misappropriation
  - Page six of 990-yes to “Did the organization become aware of a significant diversion. . .”

# WORKING WITH CHARITIES

- Embezzlement happens. (Washington Post-1000 significant diversions in five years)
  - Act against the offender.
  - Report the embezzlement.
  - Let's get (at least some) money back-from embezzler, relatives, or insurance.
  - Fixing the risk problem after the embezzlement internal controls, auditor management letter, background checks, governance,

# HOMELAND FOUNDATION

- Stillman will limited spending to five per cent of the principal of Homeland's assets per year — primarily to pay for operating and capital expenses to maintain the Wethersfield home and grounds.
- Assets reduced from \$39.8 million to \$17.4 million over five years
- Where the money went:
  - \$700,00 in life insurance funds taken from Foundation; millions of dollars on private schools attended by officers or their family members
  - \$3 million to Duke, Wyckoff (board president's) alma mater



**Andrew Caspersen Gets 4 Years in  
Prison for Fraud-NYT 11/4/2016-\$25  
million fraud on the Moore  
Charitable Fund**



# Moore Charitable Fund Response to Fraud Detection

- "When the Foundation detected irregularities in a proposed follow-on deal, it swiftly notified PJT Partners' General Counsel's Office and cooperated with PJT in their investigation of the issue. . . . the Foundation did not wait to recover its investment before contacting PJT Partners, which could have subjected some other innocent victim to Mr. Caspersen's fraud. "

# HOW WE WORK WITH CHARITIES

- Searchable Public Registry for charities information: [www.charitiesnys.com](http://www.charitiesnys.com)
- How-to Guides for governance and operations:  
[www.charitiesnys.com/guides\\_advice\\_new.jsp](http://www.charitiesnys.com/guides_advice_new.jsp)
- Advice and assistance:
  - (212) 416 8401 or [charities.bureau@ag.ny.gov](mailto:charities.bureau@ag.ny.gov)

# CHARITIES BUREAU-HELPING BEQUESTS

- 7.5% of gifts to charity are bequests
- If a will makes a bequest to charity:
- AG represents the interest of the charitable beneficiaries (through the gift to the charity)
- We address challenges to the bequests, dueling wills-caregivers, relatives, attorneys

# 2017 Issues

- Transactions reform-sales, mergers, cy pres
- Governance/Risk
- Data-based projects-IRS 990
- NYPMFA
- Registration Reform
- 2016 Legislation implementation

# Transactions reform

- Goals-predictability, advice of status and requirements, timing, closing of inactive matters
- Challenges-
  - Sales
  - Mergers
  - “Cy Pres”-(repurposing of assets) requires court approval and AG “no objection”
  - Nonprofit conversions

# GOVERNANCE/RISK-DATA BASED PROJECTS

- Ability to access, sort IRS 990 information
- Loans to officers project
- Whistleblower policies
- Conflict of interest policies
- Text search-Going concern audit issues
- Risk assessment and response
- Investment banking for nonprofits?

# NYPMFA

- Cash in non-interest bearing accounts
- No written investment strategy
- Investments with insiders
- Imprudent loans, donations inconsistent with mission
- Failure to identify, protect restricted funds



# Registration Reform

- Consultants' report finalized 10/16
- Anticipate changes in 2017 to simplify NYS filing –move to all e-filing

# New Legislation

- Governor's Ethics legislation-new 172-e, 712-f of the Executive Law-effective 11/22/16
  - Requires semi-annual reporting of contributors over \$2500 by 501©(3) organizations who provide in-kind donations over \$2500 to ©(4)s who engage in certain issue advocacy
  - Suit by ACLU to block implementation; State agrees to stay
- Nonprofit Revitalization Act changes
  - Approved by the Legislature in June
  - Signed by Governor in 11/16
  - “Foot fault” NPRA related party violations; thresholds to trigger related party rules

# LOOK TO OUR WEBSITE FOR PRACTICAL INFORMATION

- <http://www.charitiesnys.com>
- Thank you for your attention and the work you do
- James G. Sheehan
- Chief, Charities Bureau