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Today

# New York Passes Nonprofit Revitalization Act

## *Law Covers Related-Party Transactions, Conflicts of Interest, Whistleblower Policies*

In June 2013, upon the recommendation of the New York State Attorney General, both houses of the New York State Legislature unanimously passed the "Nonprofit Revitalization Act," a sweeping reform bill, running more than 70 pages and covering all types of nonprofits and religious corporations.

Included in the Act are sections dealing with the governing boards and directors of nonprofit and religious organizations: §715, Related party transactions; §715-a, Conflict of interest policy; and §715-b, Whistleblower policy. Note, however, that the whistleblower policy alone is limited and applies only to corporations with 20 or more employees and annual revenues of more than $1 million in the prior fiscal year. However, best practices dictate that all nonprofits adopt a whistleblower policy.

The Act defines "Director" as any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term "board" means "board of directors" or any other body constituting a "governing board" of the organization and includes members of church council, elder, trustee, session, synod, presbytery.

### What is a "Related-Party Transaction?"

In general, a related-party transaction is a business deal or arrangement between two parties who are joined by a special relationship prior to the deal. For example, a business transaction between a nonprofit hospital and a construction company to perform renovations on the hospital where the construction company is owned by one of the members of the board of trustees of the hospital.

Related-party transactions are a common occurrence in the business marketplace. Companies often seek business deals with entities they are familiar with or have been referred to through past relationships. While these types of transactions are legal and ethical, the special relationship inherent between the involved parties creates potential conflicts of interest which must be regulated because they can result in actions that benefit the people involved instead of the nonprofit organization itself.

Related-party transactions include any transaction, agreement, or other arrangement in which a board member or "key employee" (any person who is in a position to exercise substan-

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Celebrating New Year's Eve from Brooklyn, NY.

# **Elder Law Update:** Expedited Medicaid Eligibility Determinations for Individuals who have an Immediate Need for Community Care

Elderly or disabled individuals who require community care from Medicaid generally must go through a lengthy and often daunting application and evaluation process, at a time when they and their families are in dire need of assistance.

To address this issue, a Department of Health administrative directive, issued July 1, 2016, established new guidelines that local departments of social services must adhere to when determining Medicaid eligibility for individuals who demonstrate an immediate need for either Personal Care Services (PCS) or Consumer Directed Personal Care Services (CDPAS), programs intended to help elderly and disabled individuals remain safely in their homes, rather than in nursing homes. Both programs provide services to chronically ill or physically disabled individuals who need help with activities of daily living. This new administrative directive ensures that the individuals who require these programs are now given priority in order to receive the care they need.

A Medicaid applicant with an immediate need for these community-based services must be Medicaid eligible and submit a completed application with all required supporting documentation. In order to receive an expedited Medicaid determination, the applicant must provide a physician's order for PCS or CDPAS, as well as a signed attestation stating that: i) they have an immediate need for PCS or CDPA and that they have no informal caregivers, ii) they are not receiving needed assistance from a home care services agency, iii) they have no third party insurance or Medicare benefits available to pay for needed assistance, and iv) special equipment or supplies are not in use to meet, or cannot meet, their need for assistance.

Not later than four calendar days after receipt of the completed application, physician's order, and attestation form, Medicaid must determine whether the applicant has submitted a complete Medicaid application. Medicaid then has seven days to render a decision as to whether the applicant is eligible for Medicaid. Within 12 days from receipt of the Medicaid application, Medicaid must complete social and nursing assessments and determine whether the Medicaid applicant, if determined eligible for Medicaid, would be eligible for PCS or CDPAS and if so, the amount and duration of services that would be authorized.

Medicaid can often take 45 days or more to issue a response to a traditional application for community care. Applicants must then additionally wait for a managed long-term agency to determine the amount and duration of their care. The new Department of Health directive provides a way for those who urgently need care to receive assistance and bypass this lengthy waiting period. This development will greatly benefit people who need community care, as well as for families that require help with providing adequate care for their elderly or disabled relatives.

## 2016 FBARS are Due April 15

The deadline for filing FinCEN Form 114, better known as the FBAR, for 2016 is April 15, 2017. FBARs are generally required for taxpayers who owned or had signature authority over foreign bank accounts with an aggregate value in excess of $10,000 at any time during the calendar year.

The FBAR requirement also applies to securities, brokerage, commodity futures, and options accounts, as well as insurance policies with a cash value, an annuity policy with a cash value, and shares in a mutual fund or a similar pooled fund.

The maximum penalty for a willful FBAR violation is the greater of $100,000 or 50% of the account balance. The penalty for non-willful FBAR violations is generally $10,000 per year. The IRS has implemented amnesty programs for taxpayers who failed to comply with the FBAR requirement in the past. For more information about these programs, please contact our tax department.

# Nonprofit Revitalization Act

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tial influence over the affairs of the organization) or a related party has a direct or indirect financial interest and in which the nonprofit or an affiliate participates. A person has an indirect financial interest in an entity if a relative has an ownership interest in that entity. A relative includes spouse or domestic partner, siblings, children (whether natural or adopted), grandchildren, great-grandchildren, or the spouse or domestic partner of any of these relatives.

Related-party transactions are not prohibited but before entering into one, the director involved must make full disclosure of the relationship to the person or committee designated by the board, and the board must formally determine that the transaction is fair, reasonable and in the organization's best interest at the time of such determination. The interested board member or key employee may not participate in the discussion or voting on the transaction.

In addition, the organization's policy must include requirements that prior to entering the transaction, the board shall: consider alternative transactions to the extent available; approve the transaction by at least a majority vote of the directors present at the meeting; and contemporaneously document in writing the basis for its approval, including its consideration of any alternative transactions.

The Attorney General may bring an action to enjoin, void or rescind any related-party transaction and seek restitution from any director or entity, and the removal of directors or officers

## Conflict of Interest

A conflict of interest arises where a director, officer or other decision-maker has an outside interest or relationship that conflicts or may conflict with his or her ability to act strictly in the best interests of the organization.

Every nonprofit organization, including religious organizations, must adopt a conflict of interest policy to ensure that its directors, officers and key employees act in the corporation's best interest, which shall include, at a minimum: the definition of the circumstances that constitute a conflict of interest; procedures for disclosing a conflict of interest to the board; a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to the conflict; a prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict; a requirement that the existence and resolution of the conflict be documented in the organization's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and procedures for disclosing, addressing, and documenting related-party transactions.

In addition, the conflict of interest policy shall require that new board members and newly-elected directors, must sign and submit to the secretary of the organization or a designated compliance officer a written statement identifying, to the best of their knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee, and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director annually resubmit that written "disclosure" statement. The secretary of the corporation or the designated compliance officer must provide a copy of all completed statements to the chair of the audit committee or, if there is no audit committee, to the chair of the board.

A corporation that has adopted and possesses a conflict of interest policy pursuant to other federal, state or local laws that is substantially consistent with these requirements is deemed in compliance with the Act.

## Whistleblower Policy

Generally, a whistleblower policy is a procedure by which individuals may report suspected improper conduct within an organization without fear of retaliation or adverse employment consequences for doing so, and a procedure within the organization for collecting, recording, reporting, and addressing allegations of suspected improper conduct.

Only nonprofits that have 20 or more employees and an annual revenue of more than $1 million in the prior fiscal year are required to have a whistleblower policy to protect persons who report suspected improper conduct from retaliation. However, smaller nonprofits should certainly consider adopting these policies. The whistleblower policy must 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.

The policy shall include procedures for the reporting of violations or suspected violations of laws or corporate policies, including procedures for preserving the confidentiality of reported information; a requirement that an employee, officer or director of the corporation be designated to administer the whistleblower policy and to report to the board or its designated committee; and a requirement that a copy of the policy be distributed to all directors, officers, employees and to volunteers who provide substantial services to the corporation. This distribution requirement may be satisfied by posting the policy on the organization's website or at its offices in a conspicuous location accessible to employees and volunteers.


**This information is a very general summary. We are always available to answer your questions about this new law or other matters relating to nonprofits or religious organizations and to assist you in amending certificates of incorporation or bylaws and drafting the mandated conflicts of interest and whistleblower.**


# What you Need to Know about Delaware Statutory Trusts & 1031 Exchanges

## Introduction

As real estate investors struggle to identify and acquire replacement properties in metropolitan areas, many are looking at Delaware Statutory Trusts (DSTs) as a solution. There are numerous reasons why a real estate investor would choose to invest in a DST that owns real property in order to complete a Section IRC 1031 exchange. First, a DST is a passive investment since the DST is managed by a trustee who manages the real property. Therefore, a DST can produce investment income for the investor in the DST, without commitment involved in managing real property.

Second, it allows a real estate investor more flexibility in finding a replacement property within the 45-day time frame, and closing within the 180-day time period as required under Internal Revenue Code Section (IRC) 1031 since the investor does not need to locate a specific property. Rather, the investor needs to identify and invest in a DST that closes on the real property within the real estate investor's statutory time period. Third, a real estate investor reduces his or her personal liability with regard to the DST. For personal liability purposes, ownership in the DST is treated the same way as ownership in a trust. Lastly, a real estate investor who completes a 1031 exchange by acquiring real property, yet still has a capital gain on the difference between the sales price and the purchase price of the replacement property (or "boot"), may utilize a DST as an investment of differential in order to avoid paying any capital gains tax on the boot.

## What is a DST?

In order for a specific DST to qualify for a Section IRC 1031 exchange it must meet the IRS requirements as provided for in Internal Revenue Ruling 2004-86 (which will be discussed in more detail below). A DST is a legal investment trust entity formed under Delaware law that can be used as a tax savings vehicle for real estate investors. The DST is comprised of beneficial owners, each of whom owns an undivided interest in the DST. Each beneficial owner in a DST is entitled to an in-kind distribution of their proportionate share of the property being held in the DST. The beneficial owners do not have any voting rights and their names are not on the deed.

Trustees manage the DST and oversee the affairs of the DST. The trustees of the DST are responsible to distribute out all cash, less reserves, each quarter to all beneficial owners. The trustees can only invest cash in short-term obligations, and can delegate management duties to other people, such as officers, employees, or other persons, either as agents or independent contractors. The governing instrument of the DST determines the rights and duties for third parties managing the DST.

If the property owned by a DST is encumbered by a mortgage, the DST assumes all of the rights and obligations under the mortgage and note, and the beneficial owners are insulated from personal liability. The beneficial owner's names are never on any mortgage documents.

DST interests are freely transferable, and there is no limitation on how many beneficial owners can have an interest in a DST. However, there is an expiration date on a DST; the DST will terminate on the earlier of: i) 10 years from the date of its creation or; ii) the disposition of the property. A DST will not terminate on the bankruptcy, death, or incapacity of any owner or on the transfer.

## How Does a DST Qualify for IRC Section 1031 Treatmente

IRS Revenue Ruling 2004-86 (the "Revenue Ruling") held that an exchange of real property for an interest in a DST is an exchange of real property for an interest in the property without recognition of gain or loss under IRS Section 1031 as long as all other requirements of IRS Section 1031 are satisfied.

In addition to the requirements of IRC Section 1031, in order to qualify for IRC Section 1031 tax treatment, beneficial ownership in a DST must be considered a direct interest in the real estate owned by the DST. Additionally, a DST must be a special purpose entity, bankruptcy remote, and a passive holder of the real estate it owns.

The requirement that the DST be a passive holder of real estate creates certain restrictions that should be considered by potential investors in a DST. In order for a DST to be a passive holder of real estate, the beneficial owners cannot have the power to control or operate the property and the trustee of a DST cannot:

i) accept contributions to the DST after the offering period for soliciting investments has closed;

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# Personal Notes

*At Capell Barnett Matalon & Schoenfeld LLP we support public charities through donations of our time, energy and resources.*

**Howard Capell** expresses pride in working with the team. He writes: "I am so proud to remain a part of our firm. We have grown not only in number but also in the level of complexity of the matters we handle. Currently, our opposition has brought us before the Supreme Court of the United States. We look forward to the challenge and believe that we will be sustained. But, who knows, as the ninth justice has yet to be appointed."

An avid traveler, Howie has had an exciting year of vacations. Howie and Sheila decided to stay away from the big cities in Europe and do car trips in the countryside, traveling mountains, deltas, and out-of-the-way towns and villages. Thanks to a good GPS, the Capells stayed the course, but there were those moments when they felt isolated. "We chose Northwestern Spain and the Northern part of Italy. Each trip was about 25 days. Our pictures are great."

Howie continues: "Those who know me, know my love for photography. So it was a special treat to come upon a small photography shop in a little lakeside village and spend time with a fourth-generation photographer. I was able to purchase some old prints of pictures taken by his ancestors."

"My family is well. Ian, my oldest grandchild, is off at Cornell. One by one, the other seven will follow to the colleges of their choice. Are great-grandchildren very far off?"

**Robert Barnett** serves on the Board of Directors of the Long Island Community Foundation helping local charities achieve their goals. Robert continues to work closely with Sidney Kess, CPA, J.D., LL.M, a nationally acclaimed educator, and participated in the highly regarded UJA Federation's 46th Annual Estate, Tax & Financial Planning Conference and the 2016 Zicklin Tax Series at Baruch College. He was also a featured speaker at the Annual Estate and Financial Planning Conference of the New York State Society of Certified Public Accountants and continues his many featured presentations at the acclaimed Long Island Tax Symposium. Robert continues to serve as Co-Chair of the NYSSCPA Nassau Chapter's Federal Tax Committee, and as a member of the Nassau Academy of Law. Recently, Robert authored several tax articles published in the *CPA Journal* and other publications.

**Gregory Matalon** created and moderated several lectures for various groups of certified public accountants and attorneys, including the lecture for National Business Institute titled "Tax Planning for Trusts and Estates" and the lecture for the Long Island Tax Professional Symposium on "IRA Traps and Planning Opportunities." He was awarded the Lutheran School Association's (LSA) "2016 Spirit of Hope" honor, citing his "invaluable insight and perspective." The award presentation was held at LSA's annual golf outing at North Shore Towers. Greg and the other golfers enjoyed a wonderful day on the course. In addition, Gregory has been elected Chair of the Kew-Forest School Board of Trustees. In his spare time, he enjoyed traveling to Milan and Venice, Italy, and multiple seaside villages on the Costa Brava in Spain.

**Stuart H. Schoenfeld** continues to focus his practice in the areas of elder care and estate planning, as well as planning for families with children with developmental disabilities. He most recently lectured at the Long Island Tax Professional Symposium about "The Intersection of Tax and Elder Care Planning." This past September, he was a featured presenter at a program focusing on estate and financial planning at the Long Island LGBT Network. Stu serves as a member of the Board of Directors of the Merrick Jewish Centre and the Nassau County chapter of the Senior Umbrella Network. Stu recently celebrated his 30th wedding anniversary with his wife, Randy.

**Joseph Milano** continues to work on behalf of the Metropolitan New York Synod of the Evangelical Lutheran Church in America and the Atlantic District of the Lutheran Church-Missouri Synod. Working with Renato Matos, who was instrumental in structuring the project and negotiated the transaction, Joe obtained Attorney General and New York State Supreme Court approval for the development of vacant land owned by a church in Queens, where the church leased the lot to a developer for a term of 99 years. The developer is constructing, at its own cost and expense, a building consisting of a community facility and on-grade parking for the exclusive use of the church, at a rental of $1 per year, and approximately 28 apartments for rental by the developer. At the conclusion of the term, the real property with all of the improvements, will revert to the church. In October, Joe made a presentation on the new New York State laws relating to conflicts of interest for not-for-profit corporations at the firm's second annual update on laws relating to religious organizations at the Interchurch Center. Joe's wife, Karen, is Vice President of Physician services at The Brooklyn Hospital Center.

**Renato Matos** worked closely with the Interchurch Center to develop and host the second annual conference entitled "Important Updates to the Laws that Affect Religious Organizations," which included presentations by Bronx Borough President Ruben Diaz, Jr., Manhattan Borough President Gale Brewer, and other city and state government officials. He also collaborated with Alliance Bernstein to host a conference entitled "Utilizing Church Property to Support and Expand Mission and Ministry." In November, Renato lectured at the Long Island Tax Professionals Symposium, which he has done many times. He enjoyed a wonderful summer travelling in New England, as well as spending time at his country home in Columbia County.

**Peter Sanders** joined Capell Barnett Matalon & Schoenfeld LLP as a Partner on January 1, 2016. He brought his team from Sanders Litigation Associates, P.C. (SLA), a firm he founded in 2001. Through the years, SLA grew in sophistication and breadth of practice to include a wide variety of litigation matters before all trial level courts including the Supreme Court, District and Civil Courts, and their Commercial, Residential and Matrimonial Parts and the governing Appellate Courts throughout NYC and Nassau County. In addition to Peter, who joined CBMS's existing Litigation Partner Joseph Milano, the firm's Litigation Department now has five litigation attorneys. Peter prides himself in having established a reputation as a fierce advocate for his clients who knows how to leverage his litigation skills to achieve a successful resolution, whether it be through trial or a pragmatic settlement. He has personally tried more than 100 cases, and settled more than 1,000 in his 23 years of practice.

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# Personal Notes

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Some of the most notable examples of successful case resolutions in 2016 alone included: obtaining judgments against an orthopedist and his medical practice for $364,000 and $318,000 respectively, based upon defaults under a commercial lease; successfully dismissing the defenses raised by a cosmetic laser dermatology practice, its principle and its 16 affiliates in a $562,000 lawsuit; defeating the defenses raised by a commercial tenant/licensee in a proceeding to recover possession in a matter where dismissal of those defenses positions us well to obtain a judgment for over $741,000 for breach of contract; obtaining a judgment based upon rent stabilization fraud for $264,000, in a lawsuit that made the front page of the *New York Post*, page 6 of the *Daily News*, and was reported on the evening news by *Channels 5* and *11*; and successfully negotiating a resolution of a partition action involving 17 shareholders on behalf of a renowned Brooklyn waterfront bar and music venue that has been operating since the 1890s and has been repeatedly profiled by *The New York Times*, Anthony Bourdain on his cable show, and in multiple other travel-related publications.

Peter is a past four-term Vice President of the Kings County Housing Court Bar Association and continues to serve on its Appellate and By-Laws Committees. He has lectured on various real estate litigation topics to judges and attorneys at Bar Association continuing education forums and judicial seminars. Peter has worked with religious and not-for-profit corporations on real estate, leasing and litigation matters, independently in his own practice, and Of Counsel to CBMS for more than 10 years.

**Yvonne Cort** joined the firm as a Partner in March 2016. Her practice concentrates on IRS and NYS Tax Controversy. In recent months, Yvonne presented seminars to various groups of attorneys, accountants, and enrolled agents, including at the 14th Annual Long Island Tax Professionals Symposium, where she has been a speaker every year since its inception. Topics included liens and levies, and "Getting to Yes: What You Need to Know for IRS and NYS Offers in Compromise." In October, an accounting publication featured her article on responsible person assessments. Yvonne was named by 2016 *New York Metro Super Lawyers* magazine as a Super Lawyer in the field of Tax Law. In her free time, Yvonne enjoys being with friends and family, going to the theater, and traveling. In August, she combined her interests with a wonderful trip to London and Edinburgh, where she saw many plays.

The CBMS team visited the Briermere Farm in Riverhead, N.Y., last summer as part of an Employee Appreciation outing.

**Dolly Hoffman** is part of the firm's Litigation Department and was promoted to Counsel earlier this year. In addition to working with various religious organizations to obtain Attorney General or Supreme Court approval for sales, leases and other development projects, Dolly handles a variety of commercial litigation matters, including real estate fraud, probate, foreclosure, and matters involving corporate governance.

**Adam Zabary** continues to practice in all aspects of commercial and residential real estate litigation, as well as general commercial litigation, handling matters in all five boroughs of New York City and Nassau and Suffolk counties. His practice areas have expanded to specialized litigation issues on behalf of the firm's church clients. Adam has also continued to be an active member of the Brandeis Association. Last May, Adam enjoyed a trip to Southern California with his fiancée, Tanya, who he proposed to later in the summer.

**Albert Dumaual** focuses his practice on tax and estate planning and also counsels clients on international tax issues. Since joining the firm in 2014, Albert has lectured on a wide range of tax topics, including foreign bank account reporting requirements, charitable deductions, passive activity losses, and innocent spouse relief. Albert is licensed to practice law in New York and New Jersey.

**Joshua Weiss** is an associate in the firm's Corporate and Commercial Transactions, Religious Organizations, and Real Estate Departments. Joshua is licensed to practice law in New York and New Jersey.

**Erik Olson** is an associate in the firm's Estate Planning and Estate Administration Departments. Erik joined the firm in October of 2014 after interning with the firm in the summer of 2013. Erik is licensed to practice law in New York and California.

**Page Traxler** joined the firm as a law clerk in September 2016. Page received a Juris Doctorate from The George Washington University Law School. During law school, Page served as an intern for The Barnes Foundation, the IRS National Taxpayer Advocate Service, and The Glenmede Trust Company.

**Jodi Warren** is an associate in the firm's Corporate and Commercial Transactions, as well as the Real Estate Department. Jodi joined the firm in December 2016. Jodi is licensed to practice law in New York and New Jersey. In August, she got married and went on her honeymoon to Bali.

# Delaware Statuatory Trusts

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ii) renegotiate the terms of existing loans or borrow new funds unless a default exists as a result of any master tenant bankruptcy or insolvency at the property;

iii) reinvest the proceeds from the sale of the real property or acquire new real property;

iv) invest any reserves or cash received to profit from market fluctuations;

v) fail to distribute all cash other than reserves on a regular basis;

vi) make more than minor non-structural modifications to the property not required by law; or

vii) renegotiate any master lease on the property or enter into a new master lease on the property unless there is a master tenant bankruptcy or insolvency.

## Conclusion

A DST, if properly formed and managed in compliance with the requirements of IRS Revenue Ruling 2004-86, provides a viable alternative for real estate investors seeking to complete a 1031 exchange, but understanding the restrictions imposed on the type of assets available is imperative.

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