

ve Bill Drafting Commission
06251-01-3

SENATE

AG-2

IN SENATE--Introduced by Sen

--(at the request of the Attorney General)
and when printed to be committed
to the Committee on

----- A.
ASSEMBLY

IN ASSEMBLY--Introduced by M. of A.

(at the request of the Attorney General)

--read once and referred to the
Committee on

NTFPRCLA

(Provides additional protection
against corporate financial fraud
and abuse)

N-PC L. prevent corp. fraud

AN ACT

to amend the not-for-profit corpo-
ration law, in relation to
protections against financial fraud
and abuse, and to repeal certain
provisions of such law relating
thereto

The People of the State of New
York, represented in Senate and
Assembly, do enact as follows:

IN SENATE

Senate introducer's signature

The Senators whose names are circled below wish to join me
in the sponsorship of this proposal:

s55 Alesi	s04 Johnson	s37 Oppenheimer
s20 Andrews	s26 Krueger	s11 Padavan
s07 Balboni	s27 Kruger	s21 Parker
s42 Bonacic	s53 Kuhl	s30 Paterson
s46 Breslin	s23 Lachman	s61 Rath
s60 Brown	s39 Larkin	s36 Robach
s43 Bruno	s01 LaValle	s13 Sabini
s25 Connor	s40 Leibell	s41 Saland
s50 DeFrancisco	s52 Libous	s19 Sampson
s32 Diaz	s45 Little	s31 Schneiderman
s17 Dilan	s15 Maltese	s51 Seward
s29 Duane	s05 Marcellino	s09 Skelos
s44 Farley	s24 Marchi	s10 Smith, A.
s02 Flanagan	s62 Maziarz	s14 Smith, M.
s08 Fuschillo	s57 McGee	s35 Spano
s22 Golden	s47 Meier	s58 Stachowski
s33 Gonzalez	s28 Mendez	s16 Stavisky
s06 Hannon	s18 Montgomery	s03 Trunzo
s36 Hassell	s38 Morahan	s34 Velella
Thompson	s54 Nozzolio	s59 Volker
s49 Hoffmann	s12 Onorato	s48 Wright

IN ASSEMBLY

Assembly introducer's signature

The Members of the Assembly whose names are circled below wish
to join me in the sponsorship of this proposal:

a049 Abbate	a040 Gordon	a051 Ortiz
a001 Acampora	a075 Gottfried	a114 Orloff
a021 Alfano	a065 Grannis	a150 Parment
a084 Arroyo	a057 Green	a088 Paulin
a118 Aubertine	a077 Greene	a141 Peoples
a035 Aubry	a022 Grodenchik	a039 Peralta
a136 Bacalles	a094 Grommack	a058 Perry
a124 Barclay	a098 Gunther	a023 Pfeiffer
a014 Barra	a148 Hayes	a068 Powell
a008 Barraga	a083 Heastie	a109 Prentiss
a073 Bing	a145 Higgins	a087 Pretlow
a089 Bradley	a048 Hikind	a009 Roia
a044 Biennan	a127 Hooker	a006 Ramos
a092 Brodsky	a018 Hooper	a134 Reilich
a121 Brown	a144 Hoyt	a078 Rivera, J.
a147 Burling	a042 Jacobs	a076 Rivera, P.
a117 Butler	a131 John	a056 Robinson
a101 Cahill	a095 Karben	a074 Sanders
a096 Calhoun	a082 Kaufman	a113 Sayward
a106 Canestrari	a100 Kirvan	a029 Scarborough
a026 Carozza	a100 Klein	a140 Schimminger
a108 Casale	a129 Kolb	a122 Scozzafava
a119 Christensen	a155 Koon	a059 Seddio
a033 Clark	a012 Labriola	a038 Seminerio
a046 Cohen, A.	a034 Lafayette	a013 Siddikman
a028 Cohen, M.	a061 Lavelle	a081 Silver
a047 Colton	a050 Lentol	a155 Smith
a010 Conte	a005 Levy	a093 Spano
a032 Cook	a125 Lifton	a099 Stephens
a107 Crouch	a053 Lopez	a062 Straniero
a063 Cusick	a111 Magee	a067 Stringer
a045 Cymbrowitz	a120 Magnarelli	a011 Sweeney
a138 DelMonte	a103 Manning	a110 Tedisco
a116 Destito	a030 Markey	a002 Thiele
a086 Diaz, L.	a027 Maversohn	a031 Titus
a085 Diaz, R.	a112 McDonough	a091 Tucci
a016 DiNapoli	a019 McDonough	a143 Tokasz
a081 Dinowitz	a104 McEneny	a107 Tonko
a003 Eddington	a025 McLaughlin	a154 Towns
a044 Englebacht	a102 Miller	a115 Towse
a130 Errigo	a052 Millman	a126 Warner
a072 Espaillat	a097 Mills	a041 Weinstein
a071 Farrell	a060 Mirones	a020 Wessenberg
a015 Ferrara	a132 Morelle	a024 Weprip
a123 Finch	a139 Nesbitt	a137 Winner
a097 Fitzpatrick	a037 Nolan	a142 Wirth
a090 Galef	a043 Norman	a070 Wright
a133 Gant	a128 Oaks	a149 Young
a036 Gianans	a017 O'Connell	a055
a066 Ghck	a069 O'Donnell	a079

1) Single house bill (introduced and printed separately in either or both houses): Sign 2
copies, circle names of co-sponsors and deliver to the introduction clerk of the house
together with 4 copies of the introducer's memorandum.

2) Bi-bill (introduced simultaneously in both houses and printed as one bill): Senate
and Assembly introducer sign the same copy of the bill, circle the names of co-sponsors
and return it to the introduction clerk of either house with the remaining copies and 8
copies of the introducer's memorandum.

LBDC 1/08/03

1 Section 1. Section 519 of the not-for-profit corporation law is
2 amended by adding two new paragraphs (d) and (e) to read as follows:

3 (d) The president and treasurer of the corporation shall each sign the
4 annual report, whether or not certified by an independent public or
5 certified public accountant or a firm of such accountants, and shall
6 thereby certify the following:

7 (1) the signing officer has reviewed the report; and

8 (2) based on the officer's knowledge, the report does not contain any
9 untrue statement of a material fact or omit to state a material fact
10 necessary in order to make the statements made, in light of the circum-
11 stances under which such statements were made, not misleading.

12 (e) The president and treasurer of any corporation which shall receive
13 in any fiscal year gross revenue and support in excess of two hundred
14 fifty thousand dollars, and any president or treasurer of any corpo-
15 ration who receives compensation for such service, shall each sign the
16 annual report, whether or not certified by an independent public or
17 certified public accountant or a firm of such accountants, and shall
18 thereby certify the following:

19 (1) the signing officer has reviewed the report;

20 (2) based on the officer's knowledge, the report does not contain any
21 untrue statement of a material fact or omit to state a material fact
22 necessary in order to make the statements made, in light of the circum-
23 stances under which such statements were made, not misleading;

24 (3) based on such officer's knowledge, the financial statements, and
25 other financial information included in the report, fairly present in
26 all material respects the financial condition and results of operations
27 of the corporation as of, and for, the periods presented in the report;

28 (4) the signing officers:

1 (A) are responsible for establishing and maintaining internal
2 controls;

3 (B) have designed such internal controls to ensure that material
4 information relating to the corporation is made known to such officers
5 by others within those entities, particularly during the period in which
6 the periodic reports are being prepared;

7 (C) have evaluated the effectiveness of the corporation's internal
8 controls as of a date within ninety days prior to the report; and

9 (D) have presented in the report their conclusions about the effec-
10 tiveness of their internal controls based on their evaluation as of that
11 date;

12 (5) the signing officers have disclosed to the corporation's auditors
13 and the audit committee of the board of directors (or persons fulfilling
14 the equivalent function):

15 (A) all significant deficiencies in the design or operation of inter-
16 nal controls which could adversely affect the corporation's ability to
17 record, process, summarize, and report financial data and have identi-
18 fied for the corporation's auditors any material weaknesses in internal
19 controls; and

20 (B) any fraud, whether or not material, that involves management or
21 other employees who have a significant role in the corporation's inter-
22 nal controls; and

23 (6) the signing officers have indicated in the report whether or not
24 there were significant changes in internal controls or in other factors
25 that could significantly affect internal controls subsequent to the date
26 of their evaluation, including any corrective actions with regard to
27 significant deficiencies and material weaknesses.

1 § 2. Section 520 of the not-for-profit corporation law, as amended by
2 chapter 58 of the laws of 1981, is amended to read as follows:

3 § 520. Reports of corporation.

4 Each domestic corporation, and each foreign corporation authorized to
5 conduct activities in this state, shall from time to time file [such]
6 complete and accurate reports on its activities as may be required by
7 the laws of this state. All registration and reporting requirements
8 pursuant to EPTL 8-1.4, or related successor provisions, are, without
9 limitation on the foregoing, expressly included as reports required by
10 the laws of this state to be filed within the meaning of this section.
11 Willful or persistent failure of a corporation to file [a report]
12 complete and accurate reports as required by law shall constitute a
13 breach of the directors' and officers' duty to the corporation and
14 shall: (a) subject the corporation, at the suit of the attorney-general,
15 to an action or special proceeding for dissolution under article 11
16 (Judicial dissolution) in the case of a domestic corporation, or under §
17 1303 (Violations) in the case of a foreign corporation; and (b) subject
18 the directors and officers, at the suit of the attorney-general, to an
19 action or special proceeding for removal or such other remedies as may
20 be provided by law.

21 § 3. Section 521 of the not-for-profit corporation law, as amended by
22 chapter 690 of the laws of 1978, is amended to read as follows:

23 § 521. Liability for failure to disclose required information.

24 Failure of [the] a domestic or foreign corporation to comply in good
25 faith with the notice or disclosure or reporting provisions of section
26 501 (Stock and shares prohibited; membership certificates authorized),
27 or paragraph (c) of section 503 (Capital certificates), or paragraph (c)
28 of section 505 (Subvention certificates), or paragraph (b) of section

1 513 (Administration of assets received for specific purposes), [or
2 section 518 (Reports to comptroller),] or section 519 (Annual report of
3 directors), or section 520 (Reports of corporation), shall make the
4 corporation liable for any damage sustained by any person in consequence
5 thereof.

6 § 4. Section 712 of the not-for-profit corporation law, paragraph (e)
7 as amended by chapter 961 of the laws of 1972, is amended to read as
8 follows:

9 § 712. Executive committee and other committees.

10 (a) If the certificate of incorporation or the by-laws so [provide]
11 permit, the board, by resolution adopted by a majority of the entire
12 board, may designate from among its members an executive committee and
13 other standing committees, each consisting of three or more directors,
14 and each of which, to the extent provided in the resolution or in the
15 certificate of incorporation or by-laws, shall have all the authority of
16 the board, except that no such committee shall have authority as to the
17 following matters:

18 (1) The submission to members of any action requiring members'
19 approval under this chapter.

20 (2) The filling of vacancies in the board of directors or in any
21 committee.

22 (3) The fixing of compensation of the directors for serving on the
23 board or on any committee.

24 (4) The amendment or repeal of the by-laws or the adoption of new
25 by-laws.

26 (5) The amendment or repeal of any resolution of the board which by
27 its terms shall not be so amendable or repealable.

1 (b) The board may designate one or more directors as alternate members
2 of any standing committee, who may replace any absent member or members
3 at any meeting of such committee.

4 (c) The by-laws may provide for special committees of the board, or
5 may authorize the board to create such special committees as may be
6 deemed desirable. Unless otherwise provided in the by-laws, the members
7 of such committees shall be appointed by the chairman of the board or
8 the president of the corporation if there is no chairman of the board,
9 with the consent of the board. Special committees shall have only the
10 powers specifically delegated to them by the board and in no case shall
11 have powers which are not authorized for standing committees under this
12 section.

13 (d) Each committee of the board shall serve at the pleasure of the
14 board. The designation of any such committee and the delegation thereto
15 of authority shall not alone relieve any director of his or her duty to
16 the corporation under section 717 (Duty of directors and officers).

17 (e) Committees, other than standing or special committees of the
18 board, whether created by the board or by the members, shall be commit-
19 tees of the corporation. Such committees may be elected or appointed in
20 the same manner as officers of the corporation. Provisions of this chap-
21 ter applicable to officers generally shall apply to members of such
22 committees.

23 (f) In the case of any corporation which shall receive in any fiscal
24 year gross revenue and support in excess of two hundred fifty thousand
25 dollars, if the certificate of incorporation or the by-laws so permit,
26 the board, by resolution adopted by a majority of the entire board, must
27 designate from among its members an executive committee and an audit
28 committee, each consisting of three or more directors.

1 (1) The audit committee, and the entire board of directors in the case
2 of corporations whose certificate of incorporation or by-laws prohibit
3 the appointment of an audit committee, shall be directly responsible for
4 the appointment, compensation, and oversight of the work of any regis-
5 tered public accounting firm employed by that corporation (including
6 resolution of disagreements between management and the auditor regarding
7 financial reporting) for the purpose of preparing or issuing an audit
8 report or related work, and each such registered public accounting firm
9 shall report directly to the audit committee.

10 (2) Each member of the audit committee shall be a member of the board
11 of directors of the corporation, and shall not, other than in his or her
12 capacity as a member of the audit committee, the board of directors, or
13 any other board committee: (A) accept any consulting, advisory, or other
14 compensatory fee from the corporation; or (B) have participated in any
15 interested party transactions within the meaning of section 715 (Inter-
16 ested directors and officers) within the previous year.

17 (3) Each audit committee, and the entire board of directors in the
18 case of corporations whose certificate of incorporation or by-laws
19 prohibit the appointment of an audit committee, shall establish proce-
20 dures for: (A) the receipt, retention, and treatment of complaints
21 received by the corporation regarding accounting, internal accounting
22 controls, or auditing matters; and (B) the confidential, anonymous
23 submission by employees of the corporation of concerns regarding ques-
24 tionable accounting, auditing or other financial matters.

25 § 5. Section 715 of the not-for-profit corporation law is REPEALED and
26 a new section 715 is added to read as follows:

27 § 715. Interested directors and officers.

1 (a) No contract or other transaction directly or indirectly entered
2 into between a corporation and one or more of its or its affiliates'
3 directors or officers, or between a corporation and any other corpo-
4 ration, firm, association or other entity in which one or more of its or
5 it affiliates' directors or officers are directors or officers, or have
6 a substantial financial interest, shall be either void or voidable by
7 the corporation for this reason alone or by reason alone that such
8 director or directors or officer or officers are present at the meeting
9 of the board, or a committee thereof, which authorizes such contract or
10 transaction, or that the votes of any such persons are counted for such
11 purpose. Notwithstanding the foregoing, such contract or transaction may
12 be voided or modified by the corporation or the attorney general and
13 remedies under paragraph (c) shall be available to the corporation or to
14 the attorney general unless the interested director or officer shall
15 establish that he or she acted in good faith and unless the interested
16 director or officer or any approving director shall establish affirma-
17 tively that such contract or transaction was fair and reasonable as to
18 the corporation at the time the corporation entered into such contract
19 or transaction.

20 (b) An interested party contract or transaction within the meaning of
21 paragraph (a) shall be presumed to be fair and reasonable to the corpo-
22 ration, if the following conditions are satisfied:

23 (1) The contract or transaction was approved in advance by the board
24 or committee entitled to vote thereon and the members, if any, entitled
25 to vote thereon, by a vote sufficient for such purpose without, in the
26 case of a board or committee vote, counting the vote or votes of such
27 interested director or officer, and the material facts as to such
28 contract or transaction and such director's or officer's interest there-

1 in were disclosed in good faith or otherwise known to the board or
2 committee or members, if any, entitled to vote thereon;

3 (2) The board or committee obtained and relied upon appropriate data
4 as to comparability, prior to approving the contract or transaction, and
5 provided such data to the members, if any, entitled to vote thereon; and

6 (3) The board or committee adequately documented the basis for the
7 approval of the contract or transaction at the time of such approval,
8 which documentation shall include:

9 (A) The terms of the contract or transaction that was approved and the
10 date it was approved;

11 (B) The members of the board or committee who were present during
12 discussion of the contract or transaction that was approved and those
13 who voted on it;

14 (C) The comparability data obtained and relied upon by the board or
15 committee and a description of how the data was obtained; and

16 (D) Any actions taken with respect to consideration of the contract or
17 transaction by the interested director or officer.

18 (c) If the interested director or officer or approving director fails
19 to meet its burden under paragraph (a) or (b) or fails to comply with
20 paragraph (e) or (f), or if the corporation or the attorney general
21 develops sufficient contrary evidence to rebut the probative value of
22 the comparability data relied upon by the approving board, committee or
23 members, if any, under paragraph (b), the corporation or the attorney
24 general may void or modify the contract or transaction, unless such
25 voidance or modification would place the corporation in a position worse
26 than that in which it would be if the contract or transaction were not
27 voided or modified. In addition, regardless of whether or not the corpo-
28 ration is subject to section 4958 of the United States internal revenue

1 code of 1986, as amended, and regardless of whether or not the internal
2 revenue service pursues its remedies, the corporation or the attorney
3 general may seek to recover from the interested director or officer or
4 approving director, respectively, restitution in amounts equivalent to
5 the remedies that would be available to the internal revenue service
6 from an interested director or officer or approving director of a corpo-
7 ration subject to said section, together with interest at the rate
8 pursuant to section 5004 of the civil practice law and rules on any such
9 amounts.

10 (d) The certificate of incorporation or the by-laws may contain addi-
11 tional restrictions on contracts or transactions between a corporation
12 and its directors or officers or other persons and may provide that
13 contracts or transactions in violation of such restrictions shall be
14 void or voidable.

15 (e) Compensation of directors for services in any capacity shall be
16 fixed or, in the case of compensation by an affiliate, ratified by the
17 affirmative vote of a majority of the entire board unless a higher
18 proportion is set by the certificate of incorporation or by-laws.

19 (f) Compensation of officers in any capacity, including for service as
20 a director or officer of another corporation, firm, association or other
21 entity on behalf of the corporation shall be fixed or, in the case of
22 compensation by an affiliate, ratified by the affirmative vote of a
23 majority of the entire board unless a higher proportion is set by the
24 certificate of incorporation or by-laws or, if the officers are elected
25 by the members pursuant to paragraph (b) of section 713 (Officers), by
26 majority vote of the members as provided in paragraph (c) of section 613
27 (Vote of members) unless a higher proportion is set by the certificate
28 of incorporation or by-laws.

1 (g) For purposes of this section, an entity shall be deemed an "affil-
2 iate" of a corporation if such entity is controlled by, in control of or
3 under common control with such corporation.

4 (h) Except with respect to compensation of directors or officers, this
5 section shall not apply to any contract or transaction of which the
6 interested director or officer has no actual knowledge and which does
7 not exceed the lesser of one percent of the gross receipts of the corpo-
8 ration for the preceding fiscal year or one hundred thousand dollars.

9 § 6. Section 721 of the not-for-profit corporation law is REPEALED and
10 a new section 721 is added to read as follows:

11 § 721. Exclusivity of statutory provisions for indemnification of direc-
12 tors and officers.

13 No provision made by a corporation to indemnify its or its subsid-
14 ary's directors or officers for the defense of any proceeding, whether
15 contained in the certificate of incorporation, bylaws, a resolution of
16 members or directors, an agreement or otherwise, shall be valid unless
17 consistent with this article. Nothing contained in this article shall
18 affect any rights to indemnification to which corporate personnel other
19 than directors and officers may be entitled by law.

20 § 7. Section 722 of the not-for-profit corporation law, as amended by
21 chapter 368 of the laws of 1987, is amended to read as follows:

22 § 722. Authorization for indemnification of directors and officers.

23 (a) A corporation may indemnify any [person] director or officer ther-
24 eof, made, or threatened to be made, a party to an action or proceeding
25 other than one by or in the right of the corporation to procure a judg-
26 ment in its favor, whether civil or criminal, including an action by or
27 in the right of any other corporation of any type or kind, domestic or
28 foreign, or any partnership, joint venture, trust, employee benefit plan

1 or other enterprise, which any director or officer of the corporation
2 served in any capacity at the request of the corporation, by reason of
3 the fact that he or she, or his or her testator or intestate, was a
4 director or officer of the corporation, or served such other corpo-
5 ration, partnership, joint venture, trust, employee benefit plan or
6 other enterprise in any capacity, against judgments, fines, amounts paid
7 in settlement and reasonable expenses, including attorneys' fees and
8 expenses and court costs actually [and], necessarily and ordinarily
9 incurred as a result of such action or proceeding, or any appeal there-
10 in, [if] to the extent that such director or officer acted, in good
11 faith, for a purpose which he or she reasonably believed to be in, [or]
12 and, in the case of service for any other corporation or any partner-
13 ship, joint venture, trust, employee benefit plan or other enterprise,
14 not opposed to, the best interests of the corporation and, in criminal
15 actions or proceedings, in addition, had no reasonable cause to believe
16 that his or her conduct was unlawful.

17 (b) The [termination] settlement of any such civil [or criminal]
18 action or proceeding [by judgment, settlement, conviction or upon a plea
19 of nolo contendere, or its equivalent,] shall not in itself create a
20 presumption that any such director or officer did not act, in good
21 faith, for a purpose which he or she reasonably believed to be in, or,
22 in the case of service for any other corporation or any partnership,
23 joint venture, trust, employee benefit plan or other enterprise, not
24 opposed to, the best interests of the corporation or that he or she had
25 reasonable cause to believe that his or her conduct was unlawful.

26 (c) A corporation may indemnify any [person] director or officer ther-
27 eof made, or threatened to be made, a party to an action by or in the
28 right of the corporation to procure a judgment in its favor by reason of