



**NON-PROFIT ORGANIZATION  
COMMITTEE**

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**Via Email**

Gary Trechel  
Department of State  
Gary.Trechel@dos.ny.gov

**Re: Comments on Proposed 19 NYCRR Part 146**

Dear Mr. Trechel,

On behalf of the New York City Bar Association's Non-profit Organizations Committee, we write to provide comments on Proposed 19 NYCRR Part 146. The Non-profit Organizations Committee is a diverse committee of the New York City Bar Association with approximately 50 members. Our membership includes law firm attorneys representing nonprofits, in-house counsel for charitable organizations, and academics. Our members represent multi-million dollar institutions as well as small charities operating across the nonprofit sector. Some of these institutions have been serving New York for more than a century; others are in their infancy, taking their first steps to launch their charitable missions.

As a group, we are concerned that the proposed regulations implementing Executive Law 172-b(9) are based on a misinterpretation of the statutory language and the existing framework governing charitable organizations and exceed the statutory authority afforded the Department of State in two important respects, namely, in the (i) specified content of the reports and (ii) the filing deadline. These extra-statutory requirements pose a significant burden for New York's charitable sector.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

## Background and Context

Executive Law 172-b(9) states:

“Any registered charitable organization that is required to file an annual financial report pursuant to subdivision one or two of this section... shall also be required to file **such** annual financial report, including all required forms and attachments, with the department of state. ” (*emphasis added*)

As you know, subdivision one and two of the Executive Law, referenced in 172-b(9), refer to the long established requirement that charitable organizations organized, operating or fundraising in New York State file with the Charities Bureau of the New York State Attorney General’s Office an annual financial report, which obligation is satisfied through the filing of the NYS CHAR 500 Form together with a copy of an organization’s completed IRS Form 990 (or Form 990 EZ) and applicable schedules, and, depending on an organization’s revenues, audited financial statements or an accountant’s financial review. These reports are due, according to the same sections, on or before five and a half months following the close of an organization’s financial year, though Executive Law 172-(b)5 provides the Attorney General’s office with the discretion to extend that deadline “for a period not to exceed one hundred eighty days.” The Attorney General has exercised that discretion to extend the deadline by the full amount, consistent with the automatic extension granted by the Internal Revenue Service for charitable organizations to comply with their annual federal reporting requirements.<sup>1</sup>

## Discussion

The proposed regulations and associated rules issued by the Department of State ostensibly implementing Executive Law 172-b(9) impose requirements on charitable organizations that go well beyond the scope set forth by the legislature, and are both unnecessary and burdensome.

### *Extra-statutory Narrative Report*

While the text of the statute instructs that organizations need only file the same annual report that is due to the Charities Bureau with the Department of State, the proposed regulations additionally require charitable organizations to file:

“a statement of the filing entity’s mission that is consistent with what was or would be provided to the Internal Revenue Service, with a filing entity’s application for recognition of exemption as a 501(c)(3), all charitable categories identified in such application, any narrative description of the filing entity’s activities provided with such application, and any supporting details to the narrative description provided

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<sup>1</sup> Office of the Attorney General, Extension Request Procedure Change: 180 Day Extension of Time to File is Granted (March 17, 2015), <https://www.charitiesnys.com/pdfs/extensiongranted.pdf>. During the pandemic, the deadline has been further postponed: Charities Bureau, Guidance for Charitable Nonprofit Organizations Facing the Challenges of the COVID-19 Pandemic (April 2020), <https://www.charitiesnys.com/pdfs/charitiesbureauguidance.pdf> (all websites last visited April 5, 2021).

with such application.”

With this additional requirement, the proposed regulations extend beyond the authority of the Executive Law to collect not just the same report that is filed with the Charities Bureau, but to impose a new, substantive reporting requirement on charitable organizations to provide what essentially amounts to an additional, narrative report. Importantly, this new requirement delivers to the Department of State no information of value and appears to be based on a misapprehension of the existing regulatory framework governing charitable organizations: an organization is not bound to the anticipated activities described in its IRS Form 1023, its application for recognition of exemption (which is often submitted before the organization is even operational), but rather advises the IRS each year on its Form 990 of its current charitable purposes and activities. The IRS Form 990 is already part of the annual financial report delivered to the Charities Bureau and now, the Department of State.

### *Extra-Statutory Filing Deadline*

Moreover, the proposed regulations omit altogether any mention of filing deadlines, while the Department of State has taken the position in the filing instructions on its website that charitable organizations must file these new reports with it “on or before the fifteenth day of the fifth calendar month after the close of the charitable organization’s fiscal year,” without reference to the discretion granted to the Attorney General to extend that timeframe.<sup>2</sup> In imposing a separate, earlier filing deadline for these reports, the Department of State has again misinterpreted the statutory language to create a new, substantive obligation for charitable organizations that exceeds the authority granted to it by the legislature. Executive Law 172-b(9) makes clear that the legislature contemplates that an organization’s obligation to deliver a report to the Department of State is contingent on that organization’s obligation to deliver the same information to the Charities Bureau. But the Department of State’s earlier deadline ignores this contingency, and requires an organization to file financial reports with it *before* such information is due to the Charities Bureau. This interpretation exceeds the authority granted to it by the statute and imposes a tremendous administrative burden on charitable organizations, which would be required to close their books, engage auditors and review and finalize their financial statements on an expedited basis in order to comply with the Department of State’s accelerated deadline. The regulations should be revised to make clear that the applicable filing deadline is the same as the deadline for filing the applicable forms with the Charities Bureau.

### Conclusion

The charitable sector is already deeply strained in the current climate, as drastic losses in revenue have forced organizations to reduce staff while dedicating increased resources to meeting unprecedented need and navigating complicated new laws and regulations promulgated in connection with the pandemic. While we cannot speak to the

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<sup>2</sup> Department of State, Division of Corporations, State Records & UCC: Financial Reports to be Filed by Certain Charitable Organizations, <https://www.dos.ny.gov/corps/prop146.html>.

legislature's intention in enacting Executive Law 172-b(9) in this moment, we feel compelled to highlight that the Department of State's interpretation of the new law goes beyond the statutory language to impose additional substantive and burdensome obligations on the charitable sector in expanding the content of the report and imposing an earlier filing deadline. We urge you to reconsider and revisit the proposed regulations to address this concern.

Thank you for your consideration.

Respectfully,

Amarah Sedreddine, Co Chair  
Jacqueline Ewenstein, Co-Chair