

## RE: Comments on Notice of Modification to Proposed Text of Regulations

---

**From:** Michael <michael@wexlerlawgroup.com>

**Date:**

**To:** Joseph Zimring <Joseph.Zimring@doj.ca.gov>

---

Dear Mr. Zimring,

Thank you for the opportunity to comment. I share the goal of promoting more thorough compliance by those nonprofits required to register with the Office of the Attorney General ("OAG"), while giving the OAG additional tools to crack down on the relatively few nonprofits that are genuinely abusive. The June modifications have given the OAG more discretion and flexibility in applying these regulations, which could mitigate the impact upon small, volunteer-run nonprofits. My comments aim to improve the regulations by making them apply more selectively, with more effective notice and reasonable opportunity to address identified omissions or misstatements.

Before finalizing these regulations, I emphatically encourage the OAG to liaise with the FTB, the Secretary of State's office, and other government agencies, to coordinate about reinstatement procedures and timelines, and to share expertise about identifying those false and misleading statements on government filings that are sufficiently material to warrant administrative action by the OAG. The OAG should work in concert with the pertinent government offices overseeing nonprofit compliance -- not seek to outdo them in zealous enforcement.

Overall, I encourage the OAG to reach out before and after final adoption of these regulations, to educate those small nonprofits rather than just penalize them. As discussed in my comments, the freeze of charitable assets in section 999.9.3 could actually force some nonprofits to close down, even though technically only "suspended".

The OAG can coordinate with professional associations of advisors, as well as with associations of nonprofits, community foundations, grantmaker associations, and specialized groups such as state or regional districts of service clubs. Another resource could be university programs that already gather and analyze data about local nonprofits.

Several months prior to the regulations becoming final, the OAG could release a preliminary downloadable database of those nonprofits that it considers to be delinquent or improperly unregistered. Accordingly, those nonprofits, with assistance from advisors and from the various associations described above, could get into compliance and rectify any discrepancies.

As noted below under section 999.9, Form RRF-1 is overdue for an update, particularly to take into account the \$50,000 filing threshold for Form 990-EZ (in effect since 2011).

Also, the OAG could announce a well-publicized "amnesty" offering reduced fines and penalties to qualifying nonprofits that registered and took steps to remedy compliance gaps, before a set deadline.

Such steps would promote compliance by those nonprofits that are serving the public good but have missed a step or two on compliance. That would thereby increase registration revenue to the OAG, and allow the OAG to focus on the genuinely abusive nonprofits.

SPECIFIC COMMENTS.

### 11 CCR 313 Address of Record

This new regulation is entirely appropriate to require registrants to maintain their current address of record with the OAG. At this point, though, the existing OAG Registry is incomplete and not necessarily up to date. Moreover, inasmuch as these proposed regulations envisage notices based on filings with, and adverse actions taken by, other government agencies, and to unregistered organizations, it is reasonable to provide effective notice by copying other addresses in referenced government documents and publicly-available IRS and FTB databases of nonprofit organizations.

Any notice to an unregistered organization, and any notice to an organization that is delinquent in filing the periodic report required by 11 CCR 301, shall be copied to the addresses in the IRS and FTB publicly-available online databases, and if applicable to the agent for service of process listed on the Secretary of State website, as updated within 45 days of the notice date.

Any notice to an organization based on false or misleading statements in its filing with a government organization shall also be copied to the mailing address in that filing.

In addition any notice based on adverse action by a governmental agency shall be copied to the mailing address in that filing.

All notices should refer to the obligation to update the address of record.

#### 11 CCR 314. Grounds for Imposition of Cease and Desist Order.

No comments.

#### 11 CCR 315. Imposition of Penalty.

The notice periods should be 30 days for all violations. A five-day notice by mail provides an inadequate time to respond.

In response to my comment requesting clarification, the June modifications now makes explicit that each call, mailing, or request is a separate act of improper solicitation regardless of whether it yields a donation. That definition runs the risk of triggering astronomical penalties of \$1,000 per "act", wholly disproportionate to the donation proceeds actually received and the economic harm to donors.

The 30-day deadline for appealing a penalty should be waivable for reasonable cause.

#### 11 CCR 316. Suspension of Registration.

Subsection (b) is ambiguous in that it does not indicate whether the penalty must be paid from non-charitable funds (either by the officers, or from general operating funds of a non-501(c)(3) organization that holds some charitable funds.)

#### 11 CCR 999.6. Violations of Government Code section 12580 et seq.

The 30-day deadline for appealing an administrative action should be waivable for reasonable cause.

#### 11 CCR 999.7. Review of Hearing Officer's Proposed Decision.

No comments.

#### 11 CCR 999.8. Final Attorney General Decision.

No comments.

#### 11 CCR 999.9. Grounds for Refusal, Revocation or Suspension.

Before taking action on any of these grounds, the OAG should provide 30 day notice similar to new 999.9.1(b). If for instance the OAG believes there is a false and misleading statement (including a material omission) on an IRS Form 990, they should give the nonprofit a chance to explain and correct that misstatement.

Before taking action under 999.9(c), concerning false or misleading statements in a filing with another government agency, the OAG should be required to contact that other government agency to verify whether the problematic filing has been updated, amended, superseded, and whether in light of the expertise of that agency the filing should not be construed as false or misleading.

Before taking action under 999.9(g), concerning adverse action by another government entity, the OAG should be required to contact that other government agency to verify whether the adverse action has not been resolved, set aside, or rescinded, and whether there are extenuating circumstances.

*Effective Date and Lookback:* Will the final regulation apply to statements filed with other government agencies -- and to adverse

actions taken by other government agencies -- prior to the final effective date? If so, that retrospectivity should be made explicit, and the lookback period should be limited to three years or less.

#### 11 CCR 999.9.1. Automatic Suspension.

Subsection 999.9.1(a)(1) should exclude suspension or revocation of FTB exempt status due to failure to file with the OAG under Rev. & Tax. C. 23703, to avoid a "Catch-22".

Concerning Form RRF-1, it is ambiguous concerning organizations with receipts over \$25,000 but generally under \$50,000. Many of those organizations (excepting notably private foundations) are eligible to file IRS Form 990-N. The instructions to Form RRF-1, still bearing the version date of March 2005, can be read to suggest that those organizations should file IRS Form 990-EZ with the OAG or even with the IRS. Updating Form RRF-1 should be a priority before finalizing these regulations.

New subsections (b) and (g) could be beneficial, depending upon how the discretion is exercised. Most of the triggers for automatic revocation cannot actually be cured in 30 days, of course. It would be helpful for the OAG to state general guidelines. For instance, if a nonprofit has its exemption automatically revoked by the IRS or FTB simply for failure to file, the OAG should generally stay the automatic suspension to allow the nonprofit a reasonable interval (60 days) to apply for reinstatement, and while the reinstatement applications are pending. If ultimately the pertinent tax agencies see fit to retroactively reinstate the nonprofit to exempt status, there is little if any rationale for the OAG to have penalized and suspended the nonprofit in the interim solely for that cured defect.

Subsection (b), by requiring the OAG to send a letter before triggering automatic suspension, does provide a tool to modulate the initial application of this regulation to tens of thousands of small noncompliant charities. I hope that the OAG will not rush the process by sending an initial mass mailing (especially to obsolete addresses -- see my comments on 316).

Subsection (g) should be amended to confirm the OAG's discretion to stay automatic revocation that would otherwise have been triggered under subsection (d). For instance, the OAG could exercise its discretion to allow an organization to remain suspended due to prior noncompliance, but not revoked pending completion of efforts to remedy that noncompliance. but Section 999.9.5 does cover reinstatement after revocation.

#### 11 CCR 999.9.2. Refusal to Renew Registration.

The official comment to the modification to subsection (a)(3) can be read to refer to the pending litigation concerning filing of unredacted IRS Form 990 Schedule B. Although the Ninth Circuit did rule in favor of the OAG, the Supreme Court has not yet issued either a denial of cert or a decision. Before that outcome (which could well be in early 2016), the OAG should not take action against nonprofits that have not yet filed an unredacted Schedule B. If that outcome is in favor of the OAG, I would suggest that the OAG give a reasonable opportunity for nonprofits to comply.

Subsection (b) suggests that the notification requirement concerning adverse actions is prospective only, applicable to adverse actions issued after the effective date of these final regulations. Is that correct? If so, should that same prospective application govern subsection (a)(4), and also section 999.9?

Please see also my comments under section 999.9 concerning verification of adverse actions.

#### 11 CCR 999.9.3. Disclosure and Restrictions on Use of Charitable Assets After Suspension or Revocation of Registration.

As other practitioners had commented in November 2014, the freeze of charitable assets of a suspended nonprofit under 999.9.3(b) is potentially devastating. If it cannot pay its rent or utilities, or meet its payroll to rank-and-file employees, its charitable activity will be strangled -- regardless of other procedures in these regulations to appeal suspension. Any efforts to remedy the noncompliance that triggered suspension will be futile. This provision's safety valve -- allowing the OAG to provide written approval of distributions and expenditures of charitable assets -- will likely operate too slowly to save many small nonprofits from shutdown.

This regulation should be extensively amended to identify categories of distributions and expenditures that are permissible, such as:

- payment of rent, utilities, and compensation to persons unaffiliated with the directors and officers;
- provision of charitable goods and services directly to such unaffiliated persons; and
- if requested by the charitable grantor organization, return of funds that were granted before the suspension but not yet expended.

To take advantage of these allowed categories, a suspended organization could be required to report frequently to the OAG.

Subsection (c) should not apply to suspended organizations. The cease-and-desist orders would serve to block funds of suspended organizations, in appropriate circumstances.

11 CCR 999.9.4. Registrant Must Be In Good Standing to Operate or Solicit.

No comments.

11 CCR 999.9.5. Reinstatement.

No comments.

Please let me know if I may be of any assistance in the course of these regulatory proceedings. I personally am willing to help with outreach and education, for the benefit of small local nonprofits.

Sincerely,

Michael Folz Wexler

Certified Specialist in Taxation Law  
The State Bar of California Board of Legal Specialization

Wexler Law Group, Inc.

12526 HIGH BLUFF DRIVE, SUITE 300  
San Diego, CA 92130-2067

P 858.792.3540 Fax 858.724.1462

[michael@wexlerlawgroup.com](mailto:michael@wexlerlawgroup.com)

Satellite Offices in Rancho Bernardo and Mission Valley

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments without reading, printing, copying or forwarding it, and please notify us.

---

**From:** [Joseph Zimring <Joseph.Zimring@doj.ca.gov>](mailto:Joseph.Zimring@doj.ca.gov)

**Sent:** Thursday, June 25, 2015 04:29 PM

**To:** [michael@wexlerlawgroup.com](mailto:michael@wexlerlawgroup.com)

**Subject:** Notice of Modification to Proposed Text of Regulations

On September 26, 2014, the Attorney General's Office proposed to adopt and amend regulations related to the Supervision of Trustees and Fundraisers for Charitable Purposes Act. The Attorney General's Office has made changes to the proposed regulations. You are receiving this email because you provided comments to the proposed regulations or you requested to be notified of the modifications. A copy of the notice containing the modifications and information about submitting public comments is attached. Information regarding the proposed regulations is available on the Attorney General's website at:

<http://oag.ca.gov/charities/notice-adoption-amend>. A copy of the notice may be downloaded at:

<http://oag.ca.gov/sites/all/files/aqweb/pdfs/charities/statutes/nmp-text-regs-313-31.pdf?>

Sincerely,

Joseph N. Zimring  
Deputy Attorney General  
California Department of Justice  
Office of the Attorney General  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
(213) 897-2559  
(213) 897-7605 (fax)  
[Joseph.Zimring@doj.ca.gov](mailto:Joseph.Zimring@doj.ca.gov)



CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.