

November 10, 2014

Scott Chan, Deputy Attorney General
California Department of Justice
Charitable Trusts Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

VIA EMAIL (scott.chan@doj.ca.gov)

Re: Proposed Regulations to Title 11, Division 1, Chapters 4 and 15

Dear Deputy Attorney General Chan:

We recently became aware of the Department of Justice's proposal to adopt certain new sections of Title 11, Division 1, Chapter 4 of the California Code of Regulations ("CCR") regarding registration, the imposition of penalties, and suspension of registration for violations of the Supervision of Trustees and Fundraisers for Charitable Purposes Act and to make certain other amendments to Title 11, Division 1, Chapter 15 of the CCR regarding the grounds for suspension or revocation of a registrant's registration and the impact of such suspension or revocation on a registrant and its activities.

As attorneys who provide legal counsel to nonprofits and exempt organizations, we understand the need for and respect the importance of enabling the Attorney General to effectively and efficiently exercise its authority over persons and entities that hold charitable assets and appreciate the importance of providing clarity regarding registrations with the Registry of Charitable Trusts. However, we fear that the proposed regulations will severely and unnecessarily hinder the charitable activities of many California nonprofits, and particularly many small to medium-sized nonprofits.

More specifically, we have the following concerns regarding the below listed proposed additions to Title 11, Division 1, Chapter 15 of the CCR:

§ 999.9.3(b)

This proposed Subsection provides that, upon suspension or revocation, a nonprofit "may not distribute or expend any charitable assets or assets subject to a charitable trust without the written approval of the Attorney General." This essentially means that a nonprofit will need to cease all operations in California upon suspension or revocation of its registration, regardless of the cause of or ease of remedying such suspension or revocation. Such a regulation, particularly when read in conjunction with the other proposed regulations regarding the provisions for automatic suspension and revocation of registrations, will have a crippling effect on California nonprofits and the populations they serve. For example, consider a homeless shelter, hospice center, or nonprofit child care center that is forced to

stop providing critical services merely because it failed to timely file a complete registration renewal form, which, under proposed regulation § 999.9(a)(3), may be considered a false or misleading statement sufficient to permit the Attorney General to suspend or revoke the nonprofit's registration. Failure to file a complete Form RRF-1 is not an uncommon occurrence, particularly among small and medium-sized nonprofits managed primarily by volunteers, and the possibility that a nonprofit may be required to cease expending any charitable assets as a result of such failure is unreasonable.

This proposed Subsection further provides for the personal liability of members of the board of directors or any person directly involved in distributing or expending a nonprofit's charitable assets if any such assets are distributed or expended while the nonprofit's registration is suspended or revoked. The nonprofit sector is dependent upon the involvement of volunteers and particularly volunteer directors. The creation of an additional area for potential exposure to personal liability of directors will serve to chill volunteer board participation to the detriment of California's nonprofits. Moreover, the proposed regulations adding provisions for automatic suspension or revocation of a nonprofit's registration will expose many nonprofits, and especially small to medium-sized nonprofits, to increased risk of suspension or revocation, further increasing the risk of personal liability for directors. In the face of such liability, it is foreseeable that many individuals who otherwise would have been willing to serve as volunteer directors may be unwilling to do so, particularly for small nonprofits without adequate paid staff. For instance, consider the typical nonprofit volunteer board member who likely is unaware of the nonprofit's most current registration status. If the nonprofit's registration is suspended between board meetings, the directors are not informed of the suspension, and the organization continues to operate, a volunteer director may be held personally liable for the nonprofit's expenditures after suspension merely for allowing the organization to continue providing critical services and operating pursuant to its mission.

§ 999.9.3(c)

We find this proposed Subsection to be especially worrisome and problematic. Proposed § 999.9.3(c) provides the Attorney General with the authority to require a registrant whose registration has been suspended or revoked to distribute its assets to another charitable organization or into a blocked bank account. While such a directive may be appropriate where the Attorney General has investigated a nonprofit, determined that the nonprofit or its trustees have failed to expend property held in trust for charitable purposes appropriately, and has brought an action against an organization to enforce charitable trust, providing the Attorney General with such broad authority absent these steps far exceeds the reasonable scope of appropriate Attorney General oversight.

Under the proposed regulations, the Attorney General will be granted the authority to direct a nonprofit that has merely had its registration suspended, including by inadvertently and unintentionally failing to file a Form RRF-1 or failing to attach a required attachment to the Form RRF-1 for three consecutive years, to distribute all of its charitable assets to another charitable organization. Although such authority may rarely be exercised by the Attorney General, we feel that incorporating it into the regulations is dangerous, excessive, and unnecessary.

§ 999.9.1(c)

Providing for automatic revocation of a registration which has been continuously suspended for one year pursuant to proposed § 999.9.1 is also an extreme measure that could have serious ramifications for California nonprofits. For example, small nonprofits without physical office spaces often use the address of a volunteer officer as their registration address. Under proposed regulation § 999.9(a)(3), the Attorney General arguably has the authority to suspend a registration for failure to file a single annual registration renewal form or for failure to include a response to a single question on the Form RRF-1. If there is turnover in the nonprofit's officers, which there frequently is, and if the nonprofit inadvertently fails to update its address with the Attorney General's Registry of Charitable Trusts, it is possible that a nonprofit may never receive actual notice of its suspension of registration and may easily remain suspended for one year. Under this proposed Subsection, a nonprofit may have its registration automatically revoked for something as simple as failing to complete a portion of a single Form RRF-1. Although the Attorney General may not elect to exercise its authority under the proposed § 999.9(a)(3) in this manner, such a possibility goes well beyond the scope of reasonable consequences for failure to file a complete Form RRF-1.

We respectfully request that you consider these comments before adopting the proposed regulations to Title 11, Division 1, Chapters 4 and 15 of the CCR.

Sincerely,

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