

New York Nonprofits: Action Required for New Reporting Requirements



By [Lauren A. Suttell](#)

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Effective January 1, 2021, New York nonprofits are required to make annual filings with the Department of State. These annual filings must be made in addition to the annual reports made to the Attorney General Charities Bureau. For affected organizations with a tax year ending on December 31, the first filing will be due May 15, 2021.

In the midst of the early days of the pandemic and tucked among other legislation implementing the 2020-2021 budget, New York State quietly amended Section 172-b of the Executive Law.

This amendment is far from burden reducing like its Nonprofit Revitalization Act predecessors. The 2020 amendment added a new requirement for nonprofits which went into effect on January 1, 2021. In addition to the requirements under other sections of the Executive Law, certain charitable organizations are now required to file their Annual Financial Report (audit or review) with the Department of State (not just the Charities Bureau of the Attorney General's office).

The 2020 amendment also made changes to Sections 172-e and 172-f of the Executive Law. Section 172-e requires a Funding Disclosure Report from Section 501(c)(3) organizations that make in-kind donations to Section 501(c)(4) social welfare organizations engaged in lobbying activities. Section 172-f requires a Financial Disclosure Report from Section 501(c)(4) social welfare organizations that make certain public communications.

Prior to the 2020 amendments, these sections required the Funding Disclosure Report to include the names of donors who gave more than \$2,500 (whether cash or in-kind) to the organization and the Financial Disclosure Report

to include the identity of individuals and organizations who gave more than \$1,000 to the organization.

The requirements to disclose the identity of donors were held unconstitutional on First Amendment free speech grounds in September 2019. The 2020 amendments remove these constitutionally deficient requirements. They also changed the agency overseeing the Funding Disclosure Reports and Financial Disclosure Reports. These reports must now be filed with the Department of State, rather than the Attorney General.

To implement the amended laws, the Department of State issued a notice of proposed rulemaking on February 3, 2021. The proposed regulations shed light on the specific requirements and details behind the new filing.

Who must file?

1. Charitable organizations with total revenue and support above \$250,000 per year (even if not tax exempt under Section 501(c)(3) of the Internal Revenue Code) must file an Annual Financial Report.
2. Section 501(c)(3) organizations which make in-kind donations to a Section 501(c)(4) organization in excess of \$10,000 (increased from \$2,500) within a 6-month period must file a Funding Disclosure Report.
3. Section 501(c)(4) organizations which make expenditures for certain covered communications in excess of \$10,000 per year must file a Financial Disclosure Report.

Charitable organizations with total revenue and support less than \$250,000 per year do not need to file financial reports with the Department of State, though they will still need to file unaudited financials with the Charities Bureau.

Unlike the filings with the Charities Bureau which permit affiliated organizations to file a consolidated Annual Financial Report, there is no similar permission in the statute or proposed regulations for the Department of State filing. Consequently, separate filings with the Department of State will be needed for each organization.

What must be filed?

The proposed regulations indicate that affected organizations must file their Annual Financial Report, Funding Disclosure Report, or Financial Disclosure Report (as applicable) plus additional information. The additional information includes:

1. A statement of the organization's mission that is consistent with the organization's tax-exempt status (as set forth on its exemption application, if filed).
2. All charitable categories identified on the organization's tax-exempt status.
3. Narrative description of the organization's activities provided with its tax-exempt status.
4. Supporting details to the narrative description provided with its tax-exempt status.

When is the filing due?

Annual Financial Reports must be filed by the 15th day of the fifth calendar month after the close of the organization's fiscal year. This is the same due date as the due date of the analogous filing with the Charities Bureau. For organizations whose fiscal year ends on December 31, the filing will be due on May 15. Unlike the Charities Bureau filings, which enjoy an automatic 6-month extension to file Annual Financial Reports, no extension to file is available under the new law and proposed regulations.

The 2020 amendments did not change the due dates for the Funding Disclosure Reports or Financial Disclosure Reports. These reports are still due within 30 days of the close of a reporting period which end June 30 and December 31.

What is the fee?

The filing fee is \$25.00 per report for each type of report filed. Currently, payment must be made by mail because

the Department of State's website is not set up to accept credit card payments yet.

What are the penalties for failure to file?

The new law and proposed regulations do not include penalties for failure to file.

Will the filings be publicly disclosed?

Based on the guidance currently available, it appears that only 501(c)(3) and 501(c)(4) organizations which file Funding Disclosure Reports and/or Financial Disclosure Reports will be subject to further agency review and public disclosure requirements. The new law and proposed regulations do not provide for review and disclosure of information regarding charitable organizations who file only Annual Financial Reports.

Specifically, the 2020 amendment included a new Section 93-a of the Executive Law, which contemplates the creation of a public "Wall of Shame" where the Department of State will publish those 501(c)(3) and 501(c)(4) organizations whose Funding Disclosure Reports and Financial Disclosure Reports indicate that such organizations' activities are inconsistent with the organization's charitable purposes. The Wall of Shame would include a copy of the organization's (1) Funding Disclosure Report and/or Financial Disclosure Report, as applicable, (2) annual financial statements (excluding names and addresses of individual donors and Form 990 Schedule B), and (3) mission statement provided by the organization with its annual filing.

TIMELY REMINDER:

Nonprofits and practitioners alike may recall that Section 172-b was previously amended in connection with the Nonprofit Revitalization Act of 2013. Specifically, under the Revitalization Act, Section 172-b was modified to increase the financial thresholds that triggered financial audits and reviews. The final change to Section 172-b under the Revitalization Act is set to go into effect this year. On July 1, 2021, the financial threshold for a full audit of a nonprofit's financials will increase to \$1 million (up from \$750,000) and the threshold for review reports will expand to organizations with revenues between \$250,000 and \$1 million. Organizations with revenue less than \$250,000 will still be required to provide unaudited financial statements to the Charities Bureau.

For any questions regarding this Alert or any other legal matter affecting Not-for-Profits, please contact any of the attorneys below.

Related Team



Lauren A. Suttell
Partner | Team
Leader - Not-For-
Profit



Conor E. Brownell
Partner



Scott V. Carroll
Partner | Team Co-
Leader - Health Care



Elise M. Edwards
Senior Associate



Gregory T. Ivancic
Partner



Brigid M. Maloney
Partner | Team Co-
Leader - Health Care



Brendan J. Rich
Partner | Team
Leader - Corporate
and Mergers &
Acquisitions



David E. Siegfeld
Partner | Team
Leader - Trusts &
Estates



**Christopher A.
Walker**
Office Partner-in-
Charge, Jacksonville



ALBANY | 54 State Street, Suite 1001 • Albany, NY 12207 • 518.462.0110

BUFFALO | 50 Fountain Plaza, Suite 1700 • Buffalo, NY 14202 • 716.853.5100

CHICAGO | 125 S Clark St., 17th Floor • Chicago, IL 60603 • 872.254.5500

GREATER TORONTO AREA (PRACTICE FOCUSED ON U.S. LAW) | 1100 Burloak Drive, Suite 300 • Burlington, ON L7L 6B2 • 905.319.8964

JACKSONVILLE | 10151 Deerwood Park Blvd. , Bldg. 300, Suite 300 • Jacksonville, FL 32256 • 904.660.0020

LONG ISLAND | 1979 Marcus Ave, Suite 210 • Lake Success, NY 11042 • 516.820.1500

NEW YORK CITY | 260 Madison Avenue, 17th Floor • New York City, NY 10016 • 332.345.4500

ROCHESTER | 400 Linden Oaks Dr., Suite 150 • Rochester, NY 14625 • 585.770.7590

SAN ANTONIO | 4499 Pond Hill Road, • San Antonio, TX 78231 • 210.436.6222

WASHINGTON, D.C. | 1900 K Street, NW, Suite 730 • Washington, DC 20006 • 202.888.7610