



Getting Organized

Seventh Edition

Editors:

Ciarra A. Chavarria, Esq.
Hedwig O'Hara, Esq.

Table of Contents

Chapter One

Corporations and Unincorporated Associations

A. Corporations	1
1. Advantages of Corporations	2
a. Limited Liability	2
b. Perpetual Duration	3
c. Uniform Set of Rules	3
d. Ownership of Real Property	4
2. Requirements of Incorporation	4
3. When Incorporation May be Inappropriate or Premature	4
B. Unincorporated Associations	5
1. Advantages of Unincorporated Associations	6
2. Disadvantages of Unincorporated Associations	6
3. Registration Requirements	7
C. Types of New York Corporations	7
1. Not-For-Profit Corporations	7
2. Education Corporations	8
3. Religious Corporations	9
4. Benefit Corporations	10
D. Incorporation in Delaware	10
1. Advantages of Incorporating in Delaware	11
2. Advantages of Incorporating in New York	13

Chapter Two

Powers of Not-For-Profit Corporations

A. Basic Powers of Not-For-Profit Corporations	16
1. Perpetual Duration	16
2. Suing and Being Sued	16
3. Making Contracts and Incurring Liabilities	17
4. Appointing or Electing Officers	17
B. Nonprofit Finance and Restrictions on Profit-Making Activities	17
1. Profits, Investments, Dividends, and Compensation	17
2. Capital Contributions	18
3. Subventions	19
4. Issuance of Bonds and Creation of Security Interests	20
C. Owning and Transferring Property	21

1. Ownership of Property	21
2. Transfer and Disposition of Property	21

Chapter Three

Incorporation 23

A. Types of Not-For-Profit Corporations	23
1. Non-charitable	23
2. Charitable	23
B. Forming a Not-For-Profit Corporation	24
1. Naming the Corporation	24
a. Selecting a Name	24
b. Checking Name Availability	26
c. Reserving a Name	26
2. Drafting the Certificate of Incorporation	28
3. Obtaining Approvals and Consents	29
a. Corporations Engaging in Educational Activities	30
b. Corporations Engaging in Social Services Activities	31
c. Corporations Engaging in Mental Health Activities	31
d. Speeding Up the Approval Process — a Reminder	32
4. Filing the Certificate	32
a. Expedited Handling for Quicker Filing	32
b. Listing of Filing Fees	33
c. Effect of Filing	34
5. Post-Incorporation Notice	34
6. Organizational Meeting	34

Chapter Four

Organization and Operation of Not-For-Profit Corporations ... 36

A. Governance Documents	36
1. Bylaws	36
2. Conflict of Interest Policy	38
3. Whistleblower Policy	39
B. Membership Organizations	40
1. Choosing Whether to Have Members	41
2. Powers of Members	42
3. Qualifications for Membership	43
4. Liability of Members	43
5. Membership Classes	44

6. Meetings of the Members	44
a. Notice of Meetings	44
b. Quorum Requirements	45
c. Action by the Members	46
d. Proxies	47
7. Discipline of Members	47
8. Derivative Action by Members	48
C. Board of Directors	48
1. Composition and Qualifications of the Board	49
2. Election and Terms of Directors	49
3. Removal of Directors	50
4. Meetings of the Board	51
a. Notice of Meetings	51
b. Quorum Requirements	51
c. Action by the Board	52
d. Special Requirements	52
5. Committees	53
D. Officers	55
E. Liability of Directors and Officers	57
1. General	57
2. Prohibited Corporate Actions	58
3. Related Party Transactions	58
a. Approval by Board of Directors	58
b. Actions Required of Officers and Directors	59
4. Exemptions and Indemnification	60
F. Employer Status of Not-For-Profit Organizations	60
1. Employee Classification	61
a. Independent Contractors vs. Employees	61
b. Volunteers and Interns	63
2. Employer Filing Requirements	64
3. New York Unemployment Insurance	64
4. Workers' Compensation and Disability Insurance	65
G. Judicial Visitation and Inspection	66
<i>Chapter Five</i>	
Fundamental Corporate Changes	67
A. Changes to the Certificate of Incorporation	67
1. Certificate of Correction	67

2. Certificate of Change	68
3. Certificate of Amendment	69
4. Restated Certificate	71
B. Merger and Consolidation	71
C. Dissolution	72
1. Judicial Dissolution	73
2. Non-judicial Dissolution	74

Chapter Six

Exemption from Federal Tax

A. Classification Under Section 501(c)	79
1. Section 501(c)(3): Charitable and Educational Organizations	79
2. Section 501(c)(4): Civic Leagues and Social Welfare Organizations	80
3. Section 501(c)(2): Property Title Holding Companies	82
4. Section 501(c)(6): Non-Profit Business Organizations	82
5. Section 501(c)(7): Social and Recreational Clubs	83
6. Other Organizations	83
B. Requirements for Exemption Under Section 501(c)(3)	83
1. Form of the Organization	83
2. Exempt Purposes	84
a. "Charitable" Purposes Defined	85
b. "Educational" Purposes Defined	86
c. Examples of Organizations which Qualify as Exempt Under Section 501(c)(3)	86
3. "Organized and Operated Exclusively" Requirement of Section 501(c)(3)	88
a. "Organized Exclusively" Test	88
b. "Operated Exclusively" Test	89
(i) No Substantial Activities Unrelated to Exempt Purposes	89
(ii) No Private Inurement	89
(iii) No Private Benefit	90
(iv) Organization may not be an Action Organization	92
C. Public Charities and Private Foundations	93
1. Introduction	93
2. Definition of Private Foundation/Public Charity	94
a. Exclusion Based on Activities	94

b. Exclusion Based on Sources of Support:	
"Publicly Supported" Organizations	95
(i) Qualifying as Publicly Supported Under Sections 509(a)(1)	
and 170(b)(1)(A)(vi)	95
(1) Mechanical Test or 33½ Percent Test	96
(a) Total Support (Denominator) Issues	96
(b) Public Support (Numerator) Issues	98
(2) Facts and Circumstances Test	99
(ii) Qualifying as Publicly Supported Under I.R.C.	
Section 509(a)(2)	101
(iii) Definition of "Normally"	103
c. Exclusion Based on Support for a Public Charity	104
(i) The Organizational and Operational Test	105
(ii) Nature of the Relationship Test	106
(iii) Prohibition on Control by Disqualified Person	107
3. Consequences of Private Foundation Status	108
a. Tax on Investment Income	108
b. Prohibited Activities	108
c. Minimum Distributions	109
d. Limitation on Charitable Deduction from Income Tax	109
e. Reporting Requirements	109
4. Operating Foundations	109
5. Required Charter Provisions	110
D. Political Activity by Section 501(c)(3) Organizations	111
1. Introduction	111
a. Campaign-Related Activities	111
b. Lobbying Activities	113
(i) What is "Lobbying"?	114
(ii) How Much Lobbying is Permissible?	115
(1) The "Substantial Part" Test	115
(2) The 501(h) Election: "Lobbying Expenditures" Test	116
(3) Penalties for Exceeding the Expenditure Limits	117
c. Lobbying/Advocacy by Noncharitable Organizations	119
d. Lobbying Registration and Reporting Rules	119
E. Tax on Unrelated Business Income	120
1. "Trade or Business" Requirement	120
a. Definition	120
(i) Unfair Competition	121

(ii) Profit Motive	121
2. "Regularly Carried On" Requirement	122
3. "Not Substantially Related" Requirement	123
a. "Fragmentation"	124
4. UBIT Exclusions	124

Chapter Seven

Applying for Federal Tax-Exempt Status 128

A. The Application Process	128
B. Filling Out Form 1023	129
1. What Parts to Complete	130
2. Guidance for Completing Form 1023 Questions	130
C. Form 1023-EZ	149
D. The Determination Letter	155

Chapter Eight

Fiscal Sponsorship: An Alternative to Obtaining 501(c)(3)

Tax-Exempt Status 157

A. What is Fiscal Sponsorship	157
1. Advantages of Fiscal Sponsorship	157
2. Disadvantages of Fiscal Sponsorship	158
B. Identifying Potential Sponsors	159
C. Types of Fiscal Sponsorship Arrangements	161
1. Comprehensive Fiscal Sponsorship	161
2. Pre-approved Grant Relationship	162
3. Other Arrangements	163
4. Fiscal Sponsor's Role and Obligations	163
5. Project's Role and Obligations	164
D. Executing a Fiscal Sponsorship Agreement	164
E. Ending Fiscal Sponsorship	165

Chapter Nine

Exemption from New York State and Local Taxes 168

A. Corporation Franchise Tax	168
1. Exemption	168
2. Application Procedure	169
3. Unrelated Business Income Tax	169
4. Other Considerations	170

B. State and Local Sales and Use Tax	170
1. Criteria for Exemption	170
2. Non-exempt Sales	171
a. Sales of Tangible Personal Property in a Shop or a Store	171
b. Sales of Food or Drink in or by a Restaurant, Tavern, or Other Similar Establishment	172
c. Sales of Parking, Garage, or Motor Vehicle Storage Services	172
d. Sales Made by Remote Means	173
3. Application Procedure	173
4. Applying for a Refund of Past Sales and Use Taxes	174
5. Other Considerations	174
C. New York City Business Corporation Tax	175
1. Criteria for Exemption	175
2. Application Procedure	176
D. New York City Commercial Motor Vehicle Tax	177
E. Real Property Tax Exemption	177
1. Mandatory Exemption	177
a. Criteria for Exemption	177
b. Application Procedure	178
c. Other Considerations	178
2. Permissive Exemption	179
a. Criteria for Exemption	179
b. Application Procedure	179
c. Other Considerations	180
3. Partial Exemption – Mandatory and Permissive	180
F. New York City Water Charges and Sewer Rents	180
G. Other Taxes	181

Chapter Ten
Reporting Requirements for Tax-Exempt Organizations 182

A. Federal Requirements	182
1. Annual Information Return	182
2. Automatic Revocation of Exemption for Failure to File Annual Returns ...	183
3. Unrelated Business Income Tax Return	185
4. Employment Tax Returns	186
5. Public Inspection of Annual Returns	186
6. Miscellaneous Federal Reporting Requirements	187
B. New York State Requirements	188

1. Initial Registration	188
(i) Article 7A Registration: Organizations Soliciting Funds and Fundraising in New York State	188
(ii) EPTL Registration: Charitable Organizations Conducting Activity in New York State	189
2. Annual Reports	191
Appendix A Important Addresses, Telephone Numbers, and Websites	196
Appendix B Sample Forms and Exhibits	202
Exhibit 1 Sample Cover Letter to the Department of State re: Name Reservation Application	203
Exhibit 2 Sample Certificate of Incorporation	204
Exhibit 3 Sample Cover Letter to the Department of State re: Filing Certificate of Incorporation	209
Exhibit 4 Sample Affidavit of Authority for Pre-Existing Group to Incorporate	210
Exhibit 5 Sample Cover Letter Providing Notice to the New York State Education Department	211
Exhibit 6 Sample Email to Client Following Incorporation	212
Exhibit 7 Sample Minutes and Resolutions for Organizational Meeting of Directors	215

<i>Exhibit 8</i>	
<i>Sample Minutes and Resolutions for Annual Meeting of Directors</i>	225
<i>Exhibit 9</i>	
<i>Sample Unanimous Written Consent of Directors in Lieu of Meeting</i>	231
<i>Exhibit 10</i>	
<i>Sample Minutes of Meeting of Directors</i>	233
<i>Exhibit 11</i>	
<i>Sample Waiver of Notice of Meeting</i>	236
<i>Exhibit 12</i>	
<i>Sample Bylaws of a New York Non-Membership Corporation ..</i>	237
<i>Exhibit 13</i>	
<i>Sample Bylaws of a New York Membership Corporation.....</i>	257
<i>Exhibit 14</i>	
<i>Sample Bylaws of a Delaware Nonstock, Nonprofit Corporation</i>	281
<i>Exhibit 15</i>	
<i>Sample Conflict of Interest Policy</i>	300
<i>Exhibit 16</i>	
<i>Sample Whistleblower Policy</i>	308
<i>Exhibit 17</i>	
<i>Sample Letter to Attorney General to Amend Certificate of Incorporation</i>	314
<i>Exhibit 18</i>	
<i>Sample Cover Letter to the Department of State re: Amendment to Certificate of Incorporation</i>	316

About Lawyers Alliance for New York 317

Index 319