

Forming a Not-for-profit Corporation in New York State

Where to go for Forms and Information

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TUG HILL COMMISSION
Dulles State Office Building
317 Washington Street
Watertown, New York 13601-3782
315-785-2380/2570 or 1-888-785-2380 fax: 315-785-2574

Email: tughill@tughill.org Website: <http://www.tughill.org>

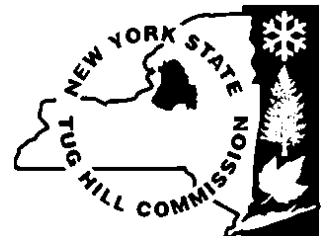


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The Tug Hill Commission *Technical and Issue Paper Series* are designed to help local officials and citizens in the Tug Hill region and other rural parts of New York State. The *Technical Paper Series* provides guidance on procedures based on questions frequently received by the Commission. The *Issue Paper Series* provides background on key issues facing the region without taking advocacy positions. Other papers in each series are available from the Tug Hill Commission at the address and phone number on the cover.

Introduction

This document provides an overview of the process and forms required for groups considering incorporation in New York State, although some of the information is also applicable to groups acting as “unincorporated associations.” Its intent is to point you in the right direction so you know where to go for required forms and more definitive guidance. Although incorporating as a not-for-profit organization or filing for tax-exempt status does not require legal counsel or assistance from an accounting professional, such assistance is advisable as the paperwork can be extensive and complex. We suggest that your organization contact the identified agencies for clarification on any questions you might have, as it may prevent errors that would delay the process.

Does your organization need to incorporate?

If the group plans on doing extensive fundraising, operating an ongoing program, being in existence for a long time, or seeking tax-exempt status through the IRS, then incorporation will likely be necessary.

If your organization plans to conduct short-term, small-scale fundraising, then incorporation may be an unnecessarily long and expensive process. It may be to the group’s advantage to simply operate as an “unincorporated association.”

Many entities and private foundations require that applicants for funding have tax-exempt status, which would first require incorporation. However, such entities often do fund requests from local governments (which are automatically considered tax-exempt). Take the example of a group of citizens raising funds for a town or village playground project that needs a sizeable grant to make the project a reality. As an unincorporated association, the group may not be an eligible applicant for a certain grant program. However, since the project is on town/village property, the municipality could apply for the grant and the citizens group could donate the funds it has raised to the municipality, designating those funds for the intended project. In this case, it is not necessary for the citizens group to incorporate and obtain tax-exempt status in order for the project to move forward.

Does your organization need to obtain tax-exempt status?

In most fundraising cases, tax-exempt status refers to 501(c)(3) organizations to which contributions are tax deductible under the Internal Revenue Service code. There are a number of other 501(c) type tax-exempt organizations which are discussed further at the end of this document. For our purposes, this section will focus on 501(c)(3) organizations.

If the organization will normally be raising more than \$5,000 per year, then filing IRS Form 1023 to apply for 501(c)(3) status is required (see below). The “gross receipts test” used by the IRS states that an organization may have gross receipts of \$7,500 or less in its first year, \$12,000 or less in its first two years, or \$15,000 or less in the current year and preceding two years before it is required to file Form 1023.

Federal ID#

Complete IRS Form SS-4: Application for Employer Identification Number, available at (<http://www.irs.gov/businesses/small/article/0,,id=98350,00.html>) or by calling 1-800-829-5500. The form can be filled out on-line or by hand and faxed or mailed. This number will allow you to set up a bank account in the organization's name and may be requested in any of the other paperwork discussed in this document.

Even an unincorporated association should at least obtain a federal employment identification number (EIN) if it plans on keeping funds in a bank account. Such an account would generally be non-interest bearing, as interest income would trigger statements from taxing entities.

Incorporation

Most organizations in New York State incorporate through the New York State Department of State under Section 402 of the state's Not-for-Profit Corporation Law. Questions regarding any part of the incorporation process may be directed to:

Division of Corporations
NYS Department of State
One Commerce Plaza
99 Washington Street, Suite 600
Albany, NY 12231
Phone: (518) 473-2492

DOS also has information available on its web site (www.dos.state.ny.us). A list of required filings is available at (www.dos.state.ny.us/corps/). A list of frequently asked questions is available at (www.dos.state.ny.us/corps/nfpfaq.asp), the end of which lists contacts for the IRS and the NYS Dept. of Taxation and Finance.

To incorporate, an organization must file a Certificate of Incorporation with DOS at the above address. The statutory filing fee is \$75, payable by certified check, attorney's check, or postal money order. Expedited processing (24-hour turn-around) can be requested for an additional \$25 fee.

Another helpful guide to the incorporation process is the document entitled "Procedures for Forming and Changing Not-For-Profit Corporations in New York", available from the Charities Bureau at the State Attorney General's Office at: (<http://www.ag.ny.gov/bureaus/charities2/pdfs/howtoincorporate.pdf>).

Certificate of Incorporation

The Certificate of Incorporation (sometimes referred to as the articles of incorporation or constitution) provides the framework under which the organization will operate, and serves as its fundamental law. It defines and limits the organization's purpose and scope of activities. The document should be inclusive enough to meet the needs of the organization, but should not be too complex or rigid. Instructions for amending the organization's name or its Certificate and filing such changes with DOS are available on its web site.

The required contents of a Certificate of Incorporation are defined under Section 402 of NYS Not-For-Profit Corporation Law. If the organization plans to file for 501(c)(3) exempt status from the IRS, then the Certificate of Incorporation should be consistent with IRS requirements. The IRS Publication 557, entitled “Tax Exempt Status for Your Organization,” includes sample Articles of Incorporation that may be used as a guide (<http://www.irs.gov/pub/irs-pdf/p557.pdf>).

NOTE: The Certificate of Incorporation is not the same as the organization’s bylaws. The bylaws are an internal document that details the organization’s operating procedures. Bylaws should be comprehensive enough to allow the organization to operate efficiently without contradicting its constitution or Certificate of Incorporation. Bylaws do not need to be filed with the Certificate of Incorporation and may be amended internally.

Charities Registration

Incorporated not-for-profits and any organization utilizing the services of a professional fundraiser or fundraising firm must file a Charities Registration Statement, Form CHAR410, with the Charities Bureau of the New York State Attorney General’s Office. The fee is \$25. The form may be filed while incorporation is still pending. Once registered, the organization must annually file the state Form 497 along with a copy of its IRS Form 990 annual report 990 (if applicable). Forms are available on the Internet or by contacting the Attorney General’s office directly at:

State of New York Office of the Attorney General
Charities Bureau
120 Broadway
New York, NY 10271
Phone: (212) 416-8401
(www.charitiesnys.com/charindex_new.html)

Incorporating/Chartering Through the NYS Education Department

Historical societies, museums, and related cultural agencies should petition the Board of Regents for a Provisional Charter or Certificate of Incorporation through:

NYS Education Department
Chartering Program
New York State Museum
New York State Education Department
Room 3097, Cultural Education Center
Albany NY 12230
Phone: (518) 473-3131
(www.nysm.nysed.gov/charter/)

The above website provides information on chartering and includes sample constitutions and bylaws. Even organizations incorporating through the Department of State may find the sample bylaws in this document to be helpful. Incorporating through the Education Department (\$100 filing fee) constitutes official recognition that the organization’s purposes are of educational or cultural value. If its educational purposes are incidental to its primary mission, the organization may choose to incorporate through the Department of State (see above).

Exemption from New York State Sales Tax

Unincorporated associations may still file for exemption from paying New York State sales tax (though they must at least be able to submit some form of governing document such as bylaws). Incorporated organizations with tax-exempt status through the IRS must still file with the Exempt Organization Office at the address below. Tax-exempt status from the IRS does not by itself exempt an organization from sales tax. Questions and forms may be obtained from:

NYS Tax Department
Exempt Organizations Unit
W. A. Harriman Campus
Albany, NY 12227-0125
Phone: 1-800-698-2909

Request form ST-119.2, “Application for An Exempt Organization Certificate.” Also request the instructions—Form ST-119.2-I. The forms and instructions are also available at the following web site: (<http://www.tax.state.ny.us/sbc/exempt.htm>).

NOTE: Sales tax exemption exempts an organization from paying state sales tax on purchases it makes. It does **NOT** exempt a non-profit organization from collecting and paying sales tax on retail sales it makes (sweatshirts, mugs, artwork, etc.).

501(c)(3) Tax-exempt Status through the IRS

All IRS Forms are available by calling their “exempt organizations” number at 1-800-829-5500. They are also available through the IRS website at (www.irs.gov).

Tax-exempt status under section 501(c)(3) of the Internal Revenue Code is obtained by filing IRS Form 1023 (<http://www.irs.gov/pub/irs-pdf/f1023.pdf>). Also request the accompanying instruction booklet, Publication 557--“Tax Exempt Status for Your Organization,” that provides more information on the rules and procedures for obtaining tax-exempt status.

The filing fee is \$150 for organizations anticipating annual revenues averaging no more than \$10,000 during their first four years. For organizations anticipating gross annual receipts averaging more than \$10,000 the filing fee is \$500. Refer to Form 8718, which should accompany your Form 1023.

The IRS review process is long. It is advisable to send a copy of your application to your congressional or senate representative requesting his/her assistance in expediting your application. This may help to complete the review process in 3 to 6 months rather than 9 months to a year.

Tax-exempt organizations must annually file the Form 990 report of revenue and expenses with the IRS.

Other 501(c) Tax-Exempt Organizations

All not-for-profits are not created equal.

501(c)(3) organizations, on which we have focused most of our discussion, include religious, educational, charitable, scientific, literary, testing for public safety, to foster national or international amateur sports competition, or prevention of cruelty to children or animals organizations. Contributions to these organizations are generally tax deductible. As already discussed, applicants must submit IRS Form 1023.

In addition to 501(c)(3), there are over twenty other types of specific 501(c) entities that are considered tax-exempt under the Internal Revenue Code. While all are exempt from paying taxes on revenue and interest, ***contributions to these other types are not always considered to be tax deductible under IRS guidelines.*** Although some require no application form, most require the submission of IRS Form 1024 to obtain tax-exempt status. All must file an annual return using Form 990 or 990EZ.

A sampling of these types includes 501(c)(4) civic leagues and employee associations; 501(c)(5) labor and agricultural organizations; 501(c)(6) business leagues, chambers of commerce, and real estate boards; and 501(c)(7) social and recreation clubs. Contributions to these organizations are generally NOT allowed as tax deductible.

Certain contributions to other types of non-501(c)(3) organizations ***may*** be considered tax deductible when made for section 501(c)(3) purposes. This may occur in the case of 501(c)(8) fraternal beneficiary societies or 501(c)(10) fraternal associations. Contributions to cemetery associations, classified as 501(c)(13), generally ***are*** considered tax deductible.

Final Words of Advice

As stated earlier, this document is not a comprehensive, detailed guide to forming a not-for-profit corporation. It is intended only to point you in the right direction. Upon reading the information provided by the publications and web sites listed, you will understand why professional legal and/or accounting services are advisable. While the process may appear complicated, it can go smoothly if you plan carefully and pay attention to detail. Remember that the laws regarding incorporation and financial filings are there to protect the public and to protect the credibility of legitimate not-for-profit organizations.

With volunteer organizations, records often get transferred from one individual to another as officers change over the years. Important organization documents are sometimes lost in the process. File these documents in a safe place, as funding applications and grant contracts may require proof of your not-for-profit status or state charities registration.