

Spring Cleaning for your Nonprofit: Dusting Off Your Articles, Bylaws, and Form 1023

Every nonprofit is unique, with its own mission, structure, and history. At the same time, they share certain common characteristics – core governing documents, Form 1023, and an IRS determination letter, to name just a few. These documents typically require significant time and attention during the formation process, but then get left in a dusty corporate notebook (or electronic equivalent) after an organization gets up and running.

Below we have highlighted certain common issues that come up in our conversations with nonprofit clients (in no particular order), with the goal of (1) providing helpful discussion points for your board and key staff; and (2) protecting your organization's reputation and tax-exempt status.¹

I. Articles of Incorporation

- Do the articles of incorporation (the “articles”) have the requisite 501(c)(3) language?
 - A nonprofit corporation submitting Form 1023, *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, is required to include certain essential provisions in its articles of incorporation. Over time, the articles may get amended and restated (and amended again and again). It is imperative that the articles retain the language required by the IRS for 501(c)(3) tax exemption.
 - **Recommendation.** Confirm that the articles of incorporation, as amended and restated over the years, have the requisite language, including (a) a statement that the organization is organized exclusively for 501(c)(3) purposes, (b) limitations on the organization's activities (e.g., no political campaign intervention, insubstantial lobbying (no lobbying if a private foundation!), no private inurement, etc.), and (c) confirmation that the organization's assets will be distributed for 501(c)(3) purposes upon dissolution.
- Are the articles consistent with the bylaws?

- The articles of incorporation can be easy to overlook since they typically don't impact an organization's day-to-day operations. It is worth noting, however, that in the event of a conflict between the articles and bylaws, the articles will prevail.
- **Recommendation.** Review the articles and bylaws side by side to ensure the two documents are consistent when reviewed together.
- How many times have the articles been amended?
 - When reviewing an organization's governing documents, we sometimes receive the articles along with 1, 2, or 3 (or more!) amendments over a period of years. Needless to say, multiple amendments can make the articles difficult to read and understand.
 - **Recommendations.** For many organizations, a "restatement" of the articles of incorporation may be the best approach. This means all of the controlling language is condensed into a single document often called the "restated articles of incorporation" or "amended and restated articles of incorporation" (possibly called something different depending on your state). The amendments remain part of the corporate record, but now the organization has everything in the same document. Restating the articles also is a good opportunity to confirm that the articles and subsequent amendments are internally consistent.
- For 509(a)(3) supporting organizations: Are any updates needed to the articles of incorporation?
 - A supporting organization's articles must state the publicly supported organization(s) on whose behalf the supporting organization is to be operated. The articles of a Type I or II supporting organization may designate its supported organization(s) by class or purpose. The articles of a Type III supporting organization may not.
 - **Recommendation.** Confirm that no updates are needed to your organization's articles of incorporation to comply with the applicable supporting organization requirements. Also, confirm that each of the designated supported organizations continues to be described in Section 509(a)(1) or 509(a)(2) of the Internal Revenue Code of 1986, as amended (the "Code").

II. Bylaws

- Are the bylaws compliant with the applicable nonprofit statute?
 - As an example, an organization incorporated in Illinois is governed by the Illinois General Not-for-Profit Corporation Act (the "Act"). This means the organization's bylaws should be consistent with the requirements of the Act. Most nonprofit statutes cover topics like the authority of the board of

directors and legal members, virtual meetings, permissible committee structures, and action by written consent, to name just a few.

- **Recommendation.** Confirm the bylaws are consistent with the applicable state nonprofit statute. As a best practice, have the bylaws reviewed periodically to confirm the bylaws include any updates to state law and best practices for 501(c)(3) organizations.
- Are the bylaws consistent with the actual practices of the organization?
 - An organization's manner of operating may change over time and the changes may not be consistent with the procedures set forth in the bylaws (e.g., [X] days' notice of a special meeting of the board; duties of officers; committee responsibilities and structure; etc.).
 - **Recommendation.** Sit down with key staff and confirm the bylaws are consistent with the actual practices of the organization.
- Is there a reference to Robert's Rules of Order in the bylaws?
 - If you've laid hands on a complete copy of Robert's Rules of Order, it is long and contains an excruciating amount of detail. Incorporating the Rules by reference could have the unintended effect of requiring your board to comply with dozens and dozens of nuanced rules in addition to the procedures already set forth in your bylaws.
 - **Recommendation.** Unless you have a parliamentarian on your board (and even if you do!), you should give serious thought to amending the bylaws to omit any reference to the Rules.
- Other Best Practices:
 - Review periodically to be sure the bylaws are compliant with any changes in the law and include current best practices for charitable organizations.
 - Consider incorporating staggered terms for directors and term limits, if appropriate.
 - Review the duties of and authority delegated to specific committees. Distinguish between committees with the authority of the board of directors and advisory committees. Confirm committee structure, including all delegated authority, is consistent with any limitations imposed by state law.
 - Consider whether your organization should have an audit, finance, or other committee. Some states, like California, may require nonprofits with gross revenues over a certain threshold to have an audit committee with specific responsibilities.
 - Review and update the description of officer responsibilities.

III. Form 1023, IRS Determination Letter, and Form 990

- Is the public charity status reported in IRS records for your organization consistent with the status reported on Schedule A of the organization's Form 990?
 - There are several reasons why the 501(c)(3) status reported in Schedule A of Form 990 (e.g., 170(b)(1)(A)(vi), 509(a)(2), etc.) may not match IRS records. Regardless, this discrepancy may create confusion with potential donors, the IRS, and other interested parties.
 - **Recommendation.** Consult with your accountant or legal counsel to determine whether the public charity status on Schedule A should be updated and/or whether the organization should seek reclassification of its public charity status (see next bullet).
- Would another 501(c)(3) status be more appropriate?
 - The IRS has established a process for an organization to request reclassification under a different section of the Code. For example, a private foundation initially funded by a single family or company may have developed a meaningful fundraising program. Public charity status now may be a possibility. Or, if your organization struggles with its public support percentage, it might make sense to seek reclassification as a supporting organization.
 - **Recommendation.** Keep in mind that your organization's 501(c)(3) classification likely is not set in stone. Have meaningful conversations with your board, accountant, and/or legal counsel to determine whether a different classification would be more appropriate.
- Has the organization materially changed its activities (or is it planning to do so in the future) from what was previously disclosed to the IRS?
 - An organization is required to notify the IRS if it materially changes its activities from those described in its original Form 1023 exemption application. Whether and how an organization notifies the IRS depends on the nature of the change, whether the change has already occurred, and other factors. For example, an organization (a) may report certain new activities to the IRS on Form 990 (Part III, line 2: "any significant program services during the year which were not listed on the prior Form 990"); or (b) may request a private letter ruling from the IRS if the organization is unsure whether a proposed change in its activities is consistent with its status as an exempt organization.
 - **Recommendation.** Dust off your organization's Form 1023 (if available) and review what was originally disclosed to the IRS. Have the organization's purposes and activities changed substantially since that time? If so, have these changes been disclosed to the IRS? At a minimum, confirm that the organization is not currently engaged in any activity that could jeopardize the organization's tax-exempt status or that could otherwise result in negative tax consequences.

- Do you have evidence that the organization has consistently been filing Form 990 returns?
 - An organization that does not file a Form 990 return for three consecutive years will automatically lose its tax-exempt status. We are seeing an increasing number of organizations that have been auto-revoked by the IRS for failing to file Form 990. The failure often comes about because of a misunderstanding about who is responsible for filing the return and/or due to turnover in the officers and directors. Needless to say, revocation causes a lot of heartache internally and with donors, not to mention time and legal/accounting fees to have the tax exemption reinstated.
 - **Recommendations.** Double-check your records to make sure you have evidence that your Form 990 returns have been filed.
- Has the organization changed its corporate name with the state since receiving its initial IRS determination letter?
 - The initial IRS determination letter will reflect an organization's name as of the date the Form 1023 was filed. If the organization has changed its name with the state, then state records and the IRS determination letter won't match. This discrepancy may create problems for vendors, donors, and others.
 - **Recommendation.** The IRS has a simple (but not quick) process for requesting a new determination letter that reflects the updated corporate name – called an “affirmation letter.” To be clear, an organization is not required to request an affirmation letter after a name change. The original IRS letter will have the organization's EIN, which will remain with the organization for its life cycle.
- When is the last time you reviewed the narratives on Form 990?
 - Your nonprofit is telling a story through its publicly available documents. These are opportunities to share your story and accomplishments with potential donors, the media, and other interested members of the public. Not to mention, the IRS and state regulators review Form 990 and may look at other publicly available information about your organization from time to time.
 - **Recommendation.** Confirm all information on Form 990 is accurate, up to date, and tells a compelling story. Put the narrative disclosures in a word document, turn on track changes, and take a close look.

Polsinelli's Nonprofit Organizations team provides a full range of professional services focused on solving many of the challenges nonprofits encounter. Please don't hesitate to reach out to [Jacob Zerkle](#), [Lisa Schultes](#), or your Polsinelli attorney if you have questions about your organization's governing documents or tax-exempt status or need assistance with any of the issues raised in this article.

[1] For simplicity, this article primarily focuses on (A) nonprofit corporations, instead of trusts; (B) organizations described in Section 501(c)(3), instead of Section 501(c)(4), Section 501(c)(6), or others; and (C) public charities, instead of private foundations.