

FORM 1023 WORKSHOP

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Information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein.

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SELECTED PRESENTATIONS, COURSES AND PUBLICATIONS

Author and Presenter, *Tomayto, Tomahto – There Really Is a Difference: Comparing Private Foundations and Donor Advised Funds*, presented to the State Bar of Texas 27th Annual Estate Planning & Probate Drafting Course, October 6, 2016.

Author and Co-Presenter, *Gifts from Cousin Eddie: Acceptance, Ownership & Management of Bizarre Assets*, presented to the Planned Giving Council of Central Texas, April 11, 2016.

Author and Presenter, *Advising Donors and Managing Gifts of Oil, Gas and Mineral Interests*, presented to the Partnership for Philanthropic Planning Lone Star Council, February 23, 2016.

Author and Presenter, *Things They Didn't Teach You in Law School: Practical Considerations for the Initial Client Conference*, presented to the 2015 Tarrant County Probate Bar Association Nuts and Bolts Seminar, September 18, 2015.

Author, *Self-Dealing Pitfalls and Strategic Solutions – Part I: Problems Related to Compensation and Shared-Cost Arrangements and Self-Dealing Pitfalls and Strategic Solutions – Part II: Problems Related to Estate Administration, Facility Use, Sale/Provision of Goods, Debt Assumption, and Controlled Entities*, published in Family Foundation Advisor, Vol. 14, Nos. 5 & 6, 2015.

Author, *It's Tea Time – "Texas Tea" Time: Advising Donors and Managing Gifts of Oil, Gas and Mineral Interests*, published in the Texas Tech University School of Law Estate Planning & Community Property Law Journal, Vol. 7, Book 1, Fall 2014. Presented to the State Bar of Texas 12th Annual Governance of Nonprofit Organizations Conference, August 22, 2014.

Author, *Gifts From Cousin Eddie: Foundation Acceptance, Ownership & Management of Bizarre Assets*, presented to The University of Texas School of Law 32nd Annual Nonprofit Organizations Institute, January 15-16, 2015; presented to the SALK Institute, 42nd Annual Tax and Management Seminar for Private Foundations, May 14-16, 2014.

Author, *Resolving Trustee Disputes: Foundation Split-Ups and Other Approaches*, presented to The University of Texas School of Law-Conference of Southwest Foundations 31st Annual Nonprofit Organizations Institute, January 15-17, 2014; published in Family Foundation Advisor, Vol. 12, No. 5, 6 and 7, 2013. Presented to the State Bar of Texas 11th Annual Governance of Nonprofit Organizations, August 22-23, 2013. Presented to the SALK Institute, 41st Annual Tax Seminar for Private Foundations, May 15-17, 2013.

Author, *Roundtable Discussion: Charitable Giving With Oil and Gas Interests*, presented to The American College of Trust and Estate Counsel 2013 Fall Meeting, October 24-27, 2013.

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I. FORM 1023 BASIC REQUIREMENTS

A. Eligibility for Exemption Under Section 501(c)(3)

Organizations that are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals are eligible to file Form 1023 for exemption from federal income tax under I.R.C. § 501(c)(3). Form 1023 is not necessary for churches, integrated auxiliaries of churches and conventions or associations of churches, or an organization with gross receipts in each taxable year of no more than \$5,000. See Jody Blazek's "Tools for Vigilant Service to Nonprofit Organizations" presented to the State Bar of Texas 14th Annual Governance of Nonprofit Organizations Course for an excellent resource, the Suitability Checklist, which will help the organization in determining whether it can *and should* file for exempt status under 501(c)(3).

B. Application for Recognition of Exemption Under Section 501(c)(3)

I.R.C. § 508(a)(1) provides that an organization organized after October 9, 1969 generally will not be treated as exempt under I.R.C. § 501(c)(3) until it notifies the Internal Revenue Service that it seeks recognition of exemption under that section. If the required notice is filed late, the exempt status, if granted, will not be retroactive and will not apply to any period prior to date of such filing.

1. **Form of Notice:** The proper Notice is provided on Form 1023 – Application for Recognition of Exemption Under § 501(c)(3) of the Internal Revenue Code.
2. **Time of and Place for Filing Notice:** The Form 1023 must be filed with the Ohio District Office (Covington, Kentucky) within **27 months from the end of the month of its organization**, which is the date it becomes an organization described in I.R.C. § 501(c)(3). Treas. Regs. § 1.508-1(a)(2)(i), (iii). If the organization fails to file Form 1023 or files late, it will not be treated as exempt for any period prior to the filing of the notice. Treas. Regs. § 1.508-1(a)(1)(i); Rev. Rul. 77-207, 1977-1 C.B. 152. Form 1023 addresses this timing requirement in two places: Part I, line 11 asks for the date of incorporation/formation (which must be consistent with the organization's certification of filing that must be attached) and Part VII, question 2 specifically asks whether this timing requirement is met; if not, Schedule E will have to be completed and attached.
3. **Substantially Complete Filing:** A substantially completed filing begins the running of the 270-day period in which the key District Director must rule on the application. (See discussion below as to "substantially complete" Form 1023.)
 - a. **Incomplete Submission:** If an organization submits an incomplete Form 1023 within the required time period for filing, and files such additional information as the Internal Service may request within the additional time period set by the Internal Revenue Service, even though beyond the 27-month filing deadline, the organization is deemed to have met the requirements of I.R.C. § 508(a). Treas. Regs. § 1.508-1(a)(2)(ii).
 - b. **Requirement to Make Substantial Changes to Articles:** If the organization is required to alter its activities or to make substantial amendments to its articles of organization, the ruling or determination letter recognizing exemption will be effective as of the date of the change.
 - c. **Nonsubstantive Changes:** If non-substantive amendments are required to be made to the articles of organization, the exemption is normally recognized retroactively to the date of formation. Rev. Proc. 90-27, 1990-1 C.B. 514.
 - d. **District Director's Failure to Rule Within 270 day period:** If a ruling is not issued by the key District Director within the 270 day period, the organization can seek a declaratory judgment.

e. Substantially Complete Form 1023: A substantially complete Form 1023 contains the following:

- i) The signature of an authorized individual;
- ii) The organization's employer identification number;
- iii) Statement of receipt and expenditures and a balance sheet for the current year and the three preceding years (or for the number of years of the organization's existence, if less than four years). [Note: If the organization has not yet commenced operations or completed one accounting period, financial data for the current year and proposed budgets for the two succeeding accounting periods are sufficient.]
- iv) Statement of actual and proposed activities, Treas. Regs. § 1.501(a)-1(b)(2)(iii), and a description of anticipated receipts and contemplated expenditures.
- v) A copy of the Articles of Organization, trust indenture or other organizational or enabling document signed by a principal officer or accompanied by a written declaration signed by an authorized individual certifying that the document is a complete and accurate copy of the original. Any articles of organization must indicate compliance with any applicable local recording statute.
- vi) If the organization is a corporation or unincorporated association which has adopted bylaws, a current copy thereof;
- vii) User fee payment for determination letter request: a check made payable to the United States Department of Treasury in payment of the user fee applicable to the organization. Rev. Proc. 93-23, 1193-1 C.B. 538, § 6.12 sets the user fee at \$850.00 for initial applications for exempt status for organizations seeking exemption under I.R.C. § 501(c) whose actual or anticipated annual gross receipts exceed \$10,000. Applications for exempt status (other than pension and profit sharing plans) that have had annual gross receipts averaging not more than \$10,000 during the preceding four years, or new organizations anticipating gross receipt averaging not more than \$10,000 during their first four years must pay a user fee of \$350.00. If the organization does not include the correct user fee with the application, the application will be returned.

The Internal Revenue Service often requests additional information from the organization seeking exempt status. An organization must timely and completely furnish any additional information requested or subject itself to dismissal of its petition for declaratory relief for failure to exhaust its administrative remedies. Rev. Proc. 90-27, 1990-1 C.B. 514.

C. Local Applications

Although this session does not cover local applications, you should note that application should also be made to state and local taxing authorities for exemption from franchise taxes, real and personal property taxes, rent taxes and sales taxes, after receiving the federal exemption determination letter.

Application should be made to the Texas Comptroller of Public Accounts for exemption from the Texas franchise tax based on the foundation's status as a I.R.C. § 501(c)(3) organization. The application is available on the Comptroller's website (<http://www.window.state.tx.us/>). Publication 96-1045, Guidelines to Texas Tax Exemptions, available on the website of the Texas Comptroller, provides detailed information as well as statutory references with respect to tax exemptions along with links to the appropriate application forms.

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