

INCORPORATION AND TAX EXEMPTION FOR
NEW HAMPSHIRE ARTS AND OTHER NONPROFIT
ORGANIZATIONS: AN INTRODUCTORY GUIDE

The New Hampshire Business Committee for the Arts was formed in 1985 to educate, motivate and recognize business support of and participation in the arts. It has over 70 dues paying members and operates a variety of programs and projects to encourage and involve businesses in the arts.

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The expertise, professionalism and dedication of these attorneys is valued and appreciated.

PREFACE

The New Hampshire Business Committee for the Arts was formed in 1985 to educate, motivate and recognize business support of and participation in the arts, published *Incorporation and Tax Exemption for New Hampshire Arts and Other Nonprofit Organizations: An Introductory Guide* in response to the many requests for information it received from those seeking guidance in forming a nonprofit arts organization. The Guide was first printed in 1989 and revised in 1992, 2002, and 2012.

The Guide is intended to provide an overview of the incorporation process including sample forms, expected fees, and contact information. Although some of the specific references are to arts organizations, the Guide has general application, and has been used by several thousand groups with an interest in incorporating as a New Hampshire voluntary corporation and in applying for federal tax-exempt status.

The Guide is intended as an aid in creating a tax-exempt, nonprofit corporation in the state of New Hampshire. The material contained in this Guide is intended only as a guide and does not purport to provide definitive answers or all-inclusive samples. WE MAKE NO WARRANTY, EXPRESSED OR IMPLIED, as to whether the materials herein are complete, up-to-date or otherwise. Independent research and verification of all material herein is essential. These materials should be used only as a starting point, not a finished product. Any local authority referred to herein should be checked to determine whether or not it has been reversed, distinguished or amended. Legal counsel should be considered for the purposes of actual incorporation and application for tax exemption.

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I. INTRODUCTION

A. Overview

A tax-exempt organization is a unique entity. It combines many of the formalities of a for-profit corporate entity with a worthy cause and heightened organizational, operating and reporting requirements. Tax-exempt entities begin as nonprofit organizations formed under state law. Most of the laws that pertain to the concept and creation of a nonprofit organization originate at the state level, while most laws concerning the tax exemption are generated at the federal level. A nonprofit organization is not necessarily a tax-exempt organization. To be exempt, a nonprofit organization must meet certain criteria set forth by federal law and must apply for exempt status.

The policies and goals of state and federal laws governing nonprofit, tax-exempt organizations are meant to encourage and foster a system to assist such organizations in becoming economically viable and to best serve the purposes for which they were formed. These laws, however, are also structured to prevent nonprofit, tax-exempt organizations from unfairly competing with for-profit businesses by limiting the privileges and advantages of nonprofit status and tax exemption to organizations that deserve it. These competing goals have resulted in what may appear to be a complicated and somewhat intimidating set of restrictions, legal requirements and procedures for achieving this desired status.

Organizations devoted to promotion of the arts may qualify for tax exemption as educational and charitable entities. In order to assist nonprofit arts organizations with getting started, this Guide provides a summary of the various requirements and procedures of incorporating a nonprofit organization and achieving tax-exempt status. In the Appendix, the authors have provided samples of some of the documents discussed in this Guide. The intention of

the authors is only to provide an overview of the procedures and responsibilities involved in creating a tax-exempt, nonprofit corporation as a charitable organization in the State of New Hampshire. Tax-exemption is also available for certain nonprofit corporations which are not charitable in nature (e.g. a chamber of commerce), however, a discussion of those organizations is beyond the scope of this Guide. Accordingly, references to tax-exempt, nonprofit corporations in this Guide are intended to refer to organizations which have a charitable purpose. The Guide is not intended as a substitute for experienced legal counsel. The authors strongly urge that legal counsel be retained for the purposes of incorporation of a nonprofit organization and applying for tax exempt status.

B. Why Incorporate

Forming a New Hampshire voluntary corporation is generally the first step in the process of organizing a tax exempt organization. Limitation of liability is an important consideration when establishing a nonprofit, tax-exempt organization. State law permits voluntary corporations to eliminate or limit the personal liability of directors and officers to the corporation for monetary damages for breach of fiduciary duty as a director or officer, except for a breach of the duty of loyalty to the corporation or its shareholders, acts or omissions which are not in good faith or which involve intentional misconduct or a knowing violation of law, and transactions from which the director or officer derived an improper personal benefit. Including a provision in the organization's Articles of Agreement which limits the liability of directors may be important when trying to recruit individuals to serve as directors of the organization.

Alternatives to the often time-consuming and sometimes expensive nonprofit incorporation and tax exemption application process exist, however, and may be appropriate for some small to medium sized organizations. One such alternative involves having a third party

(itself a tax-exempt organization) provide grant administration services for the organization. This third party retains the ultimate responsibility for the administration of the grant and bears the burden of federal reporting requirements. At the same time, the practical administration of the funds can remain with the supported organization. However, this fiscal agent relationship has legal and administrative implications, and therefore legal advice should be obtained by the parties prior to final approval of any agreement.

For larger organizations seeking complete autonomy, this "short form" alternative is often unsatisfactory. A third party grant administrator has preemptive legal rights subjecting the supported organization's expenditures of grant money to the approval and control of the third party grant administrator. The third party grant administrator arrangement is often most appropriate in cases where a start-up organization does not have a track record and wishes either to test its cohesiveness and viability prior to incorporation, or has only a single project which it wishes to carry out. Typical third-party organizations, which may be willing to perform the grant administration function, include churches, schools and other nonprofit, tax-exempt organizations such as the New Hampshire Charitable Foundation (<http://www.nhcf.org/>). In some cases, local governmental bodies may be able to accept and administer grants as well.

A second and less common alternative is to create a formal association (rather than forming a corporation). This alternative is more complex than simple third party grant administration, but avoids some of the initial and continuing legal requirements applicable to corporations. Although the Code¹ grants tax exemption to any nonprofit "corporation," it is not necessary to obtain state law voluntary (i.e. nonprofit) corporate status prior to obtaining federal income tax-exempt status because the Code's broad definition of "corporation"

¹ All references in this Guide to "the Code" or to Code sections are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

includes virtually all unincorporated charitable associations. However, only a corporation can offer incorporators the benefits of limited liability, which is often a deal breaker for using an unincorporated association.

Most organizations, whether incorporated or not, should consider purchasing liability insurance to protect their officers, directors and members or stockholders, as well as the organization itself. This liability insurance, however, will not provide protection from liability in every circumstance. For example, such insurance does not protect members, officers and directors from personal liability for claims based on breach of contract. Further, directors and officers of unincorporated nonprofit organizations may be held liable for injuries to the organization itself. Lastly, directors who unwisely adopt investment policies committing funds to their own outside interests can be held liable for restoration of the assets.

C. Why Seek Tax Exemption

There are many advantages to seeking tax-exempt status as a nonprofit corporation. The three most important advantages are tax-related. First, a nonprofit, tax-exempt organization's income (other than income from an unrelated trade or business) is exempt from federal income tax. Second, the organization is eligible to receive grants from both public and private organizations (including private foundations, which are discussed later). Third, individuals and business entities may deduct contributions to such organizations from their federal income tax. These benefits are meant to provide nonprofit, tax-exempt organizations with a substantial advantage in raising funds from the public and private sector.

Other advantages of nonprofit incorporation and tax-exempt status include eligibility for preferential postage rates, employment tax advantages, and possible exemption from certain state property and sales taxes and federal excise taxes.

The disadvantages, to qualifying as a tax-exempt organization include (1) strict

organizational, operating and reporting requirements, (2) lack of individual control and (3) restrictions on the organization's activities. First, organizations must operate in a manner that avoids "private inurement," meaning no part of the organization's assets can be used to benefit an individual, apart from the organization's purpose. The application and reporting requirements are geared toward ensuring that there is no private inurement. Second, it is important to understand that a tax-exempt nonprofit organization is operated by its directors, not by any one individual. It is possible that the person responsible for founding the organization will not be elected or re-elected as an officer or director of the organization. This comes with the territory of becoming a tax-exempt nonprofit organization. Lastly, the organization will be prohibited from certain lobbying activities and limited in the amount of business activities it may conduct which are unrelated to its purpose.

II. THE NEW HAMPSHIRE INCORPORATION PROCESS

Organizations seeking tax-exempt status have several good reasons to incorporate. As noted above, since a corporation is a legal entity separate from those who control it, incorporating helps limit the liability of individuals involved with the organization. Additionally, corporations generally have greater ease of obtaining needed capital, credit and insurance.

It is important to note that incorporating also has disadvantages. There are legal costs and fees involved in establishing a corporate structure. Additionally, corporations must follow certain formalities involving time and expense, including adopting bylaws, electing officers, holding annual meetings, and adopting corporate resolutions.

If an organization determines that the advantages of incorporation outweigh the disadvantages, an organization wishing to form a nonprofit corporation in New Hampshire should incorporate as a voluntary corporation under Chapter 292 of the N.H. Revised Statutes

Annotated ("RSA"). There are four basic steps involved with this incorporation process:

(1) selecting a corporate name, (2) providing for management of the corporation (3) filing the incorporation document, and (4) ongoing post-incorporation responsibilities.

A. Selection of Corporate Name

The first step is to select a corporate name. Unlike corporations organized for profit, a nonprofit corporation need not include words or abbreviations like "Corporation" or "Inc." in its name. The only legal limitation is that the name selected may not be too similar to any name in use by another organization. An organization should consider selecting a name that informs people about the work or purpose of the organization and it may be wise to use words like "a nonprofit corporation" on the organization's website and stationery to emphasize its corporate status.

To determine if a name is already in use, an organization may contact the Secretary of State, Corporate Division (603-271-3246) or may search the state's corporate records at <https://www.sos.nh.gov/corporate/soskb/csearch.asp>. Unfortunately, nonprofit corporations are not allowed to reserve a name prior to filing incorporation papers. Other types of entities have this option, but there is no provision in the voluntary corporation statute to authorize a name reservation for nonprofit corporations. Accordingly, once a name is selected, the organizers should move through step two as quickly as possible to file the Articles of Agreement with the New Hampshire Secretary of State.

B. Incorporation Documents

The second step to incorporation is to draft Articles of Agreement for the organization that define and limit the organization's purposes. The New Hampshire Secretary of State issues a sample form of Articles of Agreement, however, a corporation seeking

federal tax-exempt status should be careful using this form. The form includes provisions necessary for an organization to qualify as a voluntary corporation under State law, however, the form does not address provisions necessary to qualify as a tax-exempt organization under Section 501(c)(3) of the Code. A corporation's Articles of Agreement must not only meet state incorporation requirements, but must also meet requirements for federal tax-exempt status. Sample Articles of Agreement are set forth in **Appendix A** which illustrates the basic requirements of both bodies of law. The Articles of Agreement do not purport to be the ideal Articles of Agreement for every nonprofit, tax-exempt organization but are meant as a basic example.

One important distinction that must be specified in the Articles of Agreement is whether or not the nonprofit organization will have members. Members of a nonprofit organization act in some ways similar to shareholders in a corporation; they typically elect and remove directors and vote on significant actions such as amending the organization's bylaws. Members are not required by State law and thus an organization should consider whether having members makes sense based on the organization's structure and purpose. For example, an organization that is likely to have a large and/or constantly changing group of interested individuals may want to avoid the administrative difficulty of keeping track of members and organizing necessary votes, whereas an organization with a small, dedicated and steady group of individuals may find having members useful. If the organization chooses not to have members, all actions that would otherwise be taken by members may instead be taken by the organization's board of directors.

It is important to note that every organization incorporating under RSA 292 that is a "private foundation" as defined in Section 509(a) of the Code is also subject to certain limits on

its powers, whether or not those limits are set forth in the Articles of Agreement. Those limits involve highly technical tax matters which are briefly discussed in the Federal and State Tax Considerations section of this Guide.

Once the organization's Articles of Agreement are complete, you must file them with the New Hampshire Secretary of State, as follows:

1. Submit the original Articles of Agreement, signed by the incorporators, along with a check for \$25 (fee subject to change) payable to the “State of New Hampshire,” to the New Hampshire Secretary of State, Corporation Division, 107 North Main Street, Concord, New Hampshire 03301.
2. Submit a copy of the filed Articles of Agreement to the Clerk of the town or city in which the mailing address of the corporation is located, along with a check for \$5 as the filing fee.

C. Providing for Corporate Management

1. Board of Directors

RSA 292:6-a requires that a voluntary corporation's incorporators and board consist of at least five (5) voting members, who are not of the same immediate family or related by blood or marriage. An employee of the corporation may not hold the position of chairperson or presiding officer of the board. These rules are in place to encourage diversity and connection with the public and to promote public confidence in the board's decisions. These rules are not applicable to organizations classified as Private Foundations under the Code.

2. Bylaws

A nonprofit corporation must adopt bylaws to provide rules for structuring and operating the corporation. Bylaws typically contain provisions for the regulation and

management of the corporation, including the responsibilities of the Board of Directors and Officers, provisions for membership (if any), meetings, and election and removal procedures. The bylaws must be adopted by a two-thirds (2/3) majority of the signers of the Articles of Agreement. The power to alter, amend or repeal the bylaws or to adopt new bylaws is vested in the board of directors unless reserved to the members by the Articles of Agreement.

Sample bylaws are provided in **Appendix B** and illustrate only one potential method of corporate governance. The sample bylaws presume that the corporation will not issue stock. Otherwise, the bylaws should contain rules for stockholder meetings, stockholder rights to vote, and stockholder power to elect directors and officers.

In addition to adopting bylaws and electing officers and directors, the corporation should maintain a corporate record book containing important documents including incorporation documents, bylaws, annual reports, and minutes of its proceedings. The corporate record book should reside either at its office, with an advisor or with the secretary of the corporation.

D. Post-Incorporation Responsibilities

After incorporation, the corporation has several legal responsibilities. The corporation must file an Application for Registration with the Charitable Trusts Unit of the N.H. Attorney General's Office on Form NHCT-1, along with a check payable to the State of New Hampshire for \$25.00 for the filing fee. This form should be filed before the corporation accepts any funds from donors. The Charitable Trusts Unit also requires a copy of the corporation's federal annual report and if the corporation is not required to file federally, it must file Form NHCT-2A instead.

Nonprofit corporations must also file a renewal return with the Secretary of State, Corporate Division, which will be mailed to the corporation's address every five years (the next

renewal is in 2015). The fee is \$25 (fee subject to change). If the corporation fails to file, then it will be dissolved.

In order to change the corporation's name or other items in the corporation's Articles of Agreement, the corporation must file an Affidavit of Amendment with the Secretary of State and must send a copy of the filed amendment to the office of the town or city clerk in which the mailing address of the corporation is located. The fee for filing with the Secretary of State is \$25 (fee subject to change) and the fee to the town or city clerk is \$5 (fee subject to change).

If the corporation ceases to do business, then it must file a statement of dissolution with the Secretary of State, which provides that at least two-thirds of the members voted for dissolution, includes a copy of the vote to dissolve and sets forth a plan for distribution of the corporation's assets and satisfaction of its obligations in accordance with its Articles and bylaws. If the organization does not have members, the statement and vote must provide that at least two-thirds of the directors of the organization voted for dissolution. The treasurer and a majority of the directors must sign the dissolution statement and a copy must also be filed with the town or city clerk.

E. Duties and Liabilities of Directors of Nonprofit Organizations

Directors and Officers have legal duties and responsibilities for the management and oversight of the organization which include the duties of care and loyalty.

1. Duty of Care

The duty of care requires a director to act in good faith and in a manner that the director reasonably believes is in the best interest of the organization.

a. Ordinary Prudence. A director must discharge his or her duties with the care of an ordinarily prudent person in a like position under similar circumstances. Ordinary prudence requires the director to act in accordance with the following:

(1) Sound Judgment, Common Sense, and Informed Decisions. A director is expected to possess and exercise sound and independent judgment in reviewing the affairs of the organization. A director should discharge his or her duties with common sense and in a manner the director believes to be in the organization's best interests. A director must take into account the organization's nature, operations, finances and objectives. This does not mean that the director must guarantee the ultimate success of his or her conclusions or act only with excessive caution, nor should it discourage a director from taking innovative and informed risks. As long as a decision is rational, informed, and involves no conflict of interest or unreasonable risk, then a director should be insulated from liability.

(2) Diligence and Attentiveness. A director must be diligent and attentive in discharging his or her duties and should be willing to spend sufficient time to become reasonably acquainted with the organization's affairs. A director must attend Board and committee meetings and read materials provided to him or her in advance of these meetings so that he or she can meaningfully participate in all decisions. In sum, it is incumbent upon a director to be actively involved in all Board matters.

(3) Reasonable Inquiry. It is the director's responsibility to ensure that the information upon which he or she bases decisions is adequate and reliable. Thus, the duty of care encompasses an obligation of reasonable inquiry. A director cannot avoid liability by claiming ignorance if the circumstances are such that the director knew or should have known certain facts.

(4) Circumstances Dictate Degree of Care Required. The standard of care required will vary depending on the circumstances. Factors to be considered include:

- the organization's size and complexity, as well as its unique goals;
- the resources and information available at the time the decision was made, and any special knowledge of the director; and
- the urgency of the decision and the potential risks and rewards associated with the decision.

As a general rule, the Board should strive to attain a balance between minimizing risks and effectively using the organization's resources.

b. Selection and Retention of Competent Management. In order to fulfill one's duty as a director, he or she must rely on others. The Board will not be held responsible for the acts and omissions of those to whom authority is vested as long as the Board did not and should not have known that those individuals were not acting responsibly or in compliance with the law.

(1) Reasonable Reliance. A director must act on the basis of informed judgment. A director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared and provided by (1) officers or employees of the organization, if the director reasonably believes they are reliable and competent in the matters presented; (2) legal counsel, certified public accountants, financial professionals or other individuals, if the director reasonably believes they are addressing matters within their professional expertise; and (3) a Board committee, if the director reasonably believes that its report or conclusions merit confidence. Questions should be asked if a report or conclusion seems incorrect or inadequate, but a director is not required to personally exhaust every possible source of information before relying on the opinions of others.

(2) Ongoing Review. One way to ensure that management and Board committees are acting responsibly, in compliance with the law and consistent with the goals of the organization is by implementing policies and procedures for review of their actions. These policies and procedures should be designed to ensure that the Board will be promptly and fully apprised of any issues confronting the organization.

(3) Circumstances Should be Considered. Circumstances will dictate the propriety of the delegation of duties and the degree of reliance on others. For example, it may be appropriate to delegate authority where the underlying matter is of relatively insignificant consequence to the organization.

2. Duty of Loyalty

The duty of loyalty means that a director must always act in the best interests of and maintain an undivided loyalty to the organization.

a. Avoid Appearance of Impropriety. The best policy is to avoid any transaction which would even suggest the appearance of preferential treatment or usurpation of the organization's opportunity.

b. Full Disclosure. If a situation arises where a director's absolute and unconditional loyalty to the organization might be questioned, that director should make full and complete disclosure to the entire Board and excuse himself or herself from all deliberations on that topic after answering any questions the Board may have about the potential conflict. The remaining disinterested Board members may approve the transaction or contract after a thorough and independent review and a determination that it is in the organization's best interests.

3. How to Avoid Conflicts of Interest

a. Composition of the Board. The Board should be comprised of individuals who are financially disinterested. Both "insiders" (those who are involved in the daily management of the organization) and "outsiders" (those who are unaffiliated with the organization) should be asked to sit on the Board. In addition, a Board may want to consider staggering the terms of its members to provide continuity of leadership.

b. Conflict of Interest Policies. The Board is required to adopt a conflict of interest policy which sets forth a specific procedure for addressing potential conflicts of interests. A sample conflict of interest policy is provided for in the sample bylaws found in **Appendix B**. A disclosure form designed to elicit information regarding potential conflicts may also be created and used as a prerequisite to membership on a Board.

c. Pecuniary Benefit Transactions

New Hampshire has adopted laws that govern "pecuniary benefit transactions," which are transactions made by an organization in which an officer or director of the organization has an interest, whether direct or indirect. There are limited exceptions to the definition of "pecuniary benefit transaction" which are contained in RSA 7:19-a, I(c). A pecuniary benefit transaction is prohibited unless it is in the best interests of the organization and unless all statutory conditions are met, including (1) the transaction being for goods or services purchased or benefits provided in the ordinary course of business of the organization, for the actual or reasonable value of the goods or at a discount, (2) the transaction is fair to the organization, and (3) the transaction receives the affirmative vote of at least a two-thirds majority of all disinterested directors, meeting any quorum requirements, after full and fair disclosure of the material facts of the transaction to the governing board, full discussion of the transaction without participation, presence or vote of any director with a financial interest in the transaction or who has had a pecuniary benefit transaction with the organization in the same fiscal year, and a record of the action on the matter being created and recorded in the minutes of the Board. The organization's Conflict of Interests policy should set forth the procedure for addressing any potential pecuniary benefit transactions in a manner consistent with RSA 7:19-a and other relevant provisions.

III. FEDERAL AND STATE TAX CONSIDERATIONS

A. Introduction

Nonprofit organizations may be exempt from federal, state and local taxes; the most significant being federal income tax. If a nonprofit organization obtains tax-exempt status, it is exempt from federal income tax, which ranges from 15% to 35% (as of December 31, 2011) of the organization's otherwise taxable income, and it is also eligible to receive tax-deductible

contributions from its supporters. Tax-exempt status also means that the organization is exempt from New Hampshire business profits tax (the "BPT") as well as other State taxes. With these significant tax advantages in mind, the next section of the Guide will outline the legal requirements that must be met to achieve and maintain tax-exempt status.

B. Obtaining Federal Tax-exempt Status

1. The Law

a. Organizational Purpose

The policy behind federal tax exemption is to encourage the growth of various organizations that promote the public's general welfare. Section 501(c)(3) of the Code represents the largest category of tax-exempt organizations, and most arts organizations fall under this section. The IRS defines a 501(c)(3) organization as:

Corporations, or any community chest, fund or foundation, *organized and operated exclusively for* religious, *charitable*, scientific, testing for public safety, literacy *or educational purposes*, or to foster national or international amateur sport competition. . . or for the prevention of cruelty to children or animals. . . . (emphasis added).

The IRS has acknowledged that organizations devoted to the promotion of the arts may qualify as being "educational" and/or "charitable" in nature. An organization is considered "educational" under Treasury Regulation Section 1.501(c)(3)-1 if it is organized to instruct or train the individual for the purpose of improving or developing his or her capabilities or if is organized to instruct the public on subjects useful to the individual and beneficial to the community. For example, an organization may educate individuals and the public in the arts through publications, lectures, performances, exhibitions and other such mediums. Encouragement and promotion of public understanding of art as well as encouragement of the development of artistic talent are considered to be educational purposes.

Organizations may also fall within the broad definition of having a "charitable" purpose if it conducts activities for the benefit of the general public at large which are focused on the advancement of education in the arts. It is important to note, however, that not only must an arts organization be "organized" consistent with these principles by virtue of its Articles of Agreement, but the organization must also be "operated" consistent with those principles. It is possible for the Internal Revenue Service to revoke an organization's tax-exempt status even if the organization is organized for an exempt purpose if the organization is not being operated appropriately.

To operate for "educational" or "charitable" purposes, the organization's activities must not be directed to advance the individual interests of insiders in the organization or particular artists, but rather must benefit a sufficiently broad segment of the public. For example, an art exhibition in which ninety percent (90%) of all proceeds were merely turned over to the small number of individual artists on display was determined not to serve the general public, and, therefore, not deemed tax-exempt.

The Articles of Agreement provide the best starting point to ensure that an organization will have an "educational" and/or "charitable" purpose as required by Section 501(c)(3). In the sample Articles of Agreement, Article II sets forth a broad general purpose. The more expansive the purpose is within an educational field, generally, the better off the organization will be. The organization will then also have greater flexibility within which to operate.

In addition to the organization's affirmatively stated purposes, an organization must not allow:

1. the distribution of assets for a purpose other than an exempt purpose within the meaning of Section 501(c)(3) upon the organization's dissolution;
2. any part of the net earnings of the organization to inure to the benefit of any private shareholder or individual;
3. any substantial part of the organization's activities to consist of carrying on

- propaganda or otherwise attempting to influence legislation;
4. participation in or intervention in (including the publishing or distributing of statements) any political campaign on behalf of, or in opposition to, any candidate for public office; and
 5. discrimination with respect to race, national origin, religion, color or sex in relation to the services provided by the organization.

The sample Articles of Agreement provide language which complies with these legal requirements.

b. Public Charities versus Private Foundations

Section 501(c)(3) organizations are divided into two subgroups: public charities and private foundations. An organization which qualifies as a 501(c)(3) exempt organization must also meet the requirements of Section 509 to be treated as a public charity. Because private foundations are subject to greater tax liability and stricter IRS requirements, most organizations seek public charity status.

(1) Public Charities

In short, there are four types of organizations that qualify as a public charity under Section 509: (1) organizations conducting certain specified favored activities, such as a church, or those that receive a "substantial part" of their support from the general public or governmental entities; (2) organizations normally receiving more than one-third of their support in each taxable year from a combination of gifts, grants, contributions, membership fees, gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities (in an activity which is not an unrelated trade or business), provided the organization does not normally receive more than one-third of its support in each taxable year from gross investment income and after-tax unrelated business income; (3) organizations closely associated with other public charities; and (4) organizations organized and operated exclusively for public safety.

A majority of organizations seeking exempt status will qualify by using the "public support tests" under 509(a)(2). The "substantial part test" under 509(a)(1) is also a popular alternative. Under Section 509(a)(2), an organization must meet two financial tests - frequently referred to as the "two one-third tests." The first one-third test is met if more than one-third of an organization's support normally comes from gifts, grants, contributions, membership fees, and/or gross receipts from admissions. The second one-third test is met if less than one-third of an organization's total support comes from investment income and unrelated business income.

If an organization seeks exemption under the 509(a)(1) "substantial part test," the organization must demonstrate that it receives a "substantial part" (generally more than one-third) of its income from the government and public contributions.

Section 509(a)(3) provides a third, less frequently used method to qualify as a public charity. If an organization is operated exclusively for the benefit of, or to carry out the functions or purposes of, one or more public charities, and is operated, supervised or controlled by another public charity, then the organization itself will be classified as a public charity.

(2) Private Foundations

Private foundations are classified by Congress as organizations which are either self-sustaining or being sustained by a few individuals. Congress has imposed significant operating restrictions on private foundations to ensure that private foundations are operated for an exempt purpose and to safeguard against abuse. These restrictions include:

1. a 1-2% excise tax on investment income.
2. an excise tax on: (a) various acts of self-dealing between an organization and "disqualified persons," (b) failure to distribute a minimum amount of funds annually, (c) improper business

- holdings, (d) improper investments, and (e) improper expenses;
3. a tax upon termination of the organization; and
 4. a stricter limitation on the amount of the charitable deduction permitted for a contribution to the organization.²

2. The Application Process

To be recognized by the IRS as a Section 501(c)(3) tax-exempt organization, the organization must apply to the IRS for recognition.³ The organization can apply by filing IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (the “IRS Form 1023”). The form is updated, revised and sometimes may even be completely overhauled by the IRS, which was last done in 2006, so it is important to check with the IRS to make sure you are using the correct form. Forms are available on the IRS’ website at: <http://www.irs.gov>. The IRS Form 1023 must be filed within twenty-seven (27) months from the date of incorporation. If the organization files within the twenty-seven (27) month period, then the tax-exempt status of the organization, if granted, will relate back to the date of incorporation. If the IRS Form 1023 is submitted after the twenty-seven (27) month period, then tax-exempt status only applies prospectively from the date the Form 1023 was filed. IRS Form 1023 is only considered filed when it is complete, so it is advisable to begin the application process as early as possible after incorporation.

A user fee of \$850 must accompany the IRS Form 1023 unless you anticipate that the organization’s average annual gross receipts over the first four (4) years of operation will be \$10,000 or less. In that case, the user fee is only \$400. The amount of the user fee changes

² In general, individuals are allowed to deduct amounts donated to public charities up to 50% of their adjusted gross income, whereas they are allowed to deduct only up to 30% of their adjusted gross income for amounts donated to private foundations.

³ There are exceptions however, for example, under Section 508(c)(1)(B), an organization which is a public charity with annual gross receipts of \$5,000 or less does not need to file an application with the IRS if it otherwise qualified. However, so that contributors can be assured of an income tax deduction for their contributions, filing an application for recognition of exemption should strongly be considered.

from time to time and the current form 1023 should be consulted at the time of filing to determine the current user fee.

A considerable amount of information is furnished to the IRS on the IRS Form 1023. For example, the IRS Form 1023 inquires about the following:

- Information identifying the charitable organization;
- Specific information about the charitable organization's corporate form and conformed copies of the organization's formation documents and bylaws;
- A description of the charitable organization's sources of support and of its fundraising activities;
- A detailed description of the charitable organization's past, present and proposed activities and purposes;
- Information concerning the officers and directors, their compensation, duties, and qualifications and the details of any other direct or indirect dealings they may have with the organization; and
- Financial statements and projections.

The information supplied on the IRS Form 1023 must be complete and accurate. If the IRS Form 1023 demonstrates that the charitable organization has met the prerequisites for being recognized as tax-exempt by the IRS, then the IRS will issue a ruling recognizing the exemption (the "Determination Letter"). The IRS attempts to review and rule on applications within a reasonable period of time but it is not unusual for an application to take six (6) to nine (9) months to receive a determination, depending on the amount of applications received by the IRS at that time and whether additional information is requested. Once a Determination Letter is received, the organization can rely on it so long as there are no substantial changes in the charitable organization's character, purposes or methods of operation, subject to the power of the IRS to revoke the ruling due to changes in the law or other good cause.

While the charitable organization's application remains "pending," it is important that the organization's operations comply with all Section 501(c)(3) requirements as if it had already received a favorable determination.

3. Completing the Application

Completing Form 1023 can be a monumental task but it is also an opportunity to showcase your organization and its future plans not just to the IRS, but also potentially to prospective donors, members, volunteers, officers and directors. A line-by-line analysis of Form 1023 is beyond the scope of this Guide, but there are a few sections worth noting that can mean the difference between receiving a favorable Determination Letter or a long list of inquiries from the IRS. The IRS issues instructions, available on their website, that can help answer some of the preliminary questions that may arise when completing Form 1023. However, it may be beneficial to engage the assistance of an experienced attorney to draft or at least review Form 1023 before it is submitted to the IRS.

a. Part IV – Narrative Description of the Organization's Activities

Part IV of Form 1023 requests a narrative description of the organization's past, present and planned activities. This description should be as specific as possible, detailing not only what the organization plans to do but also exactly *how* it plans to do so. The description should also be narrowly focused on its intended purpose, explaining to the IRS how the organization's functions demonstrate that it is organized and operated for an exempt purpose. In this description, it is important to include planned activities, especially for newly formed organizations that may currently have very little going on, but it is also important to avoid highly speculative activities that may or may not occur in the future. To the extent the organization has independent information about the organization to corroborate the information included in the narrative (i.e. articles, videos, newsletters, etc.), these materials should be included with Form 1023.

b. Part IX – Financial Data

Part IX of Form 1023 requests either the organization's past financial information or future projected financial information, depending on how long the organization has been in existence. Projecting revenues and expenses for a new organization can be a difficult task and you should consider enlisting the assistance of an accountant who is familiar with nonprofit organizations. While Form 1023 only requires a reasonable and good faith estimate of future financial performance, it is important that the numbers are internally consistent with the remainder of the application in terms of compensation to officers and employees, expenses involved in the organization's present and planned activities and future plans. For example, if the narrative explains that the organization will have an office and three employees, the projected expense section should reflect these expenses. Also, if revenues and expenses are vastly different in a given year or from year to year, these discrepancies should be explained in order to avoid further IRS inquiry.

c. Supplementary Materials

The questions within Form 1023 are designed to gather comprehensive information about the organization and to ensure compliance with federal law. Each question has a purpose and each answer can provoke additional IRS inquiry. With that in mind, you should seek clarification from an attorney or from the IRS when you are unclear about a particular question and if necessary, provide an explanation in your supplementary materials. By seeking assistance and providing additional explanation where it appears to be necessary or helpful, you may be able to answer some of the IRS' questions before they ask them.

d. Submitting Form 1023

When Form 1023 and the required supplementary materials are compiled and completed, the tax-exempt application and supplementary materials should be submitted, along with a check for the filing fee, to the address set forth in the current instructions to form 1023.

4. The IRS Response

During the initial IRS review process, the organization's tax-exempt application will be designated for one of three possible groups: (1) those that are complete and clearly meet the requirements for tax exemption, (2) those that require minor additional information in order for a determination to be made, and (3) those that require more significant review and development before a determination can be made. If the organization falls within the first or second group, it will receive a favorable Determination Letter from the IRS or a request for more information. If the application falls within the third group, the application will be assigned to an IRS Agent for further technical review.

If the IRS makes an adverse determination, the organization may appeal the IRS' decision in accordance to the IRS instructions delivered to the organization with the Determination Letter. Alternatively, the organization may institute a declaratory judgment lawsuit. This second alternative is more costly and will require the services of an attorney.

C. State Business Profits Tax and Business Enterprise Tax Exemption

Business organizations with gross business income in excess of \$50,000 are required to file a New Hampshire Business Profits Tax return. However, under the Business Profits Tax, if a nonprofit organization is deemed exempt from federal income taxation, then it is exempt from the New Hampshire Business Profits Tax. No specific filing needs to be made with the New Hampshire Department of Revenue Administration.

Business enterprises with more than \$150,000 of gross business receipts from all of their activities or an enterprise value tax base of more than \$75,000 are required to file a Business Enterprise Tax return. However, a nonprofit organization which is deemed exempt from federal income taxation under Section 501(c)(3) of the Code is not considered a business enterprise to the extent it does not engage in unrelated business activity as defined by Section 513 of the Code.

For further information, contact the New Hampshire Department of Revenue Administration by telephone at (603) 230-5000 or visit their website at <http://www.nh.gov/revenue/index.htm>.

D. Annual Federal Tax Returns

1. IRS Forms 990 and 990 PF

A nonprofit organization that is exempt from federal income tax under Section 501(c)(3) must file an informational tax return on an annual basis. Public charities use the IRS Form 990 and private foundations use the IRS Form 990 PF. The IRS Form 990 consists of an 11-page core form and includes the following supplemental schedules, designed to require reporting of information from organizations that conduct particular activities, many of which may not apply to an arts organization but are worth noting:

- Schedule A – Supplemental Information for Organizations Exempt Under Section 501(c)(3)
- Schedule B – Schedule of Contributors (no change in form or instructions for 2006)
- Schedule C – Political Campaign and Lobbying Activity
- Schedule D - Supplemental Financial Statement Information
- Schedule E – Private Schools
- Schedule F – Activities Outside of the United States
- Schedule G – Supplemental Information Regarding Fundraising Activities
- Schedule H – Hospitals
- Schedule I – Supplemental Information on Grants and Other Assistance to Organizations, Governments, and Individuals in the U.S.
- Schedule J – Supplemental Compensation Information

- Schedule K – Supplemental Information on Tax-exempt Bonds
- Schedule L – Supplemental Information on Loans
- Schedule M – Non-cash Contributions
- Schedule N – Liquidation, Termination, Dissolution, or Significant Disposition of Assets
- Schedule R – Related Organizations

Organizations with \$25,000 or less in gross receipts for any three-year period are not required to file an IRS Form 990, however, these small organizations are required to file an IRS Form 990-N, *Electronic Notice (e-Postcard) for Tax-Exempt Organizations not Required To File IRS Forms 990*. This is an online filing only and can be accessed at: <http://www.irs.gov/charities/article/0,,id=169250,00.html>. An organization may opt to file an IRS Form 990-EZ if its gross receipts are greater than \$50,000 but less than \$200,000 and its assets are less than \$500,000.

A line-by-line analysis of the IRS Form 990 is beyond the scope of this Guide, but the most recent form is available at the IRS' website, www.irs.gov, and should be reviewed by any organization seeking tax-exempt status. When reviewing, keep in mind the following: The IRS Form 990 is a very public window on the inner workings of the organization and should be regarded as an opportunity to show the public the strengths and value of the organization. In fact, the first page of the return is designed to give potential donors a bird's eye view of what the organization does and how efficiently it operates. The governance section is also important because it is used to assess whether the board is following the best practices within the industry.

2. Due Dates

The annual information returns and any unrelated business income tax returns are due on or before the fifteenth day of the fifth month following the close of the tax year. I.R.C. § 6072(e);

Treas. Regs. § 1.6033-2(e). Thus, the return for a calendar year organization should be filed by May 15th of each year. One or more extensions may be obtained. These returns are filed with the IRS Service Center in Ogden, Utah.

The filing date for an annual information return may arrive while the organization's application for recognition of tax-exempt status is pending with the IRS. In that instance, the organization should nonetheless file the information return and indicate on it that the application is pending. Treas. Regs. § 1.6033-2(c).

3. Penalties

Failure to timely file the appropriate information return, failure to include any information required to be shown on the return or failure to show the correct information, absent reasonable cause, can give rise to a \$20 per day penalty for each day the failure continues, with a maximum penalty for any one return not to exceed the lesser of \$10,000 or five percent of the gross receipts of the organization for one year. I.R.C. § 6652(c)(1)(A); (c)(3). An additional penalty may be imposed on the individual(s) responsible for the failure to file, absent reasonable cause, at the same rate and maximum, following demand by the IRS. I.R.C. § 6652(c)(1)(B); Treas. Reg. § 301.6652-2. There is a much larger penalty on organizations having gross receipts in excess of \$1 million for a year. Under these circumstances, the per-day penalty is \$100 and the maximum penalty is \$50,000. I.R.C. § 6652(c)(1)(A). An addition to tax for failure to timely file a federal tax return, including a Form 990-T, may also be imposed. I.R.C. § 6651(a)(1). In the case of failure to timely file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may begin without assessment at any time. I.R.C. § 6501(c)(3).

4. Assessments

The IRS generally must assess any tax within three years of the due date of the return or the date on which the return involved is actually filed, whichever is later. I.R.C. § 6501(a). A

six-year statute of limitations applies, however, if an excise tax return “omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon.” With respect to taxes on private foundations and certain other instances, this extended period does not apply if there is adequate disclosure in the return to the IRS. I.R.C. § 6501(e)(3). It is the practice of the IRS to omit from its listing of organizations to which deductible gifts may be made (Pub. No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code), those organizations that fail to establish their non-filing status with the IRS. See Gen. Couns. Mem. 39389; see also Gen. Couns. Mem. 39809.

5. Form 990 T

Not all income of exempt organizations is exempt from federal taxation. The policy for requiring exempt organizations to pay income tax on business income unrelated to its exempt purpose is to eliminate unfair competition with private industry. Otherwise, the tax exemption would give organizations, whose operating costs are generally lower, an advantage over their for-profit competitors. If a Section 501(c)(3) organization has income which is considered "unrelated business income," then the organization must file an income tax return on Form 990-T and pay a tax, if appropriate, at corporate tax rates. Unrelated business income, as the name suggests, is income generated from trade or business regularly carried on by the organization that is not substantially related to the organization's exempt purpose. This tax return is also due the fifteenth day of the fifth month following the close of the organization's annual accounting period.

Unrelated business taxable income (“UBTI”) is defined under Section 512(a) as gross income derived from an unrelated trade or business regularly carried on, less directly connected deductions. All of the following elements must be satisfied to be subject to the tax on unrelated business income:

- There must be a trade or business;
- It must be regularly carried on; and
- It must be unrelated to the organization's function.

Trade or Business

Generally, a "trade or business," for unrelated business income tax purposes, is any activity that is carried on for the production of income from the sale of goods or performance of services and which presents sufficient likelihood of unfair competition with taxable entities to be within the policy intentions of the tax.

Regularly Carried On

The unrelated business income tax applies to a business activity that is regularly carried on, as distinguished from commercial transactions that are sporadic or infrequent. Specific business activities will ordinarily be deemed to be regularly carried on if they manifest a frequency and continuity and are pursued in a manner which is generally similar to comparable commercial activities of non-exempt organizations. Where income-producing activities are of a kind normally undertaken by nonexempt commercial organizations only on a seasonal basis, the conduct of such activities by an exempt organization during a significant portion of the season will ordinarily constitute the regular conduct of trade or business. For example, the operation of a horse racing track for several weeks of a year would be considered the regular conduct of trade or business because it is usual to carry on such trade or business only during a particular season.

Treas. Reg. § 1.513-1(c).

Not Substantially Related

Gross income is from unrelated business activity if the activity is not substantially related to the exempt purpose of the organization. The business activities must contribute importantly to the accomplishment of a purpose for which the organization is granted an exemption, other than the mere production of income; i.e. the activities must have a substantial causal relationship to the

achievement of the exempt purpose. In the context of an organization for the arts, the instances in which UBTI should be considered is in the realm of fundraising activities. A few examples of the types of fundraising activities that could generate UBTI, unless properly planned, are:

- *Bingo.* The term “unrelated trade or business” does not include the conduct of bingo games, if the bingo game is of a type in which usually wagers are placed, winners are determined, and prizes are distributed in the presence of all persons placing wagers, if the conduct of the game is not an activity normally carried out on a commercial basis, and if the conduct of the game does not violate any New Hampshire law.
- *Online Auctions.* Typically, charity fundraising auctions do not result in UBTI because the auctions are not “regularly carried on” and many of the items are donated (an exception to UBTI). Online auctions would need to meet these requirements, keeping in mind that an online auction that was available everyday would likely be “regularly carried on,” and such a regular activity would be more likely to involve purchased merchandise.
- *Thrift Shops.* Funds raised through thrift shops operated by tax-exempt organizations that sell donated property are excluded from UBTI, so as long as the shop does not branch out into purchased merchandise.

Unrelated business income tax is a complex tax issue. Therefore, it is recommended that an organization consult its tax advisor for further information.

E. Miscellaneous Tax Filings

1. Employee Withholding

Section 501(c)(3) organizations that pay wages have the same responsibilities for withholding, depositing and reporting Federal and State taxes as for-profit corporations. However, public charities are excluded from the Federal Unemployment Tax Act (FUTA) for services rendered by employees.

2. Local Property Tax Exemptions

Status as an exempt organization for federal and state income tax purposes does not necessarily create exempt status for local property taxes. Only very narrow categories of real estate and personal property are exempt. Under RSA 72:23, V, only real estate and personal property owned by a *charitable* organization and *occupied and used by* the organization for its exempt purposes is exempt from tax. In order to be exempt from this type of taxation, an

organization must file a form annually with the New Hampshire Department of Revenue Administration and the local tax assessor.

F. Forms

Throughout this Guide are references to IRS forms. It is important to recognize that these forms are constantly revised to reflect new changes in the law. Therefore, the references in this Guide to specifics in any such form cannot be relied upon. Current IRS forms can be obtained on the IRS website at www.irs.gov or by calling (toll-free): 1-800-829- 3676.

G. Public Inspection of Annual Return, Tax-exempt Application and Status

The IRS requires charitable organizations to make copies of their annual returns (IRS Form 990) for the last three years available to the public for inspection, as well as a copy of the organization's Form 1023. The organization is not required to provide or distribute its annual returns or exemption application, but it is required to have a copy available for inspection. The IRS states that the required information should normally be available on the day of the request for inspection and during the normal business hours of the organization's office. If an organization has no office, or if the office has very limited hours during certain times of the year, the required information should be made available within a reasonable amount of time (normally not more than two (2) weeks) and at a reasonable time of the day. The IRS may assess penalties for noncompliance with this policy. Accordingly, it is recommended that each charitable organization have these materials readily available at all times and that the legal counsel for each organization also have a full copy of these materials.

There is one exception to the public disclosure rules. The names, addresses and amounts of contributions or bequests of contributors to an organization, other than a private foundation, are not available for public inspection.

A person or organization failing to allow inspection of an organization's annual information returns is subject to a penalty of \$20 per day for each day the failure continues, absent reasonable cause, with a maximum penalty of \$10,000 per return. I.R.C. § 6652(c)(1)(C); (3). A person or organization failing to allow inspection of an organization's application for recognition of tax exemption must, absent reasonable cause, pay \$20 per day for each day the failure continues. I.R.C. § 6652(c)(1)(D); (3). A person or organization who willfully fails to comply with these inspection requirements is subject to a penalty of \$5,000 with respect to each return or application. I.R.C. § 6685.

Recommendations for Planning and Responding to Public Information Requests

Planning

- Review the information tax returns and determine if there is any information which is not required to be disclosed like contribution information or bequests. If so, then redact this information and have only redacted copies available for inspection. If there is other information that is proprietary which, if disclosed, could be an issue for an organization and its affiliates, then consider whether the organization should request an exemption from the IRS so as not to be required to disclose particular information.
- Keep the tax-exempt application and the organization's tax returns in an easily accessible place at the organization's principal office.
- Assign someone at the principal office to handle such requests and train the employee to handle requests if necessary. If a request is made in person, then the documents must be provided immediately. Consider ways to comply with this obligation without disrupting the office.
- Consider whether an organization wants to charge the permissible copy charges. If so, then be sure to enforce the policy consistently. An organization may require payment of the fees in advance. If an organization requires advance payment, then have a form letter requesting payment and mail the letter shortly after receipt of a written information request.

- If there are concerns about processing requests, consider hiring an attorney to advise on policies and procedures for dealing with requests. The records will still need to be made available at the principal place of business but referring the requests to an attorney is a permissible way to handle written requests. If doing so, be sure to send the attorney all of the required documents in advance and to immediately forward all written requests.

Response

- If a request is made in person, then refer the request to the designated employee handling requests and have the documents ready for inspection.
- If a request is made by phone, then indicate to the requesting party that the information required to be disclosed by law is available and that the request will be processed within 30 days of an organization's receipt of his or her request in writing.

IV. THE NEW HAMPSHIRE ATTORNEY GENERAL

A. Registration with the New Hampshire Attorney General

A nonprofit corporation is required to register with the Charitable Trusts Unit of the Department of Justice, Office of the New Hampshire Attorney General, using Form NHCT-1 "Application for Registration of Charitable Trust." Form NHCT-1 requires the organization to provide general information to the Charitable Trusts Unit, including copies of the organization's incorporation documents, conflict of interest and dissolution policies; a recent bank statement identifying that a separate account has been established for the organization's funds, and information identifying the organization's board members.

Form NHCT-1 is available online at <http://www.doj.nh.gov/charitable-trusts/documents/nhct-1-application.pdf> or upon request from the Charitable Trusts Unit. The filing fee is \$25. For further information, contact:

Charitable Trusts Unit
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3591

B. State Annual Returns

In addition to filing with the New Hampshire Secretary of State's Office every five years, as discussed earlier, an annual report (Form NHCT-2A) must be filed with the Charitable Trusts Unit each year. If an organization files Form 990, 990-EZ or 990-PF with the IRS, a copy of this filing must be filed with the Charitable Trusts Unit and only a portion of Form NHCT-2A will need to be completed. Consult the current version of Form NHCT-2A for specific requirements.

The due date of Form NHCT-2A depends on the fiscal year end of the organization. There is a \$75 filing fee to file Form NHCT-2A. Failure to file the report may trigger action by the Charitable Trusts Unit to compel compliance.

Nonprofit organizations that anticipate utilizing the services of professional fundraisers should contact the Charitable Trusts Unit for information on registration and reporting requirements before agreeing to any arrangement.

V. APPENDICES

**APPENDIX A
SAMPLE ARTICLES OF AGREEMENT**

STATE OF NEW HAMPSHIRE

Recording fee: \$25.00
Use black print or type.
Leave 1" margins both sides

Form No. NP 1
RSA 292:2

ARTICLES OF AGREEMENT
OF
OVER THE RAINBOW, INC.

A NEW HAMPSHIRE NONPROFIT CORPORATION

THE UNDERSIGNED, BEING PERSONS OF LAWFUL AGE, ASSOCIATE UNDER THE PROVISIONS OF THE NEW HAMPSHIRE REVISED STATUTES ANNOTATED, CHAPTER 292 BY THE FOLLOWING:

(The state statute requires that at least five people over the age of 18 associate together by Articles of Agreement to form a nonprofit organization.)

**ARTICLE I
NAME**

The name of the corporation shall be: OVER THE RAINBOW, INC. (hereinafter the "Corporation").

(The corporation can use any name which is not in use by another corporation or company. The name need not include the word "incorporated," "corporation" or "limited" or any abbreviation of one of these words.)

**ARTICLE II
PURPOSES**

Said corporation is organized exclusively for any purposes for which an organization may be exempt from federal taxation under Section 501(c)(3) of the Code.

(New Hampshire statutes limit the purposes for which a nonprofit corporation can be formed under Chapter 292. The corporation may state purposes broadly, as above.)

ARTICLE III
MEMBERSHIP

The Corporation shall not have any members.

(If the corporation does have members, the article should provide for that membership.)

ARTICLE IV
DISPOSITION OF ASSETS

In the event of the dissolution of the Corporation, in any manner or for any reason whatsoever, its remaining assets after payment of all debts and obligations of the Corporation, if any, shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations as said Court shall determine, which are organized and operated exclusively for such purposes.

(This language is included to qualify the corporation for federal tax-exempt status.)

ARTICLE V
ADDRESS

The address at which the business of this corporation is to be carried on is: 123 Fake Street, Manchester, N.H. 03101.

(State law requires disclosure of the address where the corporation's business will be carried on.)

ARTICLE VI
CAPITAL STOCK

The amount of capital stock, if any, or the number of shares is: None.

(The corporation may have capital stock, but it is unnecessary and uncommon. Stock is evidence of ownership of the corporation, and ownership of a 501(c)(3) corporation is relatively meaningless. Stockholders will not get dividends or money for the stock, even upon dissolution, because the assets of a dissolved 501(c)(3) corporation must be distributed to another 501(c)(3) corporation. Corporations selling stock must be sure to comply with complicated state and federal securities laws. If the corporation does have stock, this Article should state the total number of authorized shares and their par value, if any.)

ARTICLE VII
LIMITATION OF LIABILITY

The Directors and Officers of the corporation shall not be personally liable for any debt, liability or obligation of the Corporation. To the fullest extent now or hereafter permitted by law, no Director or Officer shall be personally liable to the Corporation or to its shareholders or members for monetary damages for breach of their fiduciary duties as an officer or director.

(The corporation may limit its officers' and directors' liability to the corporation so long as those officers and directors do not breach their duty of loyalty, act in bad faith, intentionally violate the law, or derive improper personal benefits from the activities of the corporation. Such a limitation of liability should be included in the Articles of Agreement in order to attract individuals to serve as officers and directors.)

ARTICLE VIII
PROHIBITED ACTIVITIES

1. No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its members, directors, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article II hereof.

2. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

3. Notwithstanding any other provision of these Articles, the Corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Code, or corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Code, or corresponding section of any future federal tax code.

(This section prohibits the corporation from taking certain actions which would disqualify it from receiving tax-exempt status, such as political campaigning.)

ARTICLE IX
BOARD OF DIRECTORS

The affairs of the Corporation shall be managed by the Board of Directors, the initial members of which shall consist of the five (5) incorporators and such other persons as may be chosen by them, all in accordance with the Corporation's Bylaws and in a manner not inconsistent with these Articles of Agreement, the Code and with the provisions of RSA 292, as amended.

ARTICLE X
AMENDMENTS

These Articles of the Corporation may be amended or repealed at any meeting of the Board by a majority vote of the Board; provided, however, that written notice of the proposed change shall be specified in the notice of the meeting, and provided further that no such action shall be taken, or if taken, shall be a valid act of the Corporation, if that action would in any way adversely affect the Corporation's qualification under Section 501(c)(3) of the Code.

ARTICLE XI
INCORPORATORS

The signatures and post office addresses of each of the persons associating together to form the corporation are set forth below (Note 2):

<u>Signature and Name</u>	<u>Post Office Address</u>
_____ Signature	_____ Street
_____ Name (please print)	_____ City/Town
_____ Signature	_____ Street
_____ Name (please print)	_____ City/Town
_____ Signature	_____ Street
_____ Name (please print)	_____ City/Town
_____ Signature	_____ Street
_____ Name (please print)	_____ City/Town
_____ Signature	_____ Street
_____ Name (please print)	_____ City/Town

(Under state law, the signatures and post office addresses of the incorporators are essential to formation of the corporation.)

- Notes:
1. If no provision eliminating or limiting personal liability, insert “NONE”.
 2. At least five signatures are required.

Mail fee and DATED AND SIGNED ORIGINAL to: Corporations Division, Department of State,
107 North Main Street, Concord, NH 03301-4989.

**APPENDIX B
SAMPLE BYLAWS**

BYLAWS

OF

OVER THE RAINBOW, INC.

**ARTICLE I
NAME**

The name of this corporation shall be OVER THE RAINBOW, INC. (hereinafter the “Corporation”).

**ARTICLE II
OFFICES**

The principal office of the corporation in the State of New Hampshire shall be located in Portsmouth, New Hampshire. The corporation may have such other offices, either within or without the State of New Hampshire as the Board of Directors may designate or as the business of the corporation may from time to time require.

**ARTICLE III
MEETING OF INCORPORATORS**

1. Notice of Meeting

Written or printed notice stating the place, day and hour of the meeting and, in the case of special meeting, the purpose or purposes for which the meeting is called shall be delivered not less than five (5) nor more than thirty (30) days before the date of the meeting, either personally or by mail, by or at the direction of the President, or the Secretary, or the Officer or persons calling the meeting, to each incorporator.

**ARTICLE IV
MEMBERSHIP**

The Corporation shall not have any members.

(If the corporation does have members, this section should provide for the criteria for membership.)

ARTICLE V
BOARD OF DIRECTORS

Section 1. General

The Board of Directors shall consist of not less than five (5) and not more than nine (9) Directors (the "Board"). The Corporation's incorporators shall select the initial Board. When the term of any member is about to expire, the vacancy shall be filled by a majority vote of the Board of Directors at the annual meeting after consultation with a nominating committee. The individual Board members shall continue to serve until the remaining Board members appoint a successor member or until a Board member is unable or unwilling to serve.

(Consider adding provisions to stagger the Board terms in order to ensure continuity of Board leadership)

Section 2. Control and Power

The Board shall have the exclusive control and power to manage the activities, property and affairs of the Corporation and shall determine the manner in which the funds of the Corporation shall be applied within the limitations of the Corporation's Articles of Agreement, these Bylaws, the Code and Chapter 292 of the New Hampshire Revised Statutes Annotated.

Section 3. Voting.

Each Director shall have the full right to vote and participate in the management and affairs of the Corporation.

Section 4. Meetings

The annual meeting of the Board shall be held at such place and time as determined by the Board. Regular and special meetings of the Board, or any committee thereof, shall be called by the President or at the request of two-thirds (2/3) of the membership of the Board and shall be held at such time and place as may be set forth in the notice thereof, provided that at least five (5) days' advance notice (in writing or otherwise) of every meeting shall be given to each Director or member of a committee. Such notices shall be sent to the addresses shown on the records of the Corporation or by email at the email address provided to the Corporation by each Director. Any Director may waive notice of a meeting by a signed writing filed with the records of the meeting or by attendance at the meeting without protest.

At all meetings of the Board, a majority of the Directors shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, except as may be otherwise expressly required by the Corporation's Articles of Agreement, these Bylaws or Chapter 292 of the New Hampshire Revised Statutes Annotated. If a quorum is not present at any meeting of the Board, the Directors present may adjourn the meeting, without notice other than announcement, until a quorum shall be present or available.

Section 5. Directors' Participation in Meeting By Telephone or Video Conference

A Director may participate in a meeting of the Board of Directors by means of telephone, video conference, or similar communication equipment enabling all Directors participating in the meeting to hear one another. Participation in a meeting pursuant to this Section 5 shall constitute presence in person at such meeting.

Section 6. Directors' Action Without Meeting

If all the Directors entitled to vote and then holding office severally or collectively consent in writing to any action taken or to be taken by the Corporation, then such action shall be valid as though it had been authorized at a meeting of the Board of Directors. The Secretary shall file such consent or consents with the minutes of the meetings of the Board of Directors.

Section 7. Committees

The Board may designate one (1) or more standing committees, by a resolution(s) passed by a majority of the Board. Such committee(s) shall consist of two (2) or more Directors and shall have such powers and duties as the Board deems desirable.

Section 8. Removal

Any Director may be removed with or without cause at a meeting of the Board duly called for such purpose by a two-thirds (2/3) majority vote of the disinterested members of the Board.

Section 9. Resignation

Any Director may resign at any time by giving written notice to the President or the Secretary. Any such notice shall take effect as of the date of the receipt of such notice unless otherwise specified therein.

Section 10. Vacancies

If the office of any Director shall become vacant by reason of death, resignation, disability, retirement, disqualification, removal from office, or for any other cause, the remaining members of the Board, even if less than a quorum, shall elect a successor(s) for the unexpired term of such Director.

Section 11. Compensation; Reimbursement

Directors shall not receive any compensation for attendance at regular or special meetings or for services rendered to the Corporation as a Director, but may be reimbursed for actual expenses incurred incidental to services performed for the Corporation as a Director.

ARTICLE VI OFFICERS

Section 1. General

The Corporation shall have as executive officers a President, a Secretary and a Treasurer, each of who shall be appointed by the Board. The executive officers shall be elected by the Board of Directors for such terms as the Board of Directors deems fit in its sole discretion. Each officer shall hold office for such term or until the death, disability, resignation, or removal of such officer in the manner hereinafter provided.

Section 2. President

The Board shall elect the President. The President shall preside over meetings of the Board of Directors and shall be responsible for the agenda and general conduct of such meetings. He or she will represent the Corporation at local, civic, and community activities which require the Corporation's attendance.

Section 3. Secretary

The Secretary of the Corporation shall be elected by the Board and shall keep the minutes and records of the Corporation in appropriate books or electronic records, see that all notices are given in accordance with these Bylaws or as provided by law, keep the seal of the Corporation and affix the same to corporate documents, and in general, perform all duties incidental to the office of Secretary and such other duties as may be assigned by the President or the Board.

Section 4. Treasurer

The Treasurer shall be elected by the Board and shall keep correct and complete records of account accurately showing at all times the financial condition of the Corporation. Subject to the direction of the Board, the Treasurer shall be the legal custodian of all funds of the Corporation, shall keep a detailed account of its income and expenditures, and shall be responsible for payment of all expenditures of the Corporation.

Section 5. Executive Director:

The Board shall appoint, on such terms of remuneration and duration of employment as it chooses, an Executive Director to serve as its agent in the conduct of ongoing administration, its delegate in policy implementation, and its representative in dealing with the community and groups and individuals who share the Corporation's interests and goals. The Executive Director shall be a non-voting member of the Board of Directors and all functioning committees. The Executive Director can engage or dismiss any staff, whose positions are authorized by the Board of Directors. Said staff members are directly responsible to the Executive Director, but the Board shall be notified of their hiring or dismissal.

(The Executive Director is an employee, not an officer of the Corporation, and as such, is generally only a non-voting member of the Board and is prevented by statute from being Chair of the Board)

Section 6. Removal

Any officer may be removed without cause, from such office by a two-thirds (2/3) vote of the majority of the disinterested members of the Board at a meeting of the Board called for such purpose.

Section 7. Resignation

Any officer may resign at any time by giving written notice to the Board or to the President or the Secretary of the Corporation. Any such notice shall take effect as of the date of the receipt of such notice or at any later time specified herein. The acceptance of such resignation shall not be a condition precedent necessary to its effectiveness.

Section 8. Vacancies

In the event of resignation, retirement, disqualification, death, disability or removal from office, for any reason whatsoever, of any officer of the Corporation, the vacancy so created shall be filled by the Board.

ARTICLE VII
GENERAL PROVISIONS

Section 1. Corporate Seal

The Board of Directors may authorize a corporate seal which shall have inscribed thereon the name of the corporation and the state and year of incorporation.

Section 2. Fiscal Year

The fiscal year of the Corporation shall be fixed by the Board of Directors.

(Corporation can choose any fiscal year end date. Many choose to avoid calendar year end due to potentially limited availability of professional accounting assistance)

ARTICLE VIII
CONTRACTS, CHECKS, NOTES, ETC.

Section 1. Execution of Contracts

All contracts and agreements authorized by the Board of Directors, and all checks, drafts, notes, bonds, bills of exchange and orders for the payment of money shall, unless otherwise directed by the Board of Directors, or unless otherwise required by law, be signed by any one (1) of the following officers: President, Treasurer or Secretary. The Board of Directors may, however, authorize any two (2) of said officers to sign checks, drafts and orders for the payment of money in excess of specified amounts, and may designate officers and employees of the Corporation other than those named above, or different combinations of such officers and employees, who may, in the name of the Corporation, execute checks, drafts, and orders for the payment of money on its behalf.

Section 2. Loans

No loans shall be contracted on behalf of the Corporation and no negotiable paper shall be signed in its name unless authorized by resolution of the Board of Directors. When authorized by the Board of Directors, any officer may effect loans and advances at any time for the Corporation from any bank, trust company or other institution, or from any firm, corporation or individual, and for such loans and advances may make, execute and deliver promissory notes, bonds or other certificates or evidences of indebtedness of the Corporation and, when authorized so to do, may pledge, hypothecate or transfer any securities or other property of the Corporation as security for any such loans or advances. Such authority may be general or confined to specific instances. Notwithstanding the foregoing or anything herein to the contrary, under no circumstances is the Corporation to make any loans of money or property to any directors or officers of the Corporation.

ARTICLE IX
AMENDMENTS

The Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by a majority vote of the directors present at the annual meeting. However, in no event may any amendments be made which would affect the corporation's qualification as a tax-exempt organization pursuant to Section 501(c)(3) of the Code or corresponding section of any future federal tax code.

ARTICLE X
NON-DISCRIMINATION

The corporation shall not discriminate against any person in any manner on the basis of sex, race, age, religion, handicap or ethnic origin.

ARTICLE XI
LIMITATION OF LIABILITY

Unless otherwise expressly authorized by the Board, the directors and officers shall serve without compensation and, pursuant to RSA 508:16, shall not be liable for bodily injury, personal injury and property damage if the claim for such damages arises from an act committed in good faith and without willful or wanton negligence in the course of an activity carried on to accomplish the purposes of the Corporation.

The directors and officers of the corporation shall not be liable to the Corporation or to its members, if any, for monetary damages for breach of their fiduciary duties to the fullest extent now or hereafter permitted by RSA 292.

ARTICLE XII
INDEMNIFICATION

The corporation shall indemnify and hold its directors and officers harmless from and against all suits, claims, injuries, or damages asserted against them, so long as the director or officer to be indemnified has not acted in bad faith or engaged in intentional misconduct,

knowing violation of the law, or derived an improper personal benefit therefrom.

ARTICLE XIII
CONFLICTS OF INTEREST

Any possible conflict of interest on the part of any member of the Board, officer or employee of the Corporation shall be disclosed in writing to the Board and made a matter of record through an annual procedure and also whenever the interest involves a specific issue before the Board. Where the transaction involving a board member or officer exceeds five hundred dollars (\$500) but is less than five thousand dollars (\$5,000) in a fiscal year, a two-thirds vote of the disinterested directors is required. Where the transaction involved exceeds five thousand dollars (\$5,000) in a fiscal year, a two-thirds vote of the disinterested directors and publication as required by RSA 292 is required. The minutes of the meeting shall reflect that a disclosure was made, the abstention from voting, and the actual vote itself.

Every new member of the Board will be advised of the conflicts of interest policy upon entering the duties of his or her office, and shall sign a statement acknowledging an understanding of, and agreement to, this policy. The Board will comply with all requirements of New Hampshire law in this area and the New Hampshire requirements are incorporated into and made a part of this policy statement.

ARTICLE XIV
DISSOLUTION

Upon the dissolution of the Corporation, the assets shall be distributed as set forth in the Corporation's Articles of Agreement.

ARTICLE XV
WAIVER OF NOTICE

Whenever any notice is required to be given to the Members or any director or officer by these Bylaws, the Articles of Agreement, or the laws of the State of New Hampshire, a waiver of the notice in writing, signed by the person or persons entitled to the notice, whether before or after the time stated therein, shall be deemed equivalent to giving the notice.

ARTICLE XVI
TAX-EXEMPT STATUS

These Bylaws of the Corporation shall at all times be so construed and limited as to enable the Corporation to qualify and to continue qualifying as a nonprofit corporation duly organized and existing pursuant to the provisions of Chapter 292 of the Revised Statutes Annotated of the State of New Hampshire, as amended, and as a tax-exempt charitable organization organized and operated for any purpose for which an organization may be exempt pursuant to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

APPENDIX C

This Guide is intended merely as an introduction for nonprofit incorporators seeking a general understanding of the broad parameters of the nonprofit incorporation and tax exemption processes. The laws, procedures and forms outlined herein are always changing. Nonprofit incorporators may wish to consult current sources for a more in-depth discussion of many of these requirements and procedures, and the current law in this area. The following sources of information are offered as a starting point. Specific questions may also be addressed to the Internal Revenue Service, who will answer toll-free telephone inquiries at 1-800-529-5500 (or information may be found on line at www.irs.gov) and the New Hampshire Secretary of State, Corporations Division, State House Annex - Third Floor, Concord, New Hampshire 03301, (603) 271-3244 (or online at www.state.nh.us/sos/corporate/index.htm).

1. Federal Tax-Exempt Status Related Publications

a. Internal Revenue Service ("IRS") Publications. The IRS publishes a series of informational pamphlets designed to assist nonprofit incorporators in applying for and preserving federal tax-exempt status. These pamphlets include Publication 557, "Tax-Exempt Status for Your Organization", and Publication 578, "Tax Information for Private Foundations and Foundation Managers." These publications can be obtained by calling 1- 800-829-3676 or online at www.irs.gov.

b. Volunteer Lawyers for the Arts of New York offers a workshop entitled "Nonprofit Incorporation and Tax-exempt Status." For more information regarding this program, contact them at (212) 319-2787 or online at www.vlany.org.

2. Officer and Director Responsibilities

The State of New Hampshire Department of Justice, Charitable Trusts Unit maintains a website located at <http://www.doj.nh.gov/charitable-trusts/> which provides useful information for nonprofit organizations. The Charitable Trusts Unit may be contacted at (603) 271-3591 or N.H. Department of Justice, Charitable Trusts Unit, 33 Capitol Street, Concord, NH 03301.

Internal Revenue Service	www.irs.gov/charities	Provides applicable federal laws, tax forms, explanations and a number of helpful publications and guides related to obtaining and maintaining tax-exempt status.
Internal Revenue Service	www.stayexempt.irs.gov	Provides additional educational tools and presentations including how to apply to be recognized as a tax-exempt organization, completing the annual information tax returns, and dealing with compliance issues related to hiring employees.
New Hampshire Charitable Trust Unit	www.doj.nh.gov/charitable-trusts	Provides information on regulation requirements of the New Hampshire Department of Justice, forms, access to the applicable state laws and handbooks or references to assist with establishing “best practices.”
New Hampshire Secretary of State	www.sos.nh.gov	Provides links and information about New Hampshire government as well as forms to be filed with the Corporations Division of the N.H. Secretary of State’s office.
The New Hampshire Center for Nonprofits	www.nhnonprofits.org	Includes information on workshops, upcoming events, and other issues of interest to New Hampshire nonprofits.

Guidestar	www.guidestar.org	Information about the missions, programs, and finances of more than 1.7 million IRS-recognized tax-exempt organizations, including copies of IRS Form 990.
USA.gov for Nonprofits	www.usa.gov/Business/Nonprofit	A good starting point to help nonprofit organizations access online Federal information and services.
Better Business Bureau Wise Giving Alliance	www.give.org	Includes twenty standards for charity accountability, governance, effectiveness, finances and fundraising.
Board Source	www.boardsource.org	This is a good place to get information on governance issues, including sample policies and committee charters.
Independent Sector	www.independentsector.org	This is a panel on the Nonprofit Sector's Principles on Good Governance and Ethical Practices which includes thirty-three principles, six of which are required by law, in the categories of legal compliance, effective governance, strong financial oversight, and responsible fundraising.
Nonprofit Risk Management Center	www.nonprofitrisk.org	Provides assistance and resources for community-serving nonprofit organizations. Offers a wide range of services on a variety of risk management topics.
The Hauser Center for Nonprofit Organizations at Harvard University	www.hks.harvard.edu/hauser	Provides a working paper series by nonprofit category, including papers on the issues facing nonprofits focused on the Arts, Culture and Media.

Idealist	www.idealist.org/info/Nonprofits	Provides links to various nonprofit research tools. You may also sign up for their electronic newsletter.
Big Online	www.bigdatabase.com	Big Online is the creator of an extensive database of information provides funding resources for nonprofit organizations.
Foundation Center Online	www.foundationcenter.org	A gateway to philanthropy and grant seeking on the Internet. Also includes IRS 990 tax forms for many foundations.
Grants.gov	www.grants.gov	This site helps organizations to find and apply for competitive grant opportunities from all Federal grant-making agencies on the internet.
Grassroots.org	www.grassroots.org	Provides various free resources for nonprofits.
New Hampshire State Council on the Arts	www.state.nh.us/nharts	State agency charged with enhancing the quality of life in New Hampshire by stimulating economic growth through the arts, investing in the creativity of students, making the arts accessible to underserved populations, and preserving heritage arts. Also provides links to over twenty-five organizations dedicated to enhancing and supporting the arts (http://www.nh.gov/nharts/links.html).