Contents

Preface ........................................................................................................... xi

Introduction ............................................................................................... xiii

Chapter 1
Introduction: Some Basic Questions ....................................................... 1

What Kind of “Nonprofit”? ................................................................. 1
Is the Nonprofit Tax-Exempt? ............................................................ 2
What Is Meant by Tax-Exempt Status? ............................................... 3
What Is the Federal and State Oversight for the Nonprofit? ........... 3
Does It Make Sense to Set Up a New Nonprofit? What Are the
Alternatives? ......................................................................................... 4
Existing Nonprofit .............................................................................. 4
For-Profit Corporation and Limited Liability Company .................. 5
Low-Profit Limited Liability Company (L3C) ................................. 5
Benefit Corporation ............................................................................ 6

Chapter 2
Formation of Nonprofit Organizations .................................................. 7

Forms of Nonprofit Entities ................................................................ 7
Nonprofit Corporation ......................................................................... 7
Limited Liability Company ............................................................... 7
Unincorporated Nonprofit Association .............................................. 8
Charitable Trust ................................................................................... 9
Types of Nonprofit Corporations ...................................................... 9
Public Benefit Corporation ................................................................. 10
Mutual Benefit Corporation ............................................................... 10
Religious Corporation ....................................................................... 11
Other Types of Nonprofit Corporations ............................................ 11
Organizational Documents ............................................................... 11
Nonprofit Corporation—Articles of Incorporation ........................... 11
Mandatory Provisions ...................................................................... 12
Optional Provisions .......................................................................... 14
Nonprofit Corporation—Bylaws ......................................................... 16
Sources to Consider When Drafting Bylaws .................................... 17
Subject Areas Covered in Bylaws

- Members ........................................ 17
- Election or Appointment of Directors ............ 21
- Board of Directors ........................................ 23
- Officers ........................................ 27
- Other Subject Areas ........................................ 27
- Policies, Board Resolutions, and Charters .............. 28
- Organizational Meeting/Written Consent .............. 28

Chapter 3

Tax Issues for Nonprofit Corporations ................. 31

Common Types of Tax Exemptions under Internal Revenue
Code .................................................. 31
- Section 501(c)(3)—Charity .......................... 32
- Charitable Contributions .............................. 33
- Section 501(c)(4)—Social Welfare .................. 33
- Section 501(c)(6)—Trade/Professional Associations .... 34
- Section 501(c)(7)—Social Clubs ....................... 35

State Tax Exemption ................................... 35

Classifications of Nonprofits Tax-Exempt under
- Section 501(c)(3) ........................................ 35
- Private Foundations .................................... 35
- Public Charities ......................................... 36
- Limited Liability Companies ........................... 39

Application for Tax-Exempt Status ..................... 41
- Determination of Appropriate Tax-Exempt Status ....... 41
- Filing of Application for Tax-Exempt Status ............ 41
- Additional Relevant Forms for Application ............ 41
- Employer Identification Number ...................... 42

Form 1023 ................................................. 42
- User Fees ........................................... 43
- Timing of Filing of Application ...................... 44
- Expedited Review ..................................... 44

Form 1023-EZ ............................................. 45

Interactive Form 1023 ................................... 46

Organizations Not Needing to File Applications for
- Section 501(c)(3) Status ................................ 46

Effective Date of Tax-Exempt Status and Receipt
- of Tax-Deductible Contributions ..................... 47

Public Disclosure and Access ............................ 47

Recommendations in Preparing Application for
- Tax-Exempt Status ..................................... 47
# Form 990 Information Return Reporting

- Entities Required to File the Form 990
- Types of Form 990-Series Returns
- Form 990-N (e-Postcard)
- Commencement of Filing of Form 990
- Purpose of Form 990
- Information Reported on Form 990
- Preparation Recommendations
- Group Return
- Filing Deadlines
- Electronic Filing
- Penalties for Nonfiling
- Public Disclosure and Access

# Private Inurement and Benefit

- Overview
- Private Inurement
- Private Benefit
- Excess Benefit Transactions/Intermediate Sanctions

# Unrelated Business Taxable Income

- Unrelated Trade or Business
- Exclusions from UBTI Treatment
- Tax and Filing Requirements
- Prohibition on Candidate Involvement in Political Campaigns
- Limits on Legislative Lobbying

## Chapter 4

### Governance

- Overview
- Members
- Board of Directors
- Officers
- Overriding Authority
- Resolving Disputes
- Committees
- Duplicate Boards
- Fiduciary Duties
- Duty of Care of Directors
- Uniform Prudent Management of Institutional Funds Act

---
Duty of Loyalty of Directors ........................................ 78
  General Standard ........................................ 78
  Conflict of Interest ...................................... 79
  Corporate Opportunity .................................... 80
  Confidentiality............................................ 80
  Obedience to the Nonprofit Purposes and Mission .......... 81
Role of Management in Supporting the Directors’
  Fulfillment of Duties ..................................... 81
Liability of Directors, Indemnification,
  and D&O Coverage ....................................... 81
Liability of Shields........................................... 81
Indemnification ............................................ 83
Directors and Officers Liability Coverage .................. 83
Form 990 Governance Issues ................................ 84
Board Policies ................................................ 87
  Mission Statements ...................................... 87
  Compensation ........................................... 88
  Reimbursement Policy for Business and Travel
    Entertainment .......................................... 89
  Conflict of Interest ..................................... 89
  Board Member Independence ................................ 90
  Code of Ethics ........................................... 90
  Document Retention and Destruction ....................... 91
  Whistleblower Protection ................................ 91
  Chapters, Affiliates, and Branches ....................... 92
  Fundraising ............................................. 92
  Endowment/Investments .................................. 92
  Form 990 Review ......................................... 93
  Public Accountability/Disclosure of Documents .......... 93
  Gift Acceptance .......................................... 94
  Contemporaneous Minutes ................................ 94
  Joint Ventures ........................................... 95
Attorney Serving on Nonprofit Client’s Board of Directors .... 95
  Potential Conflicts of Interest for Attorney-Directors .... 96
  Attorney-Client Privilege Waivers ........................ 97
  Protections for Attorney-Directors ....................... 97
  Considerations for Attorneys Serving on
    Nonprofit Client Boards ................................ 98
Keys to Effective Board Service ................................ 99
Corporate Housekeeping ..................................... 99
Chapter 5

Other Matters Arising in Representation of a Nonprofit ........ 101
  Subsidiaries of Nonprofits ........................................... 101
  Nonprofit Corporation Subsidiaries ......................... 101
  For-Profit Corporation Subsidiaries ...................... 102
  Limited Liability Company Subsidiaries ................. 103
  Other Considerations for Subsidiaries .................. 103
  Mergers, Sale of Assets, and Similar Transactions .... 104
    Considerations for Moving Forward with Entity
    Combinations ......................................................... 104
    Mergers .......................................................... 106
    Asset Acquisitions/Sales .................................. 108
    Parent-Subsidiary Type Arrangements ................. 109
    Forms of Less Integrated Affiliations ............... 111
    Unique Due Diligence Considerations ............... 111
    Summary ........................................................ 113
  Dissolution .......................................................... 113
    Voluntary Dissolution ................................ 113
    Administrative Dissolution ............................ 116
    Judicial (Involuntary) Dissolution ................. 116
    Tax Issues Relating to Dissolution .................. 117

Appendices

Nonprofit Corporation

Articles of Incorporation and Bylaws

Checklist ............................................................... 119
  Articles of Incorporation ................................ 119
  Bylaws ............................................................ 120

Tax-Exempt Organization Reference Chart .................. 123
  Organization Reference Chart from Tax-Exempt Status for Your
    Organization; Internal Revenue Service Publication 557
    (Rev. January 2017) ............................................. 123

Nonprofit Resources ................................................. 129
  Publications ..................................................... 129
  Periodicals ...................................................... 131
  Useful websites and organizations ..................... 131

Index ................................................................. 135