

Client Alert

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Practitioner's Guide to the New IRS Form 1023-EZ: Critical Considerations

by [Ofer Lion](#) and [Douglas Mancino](#)

To date, no one has put it better: "It's easier to get tax-exempt status under 1023-EZ than it is to get a library card," says Tim Delaney, president and CEO of the Council of Nonprofits.¹

The IRS recently released Form 1023-EZ, Streamlined Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code.² Both the Instructions for Form 1023-EZ³ and Revenue Procedure 2014-40⁴ provide additional detail about the new form and who can use it. This Practitioner's Guide to the Form 1023-EZ attempts to address critical considerations to be made in deciding whether to utilize the new form.

Attesting to a Legal Conclusion Under Penalties of Perjury – A "Will" Level Legal Opinion?

Form 1023-EZ requires the filer to attest to numerous legal conclusions about the organization, effectively at a "will" level. As a result, if there is any question about the organization's qualification for tax-exempt status, filing a Form 1023 may be the preferred route, as it allows the organization to "test" its qualifications with the IRS, and to make adjustments as may be required by the IRS in the course of its review.

Of particular note, under penalties of perjury, the Form 1023-EZ filer is required to attest that the organization:

- is organized and operated exclusively to further one or more exempt purposes;
- does not further nonexempt purposes (such as purposes that benefit private interests) more than insubstantially; and
- is not organized or operated for the primary purpose of conducting a trade or business that is not related to its exempt purpose.

Form 1023, on the other hand, allows an organization that may not be so sure about these matters to present a full description of the organization's operations, leaving it to the IRS to determine whether the

¹ Massimo Calabresi, "IRS to Rubber Stamp Tax-Exempt Status for Most Charities After Scandal," TIME, 07/13/2014, available at <http://time.com/#2979612/irs-scandal-tax-exempt-tea-party-political-groups-john-koskinen/>.

² Form 1023-EZ is available at <http://www.irs.gov/pub/irs-pdf/f1023.pdf>.

³ The Instructions for Form 1023-EZ are available at <http://www.irs.gov/pub/irs-pdf/i1023ez.pdf>.

⁴ Revenue Procedure 2014-40 is available at <http://www.irs.gov/pub/irs-drop/rp-14-40.pdf>.

organization qualifies for tax-exemption. For example, a Form 1023 can describe a financial relationship between the organization filing for exemption and a related person, in the hopes that the IRS will issue a determination letter that effectively verifies that the arrangement does not further that related person's private interests more than insubstantially.

Should Private Foundations Respect an "EZ" for Expenditure Responsibility Purposes?

Probably not. Revenue Procedure 2014-40 provides that a determination letter "issued to an organization that submitted a Form 1023-EZ ... may not be relied upon if it was based on any inaccurate material information submitted by the organization." For this purpose, "[i]naccurate material information includes an incorrect attestation as to the organization's organizational documents, the organization's exempt purposes, the organization's conduct of prohibited and restricted activities, or the organization's eligibility to file Form 1023-EZ."

A private foundation need not exercise expenditure responsibility when making a grant to certain organizations, including those eligible for Form 1023-EZ use, other than private foundations.

However, private foundations may find it difficult to rely on a determination letter issued pursuant to a Form 1023-EZ. The private foundation may not have the ability to determine whether the organization made an "incorrect attestation" on its tax-exemption application without undertaking the in-depth review that once would have been done by the IRS.

Can a Donor Rely on an "EZ" For Deductibility Purposes?

Apparently so. The Instructions to Form 1023-EZ indicate that "donors and contributors may rely on an organization's favorable Determination Letter under section 501(c)(3) until the IRS publishes notice of a change in status, unless the donor or contributor was responsible for or aware of the act or failure to act that results in the revocation of the organization's Determination Letter."

Will Guidestar.org and the IRS Business Master File Indicate Whether an Organization Used A Form 1023-EZ?

We assume that either or both Guidestar.org and the IRS Business Master File will somehow indicate whether an organization received its tax-exempt status pursuant to an IRS Form 1023-EZ.

Will Attorneys General Take a Closer Look at "EZ" Filers?

The National Association of State Charity Officials (NASCO) submitted comments to the Department of Treasury recommending against the Form 1023-EZ when it was proposed: "We believe that the Form 1023-EZ will increase opportunity for fraud and heighten the burden on state regulators to compensate for the reduced standards that will be required of the organization to meet federal tax exemption requirements."⁵

Given these comments, it certainly appears that use of Form 1023-EZ will be viewed as a red flag by state regulators.

No Expedite Request? No Need

While an expedite request cannot be filed in connection with a Form 1023-EZ, it appears that there is no need. The early returns indicate that determination letters are being issued to Form 1023-EZ filers in two or three weeks' time.

⁵ NASCO's comment letter is available at: <http://www.nasconet.org/wp-content/uploads/2014/05/FINAL-NASCO-comments-re-Form-1023-EZ1.pdf>.

Replacing a Long-Delayed 1023 with an “EZ”; The Cost of Switching to the Express

As long as a filed Form 1023 has not yet been assigned for review, which can take over a year these days, the IRS will accept a Form 1023-EZ as a replacement. However, the initial filing fee from the Form 1023's submission will not be refunded, and the submission date of the 1023-EZ will replace the Form 1023's filing date for purposes of the 27-month general limit on retroactivity.

So, if the Form 1023-EZ is not filed within 27 months of formation, the effective date of exempt status will be the submission date even if the Form 1023 being replaced was filed within 27 months. However, Form 1023-EZ permits the filer to petition for an earlier effective date than the submission date. The procedure is set forth in the Instructions to Form 1023-EZ.

The Home Address of Every Director and Officer?

The Instructions to Form 1023-EZ require the filer to “Enter the full names, titles, and personal mailing addresses of your officers, directors, and/or trustees.” The Instructions to Form 1023, on the other hand, specifically provide that “Officers, directors and trustees may use the organization’s address for mailing.”

It remains unclear whether the IRS will accept use of the organization’s address for the officers, directors and trustees of Form 1023-EZ filers.

Can a Form 1023-EZ be Filed to Reinstate an Automatically Revoked Organization?

Yes, but not for retroactive reinstatement. If the organization wishes to apply for retroactive reinstatement under Section 5 or 6 of Revenue Procedure 2014-11, it will need to file Form 1023 along with an appropriate reasonable cause statement and a confirmation that the required returns have been filed.

Conclusion

While the Form 1023-EZ may look like a panacea to any organization qualified to use it, careful consideration is merited. This Practitioner’s Guide to the Form 1023-EZ attempts to address some of the critical issues to be considered in deciding whether to utilize Form 1023 or the new Form 1023-EZ.

If you have any questions about this alert, please contact either of the Hunton & Williams LLP lawyers listed below.

Contacts

Ofer Lion
olion@hunton.com

Douglas M. Mancino
dmancino@hunton.com

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