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THE PRIVATE BRIEF · NONPROFIT GOVERNANCE

How to Start a Private Foundation in New York: The Legal Steps, in Order

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September 2026

IN BRIEF

- Form the foundation as a New York charitable not-for-profit corporation, and put the purpose and dissolution language the IRS requires into the certificate of incorporation before it is filed, because New York accepts broader purposes than the IRS does.
- The steps run in a fixed order: the certificate with the Department of State, an organizational meeting that adopts bylaws and the conflict of interest policy New York law requires, a federal tax ID, then Form 1023, filed within 27 months after the end of the month of formation so the exemption dates back to the start.
- Registration with the Attorney General's Charities Bureau runs on its own clock, within six months after the foundation holds property for charitable purposes, and does not wait for the IRS.

The family has decided. Over the holidays everyone agreed: a foundation, with the family's name on it and the three children on the board. Now someone has to build it, and the first question is always the same: where do we start?

The short answer: form a New York not-for-profit corporation whose certificate already says what the IRS needs, hold an organizational meeting, get an employer identification number, file Form 1023 with the IRS, and register with the Attorney General's Charities Bureau on the clock New York sets. The order matters more than any single step. Most of the expensive mistakes here are sequencing mistakes. Someone files a document before it is right, or a deadline starts running before anyone is watching it.

This piece is about the legal steps, not how much to give or what to fund.

Step one: choose the form

A private foundation can be set up as a trust or as a corporation. The foundations this firm forms are New York not-for-profit corporations, which gives the family a board, officers, bylaws and a set of default rules that feel familiar.

New York's Not-for-Profit Corporation Law says a corporation formed on or after July 1, 2014 "shall either be a charitable corporation or a non-charitable corporation," and the certificate has to say which. A family foundation is formed as a charitable corporation.

Step two: get the certificate right the first time

Section 402 of the law lists what the certificate of incorporation must contain, including the name, the purposes and whether the corporation is charitable, the county where its office will be, the names and addresses of the first directors, and the designation of New York's Secretary of State to receive legal papers served on the corporation.

Here is the trap. New York is relaxed about purposes: the statute says it is "sufficient to state that the purpose of the corporation is any purpose for which corporations may be organized under this chapter." The IRS is not relaxed. Its Form 1023 instructions say "Your organizing document must limit your purposes to those described in section 501(c)(3)," the part of the tax code that covers charities. The instructions offer sample language: the organization is "organized exclusively for charitable, religious, educational, and scientific purposes under section 501(c)(3)."

The IRS also expects the organizing document to dedicate the foundation's assets to charitable purposes forever, so that if the foundation ever dissolves, what is left goes to charity. Some states' laws do this job on their own, and the IRS lets organizations there rely on them. We write the clause into the certificate so nobody has to argue about it later.

One more thing belongs on the drafting checklist. Section 404 requires a state agency's approval before certain certificates can be filed. For example, a certificate whose purposes include operating "a school; a college, university or other entity providing post secondary education; a library; or a museum or historical society" needs the approval of the Commissioner of Education. A grantmaking foundation usually stays clear of these categories, but a purpose clause drafted loosely enough to sound like a school can pull the filing into an approval nobody planned for. Where no approval is needed, the certificate must say so.

The Department of State's filing fee for a not-for-profit certificate of incorporation is $75. Its page lists optional expedited handling at $25 per document for 24-hour processing, $75 for same-day and $150 for two-hour.

Step three: organize the corporation

Filing the certificate creates the foundation. It does not organize it. The organizational meeting does the rest:

1. Adopt bylaws, including how directors are elected, how successors are chosen and what counts as a quorum.
2. Confirm the board. New York requires that the entire board be "not less than three" directors.
3. Adopt a conflict of interest policy. This is not optional: section 715-a of the Not-for-Profit Corporation Law says "the board shall adopt" one, and sets its minimum contents.
4. Authorize a bank or brokerage account and accept the first contribution.
5. Fix the fiscal year, a decision that sets every federal and state deadline that follows.

The conflict of interest policy deserves a moment. The statute requires, among other things, a definition of a conflict, a way to disclose one, a rule that the person with the conflict stays out of the discussion and the vote, and a written record in the minutes. Each director must also sign a written statement of outside interests that could conflict, before first being elected and every year after. For a family board, that policy is the working half of the federal self-dealing rules, which tax many kinds of transactions between a foundation and the people closest to it. Draft it for a board whose members are related to one another and to the donor.

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Step four: the employer identification number

The foundation needs its own employer identification number, the federal tax ID, before it can open an account or apply for exemption. The IRS issues it online, and it is free.

Step five: Form 1023

Form 1023 is the application asking the IRS to recognize the foundation as a tax-exempt charity. It must be filed electronically, and the IRS user fee, currently $600, is paid through Pay.gov when you file.

There is a shorter form, the 1023-EZ, with a $275 fee. You will often hear that a private foundation cannot use it. That is too broad. The IRS instructions say a private operating foundation (one that runs its own charitable programs) cannot use it. An ordinary grantmaking foundation can, but only if it answers no to every question on the IRS eligibility worksheet, which include whether it expects gross receipts over $50,000 in any of the next three years and whether it holds total assets worth more than $250,000. A foundation funded with a real endowment is over that asset line on day one, so most family foundations file the full Form 1023.

Watch the clock. The instructions provide that “if you file Form 1023 within 27 months after the end of the month in which you were legally formed, and we approve your application, the effective date of your exempt status will be your legal date of formation.” File later and the effective date generally becomes the filing date.

Recognition is never assured: the IRS decides. It publishes a status page, which as of this writing reports that it issues “80% of Form 1023 application determinations within 191 days,” and it says plainly that many factors, including its staffing, affect that pace.

Step six: register with the Attorney General

New York registration is a separate obligation, and its clock does not wait for the IRS. Section 8-1.4 of the Estates, Powers and Trusts Law requires a filing with the Attorney General “within six months after any property held by him or her or any income therefrom is required to be applied to charitable purposes.” For a foundation, that clock can start as soon as it is funded.

If the foundation will also ask anyone for money in New York, Article 7-A of the Executive Law requires registration “prior to any solicitation,” with a $25 fee. A foundation already registered under Article 7-A is treated as having made the initial Estates, Powers and Trusts Law filing. Registration is done online on the Charities Bureau’s form CHAR410, which asks for the certificate, the bylaws and a description of the foundation’s purposes of at least 100 words. After that comes the annual CHAR500 report.

Step seven: the state sales tax exemption

Federal exemption does not bring New York’s sales tax exemption with it. The foundation applies on Form ST-119.2, with a copy of its IRS determination letter, and if approved receives Form ST-119 with its New York exemption number.

A worked example

A composite, not a client. A family incorporates in November with a certificate saying the foundation may pursue any purpose permitted under the Not-for-Profit Corporation Law. New York accepts it. The following spring, preparing Form 1023, someone notices that the certificate does not limit the foundation's purposes to charitable ones.

The fix is not a phone call. It is a board resolution, a certificate of amendment filed with the Department of State, another filing fee and a wait for the amended certificate to come back, while the 27-month clock that began in November keeps running. Drafting the clause correctly in November would have cost nothing. That sequencing is what the firm's Foundation Launch engagement is built around: the entity, the governance documents and the application in the right order, with the scope and published fee on the Foundation Launch page.

Where to start

This week, write down three things before anyone drafts a word: the names of at least three first directors, the fiscal year you want, and one paragraph describing what the foundation will fund. That paragraph will become the purpose language in the certificate, the 100-word description for the Charities Bureau and the activities narrative in Form 1023, and all three should say the same thing.

This is general information about forming a private foundation in New York, not legal advice about your situation. Filing fees and IRS processing times change, so confirm current figures before relying on them.

WRITTEN BY

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Anthony is the Managing Partner of Clemenza Law Group and serves as general counsel to a wide range of companies and philanthropic organizations. Nearly every essay here began as a real question from a real client: the contract that landed at 4 p.m., the board that meets on Thursday. He writes them the way he would answer you across the table, plainly and with care.