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Legal Issues in Mutual Aid Operations: A Preliminary Guide

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This guide was written by Clinical Professor of Law Michael Haber, who directs the Community & Economic Development Clinic at Hofstra Law School, with help from Hofstra Law students Christopher Bluethgen, Faith Pappalardo, and Zeus Smith, who deserve substantial credit for their contributions.

We'd love to hear more about your mutual aid work or talk about legal questions your group may be facing. You can contact Mike at Michael.L.Haber@hofstra.edu or @mhaber5 on Twitter.

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Our understanding of current mutual aid practices came about collaboratively, through conversations with people from many different groups involved in mutual aid in different ways across the region, including: Bed-Stuy Strong, Brooklyn Packers, Coalition for Community Advancement and Cypress Hills LDC, The Co-Op Fund and Activation Co-Op Fund, Cooperation Long Island, Crown Heights Mutual Aid, DSA's Libertarian Socialist Caucus, Mayday Space, Movimiento Cosecha, and a number of mutual aid networks that never grew so formal that they even took the time to agree on a name, but which raised important ideas and questions over these past months.

We also want to acknowledge the influence of Scott Crow, Food Not Bombs, Cindy Millstein, Mutual Aid Disaster Relief, Occupy Sandy, Dean Spade, and the Young Lords on our thinking about mutual aid, and the Lenape, Merrick, and Shinnecock people, on whose land we have done this work.

This document is not legal advice and does not replace consulting with an attorney. This guide aims to give an overview of some of the legal issues that mutual aid groups are confronting. It is principally guided by our experiences counseling and representing mutual aid groups in New York, but mutual aid projects in other states or countries may find it useful as well. **Wherever you conduct your mutual aid projects, we encourage you to consult with an attorney licensed to practice where you are, and not to rely exclusively on this guide.**

Preface

The first words of the first draft of this guide were written on May 14, 2020, when COVID-19 was the lead story on every news broadcast and the headline of every newspaper for months, and mutual aid groups were collaborating with our neighbors and getting increasingly sophisticated about building long-term, resilient projects to help our communities and organize toward social change at the neighborhood level.

The final pages of this guide are being written after midnight on May 30, 2020. A replay of an interview with a TV news reporter is on quietly in the background, periodically drowned out by sirens and flash-bangs in the distance. The reporter is describing how he was pepper-sprayed without provocation, even after identifying himself as a journalist. Friends are checking in by text and on social media, some in the streets, some back home, some watching online, at least one in a hospital, all looking for connection in this circus of racism, sickness, death.

The sirens are louder now, things are getting closer.

I'm trying to summarize some notes on food safety regulations I emailed myself last week, wondering if fixing these footnotes will actually help someone.

It won't help George Floyd.

* * *

I hope you hate this guide. The project of mutual aid and the world of corporate, tax, and regulatory law should not be a happy pairing. Most people who will read this know the feelings of community and solidarity that can come when doing mutual aid are energizing, beautiful, transformative. Thinking about tax forms and corporations and insurance is lonely and often mind-numbing. Life would be better if we could just ignore all of this.

At the same time, the state, the police, this whole system would be happy to crush the solidarity we're building between neighbors, just like they are doing to people in the streets right now. They probably won't do it with tear gas, flash-bangs, and rubber bullets—they haven't yet figured out how to portray the act of dropping off some veggies with a neighbor as a violent threat. Instead, they'll use their preferred tools: taxes, fines, regulations, endless paperwork, the non-profit industrial complex. That's why these legal technicalities are important: not because anyone should be excited about these rules, but because knowing how to operate within these bureaucracies can sometimes be the only masks and bandanas that we have to defend our communities from the kinds of tear gas and bullets that, at least tonight, feel very close.

Mike Haber
Brooklyn, NY
May 31, 2020, 2:17 AM

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1. Introduction to Mutual Aid and this Guide

A. A Brief Introduction to Mutual Aid

In an upside-down world where the prevailing view is that exploitation, hierarchy, and domination are natural and just, simple acts of sharing what we have with our neighbors and communities out of a sense of solidarity can become transgressive political acts.

The philosophers of capital have always sought to normalize extractive relationships between humans. In the second half of the nineteenth century, popular figures like Herbert Spencer and the Social Darwinists aimed to justify racism, colonialism, and extractive capitalism as a natural process, simply “survival of the fittest.” In response to their influential views, the Russian naturalist Peter Kropotkin, in *Mutual Aid: A Factor of Evolution*, argued that competition is not the end of the evolutionary story; in both animal groups and human societies, collaboration and mutual aid are commonly adopted as essential tools for survival.

Even if we just consider the last century in the global north, mutual aid has been repeatedly turned to as a tool by oppressed people, people in need, and social change movements: in the U.S., African-Americans, Jews, and recent immigrants formed dozens of fraternal and sororal societies that supported mutual aid among members in the nineteenth and early-twentieth centuries; Dorothy Day and Peter Maurin were inspired by Kropotkin when they helped to launch the Catholic Worker movement, which created and operated communal shelters and farms organized by-and-for the poor; in the late 1960s and early 1970s in the U.S., the Black Panther Party, the Young Lords, and other groups launched programs that provided free breakfast, clothing, first aid, and political education in communities of color, not as charity but as efforts to fuse radical political organizing with necessary services in their communities; anti-nuclear activists in the 1980s created Food Not Bombs, which grew into a global network of community groups that share vegetarian food with anyone who comes, typically using food that would otherwise be thrown out by retailers, while educating the public about the unjustness of massive military spending and war while so many are in need; and in recent decades, as the climate crisis has become increasingly severe, major mutual aid projects have been launched after Katrina and Rita, Sandy, Maria, and other hurricanes and emergencies.

As mutual aid projects continue to draw from and add to this history, a set of shared principles has come to define contemporary mutual aid work. Most commonly, mutual aid is defined in contrast to charity. Charity has a long history of being used by people with money and power to control those without money and power, with the extremely rich giving tiny fractions of their fortunes to programs that provide just enough help to ameliorate some of the most outrageous impacts of our economic system while posing no threat to the status quo. In contrast, mutual aid aims to be an exchange among equals: sharing resources and ideas among neighbors, building relationships, trust, and collective community power, and rejecting hierarchy and domination. In many cases, rejecting hierarchy means making decisions through consensus or consent processes instead of majority votes, and, more generally, it means avoiding top-down management structures. Its commitments to democracy, collaboration, and building community power through self-government and non-coercive decision-making put mutual aid directly in line with anti-authoritarian and anarchist political traditions, even if some who join these efforts during or after a crisis are not motivated by political ideology.

Even with these shared principles, there is no one-size-fits-all model for mutual aid. Mutual aid is an ongoing experiment in creating a new world for ourselves, “collectively self-determining, self-organizing, and starting to self-govern how to supply each other with what we need as well as desire, all the while cultivating beloved communities of care.”¹ Flexibility and experimentation are important, as mutual aid groups share their practices, learn from one another, and develop new tools and practices that work better in their particular contexts.

B. Why a Legal Guide? Do We Need to Listen to Lawyers?

In response to the COVID-19 pandemic, hundreds of groups have formed and started doing mutual aid in their communities. They have embraced a DIY spirit of experimentation, and have largely done the work of starting and organizing their projects without lawyers or much concern about the legal requirements or ramifications of their work. After all, you could hardly call it mutual aid if your first action involves calling a law firm. But as the crisis continues to unfold, mutual aid groups have been confronting increasingly complex questions as they plan and grow, and having access to relevant legal information and, ideally, representation by a movement lawyer who understands and is aligned with your group’s vision, may help.

Our philosophy in writing this guide is that this is not a crisis that will last just a few months, nor is it a crisis limited to COVID-19. As waves of COVID-19 crest and recede and we deal with its long-term economic and political fallout, it is this pre-existing condition that may kill more than the virus itself. Perhaps our best hope is that this can be a moment to grow our mutual aid, stay grounded in the social movements around us, and develop our groups into community-based counter-institutions that build collective power against oppression and that, together, we can all cultivate from these tiny sprouts into a whole new ecosystem of a better world.²

The guide might be thought of as itself a kind of mutual aid: it is an imperfect and somewhat-rushed first draft, written out of the needs we see in the current moment but with an eye toward a broader political future, and free to be shared with anyone who can use it. Our intent is not to be coercive; we do our best to explain the law and tell you broad pros and cons of different approaches to it, but we acknowledge that we do not have all of the answers—we are completely confident that some of your ideas and solutions are much better than what we’ve come up with so far. We encourage you to share those ideas with us so that this guide can be improved, and we welcome your thoughts on what other questions we should address and what needs more information here.

Finally, we also have a limited capacity to provide *pro bono* client representation to mutual aid groups, and we would be happy to talk about whether we’d be able to directly represent you, or if we could try to refer you to another *pro bono* lawyer. You can reach us at Michael.L.Haber@hofstra.edu, by phone at 516-463-5934, or on Twitter at @mhaber5.

¹ Cindy Millstein, *Collective Care is our Best Weapon against COVID-19*, <https://mutualaididasterrelief.org/collective-care/> (2020).

² See generally Michael Haber, *CED After #OWS: From Community Economic Development to Community Counter-Institutions*, 43 FORDHAM URBAN L. J. 295 (2016), available at <https://ssrn.com/abstract=2847215>; Symbiosis Research Collective, *Community, Democracy, and Mutual Aid: Toward Dual Power and Beyond* (2017), available at https://thenextsystem.org/sites/default/files/2017-07/Symbiosis_AtLargeFirst-corrected-2.pdf.

2. Mutual Aid and Risk of Liability

The questions we get asked most often by mutual aid groups are things like this: Could we get sued? Could we get in trouble for this work? If someone gets sick or hurt, could they blame us? The answer to all these questions is clear: Unfortunately, yes—there's a risk that you could be sued and compelled to pay damages to someone because of participation in mutual aid projects.

A. Who could sue?

- If your group makes deliveries to a person and that person gets sick, they could sue.
- If a member of your group gets sick while doing mutual aid activities, they could sue.
- If your group fails to comply with some legal obligation, like it fails to pay taxes or comply with a food safety regulation, or if you fail to pay a bill you owe when it comes due, a private company or a government entity could sue.

B. Who, exactly, would they sue?

Most mutual aid groups operating right now are not incorporated. Because there is no legal entity to sue, individuals affiliated with the mutual aid group could be sued.

Let's take an easily-imagined scenario. Imagine Albert, an active member of your mutual aid group, gets sick from COVID-19 and dies, leaving \$50,000 of medical bills and a potential civil claim for wrongful death, and that through contact tracing or another investigation, it looks likely that Albert got sick because of working alongside another member of your mutual aid group, Blanca, who had COVID-19 and participated in this mutual aid project anyway, wearing a mask that did not fit exactly right.

Albert's family has access to Albert's phone and they see that Albert was directed to meet with Blanca, Carson, and Dana as part of their work with this mutual aid group. They see that this group's activities were coordinated through Slack or a similar digital platform, and they believe that Eddie and Felipe are the coordinators or leaders of that digital space, even if they do not have formal titles or roles. They also learn that Gretchen and Hector are listed as the contacts on a PayPal or Venmo account used by the group. They might simply see Isaac's name in the Slack and decide to sue him too, even though he hasn't been an active member of the group, simply because Isaac comes from a wealthy and prominent family in town. Albert's family could very easily sue Blanca, Carson, Dana, Eddie, Felipe, Gretchen, Hector, and Isaac. They might not have winning lawsuits against some of them, but those people might all have to pay lawyers just to get the case dismissed against them.

C. Would that lawsuit win?

Could Blanca—who may have accidentally gotten others sick by not properly wearing a mask—be forced to pay damages to Albert's family? What about Ed and Felipe, who were simply trying to help coordinate mutual aid activities in their community, or Gretchen and Hector, who saw their roles as limited to making sure that money was not being misused? A lot will depend on the specific facts of the case, but yes, there is some risk that these kinds of lawsuits could win.

Imagine if Albert's family were to sue Blanca and also Isaac, thinking that Isaac is wealthy and could help pay for Albert's bills, even if he wasn't present on the day that Albert was infected and wasn't even an active member of the group. Surely Isaac won't have to pay, right? The law is not completely consistent on this question from state to state, but courts generally look for there to be some connection—even if it is fairly indirect—between a person and the injury to find them liable for the harm. For instance, a court in Maine found that when a guest slipped and fell at a party sponsored by an unincorporated association, the person who fell could recover damages from individual members of the group based only on going to meetings where the party was being planned.³ In Florida, a court found that members of an unincorporated association with an initiation ritual that involved firing a shotgun loaded with blanks were not individually liable when someone lost an eye from that gun unless they participated in the ritual more closely than simply attending it.⁴ In Delaware, a court found that people injured in a fight at an unincorporated college fraternity could proceed with a case only against the members of the fraternity who “authorized, planned, directed, or participated in the fight.”⁵ The California Court of Appeals found that members of an unincorporated association could be held liable for one member negligently driving a car if those members approved the decision for that member to drive.⁶

These decisions point toward Isaac possibly being shielded from personal liability, but Eddie and Felipe, who helped coordinate the group's activities, or even Gretchen and Hector, who helped to manage the group's money, are not necessarily safe from personal liability if Albert's family were to sue them.

D. Managing Risk of Liability

One of the main goals of this guide is to help your group navigate and manage the risks of having your group or your members sued for damages. Nothing is perfect protection, but there are steps you can take that provide meaningful protection for your group and its members, including:

- Incorporating an entity for your mutual aid project (Section 3);
- Adopting a written Safety Policy describing steps members are expected to take to keep people safe, and updating it as public health experts learn more about COVID-19 (Section 4);
- Using liability waivers and obtaining appropriate insurance (Section 4)
- Understanding your potential tax liability (Section 6)
- Understanding the risks that can arise from operating a disaster relief or emergency hardship fund (Section 6), crowdfunding (Section 7), or handling, processing, or serving food (Section 8).

Not all of these will be protections that every mutual aid group will want to use—and even if you were to take all of them, it would only reduce risk, not eliminate it. For some mutual aid groups, some of these steps are going to be too inconsistent with your political visions to adopt. We encourage you to balance your tolerance for risk against your political outlooks. Our purpose here is not to convince you that any of these steps are necessarily right for you, but to encourage you to do that balancing with a clear understanding of your risks and legal options.

³ Libby v. Perry, 311 A.2d 527 (Me. 1973).

⁴ Guyton v. Howard, 525 So. 2d 948 (Fla. 1988).

⁵ Marshall v. Delaware, 1986 WL 11566 (Del. 1986).

⁶ Steuer v. Phelps, 41 Cal. App.3d 468, 116 Cal. Rptr. 61 (1974).

3. Questions about Governance and Incorporation

A. Governance and Decision-Making: Not the Same as Incorporation, and You're Already Doing It

Even if your mutual aid group plans to never incorporate, it is a good idea to establish some written rules for how your group makes decisions and operates. As Jo Freeman observed decades ago, saying that your group has no structure and that people are free to do whatever they please is not liberation: it means that unwritten rules, friendship cliques, and popularity contests fill the void where a set of mutually agreed-upon group rules could otherwise be.⁷

What are good things to put in writing for your members to know and agree to follow? We recommend considering the following:

- *Principles and Purposes* – What are your shared values or points of unity? What are your goals?
- *Community Agreements or Group Agreements, and an Anti-Oppression Statement or Safer Space Policy* – These are different, but all speak to creating an environment for collaboration that aims to support and be respectful toward all participants. A community agreement or group agreement asks all members to consent to a set of member-created statements describing what all members of the group need from—and are willing to commit to—one another in order to feel safe.⁸ Anti-oppression statements and safer spaces policies aim to fight against white male-domination of activist spaces by specifically calling on activist spaces to address oppression and discrimination within their groups.⁹
- *Safety Policy* – We recommend that all mutual aid groups adopt a policy on how you will be keeping each other and the community as safe as you can from COVID-19.¹⁰
- *Policies Regarding Membership, Participation, and Voting* – Does a person need to take some action to participate in the group? Is there a way to formally leave the group? What process is used to make decisions—majority vote, consensus, consent, something else?¹¹ Do all members get to participate in decision-making? Is there more than one decision-making body? Are all decisions made by the group as a whole?
- *Policies on Money* – If your group has a bank account, or an account with a payment processing firm like PayPal or Venmo, who has access to those accounts, and what are your policies on keeping records of those funds, requesting funds, and authorizing payments?
- *Policies on Engagement* – Are there rules regarding how you interact with the community or broader public? Are there rules on who can speak for the group?
- *Policies on Communications and Recordkeeping* – How does someone join your communications platforms? Where do you keep records of your decisions and internal communications? Are there people tasked with maintaining those records?

⁷ Jo Freeman, *The Tyranny of Structurelessness*, available at <https://www.jofreeman.com/joreen/tyranny.htm> (1973).

⁸ See National Equity Project, *Developing Community Agreements*, <https://nationalequityproject.org/resources/featured-resources/developing-community-agreements>; Seeds for Change, *Group Agreements for Workshops and Meetings*, <https://www.seedsforchange.org.uk/groupagree>.

⁹ See Timothy Luchies, *Anti-Oppression as Pedagogy; Prefiguration as Praxis*, 6 INTERFACE 99 (2014), available at <http://www.interfacejournal.net/wordpress/wp-content/uploads/2014/06/Interface-6-1-Luchies.pdf>; Coalition for Safer Spaces, *What Are, and Why Support, “Safer” Spaces*, Apr. 4, 2010, <https://saferspacesnyc.wordpress.com/>.

¹⁰ See *infra* Section 4.A for ideas on what to put in a Safety Policy.

¹¹ See *infra* Section 3.D.5.

- *Rules on Conflicts* – What is the process to resolve conflicts that may arise between people inside or outside the group?¹²

B. Why Consider Incorporation?

Incorporation is not something many mutual aid groups are excited about, but it also may be the best form of protection from liability for mutual aid groups and their members.

Limited liability companies (LLCs) and corporations, including not-for-profit corporations and cooperative corporations, are separate entities from their shareholders, members, officers, employees, volunteers, and other stakeholders. If ABC Mutual Aid is an incorporated entity responsible for a debt, including a debt that arose from a court judgment or a government tax or fine, it would be the responsibility of the entity to pay that debt, not the responsibility of any of those stakeholders. If the entity had no money or other way to pay the debt, it would basically be “judgment proof”—there would be no way for the party owed money to collect on the debt.

To use the example described in Section 2, if Albert’s family were to sue Blanca, Carson, Dana, Eddie, Felipe, Gretchen, Hector, and Isaac, and these mutual aid activities were being done through an incorporated entity, there would be very little chance of any of the individual members owing Albert’s family money. Albert’s family could win damages against the corporation only, and only if it were found to have been negligent. If Carson owns a house, if Eddie has a job with wages that could be garnished, if Gretchen has \$5,000 in the bank, those would all be safe. Only the corporation’s assets—for most mutual aid groups without vehicles or offices, this would mean only any money in a bank account—would be at risk. Even beyond that, if the mutual aid group were incorporated as a non-profit corporate entity that meets the requirements of the federal Volunteer Protection Act,¹³ its volunteers would have additional protections against personal liability.

Piercing the Corporate Veil: The Rare Exception to Corporate Liability Protection. In very rare situations, a court will hold individual stakeholders, members, directors, or owners of an LLC or corporate entity responsible for their acts done as part of the entity, defeating corporate liability protection. Lawyers call this “piercing the corporate veil.” Courts will usually only do this when all three of these factors are present: (1) there is no meaningful separation between the entity and its owners—the entity fails to follow basic corporate formalities, like it keeps its money co-mingled in a member’s personal bank account; (2) the actions that caused the debt were fraudulent or extremely serious; and (3) the people who are owed money suffered unjustly.

While veil piercing is rare, it is important to avoid by keeping up with corporate formalities, like holding meetings when required and keeping your group’s money separate from any personal bank accounts.

¹² This list was inspired in part by Sustainable Economies Law Center, *Micro-Training: Mutual Aid and the Law*, May 21, 2020, <https://www.youtube.com/watch?v=9XU50Q1K9mM>.

¹³ 42 U.S.C. § 14501 et seq. provides protections for volunteers acting within the scope of their responsibilities for a nonprofit organization if the harm they cause was not due to willful or criminal misconduct, gross negligence, intentional misconduct, a flagrant indifference to the rights or safety of the individual harmed, and was not caused by the volunteer driving a car or flying an airplane. It only applies to 501(c)(3) non-profit organizations and organizations organized and

C. Why Reject Incorporation?

Incorporation can help protect your members and volunteers from personal liability, but there are also lots of reasons not to incorporate. Here are some of the concerns about incorporation that mutual aid groups have raised with us:

1. *We want absolutely nothing to do with the state.* Given how the U.S. and other governments so frequently repress communities of color and social movements when they become powerful, it is understandable for your mutual aid group to view any voluntary interaction with state with suspicion. If your group wants to draw an admirably bright line here, you might want to make it very clear to new volunteers that their participation does not necessarily come with the protections provided by volunteering with a conventional non-profit corporation.
2. *We don't want to take the time or expense of incorporating and keeping up with all of the legal requirements on corporate entities.* This is also an understandable concern. Corporate formation usually costs between \$75 and \$200 in New York (costs vary from state to state, but New York's range is fairly average), but there are some hidden costs, especially for LLCs, which can cost more than \$1,000 to form in New York.¹⁴ The time to create a corporate entity is usually minimal, but there are some basic corporate compliance steps that need to be followed going forward into the future. This work can become a burden, but you might also approach it with the mindset of seeking to do the least amount necessary to avoid trouble. In Section 3.D, we discuss this as the “lighter” approach to corporate formation.
3. *We are concerned that we'll be forced to have a Board and a hierarchy and make decisions by popular vote, all of which will change the culture and operations of our group, and we're concerned about the non-profit industrial complex.* These often are some of the biggest concerns of mutual aid groups, and rightfully so. If our goal is “solidarity, not charity,” are we just making ourselves into charities if we start down the road of corporate formation? We will discuss this next, in Section 3.D.

D. Corporate Formation, Formality, and Hierarchy

This Section 3.D does not go into a detailed description of all of the steps and processes necessary to organize an entity, as there are lots of resources on corporate formation already available, and the rules vary enough from state to state that we could never create a guide describing the details of how to do this in every state. Moreover, the “heavier” your approach to corporate formation, the more you may want to dig into the law to make these structures reflect your horizontal structures and democratic values, and the more important it may be to try to do this work in consultation with a movement lawyer aligned with your values.

operated “primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime.”

¹⁴ See *infra* Section 3.D.4.

This section contains five sub-sections, which aim to give an outline of some of the important issues for groups considering corporate formation, and an accurate description of how corporate formation may impact your group. In 3.D.1, we present options your group might explore that provide some of the advantages of incorporation, without requiring you to fully incorporate. In 3.D.2, we describe what we call heavier and lighter approaches to corporate formation. In the next two sub-sections, we present two categories of corporate forms that mutual aid groups are likely to consider. In 3.D.3, we give an overview of non-profit corporations and the kinds of mutual aid groups that might be well-suited to non-profit entities, and we discuss the non-profit industrial complex. In 3.D.4, we give an overview of cooperative corporations and LLCs, and we discuss the kinds of mutual aid groups that might be well-suited to a cooperative corporation or LLC. Finally, in 3.D.5, we briefly discuss some decision-making mechanisms: consensus, consent, and majority voting.

1. Some of the Advantages of Incorporation Without a Corporate Entity – Licenses and Other Ways to Join Forces with Existing Entities

Mutual aid groups that want to avoid incorporation might want to explore entering into a relationship with an incorporated entity that could absorb some of the risk of your activities. There are a few ways this might be done, depending on the specific work your group is doing and your relationships with other groups.

One relationship that we've seen emerge in New York in recent weeks is what lawyers sometimes call a *license*, but which might more clearly be called an agreement to share space. Imagine a church or other religious facility, or some other non-profit space that is largely empty most of the day, most days of the week. The entity that owns or leases that space could enter into a contract allowing one or more mutual aid groups to use that space for mutual aid work—sorting groceries, packing bags of food for delivery, etc.—at certain days and times. Typically, a group licensing its property would ask the group using its space to bear responsibility for any accident or injury that occurs when it is using the space; but it would be fine for the group with the space to agree to bear that risk, especially if it has insurance, a corporate entity, and other forms of protection. The incorporated group might be able to name the mutual aid group as an additional insured on its commercial general liability insurance policy, protecting both the mutual aid group and the incorporated entity. This approach could have some costs for the entity that hosts the activities, and it is not complete protection for the mutual aid group, which would likely still be responsible for activities not occurring in the organization's space or otherwise not covered by the contract with the incorporated entity.

One step further than a license or agreement to share space would be for a mutual aid group to move itself and its activities into an existing non-profit or cooperative corporation, turning itself into a project or program of that entity. There would have to be a contract between the mutual aid group and the incorporated entity that would require the mutual aid group to agree to the rules set by the non-profit or cooperative, and, in exchange, the mutual aid group would be protected by the corporate entity and allowed to keep its existing decision-making structures as long as they remain in compliance with those

rules. This arrangement is one form of fiscal sponsorship; fiscal sponsorships are described in further detail in Section 6.¹⁵

2. *Lighter and Heavier Approaches to Forming and Operating as a Corporate Entity*

Forming a corporate entity requires that your organization comply with certain rules related to the entity, so it would be incorrect and misleading to say that you can just send some money and a form incorporation document you downloaded from the internet to the state, form an entity, and then ignore the entity and all corporate formalities, and still be protected from personal liability. That said, there are different degrees of engagement a mutual aid group could have with the responsibilities and formalities of an incorporated entity; this structure could become an important part of your organizational process as you plan for the future, or it could be a relatively small project in which a few of your members take responsibility for your corporate compliance needs while deferring to your existing processes and governance structure as much as possible. We call this latter level of engagement with corporate law the “lighter approach” to incorporating, and contrast it with the “heavier approach,” where your group really digs into the work needed for your group’s formal corporate structure and by-laws to fully capture everything you like about your existing horizontal, decentralized, democratic structures.

The lighter approach might look like this. Your mutual aid group identifies a handful of trusted people who agree to take on the responsibility of coordinating the incorporation project. Those people become the Board of the organization, but agree to only intervene in the group’s existing processes to the extent legally required. That group is tasked with forming the entity and doing the basic legal compliance work necessary to fulfill their fiduciary duties and make sure that the entity’s work remains protected by the corporate entity to the extent possible. The organization’s decision-making and governance continue largely as they have to date, except when the Board finds there to be an issue, in which case they bring that issue to the membership as a whole (or some working group or circle responsible for the issue, depending on your structure) for discussion. For the typical participant in your mutual aid group, “Board of Directors” may be a term they never hear or think about as they undertake their mutual aid activities.

The lighter approach can work well for groups that might not exist for more than a year or two, for groups without large bank accounts or budgets, and for groups where there are a few trusted people who are willing to take on this responsibility. At its quickest, it takes very little time or effort to set up, and if members are willing to cede some of their authority to that small group, and those people are willing to work collaboratively with volunteers and others, it can be an easy and fairly smooth way to get the benefits of corporate liability protection with few changes to your current processes.

There are some serious risks to the lighter approach, however. This group tasked with serving as the Board could decide in good faith that they want to or need to take a more top-down approach toward the organization than others in the group want them to, which could lead to a disruptive internal dispute. At the other extreme, the Board could defer too much to existing organizational practices, and find themselves in trouble for violating their fiduciary duties or neglecting some important corporate responsibility. The ideal candidates for these positions would be people experienced in corporate

¹⁵ In Gregory Colvin’s widely-cited typology of fiscal sponsorship relationships, this would be a form of “Type A” fiscal sponsorship. See Gregory Colvin, *Presentation on Fiscal Sponsorship* (Nov. 17, 2006), available at http://www.fiscalsponsorship.com/images/WCTEO_Gregory-Colvin.pdf.

governance norms, widely trusted by the group, and willing to defer to your decentralized or horizontal organizational structure whenever possible—such people may be hard to find.

The heavier approach might look like this. A small group of people interested in these questions do as much research and planning as they can on their own, perhaps in consultation with a lawyer, and present a detailed overview of how you might transform your existing structure into a non-profit, co-op, or other entity. It might require some effort to develop this model, would require members to understand and approve the change, and could require some of your current practices or processes to change—although for most mutual aid groups, most or all practices should be able to stay the same. While more labor intensive, the heavier approach deserves consideration, especially for groups that envision themselves existing for some years to come. To fully discuss and map out your governance and decision-making processes into a detailed legal model is work—but can also be an opportunity to put yourself in a position to grow your internal organizing, build critical relationships, and plan for the future.

Of course, your options for how you might engage with the corporate formation process are not limited to so light that you are barely aware of it, and so heavy that they force you to lose focus on your day-to-day work. There are many ways to effectively chart a course toward incorporation somewhere in between these extremes.

3. *Mutual Aid Groups as Non-Profit Corporations*

For many mutual aid groups considering entity formation, the most likely corporate form is the non-profit corporation; New York State calls them not-for-profit corporations. The primary rule distinguishing non-profit entities from business entities is what is sometimes called “the non-distribution constraint”: if a non-profit brings in more money than it needs for the year, it cannot distribute profits to its Board, members, investors, or other parties in the way a conventional business corporation could pay out a dividend. That’s the essential difference between non-profits and other business entities.

Fiduciary Duties. People serving on Boards and similar leadership bodies are required to comply with their fiduciary duties. These are generally good practices and, in general, should not be controversial for mutual aid groups. The primary fiduciary duties are:

(a) *Duty of Loyalty*, which requires directors to disclose any conflicts of interest they may have, prohibits directors from self-dealing, and bans “usurpation of corporate opportunities,” making personal business deals on the side that hurt the entity, based on information they only learned about through serving on the Board;

(b) *Duty of Obedience*, which requires directors ensure that corporate actions are within the purposes and powers authorized by the group’s corporate charter; and

(c) *Duty of Care*, which requires that directors act reasonably and in good faith, although directors are generally not held personally liable for harms caused by their decisions if they were reasonably informed, did not engage in fraud or illegality, and did not have a disabling conflict of interest.

There are other, more specific or procedural rules that state non-profit corporate law imposes as well—but these are often quite flexible in ways that the non-distribution constraint is not. Below, we give an example of one rule and show how, with some creativity, non-profit conventions are regularly and easily made more democratic, more horizontal, and more in line with the principles of mutual aid. For a much longer discussion of some of the ways activist groups have been experimenting with non-profit forms, [see our piece on how activists are developing new non-profit organizational models](#).¹⁶

Flexibility of the Non-Profit Form. Non-profit law has many default rules that can easily and lawfully be deviated from in order to create organizational structures that work for your group. Let's take an easy but relevant example: New York's requirement that non-profits have a Board with at least three people on it. N.Y. N-PCL § 702.

If you are a mutual aid group with 50 people active on your communications platform and 100 people who have participated in your activities or on your platform at least once and you want to operate democratically, how do you allow just three people to be in charge? *You don't*. You have any number of ways to make the Board reflect your values, including:

- You could have all 50 or 100 people on your Board, allowing all to participate equally in governance. If that's too unwieldy, you could create a number of Board committees with different areas of responsibility and then have the Board as a whole only come together to review the decisions made by those committees once or twice a year. That review could be a ratification, where committee decisions have to be approved by the larger Board, or just an update, where the larger Board just gets information about decisions already made by a decentralized committee.
- You could have all 100 people become a formal membership in your non-profit, allowing your members to elect and recall a small Board, and granting your members rights to vote on all or nearly all important organizational issues.
- You could create a medium-sized Board of 10-15 people and then require that any decision they make that would not be unanimous get sent to all members for input or a vote.
- You could create classes of members, so the group of 50 active members get to vote on most issues and have control over the Board, and the 50 less-active members get more limited rights.
- If your group does not like these options and doesn't come up with any alternatives under New York law, you could look to the non-profit law of any of the other states. Under Delaware law, you only need one Director. Del. GCL § 141(b). Under Washington, D.C. non-profit law you don't need to have a Board at all. D.C. Code § 29-401.50.

While there are some requirements imposed on non-profit corporations as state entities, more serious restrictions get imposed on non-profits that choose to apply for tax exemption, especially for groups that want 501(c)(3) tax exemption. But establishing a basic non-profit entity is fairly straightforward and fairly inexpensive (\$75 in New York).

¹⁶ Michael Haber, *The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex*, 73 U. MIAMI L. REV. 863 (2019), available at <https://repository.law.miami.edu/umlr/vol73/iss3/6/>.

Many activists inclined toward mutual aid work are distrustful and skeptical of many non-profits, as you probably should be. But we believe it is important to understand exactly how non-profits go wrong, rather than to reject the use of this tool for all purposes. We summarize some of the core critiques of the non-profit industrial complex below, and we encourage you to read the writings of the activists who have raised these issues.¹⁷

The Non-Profit Industrial Complex. Many activists are familiar with the concept of the “non-profit industrial complex.” Activists have made many important criticisms of non-profit work as it is typically done that deserve serious attention. At the same time, sometimes “non-profit industrial complex” is used as a shorthand for anything bad a non-profit does, even if the fault might be with a specific person (my coworker is a jerk) or a system outside the scope of what the organization could reasonably tackle (you claim to be an environmental justice organization, and yet I saw someone driving an SUV wearing a shirt with your logo on it). To us, there are four primary criticisms of the non-profit industrial complex that deserve our closest attention:

- (a) *Non-profits can prevent real community leadership.* By relying on grant funds, a non-profit has to hire a sophisticated staff to manage grant compliance, leading many groups to become full of privileged, often white college graduates, not people from the communities with the most at stake.
- (b) *De-politicization.* Non-profits can become unwilling to take strong stands on controversial issues that could offend wealthy potential donors. Even beyond that, foundations and government funders tend to fund service provision rather than organizing, and often will not fund projects that combine service provision and organizing in the way that activists and mutual aid groups often aim to do in order to maximize their effectiveness.
- (c) *Movement capture.* Non-profits leech off of social movements and eventually suck out funds, energy, and power, slowly weakening the original movement.
- (d) *Tax exemption is not benign.* It is easy to see tax-exemption as just a way to attract resources to causes and organizations without money, but we should not lose sight of the history of tax exemption as a tool for the very wealthy to reduce their taxes and keep their money in their families’ hands through family foundations and other tools—instead of paying taxes and having their money go to priorities set by Congress, which, in theory, answers to the public.

No corporate form is perfect, but if your mutual aid group wants to consider protecting your members through incorporation, a non-profit corporation is a reasonable way to go. To us, taking the criticism of the non-profit industrial complex seriously does not necessarily mean that no non-profit should exist in our current system, but rather that non-profits that do exist should structure themselves in ways that are responsive to the serious issues raised by these criticisms.

If you form a non-profit corporation, you should be extremely careful to ensure that community members with the most at stake are active leaders within your organization; this might mean that some in your group need to step back to let others lead. You should be careful not to allow potential sources of

¹⁷ See generally THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (INCITE! ed., 2007).

revenue cloud the clarity of your political visions. You should make sure that you are not siphoning off funds that might go to support social movements; you might do that by making sure that you are in alignment with, and actively using your resources to support, movements around the COVID-19 recovery and the Movement for Black Lives, as well as other social movements that have not lost their importance in the last few months, like movements against global climate change and for a Green New Deal, the immigrants' rights movement, and movements supporting LGBTQ+ communities, among others. And your group should consider the choice of whether or not to pursue tax exemption both in terms of its potential impact on your group's activities, and in light of how our system of tax exemption as a whole may be a net negative for low-income communities and people of color.

If your mutual aid group is considering non-profit corporate formation, you then are faced with further questions: whether you want to pursue a lighter or heavier approach to this process and whether or not you want to pursue tax exemption. One thing that might be less of an issue than you imagine is whether non-profit law allows you to use your current decision-making and governance structures. There are many ways to navigate these laws, there are models for radical, horizontal, decentralized organizations already out there that you can look to for inspiration,¹⁸ and there may be *pro bono* lawyers who would be able to help you do so.

Nuts and Bolts of Not-for-Profit Corporate Formation. You can form a non-profit corporation in any state, though it might be easiest for a small group to form in the state where you do your work. In New York, to form a Not-for-Profit Corporation, you send a document called a Certificate of Incorporation to the New York State Department of State along with \$75. The state has a form Certificate of Incorporation you can use at <https://www.dos.ny.gov/forms/corporations/1511-f-1.pdf>, though if you plan to become a 501(c)(3), you'll need to include some additional language that the state does not provide. There is a more detailed guide to forming a not-for-profit corporation at https://www.dos.ny.gov/forms/corporations/1511-f-1_instructions.pdf, and some sample language to use in your incorporation documents if you plan to seek 501(c)(3) status at <https://www.irs.gov/charities-non-profits/suggested-language-for-corporations-and-associations>.

After you form a non-profit entity, you may adopt by-laws that describe how the organization will conduct its governance and decision-making. You may also want to consider whether or not you want to apply for tax-exemption. If your group is small or not expected to last for a long time, you may be able to do nothing else and be considered a 501(c)(3)—if you want that status. Non-profits that receive \$7,500 or less in their first year of existence, and non-profits that “normally” have less than \$5,000 in total revenue can be considered 501(c)(3)s without applying to the IRS. If you do not obtain tax-exempt status, you would be subject to ordinary corporate tax. Non-profits and other entities that ask for donations from the general public may also need to register with the attorney general in one or more states.

You might want to consult with a *pro bono* attorney to help with this work. Please [contact us](#) to discuss whether we could work with you or if we can refer you to someone else in our network.

¹⁸ See Michael Haber, *The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex*, 73 U. MIAMI L. REV. 863 (2019), available at <https://repository.law.miami.edu/umlr/vol73/iss3/6/>.

4. Mutual Aid Groups as LLCs or Cooperatives

Some mutual aid groups may have missions or structures that make more sense as LLCs or Cooperatives, and as other mutual aid groups start to expand their work into projects that require consistent, long-term hours of work from groups of people who likely need to be compensated for their time, more mutual aid projects may start to consider these forms.

The first thing to keep in mind with these kinds of entities is that they exist, at least in part, to make a profit. As noted above, many activists today have somewhat negative feelings about non-profit corporate forms and largely positive feelings about co-op forms—so much so that some miss the political agenda of the co-op movement, which is to restructure workplaces so they are more equitable, humane, and collaborative—but not to create businesses that have no goods or services to sell. If your mutual aid group does have goods or services it sells, a cooperative or LLC might be worth consideration.

Limited Liability Companies have become extremely common entities for small businesses of all kinds, and they are very flexible compared to most corporate forms. They are largely governed by the terms of their internal contracts among their members, usually called Operating Agreements, and so LLCs are used by everyone from billionaire real estate developers to worker co-ops and small collective groups of all sorts. Indeed, because New York's cooperative corporation statute is somewhat rigid and unclear compared to the co-op statutes in some other states, many worker co-ops in New York opt to form as LLCs, and then just structure themselves according to cooperative principles through their Operating Agreements.

Nuts and Bolts of LLC Formation. You can form an LLC in any state, though it might be easiest for a small group to form in the state where you work. To form an LLC in New York, you need to file Articles of Organization with the state, which can be done online [here](#). The cost to form the LLC is \$200.

LLCs in New York are required to complete an expensive (as much as \$1,000 or more) additional step called *the publication process*. This requires you to put an announcement of your LLC in some newspapers and then notify the state. If you want to take as light an approach to your corporate formation as possible, you might simply skip this step without too much risk.*

Operating Agreements are flexible documents that can be tailored to your organization. That flexibility means that if you want to take a heavier approach to formation, you could start from a nearly blank slate to build your perfect organizational structure. But if you are aiming to take a lighter approach to formation, you might want to start from an existing form. There are many form Operating Agreements available online, but you should be careful in reviewing them.

You might want to consult with a *pro bono* attorney to help with this. Please [contact us](#) to discuss whether we could work with you or if we can refer you to someone in our network.

* After 120 days, your LLC would be prevented from undertaking certain important actions—suing or responding to a lawsuit, possibly taking out a loan or buying real property—until you complete publication. In the alternative, for a fee, there are firms that will handle the publication process for you; you can find them by googling “NY LLC Publication.”

LLCs also have the option to elect how they are taxed—whether they pay tax at the corporate level, or pass through their profits to members, who pay personal tax on their income, like a partnership. Although many small businesses save on their overall taxes by passing through profits to their members, there are situations when it may be a good idea to pay taxes as a partnership, and that decision should be considered carefully.

If your mutual aid group is considering cooperative structures, you may be choosing between a worker cooperative corporation and an LLC that is structured like a cooperative. Here are some of the main requirements and restrictions on worker co-ops formed under New York Cooperative Corporations Law and worker co-ops formed under LLC Law:

- Worker co-ops formed under New York Cooperative Corporations Law may use the word “co-op” or “cooperative” in their legal corporate names; LLCs may not.
- Worker co-ops formed under Cooperative Corporations Law must have a Board of at least five people, including some people who are not worker-owners; LLC co-ops may be self-governed by members (but may choose to be managed by non-member managers).
- Worker-Owners in worker co-ops formed under Cooperative Corporations Law are generally treated as employees, not owners, so they must be authorized to work legally, and must be paid minimum wage and overtime; LLC worker-owners may be characterized as owners and not employees, so undocumented people may join your group and, if agreed to by the group, you can pay yourselves less than minimum wage and not pay overtime, which can be very useful in the initial months of business operations.
- Worker-Owners in worker cooperative corporations are generally paid wages and then paid a distribution based on their proportion of hours worked or wages earned; LLC worker-owners may be paid wages, or a share of earnings, or in some other way determined by the members.

Nuts and Bolts of Cooperative Corporation Formation. To form a Cooperative Corporation in New York, you need to file a Certificate of Incorporation with the New York State Department of State, and you can generally follow the rules and pricing schedule for Business Corporations, substituting Article 2 or Article 5-a of the Cooperative Corporation Law wherever state forms say Business Corporation Law. Because cooperative corporations are not widely used in New York, the state has few forms or official resources for groups considering these forms. New York State’s resources on Business Corporations are [here](#).

You might want to consult with a *pro bono* attorney to help with this work. Please [contact us](#) to discuss whether we could work with you or if we can refer you to someone else in our network.

If your group’s activities are largely not profit-generating, but you do not want to be a non-profit, an alternative to a worker cooperative corporation formed under Article 5-A of the New York State Cooperative Corporations Law might be to form as an ordinary cooperative under Article 2 of the New York State Cooperative Corporations Law. Article 2 Cooperatives are somewhat like Business Corporations in their structure—and they rely on Business Corporation Law for some of their rules—but they operate on a cooperative basis. This choice might be a good fit for a mutual aid group that is raising funds exclusively from its members and distributing those funds in a way that is decided collectively. It

might be more challenging to operate this way if you have a larger group with different working groups or circles that do different mutual aid activities, and to the extent that you may want to retain funds for longer-term projects, those funds may be taxable, unlike retained funds in a non-profit corporation. In some cases, it could be more challenging for groups that want to take advantage of some of the benefits of tax exemption, like seeking grants or donations or partnering with larger conventional non-profits.

5. *Decision-making: Consent, Consensus, Majority Votes*

Your mutual aid group may already have rules on group decision-making. If your group chooses to incorporate an entity, you would in most cases be able to tailor your internal decision-making rules to align with the decision-making policies you already use. Although not a strictly legal question, we are periodically asked about different approaches to decision-making, and sometimes there is some understandable confusion about the meanings of terms like *consensus* and *consent*. Of course, what is most important is that your group has an understanding of what you want your decision-making process to be, not what you call it.

The term *consensus* has a long history dating back to Quaker traditions and earlier decision-making processes. In the Quaker tradition, the idea of consensus means something close to unanimity, the “total absence of any argued objection.” Activists influenced by Quaker traditions took this form of decision-making and tweaked it over time, through 1970s and 1980s activism like the Movement for a New Society and the anti-nuclear movement. In this model, *consensus* is used to describe a process of group dialogue, in which member discuss their proposals collaboratively. Together, the group refines those proposals based on any concerns that members express until the proposal either achieves consensus or a group member blocks consensus, in which case the proposal may be abandoned, postponed, or discussed further and modified.¹⁹ It is not the same as requiring a unanimous vote on a detailed proposal, and the process only works well if blocks are reserved for proposals that members of the group truly cannot live with. Activists in the anti-globalization movement and the Occupy Movement used forms of consensus-decision making coming out of this tradition.

Consent as a decision-making tool also developed as a response to the Quaker tradition. Gerard Endenburg, a Dutch engineer whose ideas would influence organizational thinking in groups ranging from communes and intentional communities to Silicon Valley technology firms, was educated in Quaker schools. When he sought to develop a process for collaborative decision-making within his engineering firm, he created the consent process as a way to decide on proposals as part of a governance system he named sociocracy. In that process, a group goes through four steps: presentation of a proposal; a clarifying round in which only clarifying questions are asked about the proposal; a quick reaction round, in which quick feedback on the proposal is solicited and used to modify the proposal; and, finally, a consent round, in which all members of the decision-making circle are asked if they have any “reasoned objections” to the proposal.²⁰ One of the keys to the sociocratic process is that all

¹⁹ For a detailed description of this kind of consensus decision-making, see C.T. BUTLER & AMY ROTHSTEIN, ON CONFLICT AND CONSENSUS: A HANDBOOK ON FORMAL CONSENSUS DECISIONMAKING (1987).

²⁰ For a detailed description of sociocratic governance, see TED J. RAU & JERRY KOCH-GONZALEZ, MANY VOICES ONE SONG: SHARED POWER WITH SOCIOCRACY (2018).

members of a decision-making circle are asked to participate in each of the rounds, encouraging all to weigh in so that proposals ideally reflect the views of all participants.

Activists often turn to tools like consent and consensus for their decision-making. But these processes come with downsides as well. When done poorly or in a group that lacks ideological coherence, these processes can lead a group to inaction or a tendency to make all decisions into unanimous votes. When blocks are not reserved for very rare occasions, a group may be unable to do anything at all. Neither consensus nor consent works well for large groups without sub-dividing the group in some way.²¹ These processes can also lead to a kind of groupthink: group members may withhold good-faith concerns about a proposal because they do not want to block something that most members of the group seem likely to support. An up-or-down vote has the simple benefit of allowing members to quickly and easily express their doubts about a proposal without derailing something that might be supported by nearly everyone else in the group.²²

Of course, all of these mechanisms can be effective tools for decision-making, but all work best if a group is clear in its goals and listens to and respects the concerns and input of all members.

²¹ Consensus-based groups may do this through semi-autonomous working groups that come together in spokescouncils, a reporting and coordination council made of all working groups, and sociocratic, consent-based groups can be comprised of a variety of small circles that are connected to one another through people assigned to link from one circle to the next, reporting and giving input at all levels of the group.

²² See DELFINA VANNUCCI & RICHARD SINGER, *COME HELL OR HIGH WATER: A HANDBOOK ON COLLECTIVE PROCESSES GONE AWRY* (2010).

4. Safety Policies, Liability Waivers, and Insurance

In addition to considering the use of a corporate entity to help protect your members from personal liability, there are other steps that mutual aid groups should consider as ways to help protect yourselves and your members.

A. Safety Policies

In a global pandemic, it makes sense to follow the guidance of medical and public health experts. Whether or not you form a corporate entity, it is important for your community's health and safety for your group to implement a written Safety Policy describing the steps members or volunteers are expected to take to keep themselves and others safe. It also happens to be some protection for your group in the event that someone gets sick and sues your group.

Your Safety Policy should be updated regularly as health and safety guidelines from experts are updated, and you should ask your members and volunteers to acknowledge or sign that they have read and agree to follow the Safety Policy. To maximize the legal protection this policy will provide for your group, we recommend that you base your policy on health and safety guidelines from governmental bodies like the Centers for Disease Control and Prevention (CDC) and state and local health agencies.

The CDC has the following resources that may be of use to your group:

- [CDC guidelines for operating a community organization](#)
- [CDC guidelines for operating a business or workplace](#)
- [CDC printable material on COVID-19 prevention](#)

In New York, New York City has its own [guidelines for non-healthcare environments](#). Elsewhere in the state, many county-level Departments of Health have their own guidelines. A map of links to the websites of every county Department of Health in New York can be found [here](#).

Finally, although the Occupational Safety and Health Act (OSHA) generally does not apply to volunteers, OSHA does have a set of [health and safety guidelines on package delivery](#) that are worth reviewing if your group makes package deliveries to people.

B. Liability Waivers

A liability waiver is a legal contract signed by someone that acknowledges and accepts the risks that come with participation in an activity. Mutual aid groups may ask their volunteers or members to sign a liability waiver to help protect the group, other members, or leaders of the group from being held financially or legally responsible if someone participating with your group gets sick or injured.

New York State will enforce liability waivers when they say in unequivocal terms that the parties to the contract intend to excuse the party protected by the waiver from liability for its negligence.²³ When New York courts review a liability waiver, they view them with scrutiny, but they are often enforced. To be enforceable, a liability waiver used by a mutual aid group should very clearly express that both parties intend to relieve your group of any liability for negligence, and you should allow the participant or volunteer time to read the waiver before signing. Courts will generally not enforce a contract against a minor, so if you have any participants or volunteers under 18 years old, you might ask for their parent or guardian to sign a liability waiver on their behalf.

Courts will only allow groups to protect themselves and their members from liability for negligent actions. If a court finds your group or its members were acting recklessly or with gross negligence, or that someone intentionally caused an injury to a person or their property, it would likely determine that the liability waiver does not protect you from liability.

C. Insurance

As an unincorporated association, we are not aware of ordinary commercial insurance that you can purchase, although the universe of insurance products is large, and we encourage you to talk to insurance brokers in your state to see if they know of any insurance products you might be able to purchase. (Of course, your unincorporated association's individual members or volunteers could each insure themselves as individuals, but that is obviously an unlikely and very expensive approach.)

If your group does incorporate but remains worried about liability, you could explore the idea of getting insurance as additional protection for your group. If you are insured and someone sues you for something covered by your insurance policy, your insurance carrier could defend or pay to defend you in court, as well as pay for any damages that might be awarded at trial or agreed to in a settlement.

1. Commercial General Liability Insurance

For most mutual aid groups, you might want to begin by looking at Commercial General Liability (CGL) insurance, which is designed to cover common risks that arise at a workplace. You should ideally seek a CGL insurance product that would cover both claims that arise at your physical locations (any hub or facility where you work), and claims that arise in other locations, including the driveways, steps, or common areas of homes where you make deliveries, any stores where you may purchase or obtain food or products for distribution, and any other places where your workers or volunteers may be.

2. Workers' Compensation Insurance

CGL insurance is broad, but not a complete safety net. It does not protect against harm caused to volunteers or employees. To protect yourself from claims made by a volunteer, independent contractor or employee, you would need to consider workers' compensation insurance.

²³ *Blog v. Battery Park City Authority*, 234 A.D.2d 99, 100 (1st Dept. 1996); however, by statute, New York prohibits enforcement of waivers by owners of commercial pools, gyms, and other facilities that charge for recreation or amusement. N.Y. Gen. Oblig. L. § 5-326.

Workers compensation insurance is generally required for employees (and sometimes independent contractors as well) in most businesses, in most states, but there are exceptions. In New York, for instance, paid individuals—both employees and independent contractors—engaged in teaching or other “non-manual” work for a religious, charitable, or educational 501(c)(3) non-profit are exempt from mandatory workers’ compensation coverage.²⁴ Volunteers who receive no compensation or pay of any kind are also exempt from mandatory workers’ compensation coverage.²⁵ But even if workers’ compensation insurance is not required for your employees, independent contractors, members, or volunteers, you could consider purchasing workers’ compensation insurance to protect both your group and all of the people affiliated with it. Unincorporated associations may not be able to purchase workers’ compensation insurance, however.

Unlike other forms of insurance, where you would seek insurance either from an insurance agent who represents one carrier (Farmers, Geico, Nationwide, etc.) or through an insurance broker who could help you compare the different insurance products offered by those different companies, New York State has a state insurance program for workers’ compensation. Although many private insurance carriers also offer workers’ compensation coverage, the public New York State Insurance Fund (“NYSIF”) offers protection for a lower cost than the private firms. You can learn more about applying for NYSIF coverage [here](#).

3. Product Liability Insurance and Various Kinds of Food-Related Insurance

As our response to the crisis continues to evolve, mutual aid groups are becoming more sophisticated about sourcing and distribution of goods. Some groups have already been producing and distributing masks and similar protective equipment. Recipients of such products may be harmed by an unsafe or defective product that you made and distributed. Product liability insurance can protect your organization in the event that a product made by your group causes an injury to a person who receives it. Mutual aid groups have quite varied relationships to food—packing it, cooking it, storing it, distributing it—and some parts of the food production and distribution process are covered by product liability insurance, while other parts might be better protected by one of the different food-related insurance products that have been created by insurance companies in recent years.

Product liability and food-related liability insurance may not be available to unincorporated associations. Because there seems to be a greater variety of insurance products offered in these categories than in CGL and workers’ compensation coverage, if you are interested in this kind of coverage, we recommend talking to one or more insurance brokers in your area to understand what options are available to you.

²⁴ N.Y. Work. Comp. L. § 3.

²⁵ *Id.*

5. Banking for Mutual Aid Groups

There's good news for mutual aid groups that want to open bank accounts: many banks and credit unions will allow you to open a bank account, whether or not you are incorporated.

If your mutual aid group is unincorporated, it can open a bank account as an unincorporated association rather than through the personal accounts of individual members. To open a bank account, the unincorporated association needs a name, EIN, and some kind of resolution authorizing specific people to access the bank account. Some banks provide templates for these resolutions for unincorporated associations to use. Each bank or credit union will have slightly different requirements, but many banks and credit unions allow unincorporated groups to open a bank account as long as your members are based in one state or city.

Of course, corporations, not-for-profit corporations, co-operative corporations, LLCs, and other business entities can open bank accounts at most banks and credit unions. Once again, the entity will need to provide its legal name, EIN, incorporation documents (Certificate of Incorporation, Articles of Organization, or a similar document), and resolutions listing who can access the bank account.

Some mutual aid groups start out by having any money they raise stored in one or more members' bank accounts. This is not an ideal approach. For one thing, the members, once the money is in their bank account, might be tempted to take some or all of the money and not actually deliver it to the mutual aid group or community you serve. If they are not keeping close records, they might even spend some of the money simply by accident. In addition, there is some chance that those members could end up being told that those funds are taxable, or end up in a tax dispute with the IRS. It is probably better for those people if the group as a whole is in that dispute, not just that one person. We discuss the taxation of unincorporated entities in Section 6.

Many mutual aid groups have also been relying on online payment processors, like PayPal and Venmo, which all have their own rules and their own fee structures. While these platforms may be convenient and familiar to many, it might be worth exploring what services are available from your local credit unions, many of which offer broader services than you might expect, and most of which charge lower fees than commercial banks and have substantially more community-driven missions than banks and payment processors. The National Credit Union Administration has a credit union locator [here](#).

EINs. An Employer Identification Number, often called an EIN or Federal EIN (or FEIN), is simply a number that any group, incorporated or not, can obtain for free from the IRS. Any member of your group can apply for one online [here](#). The website will ask a series of questions, and then spits out the EIN directly online.

Although the website will issue the EIN no matter how you answer the questions, your answers are important, because they give notice to the IRS about what tax filings it should expect to receive from the group in the future.

6. Funding Mutual Aid, Taxes on Mutual Aid

In response to the pandemic, mutual aid groups have been providing food, funds, and services to people in their communities in all sorts of ways. Sometimes this work is funded through crowdfunding, which is discussed in Section 7. Other groups have organizational funds that are deposited in a bank account, and others have no centralized bank account at all, relying on decentralized, person-to-person financing for mutual aid. In Section 6.A, we describe some of the decentralized mechanisms being used by different groups. When done carefully, these models may not give rise to taxable events for the mutual aid groups organizing them, but there are issues related to barter taxation that may arise. In Section 6.B, we describe how 501(c)(3) groups may operate disaster relief or emergency hardship funds, and the IRS rules on those funds. In Section 6.C, we discuss fiscal sponsorship, one tool unincorporated groups can use to finance their projects without having them taxed. In Section 6.D, we talk about how the rules on disaster relief or emergency hardship funds might apply to other kinds of tax-exempt organizations, like 501(c)(4)s, 501(c)(8)s, and 501(c)(10)s. In Section 6.E, we dig into the rules on the taxation of unincorporated associations to help you navigate some potential tax risks.

A. Decentralized, Person-to-Person Funding

The mechanisms that mutual aid groups have been using for their projects are incredibly varied. Many mutual aid groups, rather than directly operating a bank account, have used decentralized or person-to-person models to fund their processes. Some groups have been using what is sometimes called a “buddy system,” where money and necessary services are exchanged just between two people or just between a few specific households, without any money passing through a centralized system. Some groups have a three-part process, where requests come into a centralized system (a phone number, an online form, social media, etc.), the request is sent to volunteers to fulfill, and those volunteers then seek reimbursement directly from donors who are also part of the mutual aid group. Some groups have created online “exchanges,” through which people with goods or services they can share are able to post, and people in need can contact them to exchange things privately. Other groups present their work as efforts to promote such private exchanges of money, goods, or services, without any further coordination beyond that.

Some of these decentralized models seem likely to protect your mutual aid groups from being taxed, but others may run into issues related to taxation on bartering. We encourage groups that are operating efforts like this to speak about the details of your model with an accountant or tax attorney.

Before we discuss barter taxation and how it might apply to mutual aid groups, whether incorporated or unincorporated, let’s look at the tax ramifications for the individual participants connecting through a mutual aid group to exchange goods or services. If two people meet—through a mutual aid group’s online platform on an in-person meeting, or just in the neighborhood—and one has money but needs masks and the other has masks but needs money, the exchange of masks for dollars is an ordinary, taxable transaction; the person receiving the money is supposed to report that to the IRS when they file their tax returns. But what if instead of dollars, a person trades masks for a package of toilet paper or for the service of going to the grocery store to pick up and deliver a grocery order? According to the IRS, an exchange of property or services without money is taxable bartering, and parties must include the fair

market value of the property or services that they receive through bartering on their income tax filing.²⁶ The IRS treats this as though both sides of the exchange sold goods or services to the other for the value of the goods or services they received.²⁷

So that's a tax issue for the individuals doing that bartering, not the mutual aid group that simply connects people and encourages them to trade, right? Unfortunately, not always—and this is where groups promoting private exchanges need to be careful, even if they do not have bank accounts or money passing directly through the group. If your group has members or participants that contract with one another, or with your group, it may trigger filing requirements as a *barter exchange*.

Outside of the context of mutual aid, barter exchanges often operate through a system of accounts and credits. If Abe has a lamp worth \$50 that Bina wants, Abe could send the lamp to Bina and get 50 credits put in his account that he can put toward the skateboard he wants to look for over the winter. In other cases, barter exchanges simply facilitate and track direct exchanges between members, without the system of accounts and credits. In either of these models, barter exchanges are generally required to report on Form 1099-B all of the exchanges taking place through the barter exchange, even if they do not involve credits that are counted on the barter exchange's books.²⁸ Mutual aid groups legally obligated to file Form 1099-Bs are being asked to manage a substantial record-keeping and compliance operation.

There are two important exceptions to this rule that may apply to your mutual aid group. First, your activities may not qualify as a barter exchange if you arrange “solely for the informal exchange of similar services on a noncommercial basis.”²⁹ The IRS gives little guidance on exactly how similar the services have to be to qualify for this exception, but the example they give is of identical services: a group of three people sharing responsibility for driving a carpool every three days is not a

Let's be honest about compliance with the bartering rules. People engage in bartering all the time—your neighbor brings you a bottle of wine because you shared some vegetables from your garden with her, or you stay at an acquaintance's house in exchange for watering their plants and feeding their cat. When this is done “informally and directly between taxpayers, there may be a high level of noncompliance in reporting the income received.”* Given that people frequently engage in these kinds of transactions and often violate tax law by not reporting them, what is the IRS doing? According to one tax law scholar, “[t]he reality is that the IRS has not made a significant effort to tax barter transaction other than those that are being reported by barter-exchange companies.”†

In other words, compliance with the barter exchange rules is often what triggers IRS interest in activities that may be overlooked otherwise, but noncompliance could potentially have serious financial ramifications for mutual aid groups.

* Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 32-33 (2007).

† Sergio Pareja, *It Takes a Village: The Problem with Routinely Taxing Barter Transactions*, 59 CATH. U. L. REV. 785, 788 (2010).

²⁶ IRS Pub. 525 (rev. ed. 2019), available at <https://www.irs.gov/publications/p525>. Depending on the specific situation, this may be reported as “Other Income” on your Form 1040, on Form 1040, Schedule C, or on business returns like Form 1065 or Form 1120.

²⁷ Rev. Rul. 79-24, 1979-1 CB 60.

²⁸ 26 CFR §§ 1.6045-1(a)(4), 1.6045-1(e), 1.6045-1(f).

²⁹ 26 CFR § 1.6045-1(a)(4).

barter exchange.³⁰ Second, a barter exchange through which there are fewer than 100 exchanges during a calendar year is not required to report on those exchanges.³¹ Mutual aid groups conducting activities that might be considered barter exchanges by the IRS should consider whether they may be required to monitor all barter transactions and issue 1099-Bs or if they might fit within one of these exceptions.

At this time, we do not have a sense of how many mutual aid groups are really fostering or encouraging bartering in a way that does not fit within either of these exceptions, but if your activities do constitute a barter exchange, we encourage you to consult with an accountant or tax attorney for advice tailored to your specific practices.

B. 501(c)(3)s Operating Disaster Relief or Emergency Hardship Funds

In response to the COVID-19 pandemic, a group might do any of the following activities:

- Receive funds from the public and distribute that money to people in need in their communities;
- Receive funds from the public and distribute that money to their members or volunteers to use for the purchase and distribution of goods needed by people in their communities; or
- Receive funds from the public and use that money to pay or reimburse their members for purchases and distribution of goods needed by people in their communities.

If the group doing these activities has federal 501(c)(3) tax exemption or has applied for federal 501(c)(3) tax exemption and is operating in compliance with the 501(c)(3) requirements, the IRS calls the pool of funds they get from the public a “disaster relief or emergency hardship fund.” The IRS has clear rules on operating a disaster relief or emergency hardship fund for 501(c)(3) public charities that should be followed by any group that has, or has applied for, 501(c)(3) status.

For groups that do not have that status but are interested in taking advantage of the protection that 501(c)(3) status can afford a group operating such a pool of money, one option you might consider is fiscal sponsorship. In Section 6.C, we discuss fiscal sponsorship and some of the different models groups might use. If the group does exactly these same activities as another kind of tax-exempt organization, the law is slightly less clear; in Section 6.D, we describe how the rules on disaster relief or emergency hardship funds might apply to 501(c)(4), 501(c)(8), and 501(c)(10) organizations, which we believe are likely alternatives to 501(c)(3) being considered by some mutual aid groups.

501(c)(3) organizations commonly set up disaster relief or emergency hardship funds to help in the aftermath of natural disasters or other emergencies. A 501(c)(3) public charity may set up such a fund even if disaster relief or emergency hardship activities were not originally approved as organizational activities in its tax-exemption application.³² The entity would not need to obtain prior approval from the IRS, but would be required to report the new activity on its annual Form 990 tax return.³³ If a new organization is being formed for disaster relief purposes, the IRS may expedite handling of its application to become a tax-exempt entity, but this is done infrequently.³⁴

³⁰ 26 CFR § 1.6045-1(b).

³¹ 26 CFR § 1.6045-1(e).

³² IRS Pub. 3833 (rev. ed. 2014), available at <https://www.irs.gov/pub/irs-pdf/p3833.pdf>.

³³ *Id.*

³⁴ *Id.*

There are a few requirements imposed on disaster relief or emergency hardship funds: (1) they must have a proper charitable class; (2) they must satisfy the requirements of the “needy or distressed” test; and (3) they must maintain substantial records of their activities. These are discussed in the next 3 sub-sections. After that, we look at how these recordkeeping requirements are likely to impact funds that serve undocumented immigrants.

1. Requirements and Characteristics of a Charitable Class

A 501(c)(3) operating a disaster relief or emergency hardship fund should ensure that it is set up to serve a public interest and be able to show that it has not been formed to benefit designated individuals.³⁵ The individuals that the 501(c)(3) seeks to help must be a charitable class, a group “large enough or sufficiently indefinite”³⁶ that it would help a community of some kind, not pre-selected individuals.³⁷ This also means that donors cannot earmark funds for a specific individual or family.³⁸

2. The “Needy or Distressed” Test

When a disaster first strikes, the IRS understands that many 501(c)(3)s want to spring into action without assessing individuals’ financial means. A charity can provide such immediate aid—blankets, shelter, food, clothing, medicine, transportation, and small amounts of money—without pausing to conduct needs assessments.³⁹ A 501(c)(3) that only gives short-term emergency aid does not need to keep documentation of the name, address, and amounts distributed to each recipient; they are only required to keep records of the date, place, and estimated number of people assisted.⁴⁰

Longer term, charitable funds cannot be given out to people simply because they are victims of a disaster, and as time passes between the immediate disaster and the provision of aid, it becomes increasingly mandatory for a 501(c)(3) operating a disaster relief or emergency hardship fund to assess the financial need of each person coming to it for assistance.⁴¹ The IRS expects 501(c)(3) organizations to make determinations about how its money will be spent “based on an objective evaluation of the victims’ needs at the time the grant is made.”⁴² The IRS view, in short, is deeply enmeshed in a traditional “charity” mindset,⁴³ based on the idea that 501(c)(3) tax-exemption benefits should not go to groups just sharing basic resources with their communities, but only to groups seeking out the neediest. That may be an understandable priority when resources are scarce, but—in a move entirely typical of the charity mindset—the IRS policies these priorities by requiring a substantial amount of additional work from 501(c)(3) groups, distracting groups from their core missions and goals in order to prevent any fraction of resources from going to someone who might be struggling but is not yet totally destitute.

³⁵ 26 CFR § 1.501(c)(3)-1(d)(3)(ii) (2017).

³⁶ To be considered an indefinite class, the relief program must be open-ended and benefit an indefinite number of persons impacted by the disaster. *Thomason v. Comm’r*, 2 TC 441, 443-44 (1943).

³⁷ *Id.*; see *Russell v. Allen*, 107 U.S. 163, 167 (1883) (“[A charitable trust] may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity”).

³⁸ Victoria B. Bjorklund & David Shevlin, *Responding Promptly to Needs for Disaster Relief: Experienced Exempt Organizations Advisers Share Their Playbook*, CV018 ALI-CLE 159 (2013).

³⁹ IRS Pub. 3833 (rev. ed. 2014), available at <https://www.irs.gov/pub/irs-pdf/p3833.pdf>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Section 1.A.

3. Best Practices for Long-Term Recordkeeping

Much of the additional work for 501(c)(3) groups that operate disaster relief or emergency hardship funds comes in the form of recordkeeping. Although the distinction between immediate aid and long-term relief is not particularly clear, **we believe that as of now, May 2020, a 501(c)(3) organization that operates a disaster relief or emergency hardship fund in response to COVID-19 should assume their activities will be considered “long-term relief” by the IRS, and should keep records as described below to be in compliance with IRS rules.**

A 501(c)(3) operating a disaster relief or emergency hardship fund classified as “long-term relief” needs to keep records of its aid to individuals, including documentation of:

- A complete description of the assistance provided;
- Costs associated with providing the assistance;
- The purpose for which the aid was given;
- The objective criteria for disbursing assistance under each program;
- How the recipients were selected;
- The name, address, and amount distributed to each recipient;
- Any relationship between a recipient and officers, directors, or key employees of, or substantial contributors to, the organization; and
- The composition of the selection committee approving the assistance.⁴⁴

4. Potential Risks for Undocumented Immigrants or Other Vulnerable Populations

Because some federal disaster relief programs have specifically excluded undocumented immigrants in need, and more generally because undocumented communities have been under attack for many years, some 501(c)(3)s have asked us about operating funds to provide cash assistance to these communities. While it is, of course, perfectly legal to operate a fund that benefits undocumented people, 501(c)(3) groups have asked whether operating a disaster relief or emergency hardship fund that is targeted to—or advertised or announced as serving—primarily undocumented people might pose a risk to the immigrants they are trying to help if these 501(c)(3)s comply with the recordkeeping rules for disaster relief or emergency hardship funds, keeping detailed records of the names and addresses of the people they support. Is there a chance that the IRS would obtain these lists and turn over these records, either voluntarily or by court order, to immigration enforcement authorities in order to try to arrest, detain, or deport undocumented people?

Unfortunately, our answer here is that there is a small amount of risk to this recordkeeping given just how aggressively the Trump Administration has targeted undocumented people, and how it has sometimes used administrative tools to undermine the intent of federal statutes and longstanding agency policies, especially when it comes to the rights of immigrants and people of color. With that caveat, the Internal Revenue Code is fairly clear that the IRS cannot share tax information with other government agencies, except for state tax agencies, the Social Security Administration, and as part of court-ordered criminal law investigations or tax-related investigations—but not with ICE or other immigration

⁴⁴ IRS Pub. 3833 (rev. ed. 2014), available at <https://www.irs.gov/pub/irs-pdf/p3833.pdf>.

enforcement bodies.⁴⁵ To reduce the risk of having records you are required to keep from being used to attack the undocumented people you are trying to help, 501(c)(3) organizations operating a disaster relief or emergency hardship fund might experiment with taking steps to conduct your recordkeeping in a way that satisfies the IRS without being so detailed that the information would be meaningful to ICE or another immigration enforcement body, in the unlikely event that they are able to obtain it. Non-profits could also explore utilizing an entity with 501(c)(4) tax-exemption or another, non-charitable tax exempt status, which we believe should not be subject to the same level of detailed recordkeeping as 501(c)(3)s are, as we describe in Section 6.D.

C. Fiscal Sponsorship: Partnering with a Non-Profit to Help with These Details

The idea of operating a centralized fund, instead of managing your group's funds through decentralized models, may be appealing to some mutual aid groups. For some of those groups, obtaining 501(c)(3) status is a good way to go. For others, investigating other tax-exemption options, such as those discussed in Section 6.D, would be better. Other groups may be comfortable with the risks of operating a centralized fund in your mutual aid efforts even as an unincorporated association, as described in Section 6.E. There is one other option that can be a good model for some mutual aid groups: fiscal sponsorship.

Fiscal sponsorship is widely used in the non-profit sector, but there are a few different ways it is done, and the term does not have a precise legal definition; the term describes a variety of contractual relationships, usually between an established 501(c)(3) tax-exempt non-profit corporation and another individual, group, or less-established non-profit corporation. Broadly speaking, the idea is that the more established 501(c)(3) helps the other person or group to receive donations, grants, or other money, often for a fee, like a small percentage of the funds received.

In Section 3, we discussed one way this is done, what is sometimes called "Model A" fiscal sponsorship.⁴⁶ In this model, the person or group becomes a project of the sponsor entity, and the degree of control over its finances and operations as a part of the sponsor are set by contract. Typically in this model, the money coming into the project (grants, donations, crowdfunding campaign money, income from services provided, etc.) is put into the bank account of the sponsor and paid out of the bank account of the sponsor for the purposes of the project. The sponsor would typically handle tax, accounting, and legal compliance issues for the project.

A second way this can be done, sometimes called "Model C" fiscal sponsorship, involves a similar relationship, but with the project remaining separate and independent from the sponsor. The sponsor still receives funds reserved for the project's purposes, but then gives them to the project for approved project purposes. The sponsor may require reports showing how the money was spent, may charge a fee for their work, and may make other requests of the project, but the sponsor again would handle tax, accounting, and compliance issues. Perhaps like any relationship, when both sides of a Model C fiscal sponsorship are comfortable with the relationship and aligned in their visions, this can benefit both

⁴⁵ 26 U.S.C. § 6103.

⁴⁶ See Gregory L. Colvin, *Fiscal Sponsorship: 6 Ways to Do It Right – A Synopsis* (1993), available at <https://www.adlercolvin.com/wp-content/uploads/2017/12/Fiscal-Sponsorship-Six-Ways-To-Do-It-Right-A-Synopsis.pdf>.

sides; when the sponsor is uncomfortable with aspects of the project, or when the project is uncomfortable with ceding any financial control, the relationship can fall apart.

In Model A and Model C fiscal sponsorships, the sponsor is not just a bank that takes in money and redistributes it. The sponsor has its own set of charitable purposes and its own compliance issues to be sensitive to, and it is responsible for exercising some level of control over how the money passing through it is spent. If the sponsor has told the IRS and the state that it helps low-income people in Florida, and your group is delivering groceries to a group of people who are mostly (but not all) low-income and mostly (but not all) in Florida, the sponsor would either have to become comfortable with your activities, or would ask you to change them, or would try to work with you to find a way that the funds that went through its accounts did not go toward those arguably non-compliant activities. The best way to approach this relationship is to have an honest conversation with potential sponsors about your current and planned activities.

D. Other Tax-Exempt Organizations Operating Disaster Relief or Emergency Hardship Funds

Mutual aid groups that we have met that have expressed interest in exempt statuses other than 501(c)(3) seem to be aligned with 501(c)(4) and 501(c)(8) or 501(c)(10) tax exemptions.

Federal tax-exempt organizations are sometimes divided into two categories: 501(c)(3) and all other exempt organizations. While this is somewhat oversimplified, there are substantial differences between 501(c)(3) and most other exempt classifications:

- 501(c)(3) organizations both do not pay federal tax and also provide a benefit to their donors—donors get a partial deduction from their federal income tax (if they itemize deductions) for their donations; most other exempt organizations do not pay federal tax but do not provide that benefit to their donors, and so they are thought to be less attractive to wealthy donors.
- Private foundations and government grantors target much of their giving to 501(c)(3) organizations, so 501(c)(3)s again typically attract funds from these sources in greater amounts than groups with other exemptions.
- 501(c)(3) organizations are slightly limited in the amount of lobbying they can do on issues before governmental bodies, and they are mostly prohibited from engaging in electoral advocacy for or against candidates or political parties; other types of exempt organizations have greater freedom to do lobbying and political activities.

There are many additional rules on the differences between exempt statuses, but in the broadest possible terms, 501(c)(4) organizations are similar to 501(c)(3)s, but they may do additional lobbying and political activities, and are somewhat less attractive to wealthy donors and grantors. 501(c)(8) and 501(c)(10) organizations are less common than 501(c)(3)s and 501(c)(4)s, but they refer to fraternal societies that provide benefits to their members and, in the case of 501(c)(10)s, to their communities; as these exemptions were intended for national or international fraternal organizations (Elks, Knights of Columbus, Masons, etc.), they require more than one entity and may be more challenging to properly form than 501(c)(3)s and (c)(4)s. Still, the core intended purpose of 501(c)(10)—to exempt organizations providing for both members and the broader community—sounds closer to mutual aid than the charitable purposes that underlie 501(c)(3) tax exemption.

For groups considering non-501(c)(3) tax exemption, how would the IRS rules for disaster relief or emergency hardship funds apply? The IRS has clear recordkeeping requirements for these funds when operated by 501(c)(3)s, but do those rules apply to other exempt organizations?

We believe that the recordkeeping requirements that apply to 501(c)(3) organizations are probably not enforced against other exempt organizations. The IRS recordkeeping requirements are based on the idea that 501(c)(3) organizations must seek out those in great need—in the context of a disaster like a hurricane or the COVID-19 pandemic, most people have some needs, but it is the job the charity to serve people who are in need of food and shelter, not people who are frustrated by long waits for food delivery or shortages of toilet paper. Other kinds of exempt organizations are not required to meet that standard. 501(c)(4) organizations, for example, must be “primarily engaged in promoting in some way the common good and general welfare of the people of the community.”⁴⁷ 501(c)(4), 501(c)(8), and 501(c)(10) organizations may, and sometimes do, exist to improve a community comprised of wealthy people, and so they are different enough from charities that this kind of recordkeeping seems incongruous with the reasons for these exemption categories. Of course, no tax-exempt organization may engage in fraud, private inurement, or private benefit,⁴⁸ and any tax-exempt organization should have a clear and fair decision-making processes for how it makes its funding decisions. It might still be a good idea to save generalized records of who you serve and how and when you serve them, but we believe that the detailed, individualized records required to be kept by 501(c)(3)s should not be required by groups with some of these other exemptions.

E. Tax Risks for Unincorporated Associations Operating Centralized Funds

Some unincorporated mutual aid groups are operating centralized bank accounts or collectively managing an online payment processing account for the group. This Section 6.E will describe some of the questions around tax risks for groups operating with a model like this. Before we dig into those questions, groups in this category have some ways that they could avoid the ambiguity and risk around the centralized financial model before tax season. First, as described in Section 6.C, a group could negotiate a relationship with a fiscal sponsor that would allow it to avoid these questions. Second, unincorporated associations that keep money in this way and operate for charitable or educational purposes may claim 501(c)(3) tax exemption without ever applying to the IRS for tax exemption if they receive \$7,500 or less in their first year of existence and “normally” have less than \$5,000 in total annual revenue.

What about unincorporated associations that have no fiscal sponsor, that exceed the revenue limit that triggers the exemption filing requirement, or that do not want to have 501(c)(3) status? The law here is not as clear as could be, and there is some risk for groups doing this.

⁴⁷ 26 CFR §1.501(c)(4)-1.

⁴⁸ A “private benefit” occurs when a tax-exempt group confers a financial or other benefit to a person or entity that is outside of the exempt-purpose of the organization; if your group operates a soup kitchen but serves lobster to some specific person when they come for lunch, it may be a private benefit. “Private inurement” is when a tax-exempt group confers a financial or other benefit to an insider—someone on the Board or someone with control or influence over the organization—that is not a reasonable or justifiable way to fulfill its exempt purposes. If your soup kitchen pays its Board Chair \$60/hour to work at the soup kitchen when everyone else working there makes minimum wage, that may be private inurement.

The Internal Revenue Code states that all income, wherever it comes from, is taxable unless there is an exception within the Code.⁴⁹ It goes on to say that gross income does not include the value of property acquired by gift, but it never defines what a gift is, leaving it to courts to sort out.⁵⁰ The leading case on the issue, *Commissioner v. Duberstein*, 363 U.S. 278 (1960), says that a gift must be made with “detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses.”⁵¹ To determine whether a donation was made out of generosity, affection, or charity, the most important consideration is the donor’s intention.⁵²

It may seem obvious that people who give to your mutual aid group “are contributing money not for a reward or a quid pro quo but rather to express gratitude or because they feel sympathetic for the project creator or beneficiary.”⁵³ However, there are at least some cases where the IRS has sought to impose partnership taxation on activities conducted by unincorporated mutual aid groups. Partnerships are not subject to federal income tax; they are pass-through entities and the IRS might seek to impose a tax on all partners in the partnership. This same kind of taxation applies to many LLCs and other business entities, and it makes some sense in that context: if you are one of the owners of a typical small business that is organized as an LLC, you probably know you own it, you receive income from it, you get a tax form related to it, and you pay taxes on it. What if you are someone who, in the spirit of community, joined a Slack channel, learned a bit about the activities of a local mutual aid group, and gave out groceries once or twice? Do you think of yourself as an owner or partner in the group? Probably not. Does anyone have your address or social security number to issue a tax form to you? Almost definitely not.

This means the IRS could end up finding one or two people with control over a bank account and trying to impose tax on them for the activities of the whole project, which might have had hundreds of volunteers or members and thousands of dollars pass through its bank account over the course of the project. It would be an especially unfair result given that the people with control over that account were acting, in effect, as agents or trustees for the unincorporated association, and did not have control over that money to use it for their own personal purposes. There are a number of arguments or actions that unincorporated associations or individuals affiliated with unincorporated associations could try to make as to why their mutual aid should not be taxable. They could point to the principles announced in *Duberstein*, or make equity arguments to a court to impose a constructive trust. They could try to make arguments based on agency principles. They could try to negotiate with the IRS for equitable tax relief.

None of these approaches is certain to succeed. If your group has substantial money passing through a single organizational bank account in May 2020, you might want to look more closely at fiscal sponsorships or other options to protect your activities from this risk, or you might want to plan ahead for potential tax liability, even if it does not come.

⁴⁹ 26 U.S.C. § 61.

⁵⁰ 26 U.S.C. § 102.

⁵¹ *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960), *citing* *Comm’r v. LoBue*, 351 U.S. 243, 246 (1956); *Robertson v. United States*, 343 U.S. 711, 714 (1952) (internal quotations omitted).

⁵² *Id.*

⁵³ Andrew M. Wasilick, *The Tax Implications of Crowdfunding: From Income to Deductions*, 97 N.C. L. Rev. 710, 720 (2019).

Unincorporated associations also should maintain their records and consider that this may well be an ongoing issue with the IRS. The IRS has the ability to assess taxes for up to three years after you file a tax return, up to six years if it determines there is a “substantial omission of items” on a previously-filed tax return, and, if it finds that you filed a false or fraudulent return—or never filed a return that was required—it can assess taxes anytime.⁵⁴

If you have already received a Form 1099-K related to money raised as part of an unincorporated mutual aid project, there is more to consider in Section 7.

⁵⁴ 26 U.S.C. § 6501

7. Crowdfunding Regulation and Taxes

Many mutual aid groups have been using digital crowdfunding platforms like GoFundMe to raise money. The focus of this section is on donation-based crowdfunding, how such crowdfunding is taxed, and more generally on how to navigate taxes after an unincorporated association or an individual affiliated with an unincorporated association receives a tax form called a 1099-K because of its mutual aid activities.

Donation-based crowdfunding means that when donors are giving money to the mutual aid project—whether it is an unincorporated association, non-profit corporation, or business entity—they do not receive anything in return for their money. This should be distinguished from forms of crowdfunding in which donors receive an incentive (a small or large gift or reward) or an equity ownership stake in a business in exchange for their financial support.

A. IRS Guidance on Donation-based Crowdfunding

The IRS has not provided much direct guidance on the issue of donation-based crowdfunding. In a 2016 information letter, the IRS advised that “crowdfunding revenues generally are includable in income if they are not . . . gifts made out of detached generosity and without any ‘quid pro quo.’”⁵⁵ Similarly, when asked for guidance by the online payment processor WePay in 2015, the IRS declined to advise it on whether or not it needed to file a Form 1099-K when it processed gift or donation payments, pointing only to existing authority on the issue.⁵⁶ This has been interpreted to be a reference to 26 U.S.C. § 6050W(d)(3), which requires third-party payment processors like WePay and PayPal to issue 1099-Ks when a person receiving money provided goods or services in exchange for those funds.⁵⁷

In donation-based crowdfunding, goods or services are not provided to donors, and therefore it seems that 1099-Ks are generally not required to be issued by these third-party payment processors—at least not for smaller crowdfunding campaigns. 26 U.S.C. § 6050W(e) requires that third-party payment processors file a Form 1099-K with the IRS for any campaigns—including donation-based crowdfunding campaigns—that receive over \$20,000 or over 200 donations, and send a copy of this Form 1099-K to the organizer of the campaign.⁵⁸ Because the law here can be interpreted differently, online payment processors may be taking different approaches to these issues. WePay, for instance, seems to have determined that it does not have to send Form 1099-Ks to recipients of gifts or donations that receive fewer than 200 donations and less than \$20,000; other payment processors may have decided to issue Form 1099-Ks even if it is likely not required, adopting a uniform policy that they cannot determine whether money sent through their platforms are intended to be gift donations or not.⁵⁹

If an online payment processor submits a Form 1099-K to the IRS, a copy should be sent to the person organizing the crowdfunding campaign, although generally parties are required to properly report their income whether or not they receive a Form 1099-K. Who will receive the 1099-K? We do not know the

⁵⁵ INFO 2016-0036 (Jun. 24, 2016).

⁵⁶ Cheryl T. Metrejean & Britton A. McKay, *Donation-based Crowdfunding and Nontaxable Gifts*, J. OF ACCOUNTANCY (Mar. 1, 2018), <https://www.journalofaccountancy.com/issues/2018/mar/donation-based-crowdfunding.html>.

⁵⁷ *Id.*; 26 U.S.C. § 6050W(d)(3).

⁵⁸ 26 U.S.C. § 6050W(e).

⁵⁹ Metrejean & McKay, *supra* note 56.

requirements of every crowdfunding platform, but we believe that all require that the organizer of a campaign, when signing up, provides them with at least a Social Security Number (or Individual Taxpayer Identification Number) or an Employer Identification Number. In the typical case, the crowdfunding organizer would look to the online platform like one of these:

- ABC Mutual Aid, EIN 12-3456789
- John Smith, SSN 123-45-6789, collecting funds for the project “ABC Mutual Aid”
- ABC Mutual Aid, John Smith, Organizer, SSN 123-45-6789

The crowdfunding campaign will likely consider the SSN or EIN given to it as the identification number of the organizer, even in the third example, where John Smith arguably presented himself as organizing the campaign as an agent of this group and not in his individual capacity.

If you receive a 1099-K, do not panic, but be prepared to provide additional information about the campaign you organized in order to put yourself in the best position to minimize taxes on money your campaign raised.

B. When You Receive a Form 1099-K

If your group’s EIN or your personal SSN is on file with an online payment processor or donative crowdfunding campaign platform, you may receive a 1099-K. We expect that many mutual aid groups or affiliated individuals who receive a 1099-K will try to exclude that money as gifts under the standard set in the *Duberstein* case described in Section 6.E. Especially if the amount of money at stake is significant, you may want to consult with an accountant or tax attorney familiar with donative crowdfunding prior to filing your taxes. We anticipate that most organizers of donative campaigns are likely to record their 1099-K income as “other income,” and then report a corresponding reduction in other income of the same amount, as follows:

- For an individual, this would be done on Schedule 1 of their 1040. On Schedule 1 it is recorded where it says “Other income. List type and amount.” The taxpayer could write something like: “Form 1099-K received \$ amount for gift donations received on crowdfunding platform _____,” and then record zero dollars.
- For a corporation filling out a Form 1120 or a partnership or LLC filling out a Form 1065, it would record the amount listed on the 1099-K under “Other Income” and attach a statement saying that they received the Form 1099-K for gift donations received through a crowdfunding website. The entity would then put a corresponding reduction to other income on the line that states “Other deductions,” and attach a statement saying that the money received was nontaxable gifts. A taxpayer could further prove this by attaching a printout from the crowdfunding website page it used to raise the money and the list of donations.
- A non-profit entity filling out a Form 990 would do this similarly, by reporting the 1099-K amount as “Other Revenue” and then again as “Other Expenses” on their Form 990. The taxpayer could also give an explanation stating the money was gifts received through donative crowdfunding.

These responses aim to show the IRS that the money reported on the form 1099-K was properly excludable as a gift and should, under the standard set in the *Duberstein* case, prevent the organizer from

having to pay taxes on the funds. This does not mean that there will not be an inquiry or dispute with the IRS. We encourage anyone in this situation keep detailed records of the history of the crowdfunding campaign's creation to show that it was created for community support that meets the "gift" standard detailed in *Duberstein* and to keep records of how the funds were used.⁶⁰ If a tax inquiry or dispute arises, we recommend you consult with an accountant or tax attorney.

⁶⁰ Caroline Tso Chen, *Tax Implications of #MeToo and More*, TAX NOTES FED., Aug. 5 2019, p. 847, 853.

8. Food Storage and Safety

As the crisis continues, some mutual aid groups have become increasingly involved with food handling, processing, serving, or storage. For mutual aid groups that are directly dealing with food in these ways, there are unique federal, state, and local regulatory burdens. The regulations around food are substantial and vary from location to location and activity to activity. This section will address broad areas of the laws around food, rather than trying to account for every possible structure or activity that mutual aid groups are using. We have also limited our analysis to rules that apply to New York, with a focus on New York City, and some of these rules may be quite different in other locations.

Section 8.A gives a broad overview of general food laws and food safety regulations at the federal and state levels, with additional information on New York City. Section 8.B lists some very general good practices on food storage and food safety.

A. General Food Laws and Food Safety Regulations in New York

Because the universe of food regulation is so broad, and because mutual aid groups have been involved with food in such varied ways, this section aims to give a broad overview of the regulatory landscape, to help give groups an idea of what laws and regulations might apply to their current or planned activities.

1. Federal Food Safety Regulation

- **Food Safety Modernization Act.** The Food Safety Modernization Act (FSMA) of 2011 was the most significant update to federal food safety regulation since the early twentieth century, introducing requirements that facilities that handle food have detailed plans documenting preventative safety protocols. In general, facilities that manufacture/process, pack, or hold food for human or animal consumption must be registered with the FDA, although there are broad exceptions under the act. There is an exception for “retail food establishments” that sell food directly to consumers, including things like grocery stores, farmers’ markets, CSAs, and door-to-door food sales.⁶¹ If your mutual aid group is selling food that it also processes, packs, or holds, it will need to sell more of that food to individual consumers than to businesses in order to fit the retail food establishment exception. There is also an exception for “nonprofit food establishments” where “food is prepared for, or served directly to the consumer,” including “central food banks, soup kitchens, and nonprofit food delivery services.”⁶² To be classified as a “nonprofit food establishment,” a group must either be a 501(c)(3) or satisfy a test roughly equivalent to the requirements to qualify as a 501(c)(3).⁶³

⁶¹ 21 CFR § 1.227.

⁶² 21 CFR §§ 1.226-1.227.

⁶³ 21 CFR § 1.227 says that organizations qualifying for this exemption must “meet the terms of” 501(c)(3). The FDA has issued guidance explaining how it interprets that rule, saying that a group that does not have formal 501(c)(3) status may still qualify if: (1) it is organized and operated exclusively for religious, charitable, educational or other 501(c)(3) purposes; (2) no part of the net earnings of the entity may inure to the benefit of any private individual; (3) no substantial part of the entity's activities may be for the purpose of influencing legislation; and (4) the entity does not participate in any political campaign of any candidate for public office. U.S. Dept. of Health & Human Svcs., FDA, *Questions and Answers Regarding Food Facility Registration (Seventh Edition): Guidance for Industry* 19 (2018), available at <https://www.fda.gov/media/85043/download>.

2. New York State Food Safety Regulation

- **New York Agriculture and Markets Law (AGML).** Much of the regulation of food safety is handled at the state level. This statute requires different kinds of food operations to obtain different licenses, some of which might apply to mutual aid work involving food preparation in New York. For an overview of different licenses that might apply to your group, visit the [Department of Agriculture and Markets website](#).

Mutual aid groups that offer people food that could spoil, when the food is intended to be eaten elsewhere, might be required to obtain a license as a *Retail Food Store*, although the application appears to require a physical store and also seems to not apply to groups that only sell fresh fruit and vegetables.⁶⁴ Mutual aid groups that store food for commercial distribution may fall under the state regulations on being “food warehouses” and require licensing as either a *Food Warehouse* or a *Refrigerated Warehouse*, although most mutual aid groups do not hold onto food for long periods, as may be required.⁶⁵

State and county Departments of Health closely regulate *Food Processing Establishments*, requiring licenses when a food manufacturer, processing plant, wholesale bakery, or retail food establishment is cooking food, including basic activities like repackaging foods, baking breads or cookies, or just popping popcorn.⁶⁶ If your mutual aid group is doing work like this in New York, you should closely review these licensing requirements.

In recent months, the state has issued interim guidance for groups involved with food during the COVID-19 pandemic, including [Interim Guidance for Grocery Home Deliveries and Ecommerce Home Deliveries](#), and [Interim Guidance to Restaurants and Food Manufacturers/Distributors to Sell Grocery Items](#). For groups making deliveries or distributing food, these documents have important information on the state’s current policies. These documents are periodically updated, and the newest versions should be available on the Department of Agriculture and Markets website.

- **New York State Sanitary Code.** The New York State Bureau of Community Environmental Health and Food Protections maintains Part 14 of the Sanitary Code, which contains more detailed regulations regarding the standards that have to be met by all food establishments. Part 14-1 contains the rules for Food Service Establishments in general. Part 14-2 lists rules for *Temporary Food Service Establishments*, “where food is prepared or handled and served to the public, with or without charge, and which operates at a fixed location in conjunction with a single event or celebration of not more than 14 consecutive days duration.”⁶⁷ Groups with projects that fit this description may need to seek a permit pursuant to Part 14-2.2.⁶⁸ Part 14-4 contains regulations for *Mobile Food Service Establishments and Pushcarts*, which covers

⁶⁴ N.Y. Agri. & Mkts. L. § 500(d); see New York State Department of Agriculture and Markets, *Application for Retail Food Store License – Article 28-A*, available at <https://agriculture.ny.gov/food-business-licensing>.

⁶⁵ N.Y. Agri. & Mkts. L. § 500(d); see New York State Department of Agriculture and Markets, *Application for Food Warehouse License – Article 28-D; Application for Refrigerated Warehouse/Locker Plant/Fresh Fruit and/or Vegetable Storage Facility License – Article 19*, available at <https://agriculture.ny.gov/food-business-licensing>.

⁶⁶ N.Y. Agri. & Mkts. L. § 251-Z; <https://agriculture.ny.gov/food-business-licensing>.

⁶⁷ 10 NYCRR 14-2.1.

⁶⁸ 10 NYCRR 14-2.2.

motorized vehicles like food trucks and manually-propelled carts used to sell food.⁶⁹ Part 14-4 also applies to *Mobile Food Service Establishment Commissaries*, establishments “where food is manufactured, stored, prepared, portioned or packaged, or any combination of these, where such food is intended for consumption at another establishment or place.”⁷⁰ Groups are able to apply for a waiver for their mobile food service establishment, pushcart, or mobile food service establishment commissary “when it reasonably appears that the public health will not be endangered by such waiver.”⁷¹

3. *New York City Food Safety Regulation*

- Article 81 of the New York City Health Code regulates New York City food preparation and food establishments. If your group is heating or preparing food, you may be required to get a permit under these rules, although there is an exception for religious, fraternal, and charitable organizations that provide food services less than once per week. Those groups need to notify the Department of Health of their intention to engage in those operations and may receive authorization to do that work without a permit, although the Department of Health retains the right “to take any actions necessary to protect the public health.”⁷² Article 81 also lists New York City rules related to sanitary conditions in food preparation and food establishments, and details what foods are considered potentially hazardous and subject to tighter regulations.

4. *Zoning-Related Regulation*

- It is also important for mutual aid groups doing significant food-related work to pay attention to their local zoning laws. Generally, the activities of small food producers or hobbyists that are consistent with customary uses of a private residence do not require compliance with food-related regulations. In New York City, in addition to satisfying any applicable food safety regulations, residentially-zoned apartments and homes are only allowed to contain businesses where the business takes up no more than the lesser of 25% of the home or 500 square feet.⁷³

B. Good Practices on Navigating Food Regulations

Food laws are substantial hurdles for groups that want to establish short-term, volunteer-driven mutual aid programs of food production and distribution. While there are risks to engaging in direct contact with food, there are practices that may make such work safer for your group.

- **Consider peer-to-peer.** Peer-to-peer food-sharing networks are largely not regulated at the federal, state, or local levels. If your mutual aid group operates a platform through which individuals can find each other to help one another without direct food exchanges, it is likely to be able to avoid much of the regulatory oversight described in this Section.

⁶⁹ 10 NYCRR 14-2.1.

⁷⁰ 10 NYCRR 14-4.31.

⁷¹ 10 NYCRR 14-4.199.

⁷² § 81.05 R. City of N.Y.

⁷³ N.Y. Zoning Res. 12-10.

- **Larger, centralized facilities may be more efficient, but they are more heavily regulated.** Some mutual aid groups that are preparing for long-term community food work are looking at ways they can increase efficiency through bulk-purchasing and centralizing their operations. This likely is cheaper and more efficient, but it may trigger more regulatory oversight of your group. Consider the downsides of growth and centralization, and consider the possibility of splitting one large group into two or three smaller groups if that can help your group navigate these issues.
- **Consider collaboration with existing networks and organizations.** Soup kitchens, food pantries, and other charitable groups—as well as more radical mutual aid food-sharing networks like [Food Not Bombs](#)—exist all around the world. Considering how your group could partner with or learn from those existing groups could help your mutual aid group develop your experience, community ties, and understanding of the local regulatory environment.
- **Utilize basic safety procedures:** Even outside of regulatory burdens, mutual aid groups have a responsibility to be as safe as possible to prevent illness and provide healthy food in our communities. Look for up-to-date resources on food safety during the pandemic, and check out Mutual Aid Disaster Relief's [overview of hygienic practices for groups working with food during the pandemic](#).

9. Other Resources

At this point, there are hundreds of mutual aid-related resources online. Here's a brief list of some of our favorites:

Online

- Big Door Brigade, [Mutual Aid Toolbox](#)
- Electronic Frontier Foundation, [Keeping Each Other Safe When Virtually Organizing Mutual Aid](#)
- [Mutual Aid Disaster Relief](#)
- Mutual Aid NYC, [How to set up a mutual aid neighborhood group: a resource list](#)
- Rad Comms Network, [Database of Localized Resources During COVID 19 Outbreak](#)
- Sustainable Economies Law Center, [Micro-Training: Mutual Aid and the Law](#)

Books

- Yarimar Bonilla and After the Storm, eds., [Aftershocks of Disaster: Puerto Rico Before and After the Storm](#)
- scott crow, [Black Flags and Windmills](#)
- INCITE! Women of Color Against Violence, ed., [The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex](#)
- Peter Kropotkin, [Mutual Aid: A Factor of Evolution](#)

Other Media

- [Mutual Aid on Lockdown](#) (podcast)
- [The Response: How Puerto Ricans are Restoring Power to the People](#) (film)