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the law of fundraising

2019 Cumulative Supplement

Fifth Edition

Bruce R. Hopkins and
Alicia M. Beck

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the law of
fundraising

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Alicia M. Beck

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Preface

This 2019 cumulative supplement is the fourth supplement to accompany the fifth edition of this book. The supplement essentially covers developments in the law of fundraising as of the close of 2018.

From a federal law standpoint, probably the most significant recent development in the realm of fundraising occurred when the U.S. Tax Court, in response to considerable litigation on the point, found a way to salvage charitable gift substantiation where the charitable donee has not supplied a gift substantiation letter (or at least not a qualifying one) to the donor, doing so in the context of gifts of easements: the deed of easement may serve as the gift substantiation document. This development is discussed in a section added by this supplement but in essence the court is disregarding as mere boilerplate a provision in the deed reciting consideration by reason of a merger clause.

Also notably, what would have been an important development in the realm of charitable fundraising occurred when the Department of the Treasury and the IRS published proposed regulations to implement the exception to the general charitable gift substantiation requirement. Pursuant to this exception, donee organizations would have been able to file information returns with the IRS that report the required information about contributions. The fundraising community has become rather familiar with the general substantiation rules, using the required contemporaneous written acknowledgement letters as an opportunity to communicate with (as in say thank you to) their donors. If these rules concerning this exception had been implemented, administrators of charitable organizations would have had to make the decision as to whether to stay with the general substantiation regime or begin filing information returns with the IRS. The professional fundraising community certainly had a vested interest in the outcome of that decision making. The decision not only would have had an impact on donor relations efforts but, as the Association of Fundraising Professionals noted in its October 28, 2015, eWire, the proposal raised problems regarding donor confidentiality and privacy. The fundraising community, however, sidestepped these dilemmas when the IRS, overwhelmed and frustrated by the controversy, summarily, on January 7, 2016, withdrew the proposed regulations. Indeed, the underlying statute was repealed on enactment of the Tax Cuts and Jobs Act.

A section has been added to the book, addressing the matter as to when an organization can be considered a tax-exempt charitable entity where its sole functions are fundraising and grantmaking. As we discuss, it has been IRS policy since 1924 that a nonprofit organization that only carries on operations that involve generation and receipt of contributions (and perhaps investment

PREFACE

income) and distribution of its income to public charities is eligible to receive recognition of tax exemption as a public charity. This point has often been restated over the years. The IRS caused a major shift in thinking concerning this topic when, in 1964, the agency introduced the commensurate test. As applied to fundraising and grantmaking charities, this test requires that the amounts distributed to one or more charities must be “significant.” (This aspect of the topic was raised to a much higher level of concern when, a few years ago, the IRS launched its “charitable spending initiative.” This could have been a major development for the fundraising community; the initiative, however, collapsed and disappeared in the aftermath of the chaos surrounding the brouhaha over the IRS’s mishandling of certain applications for recognition of exemption.)

In recent months, however, largely by means of private letter rulings, the IRS has taken a harder line as to fundraising charities, principally by adversely applying the doctrines of private benefit and commerciality. There has been an unusually large number of IRS private letter rulings concerning nonprofit organizations established to engage in forms of online fundraising for charity. The IRS has denied recognition of tax exemption as a charitable entity in every one of these cases. Some of these rulings are inconsistent with law that has been in existence for over 90 years, concerning exemption for entities whose functions are solely fundraising and grantmaking. The IRS’s fixation on the commerciality doctrine has spilled over into this area, causing policy shifts, with the agency resting its denial positions on that doctrine and, in some instances, as noted, also the private benefit doctrine. We added this section to explore this aspect of the IRS’s recent ruling policy.

The IRS’s focus in this area notwithstanding, online fundraising by charities that are tax-exempt continues to grow, and thus we expanded our portrait of charitable giving to include a look at this phenomenon.

Other topics we have covered include a study of state-level oversight and regulation of charitable organizations, expanded Form 990 filing requirements in the states, discussion of a troubling IRS technical advice memorandum finding a charitable organization’s fundraising program to be an unrelated business (a matter now before the Tax Court), the import of the IRS’s new streamlined application for recognition of exemption, fundraisers’ compensation, and more law concerning raffles conducted by charities.

We appreciate the assistance we have received from John Wiley & Sons in the preparation of this supplement. Our thanks are extended, in particular, to our development editor, Brian T. Neill, and Abirami Srikandan, production editor, for their assistance and support in connection with this supplement.

Bruce R. Hopkins
Alicia M. Beck
March 2019

About the Authors

Bruce R. Hopkins practices law with the Bruce R. Hopkins Law Firm, LLC, in Kansas City, Missouri. His practice concentrates on the representation of charitable and other tax-exempt organizations, ranging over the entirety of law matters involving exempt organizations, with emphasis on fundraising law issues, charitable giving (including planned giving), the formation of nonprofit organizations, acquisition of recognition of tax-exempt status for them, governance and the law, the private inurement and private benefit doctrines, the intermediate sanctions rules, legislative and political campaign activities issues, public charity and private foundation rules, unrelated business planning, use of exempt and for-profit subsidiaries, joint-venture planning, tax shelter involvement, review of annual information returns, and Internet communications developments.

Mr. Hopkins served as chair of the Committee on Exempt Organizations, Tax Section, American Bar Association; chair, Section of Taxation, National Association of College and University Attorneys; and president, Planned Giving Study Group of Greater Washington, D.C.

Mr. Hopkins is the series editor of Wiley's Nonprofit Law, Finance, and Management Series. In addition to co-authoring *The Law of Fundraising, Fifth Edition*, he is the author of *The Law of Tax-Exempt Organizations, Twelfth Edition*; *Planning Guide for the Law of Tax-Exempt Organizations: Strategies and Commentaries*; *Bruce R. Hopkins' Nonprofit Law Library* (e-book); *Tax-Exempt Organizations and Constitutional Law: Nonprofit Law as Shaped by the U.S. Supreme Court*; *IRS Audits of Tax-Exempt Organizations: Policies, Practices, and Procedures*; *Bruce R. Hopkins' Nonprofit Law Dictionary*; *The Tax Law of Charitable Giving, Fifth Edition*; *The Tax Law of Associations*; *The Tax Law of Unrelated Business for Nonprofit Organizations*; *The Nonprofits' Guide to Internet Communications Law*; *The Law of Intermediate Sanctions: A Guide for Nonprofits*; *Starting and Managing a Nonprofit Organization: A Legal Guide, Seventh Edition*; *Nonprofit Law Made Easy*; *Charitable Giving Law Made Easy*; *Private Foundation Law Made Easy*; *650 Essential Nonprofit Law Questions Answered*; *The First Legal Answer Book for Fund-Raisers*; *The Second Legal Answer Book for Fund-Raisers*; *The Legal Answer Book for Nonprofit Organizations*; and *The Second Legal Answer Book for Nonprofit Organizations*; and is the co-author, with Jody Blazek, of *The Tax Law of Private Foundations, Fifth Edition*; also with Ms. Blazek, *The Legal Answer Book for Private Foundations*; with Thomas K. Hyatt, of *The Law of Tax-Exempt Healthcare Organizations, Fourth Edition*; with David O. Middlebrook, of *Nonprofit Law for Religious Organizations: Essential Questions and Answers*; with Douglas K. Anning, Virginia C. Gross, and Thomas J. Schenkelberg, of *The*

ABOUT THE AUTHORS

New Form 990: Law, Policy and Preparation; with Ms. Gross, of *Nonprofit Governance: Law, Practices, and Trends*; and with Ms. Gross and Mr. Schenkelberg, of *Nonprofit Law for Colleges and Universities: Essential Questions and Answers for Officers, Directors, and Advisors*. He also writes *Bruce R. Hopkins' Nonprofit Counsel*, a monthly newsletter, published by John Wiley & Sons.

Mr. Hopkins maintains a website providing information about the law of tax-exempt organizations and charitable giving law, including charitable fundraising law, at www.brucerhopkinslaw.com. Material posted on this site includes a current developments outline concerning this aspect of the law, and summaries of and indexes to his monthly newsletter.

Mr. Hopkins earned his JD and LLM degrees at George Washington University National Law Center, his SJD degree at the University of Kansas School of Law, and his BA at the University of Michigan. He is a member of the bars of the District of Columbia and the state of Missouri. He is the Professor from Practice at the Kansas University Law School, teaching courses on the law of nonprofit and tax-exempt organizations, including charitable fundraising law.

Mr. Hopkins received the 2007 Outstanding Nonprofit Lawyer Award (Vanguard Lifetime Achievement Award) from the American Bar Association, Section of Business Law, Committee on Nonprofit Corporations. He is listed in *The Best Lawyers in America, Nonprofit Organizations/Charities Law*.

Alicia M. Beck is an associate in the law firm of Polsinelli PC, practicing in the firm's Kansas City, Missouri, office. She specializes in advising nonprofit entities. Her clients include national hospital systems, research organizations, private foundations, colleges, universities, associations, social welfare organizations, and governmental entities. Ms. Beck assists these clients with formation, structure, and operational issues, including fundraising regulation. She also has experience with various tax restructuring issues relating to international entities.

Ms. Beck received her JD degree from the University of Kansas School of Law. Ms. Beck received an LLM in taxation from Northwestern University. She received a BA in Supply and Value Chain Management from Texas Christian University. She is a member of the bars of the states of Illinois, Kansas, and Missouri. She was also selected a 2015 Kansas and Missouri Rising Star for Tax Law.

CHAPTER ONE

Government Regulation of Fundraising for Charity

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§ 1.2 CHARITABLE FUNDRAISING: A PORTRAIT

p. 9. *Insert following heading:*

From the standpoint of the law of charitable fundraising, two aspects of the portrait of charitable giving in the United States are important: the extent of charitable giving in general and the increasing use of the Internet for the purpose of soliciting charitable contributions.

(a) Scope of Charitable Giving in General

p. 9. *Delete text following the first paragraph and substitute:*

Charitable giving in the United States in 2017 is estimated to have totaled \$410.02 billion. Giving by individuals in 2017 amounted to an estimated \$286.65 billion; this level of giving constituted about 70 percent of all charitable giving for the year. Grantmaking by private foundations is an estimated \$66.9 billion (16 percent of total funding). Gifts in the form of charitable bequests in 2017 are estimated to be \$35.7 billion (9 percent of total giving). Gifts from corporations in 2017 totaled \$20.77 billion (5 percent of total giving for that year).

Contributions to religious organizations in 2017 totaled \$127.37 billion (31 percent of all giving that year). Gifts to educational organizations amounted to \$58.9 billion (14 percent); to human service entities, \$50.06 billion

(12 percent); to foundations, \$45.89 billion (11 percent); to health care institutions, \$38.27 billion (8 percent); to public-society benefit organizations, \$29.59 billion (8 percent); to international affairs entities, \$22.97 billion (6 percent); to arts, culture, and humanities entities, \$19.51 billion (5 percent); and to environmental and animals groups, \$11.3 billion (3 percent).²⁴

p. 10. Delete first paragraph and substitute:

(b) Online Charitable Fundraising

Not that many years ago, use of the Internet for charitable fundraising was only nascent. One analysis of online fundraising, in its beginnings, did not have statistics on this approach to gift solicitation.^{25.1} But it was clearly coming, and was expected to someday be a major force in charitable fundraising. Now, that “someday” has arrived.

In mid-2014, *The Chronicle of Philanthropy* gave a special report on online fundraising, with the theme being “Digital Giving Goes Mainstream.”^{25.2} Among the findings in this report was that Internet gifts climbed 13 percent in 2013 in relation to 2012, although online fundraising “still accounts for a very small portion of the money charities rely on.”^{25.3} Nonetheless, in 2013, the Leukemia & Lymphoma Society raised over \$98 million online, the California Community Foundation raised more than \$95 million online, the American Heart Association raised \$59 million in that manner; other totals were over \$45 million (World Vision), about \$40 million (Campus Crusade for Christ International, Cystic Fibrosis Foundation, National Christian Foundation, Salvation Army), about \$30 million (March of Dimes Foundation, Young Life), and about \$20 million (Global Impact, Memorial Sloan Kettering Cancer Center, United States Fund for Unicef, University of Michigan).^{25.4}

About one year later, another report speaks of the “transformative promise of online fundraising” that has yet to materialize.^{25.5} This report looks at the “short history of online fundraising” and finds that it “is not without signs of progress.” It summarizes the successes of online-giving websites and notes

²⁴ These data are from *Giving USA 2017*, published by the Giving USA Foundation, and researched and written under the auspices of the Center on Philanthropy at Indiana University.

^{25.1} Hopkins, *The Nonprofits' Guide to Internet Communication Law* (John Wiley & Sons: 2003), Chapter 4.

^{25.2} XXVI *Chron. of Phil.* (No. 13) F-1 (May 22, 2014).

^{25.3} Daniels and Narayanswamy, “Online Giving Grows More Sophisticated,” XXVI *Chron. of Phil.* (No. 13) F-3 (May 22, 2014).

^{25.4} XXVI *Chron. of Phil.* (No. 13) F-4 (May 22, 2014).

^{25.5} “Click, Click, Cash?,” 27 *Chron. of Phil.* (No. 9) 10 (May 2015).