

Wiley Nonprofit Authority

+ website

# the law of fundraising

2021 Cumulative Supplement

*Fifth Edition*

**Bruce R. Hopkins** and  
**Alicia M. Beck**

WILEY



# the law of **fundraising**

2021 Cumulative Supplement



## Subscriber Update Service

**BECOME A SUBSCRIBER!**

*Did you purchase this product from a bookstore?*

**BECOME A SUBSCRIBER!**

***Did you purchase this product from a bookstore?***

If you did, it's important for you to become a subscriber. John Wiley & Sons, Inc. may publish, on a periodic basis, supplements and new editions to reflect the latest changes in the subject matter that you ***need to know*** in order to stay competitive in this ever-changing industry. By contacting the Wiley office nearest you, you'll receive any current update at no additional charge. In addition, you'll receive future updates and revised or related volumes on a 30-day examination review.

If you purchased this product directly from John Wiley & Sons, Inc., we have already recorded your subscription for this update service.

To become a subscriber, please call **1-877-762-2974** or send your name, company name (if applicable), address, and the title of the product to:

mailing address:

**Supplement Department  
John Wiley & Sons, Inc.  
10475 Crosspoint Blvd.  
Indianapolis, IN 46256**

email:

subscriber@wiley.com

fax:

**1-800-605-2665**

online:

www.wiley.com

For customers outside the United States, please contact the Wiley office nearest you:

**Professional & Reference Division**

John Wiley & Sons Canada, Ltd.  
90 Eglinton Ave. E. Suite 300  
Toronto, Ontario M4P 2Y3  
Canada  
Phone: 416-236-4433  
Phone: 1-800-567-4797  
Fax: 416-236-8743  
Email: canada@wiley.com

John Wiley & Sons Australia, Ltd.  
42 McDougall Street  
Milton, Queensland 4064  
AUSTRALIA  
Phone: 61-7-3859-9755  
Fax: 61-7-3859-9715  
Email: aus-custservice@wiley.com

**John Wiley & Sons, Ltd.**

European Distribution Centre  
New Era Estate  
Oldlands Way  
Bognor Regis, West Sussex  
PO22 9NQ, UK  
Phone: (0)1243 779777  
Fax: (0)1243 843 123  
Email: customer@wiley.co.uk

John Wiley & Sons (Asia) Pte., Ltd.  
1 Fusionopolis Walk  
#07-01 Solaris South Tower  
SINGAPORE 138628  
Phone: 65-6302-9838  
Fax: 65-6265-1782  
Customer Service: 65-6302-9800  
Email: asiacart@wiley.com

# the law of **fundraising**

2021 Cumulative Supplement      *Fifth Edition*

**Bruce R. Hopkins** and  
**Alicia M. Beck**

**WILEY**

Copyright © 2021 by John Wiley & Sons, Inc. All rights reserved

Published by John Wiley & Sons, Inc., Hoboken, New Jersey

Published simultaneously in Canada

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, scanning, or otherwise, except as permitted under Section 107 or 108 of the 1976 United States Copyright Act, without either the prior written permission of the Publisher, or authorization through payment of the appropriate per-copy fee to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, (978) 750-8400, fax (978) 646-8600, or on the web at [www.copyright.com](http://www.copyright.com). Requests to the Publisher for permission should be addressed to the Permissions Department, John Wiley & Sons, Inc., 111 River Street, Hoboken, NJ 07030, (201) 748-6011, fax (201) 748-6008, or online at [www.wiley.com/go/permissions](http://www.wiley.com/go/permissions).

**Limit of Liability/Disclaimer of Warranty:** While the publisher and author have used their best efforts in preparing this book, they make no representations or warranties with respect to the accuracy or completeness of the contents of this book and specifically disclaim any implied warranties of merchantability or fitness for a particular purpose. No warranty may be created or extended by sales representatives or written sales materials. The advice and strategies contained herein may not be suitable for your situation. You should consult with a professional where appropriate. Neither the publisher nor the author shall be liable for damages arising herefrom.

For general information about our other products and services, please contact our Customer Care Department within the United States at (800) 762-2974, outside the United States at (317) 572-3993, or fax (317) 572-4002.

Wiley publishes in a variety of print and electronic formats and by print-on-demand. Some material included with standard print versions of this book may not be included in ebooks or in print-on-demand. If this book refers to media such as a CD or DVD that is not included in the version you purchased, you may download this material at <http://booksupport.wiley.com>. For more information about Wiley products, visit [www.wiley.com](http://www.wiley.com).

Library of Congress Cataloging-in-Publication Data is Available:

ISBN 978-1-118-65063-9 (main edition)

ISBN 978-1-119-75788-7 (supplement)

ISBN 978-1-119-75816-7 (ePDF)

ISBN 978-1-119-75815-0 (ePub)

Cover Design: Wiley

Cover Image: © Comstock / Jupiter Images

10 9 8 7 6 5 4 3 2 1

# Contents

<b>Preface</b>	<b>vii</b>
<b>Chapter One Government Regulation of Fundraising for Charity</b>	<b>1</b>
§ 1.2 Charitable Fundraising: A Portrait	1
§ 1.3 Evolution of Government Regulation of Fundraising	3
§ 1.4 Contemporary Regulatory Climate	6
<b>Chapter Four State Regulation of Fundraising</b>	<b>9</b>
§ 4.2 Police Power	9
§ 4.2A Registration and Licensing Requirements (New)	9
§ 4.2B Charitable Purposes Revisited (New)	11
§ 4.3 Fundraising as Free Speech	11
§ 4.8 Other Constitutional Law Issues	15
<b>Chapter Five Federal Regulation of Fundraising</b>	<b>17</b>
§ 5.2A Private Benefit Doctrine	17
§ 5.3 Charitable Gift Substantiation Requirements	19
§ 5.6 Intermediate Sanctions	27
§ 5.7 Unrelated Business Rules	29
§ 5.8 Exemption Application Process	33
§ 5.11 Public Charity Classifications	33
§ 5.13 Fundraising Compensation Arrangements	35
§ 5.14 Charitable Deduction Rules	36
§ 5.15 Commensurate Test	37
§ 5.18 Postal Laws	38
§ 5.21 FTC Telemarketing Rules	38
§ 5.22 Internet Communications	39
§ 5.25 Political Campaign Financing	39
§ 5.26 Fundraising Organizations	39
§ 5.27 House of Representatives Memorandum	49
<b>Chapter Six Import of Form 990</b>	<b>51</b>
§ 6.11 Schedule B	51
<b>APPENDICES</b>	<b>59</b>
<b>Appendix D Inflation-Adjusted Insubstantiality Threshold—\$50 Test</b>	<b>59</b>
<b>Appendix E Inflation-Adjusted Insubstantiality Threshold—\$25 Test</b>	<b>61</b>
<b>Appendix F Inflation-Adjusted Low-Cost Article Definition</b>	<b>63</b>

## CONTENTS

<b>TABLES</b>	<b>65</b>
<b>Cumulative Table of Cases</b>	<b>65</b>
<b>Cumulative Table of IRS Pronouncements</b>	<b>75</b>
<b>Cumulative Table of Private Letter Rulings and Technical Advice Memoranda Discussed in <i>Bruce R. Hopkins' Nonprofit Counsel</i></b>	<b>77</b>
<b>Cumulative Table of Cases Discussed in <i>Bruce R. Hopkins' Nonprofit Counsel</i></b>	<b>79</b>
<b>Online Resources</b>	<b>83</b>
<b>Index</b>	<b>85</b>



# Preface

This 2021 cumulative supplement is the sixth supplement to accompany the fifth edition of this book. The supplement covers developments in the law of fundraising for charitable purposes as of the close of 2020.

Congress has been quite active in the realm of nonprofit tax law, including enactment of the Tax Cuts and Jobs Act; some of what has been conjured directly impacts charitable fundraising. These law changes include revisions in the percentage limitations on deductible charitable giving and the way tax-exempt organizations compute their unrelated business taxable income (what we call the bucketing rule). In the aftermath of these revisions in the statutory law, the Department of the Treasury and the IRS have been busy writing guidance that amplifies these statutes. Thus, for example, final regulations to accompany the bucketing rule have been promulgated.

In addition to the foregoing, the Treasury Department issued final regulations applying the quid pro quo principle in the context of deductible charitable gifts, Treasury also issued final regulations concerning donor disclosure requirements, the IRS has revised its application for recognition of tax exemption as part of the requirement that it be filed electronically, and the IRS published guidance as to when the business expense deduction is available in the charitable giving setting.

From a federal law standpoint, a significant 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 acknowledgment 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.

## PREFACE

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 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.

Recent years have brought many court cases concerning the matter of disclosure of donor information. This issue has arisen in the fundraising setting but, as recent cases illustrate, this issue is ballooning beyond the fundraising context. The extent to which donor disclosure is permissible and when it violates fundamental principles of free speech and privacy may be considered by the U.S. Supreme Court. This litigation is summarized in this supplement.

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, discussion of a troubling IRS technical advice memorandum finding a charitable organization’s fundraising program to be an unrelated business, the import of the IRS’s streamlined application for recognition of exemption, fundraisers’ compensation, and more law concerning raffles conducted by charities.

## PREFACE

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 Deborah Schindler, managing editor, for their assistance and support in connection with this cumulative supplement.

Bruce R. Hopkins

Alicia M. Beck

March 2021

