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2021 Cumulative Supplement

Fourth Edition

Michael I. Sanders

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To my wife of 50+ wonderful years,
Judy, whose love, devotion, and patience
have made this book possible;
and to David, Patty, Hayley, and Jacob;
Noah, Brooke, Emme, and Ryder Aaron;
Adam, Randi, Gabby, and Eva;
and Sammy, Rebecca, Benjamin, and Jonah.

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Preface

As the year comes to an end, the boards of nonprofit organizations are taking a look back at 2020–2021 to reflect on the challenges they faced, as well as their accomplishments and their failures, to guide them in defining future strategies and opportunities. Indeed, while donations to charities were expected to drop by at least $13 billion each year as a result of the JCJA's changes to the charitable contribution deduction, it has been reported that the percentage of taxpayers who itemize their deductions declined by 35 percent.[1] It is no surprise that the COVID-19 pandemic forced many exempt organizations to do "more with less" and to create new workplace strategies and business practices to sustain their missions, in many cases creating what may be permanent change.[2] For example, at the university level, the sector pivoted and responded to the needs and safety of students with painful decreases in revenue and increased costs. In fact, I taught over the past year and a half at GW Law and Georgetown Law Center on a remote learning platform. Charitable organizations needed to respond to the escalated need for social services while maintaining pre-pandemic giving commitments and investment returns.

Charities were faced with the balancing of their own financial needs, both supporting nonprofits that had lost funding and recognizing the growing needs of the community, including unemployment and food insecurity. For this reason the use of joint ventures, impact investing, and mission-related investments, among other techniques, have become even more critical to the sustainability of the charitable sector. Commercial co-venturing has raised significant amounts of money. There are studies that show that millennials prefer to make purchases that identify with "causes," so many social media platforms now provide the means by which the public can also solicit money for charities. However, this is a typically unregulated area, although in some states there is regulation of various kinds. It is clear that many charities are under financial strain for the foregoing reasons, but it should be kept in mind that in the last go-round after the Great Recession, charities that were in dire straits were able to restructure and, in many cases, merge as a way to preserve their charitable goals.

In Chapter 2, there is a continued review of the impact of the CARES Act on contributions by individuals and corporations that provide significant temporary tax relief and charitable giving benefits. There is also a

[1] Janene R. Finley, *Reforming the Charitable Contribution Tax Deduction: Accounting for Random Acts of Charity*, 10 Wm. & Mary Bus. L. Rev. 479, 481 (2019).

[2] CohnReznick (Alfonso and McGowan), A Year in Review (Feb. 2021).

discussion of Notice 2020-36 regarding modifications of the group exemption rules, followed by an explanation of the compliance strategy and commerciality doctrine, which has been expanded in recent times.

In Chapter 3, there is a brief discussion of waterfall and claw back rules with regard to partnership distributions to partners.

In Chapter 5, there is a discussion of the final regulations under Section 4960, including changes to the proposed regulations regarding volunteers and covered employees.

In Chapter 6, there is an expanded discussion of impact investing and the commercialism doctrine. There is also a new discussion regarding commercial co-ventures, which have become quite popular. And finally there is an expanded discussion of the use of C corporations and REIT blockers, including a number of diagrams illustrating their effect.

In Chapter 8, there is a discussion of the final silo regulations and changes made from the proposed regulations.

In Chapter 10, there is a discussion regarding the contribution of nonvoting LLC interest to a private foundation, with an analysis of the impact of the self-dealing and excess business holding implications.

In Chapter 13, there is an update of LIHTC, along with the various IRS notices relative to opportunity zone funds in which the proposed rules have been revised; in this regard, the discussion of the written plan exception to QOZBs and foreign investments that follow the publication of the final regulations. There is also a subsection discussing proposed legislative recommendations to improve guardrails and incentives without resulting in undue disruption to communities or market participants. Finally there is a discussion of new market tax credits, which have been extended through 2025 with an additional $5 million annually. The new market tax credit area has also received a lot of attention relative to unwinds, which occur after seven-year compliance.

In Chapter 14 there is a discussion of the final regulations under Section 4968, which generally follow the proposed regulations.

The bottom line, once again, is that there is no one paradigm for joint ventures, especially in the face of the COVID-19 pandemic and its continued pressures on the budget and reduced fundraising. As previously discussed, in view of the financial distress that exempt organizations have faced, they now need to be even more creative and forge new paths to create and solve many issues affecting their future and operations. This text is intended to suggest mechanisms to accomplish the worthy goals of the charitable communities, especially following the pandemic crisis. We also believe that the opportunity zone legislation will survive under the Biden administration and, in fact, is likely to be expanded; however, with additional reporting and disclosure requirements. It should create an extremely attractable alternative to allow funds to be redirected to include the revised 2020 census tract.

Acknowledgments

I want to call attention to the work of a number of the graduate tax students at Georgetown Law Center who have taken the class Special Topics in Exempt Organizations and have written papers that have served to provide substantive materials, which are included in the text: Philip Harris, who has written on the "commerciality doctrine"; Conor Kratz, who has written a paper regarding new market tax credits; and David Kolokolo, who has written on foreign grantmaking rules. I again thank Amanda H. Nussbaum, who presented at Georgetown University Law Center on UBIT and PE practice and provided examples as to the use of blockers; and Cynthia Paine, for updating the LIHTC material. Finally, as always, I appreciate the outstanding contribution of Ronald Schultz at Alliant Group for his lectures at Georgetown University Law Center and his draft of current developments regarding conservation organizations.

I especially acknowledge Linda Schrader, whose extraordinary kindness and sensitivity have been invaluable in the preparation of the manuscript as well as her coordination with the staff at John Wiley & Sons; Linda has been critical to the entire process since the beginning of the treatise.

CHAPTER 1

Introduction: Joint Ventures Involving Exempt Organizations

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§ 1.4 UNIVERSITY JOINT VENTURES

p. 11. ***Add the following new paragraph at the end of this section:***

There is continued congressional focus on university endowments in light of the soaring cost of tuition and the perceived relatively low rate of financial assistance provided by colleges and universities with substantial endowments. See Chapter 14 for a discussion on policy changes that are being proposed, including imposing an annual payout requirement on endowment funds, among others.

§ 1.5 LOW-INCOME HOUSING AND NEW MARKETS TAX CREDIT JOINT VENTURES

pp. 13–14. ***Delete the last paragraph on p. 13 and replace with the following:***

The CDFI Fund has made 1,254 allocation awards totaling $61 billion in allocation authority since the NMTC Program's inception. Since inception through FY 2019, CDEs have disbursed a total of $52.5 billion in QEI proceeds to low-income community businesses (QALICBs).

§ 1.6 CONSERVATION JOINT VENTURES

p. 15. ***Add the following to the last paragraph of this section:***

In January 2014, Treasury and the IRS issued Revenue Procedure 2014-12, 2014-3 I.R.B. 414, which established a safe harbor for federal historic tax credit investments made within a single tier through a master lease pass-through structure. The guidance was issued in response to the *Historic Boardwalk* decision referenced earlier.

§ 1.8 REV. RUL. 98-15 AND JOINT VENTURE STRUCTURE

p. 18. ***Add the following to the end of footnote 65:***

PLR 201744019 (revocation of exemption of a § 501(c)(3) exempt hospital that was not operated exclusively for § 501(c)(3) purposes because it lacked the ability to require a for-profit manager to operate for charitable purposes).

§ 1.10 ANCILLARY JOINT VENTURES: REV. RUL. 2004-51

p. 21. ***Add the following new paragraph to the end of this section:***

In Section 4.10, there is an analysis of a virtual joint venture hypothetical, as to which a similar rationale should apply in a case in which the IRS proposes the revocation of an existing 501(c)(3) organization, alleging impermissible private benefit following an examination of its relationship with a for-profit entity. This commentator believes that the rationale should apply, notwithstanding the fact that no formal joint venture arrangement exists between the parties.

§ 1.14 THE EXEMPT ORGANIZATION AS A LENDER OR GROUND LESSOR

p. 28. ***Insert the following at the end of this section:***

The Internal Revenue Service recently issued final guidance for private foundations that updates examples that relate to program-related investments that pass muster under § 4944(c). The rules (T.D. 9762) provide changes and examples that were first provided in the 2012 Proposed Regulations. See subsection 6.5(b) for a detailed discussion of the new examples.

In April 2016 the IRS issued final guidance for private foundations that updates a number of examples of program-related investments that won't trigger excise taxes. Final Rules (T.D. 9762) illustrate changes to the examples provided in the 2012 Proposed Rules. In one change involving Example 11, a private foundation that invested in a drug company subsidiary developing a vaccine for disease predominantly affecting poor

people in developing countries recognizes that, in addition to distributing the vaccine at affordable prices, the subsidiary is allowed to sell the vaccine to those who can afford it at fair market value prices. In Chapter 6, each of the examples and its revised Treasury guidelines are set forth.

§ 1.15 PARTNERSHIP TAXATION

(a) Overview

p. 30. ***Add the following new paragraph to the end of this subsection:***

In the Bipartisan Budget Act of 2015, the partnership audit rules have been revised, the effect of which is that adjustments of income, gain, loss, deduction, or credit are to be determined at the partnership level and the taxes attributable thereto will be assessed and collected at the partnership level. The new rules are effective beginning taxable years after December 31, 2018, although small partnerships may opt out before then. See Chapter 3 for a discussion of the application of the new rules.

(b) Bargain Sale Including "Like Kind" Exchange

p. 30. ***Add the following to the end of footnote 101:***

See discussions regarding contribution of LLC/partnership interests to charity in subsection 2.11(f), *infra*, and Section 3.11, Sale or Other Disposition of Assets or Interests.

§ 1.17 USE OF A SUBSIDIARY AS A PARTICIPANT IN A JOINT VENTURE

p. 34. ***Add the following paragraph after the first full paragraph on this page:***

In September 2015, National Geographic Society formed a joint venture with 21st Century Fox, called the National Geographic Partners, a for-profit media joint venture. In this new venture, Fox contributed a substantial amount of cash to National Geographic, which increased its endowment to nearly $1 billion, in exchange for the contribution of significant assets, including its television channels and related digital and social media platforms. See subsection 6.3(b)(iv) for an analysis of the structure.

§ 1.22 LIMITATION ON PRIVATE FOUNDATION'S ACTIVITIES THAT LIMIT EXCESS BUSINESS HOLDINGS

p. 45. ***Add the following footnote to the end of this section:***

[163.1] See discussion regarding the contribution of LLC/partnership interests to charity in subsection 2.11(f).

§ 1.24 OTHER DEVELOPMENTS (REVISED)

p. 47. ***Add the following as footnote 175 to the last sentence of this section:***

[175] In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court cited p. 555 in this book, which described Google.org advancing its charitable goals while operating as a for-profit corporation. See footnote 24 of the *Hobby Lobby* decision, 134 S.Ct. 2751 (2014). The court recognized that while operating as a for-profit corporation, it is able to invest in for-profit endeavors, do lobbying, and tap Google's innovative technology and workforce. It acknowledged that states have increasingly adopted laws formally recognizing hybrid corporate forms.

p. 47. ***Add the following at the end of the subsection:***

With the growing impact of COVID-19, many business owners are interested in providing financial assistance to their furloughed or terminated employees, even though they cannot afford to keep them on their payroll. An attractive option is the creation of an employer-sponsored charity to raise tax-deductible contributions to be distributed to former employees who demonstrate need. In addition, a supplemental unemployment benefit trust under section 501(c)(17) can be formed as part of a plan to pay supplemental unemployment compensation benefits. Under section 139, employers can provide assistance directly to an employee free of income tax, provided the funds are used to pay or reimburse amounts that are reasonably expected to be incurred for incremental personal, family, or living expenses as a result of the COVID-19 crisis.

Under section 139, payments may cover the following expenses: (1) unreimbursed medical expenses and health-related expenses; (2) home expenses due to telecommuting; (3) housing costs for additional family members; (4) increased childcare and tutoring costs due to school closings; (5) additional commuting expenses; and (6) increased costs of home office supplies.

An employer-sponsored charity may cover not only those employees who are suffering under the impact of COVID-19 but may cover future hardships as well. However, charities benefiting individuals are permissible if the class of eligible beneficiaries is broad enough to be considered "indeterminable." For example, a charity designed to benefit past, current, and future employees of an entire restaurant group due to the pandemic and future disasters is broad enough and the beneficiaries are not immediately identifiable because unknown future employees and current employees who are victims of future disasters are eligible beneficiaries. Secondly, the individuals who are invested with the authority to make the grants—the board of directors or a committee appointed by the board—must consist of a majority of individuals who do not exert "substantial influence" over the business with rank-and-file employees and should be included among the decision makers. Finally, individuals who demonstrate a financial need are eligible to receive assistance, but the charity should avoid giving a "one size fits all" grant to every employee. Acceptable purposes for such grants

include payment of necessary healthcare expenses; providing cost of child-care or educational expenses for children of employees; or short-term grants meant to cover basic living expenses.

CAVEAT

The charity should retain documentation regarding the employee's eligibility for a grant and verification that the employee used the funds for eligible purposes.[176]

CAVEAT

Businesses that contemplate severance payments to workers should consider structuring such payments so that they qualify under section 139. If so, the payments would appear to be exempt from income tax and most payroll taxes. However, any payments pursuant to a legal or contractual obligation to pay severance would be difficult to categorize as section 139 payments. Secondly, section 139 contemplates payments commensurate with expenses they intend to offset, while severance payments are often computed based upon years of service and salary levels.

In Notice 2020-46, the IRS provided guidance to employers for how to exchange employee elections to forgo vacation, sick, or personal leave for cash payments that the employer makes to charitable organizations for COVID-19 relief. An employee who elects to relinquish aid leave will not be taxed on the value of the leave, if the payments in exchange for the leave are made by the individual's employer prior to January, 1, 2021, to a § 170(c) organization that provides "relief to victims of the COVID-19 pandemic."

CAVEAT

Although not explicit in the IRS notice, the use of the phrase "victims of the COVID-19 pandemic" can be read to mean that the permissible use of the donations extends not only to assist people who contract the disease, but also to people who lose their jobs or are otherwise financially harmed by the pandemic.[177]

[176] It is important to note that as an alternative, employers may be able to assist their employees by making qualified disaster relief payments on a tax-free basis under section 139 of the Code, previously discussed.

[177] Employers will have the choice of deducting these contributions either under the rules of Code § 170, as a charitable contribution deduction, or under section 162, which relates to the deduction for ordinary and necessary business expenses. The benefit of taking a deduction under Code § 162 as opposed to Code § 170 is that the employer will not be subject to certain limitations that section 170 imposes on the amount of the payment that is deductible in the year of the payment.

The CARES Act expanded the definition of educational assistance for purposes of section 127 of the Internal Revenue Code of 1986, as amended, to include certain employer payments made after March 27, 2020 under an "educational assistance program"[178] for repayment of employee student loans. As a result, through the end of the 2025 taxable year, an employer can make tax-free payments to its employees for student loan assistance of up to $5,250 per year. Payments in excess of $5,250 per year (and payments that are not made pursuant to an educational assistance program (as described below)) would be included in the employee's gross income. Additional rules and requirements related to qualified payments and educational assistance programs are described below.

- The payments can be made to the employee or directly to the lender, for repayment of either principal or interest, so long as the payments are made with respect to a "qualified education loan" and certain requirements under section 127 of the Code are met. A qualified education loan would generally include any student loan that is part of a federal postsecondary education loan program that is incurred for "qualified education expenses" of the employee's education, such as tuition and fees, room and board, books, certain supplies and equipment, and certain other necessary expenses for the employee's education. The qualified education expenses must generally be paid or incurred with student loan proceeds within a reasonable period of time before or after the employee takes out the loan.
- In order for the payments to employees to qualify for the gross income exclusion, the payments must be made pursuant to a separate written educational assistance program established for the exclusive benefit of the employer's employees so as to provide them with educational assistance.
- The employer can establish certain restrictions (subject to the nondiscrimination rules under section 127 of the Code, discussed below) on an employee's eligibility under the program such as job relationship requirements, limitation on when and where the courses can be taken, preapproval by the program manager or the

[178] The term "educational assistance" means (a) the payment, by an employer, of expenses incurred by or on behalf of an employee for education of that employee (including, but not limited to, tuition, fees, and similar payments, books, supplies, and equipment); (b) in the case of payments made before January 1, 2021, the payment by an employer, whether paid to the employee or to a lender, of principal or interest on any qualified education loan (as defined in § 221(d)(1)) incurred by the employee for education of the employee; and (c) the provision, by an employer, of courses of instruction for such employee (including books, supplies, and equipment), but does not include payment for, or the provision of, tools or supplies that may be retained by the employee after completion of a course of instruction, or meals, lodging, or transportation. The term "educational assistance" also does not include any payment for, or the provision of, any benefits with respect to any course or other education involving sports, games, or hobbies. (See § 127(c)(1).)

employee's supervisor, proof of completion of the course, minimum course grades, and completion of a certain period of employment after completion of the course.

- The following are additional requirements of the educational assistance program under section 127 of the Code:
    - The program benefits employees who qualify under rules set up by the employer (such as those described above in the immediately preceding bullet point) that do not discriminate in favor of highly compensated employees (i.e., an employee who (i) during the current or preceding tax year is or was a more than 5 percent owner with respect to the employer, or (ii) earned compensation in excess of $130,000 (for the 2021 tax year) unless such employee was not also in the top 20 percent of employees by pay for the preceding year and the employer chooses not to treat such individual as a highly compensated employee);
    - The program does not provide for more than 5 percent of its total benefits during the year to its more than 5 percent shareholders or owners (or their spouses or dependents);
    - The program does not allow the employees to receive cash or other benefits that must be included in gross income instead of educational assistance; and
    - The employer must give reasonable notice of the program to its eligible employees.
- An employer can choose to treat the following individuals as employees for purposes of the income exclusion rules: a current employee; a former employee who retired, left on disability, or was laid off; a leased employee who provided services under the employer's primary direction or control on a substantially full-time basis for at least a year; and self-employed individuals (such as an owner of a business if the employer is a sole proprietorship, or a partner who performs services for a partnership if the employer is a partnership).
- The program does not need to be funded to qualify.
- The employer may, but is not required to, obtain a determination letter from the IRS that the program is a qualified educational assistance program.

CHAPTER 2

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§ 2.1 INTRODUCTION

p. 50. ***Insert quotation marks around* IRC *on line 8 and add a comma after* contributions and churches *in footnote* 2.**

p. 52. ***Insert the following after the last paragraph of this section:***

In the 2017 Tax Act (Pub. L. No. 115-97) (the "Tax Act"), the following changes affect tax-exempt organizations:

1. **New 2017 Legislation**

   A. Charitable contributions are likely to decline as a result of the lowering of the individual income tax brackets (a maximum rate of 37 percent) while doubling the standard deduction. These rates and the standard deduction sunset after December 31, 2025. It is projected that only 5 percent of taxpayers will have sufficient itemized deductions that exceed the standard deduction that will enable them to continue to claim a charitable contribution deduction, which may curtail charitable giving. Moreover, the estate tax exemption was doubled so that individuals now have $11 million of exemption and married couples are able to exclude $22.4 million from their estate tax.

This provision also sunsets after December 31, 2025. Finally, there is a reduction in the C Corporation rates to 21 percent, which is a permanent change. It is important to note that C Corps have been the largest investor in joint ventures, including the low-income house tax credit and new market tax credits. (See Chapter 13.)

B. The AGI annual limitation has been increased to 60 percent for cash contributions; the provision also sunsets after December 31, 2025. There is obvious concern that major donors are likely to be the only taxpayers in a position to give away up to 60 percent of their AGI in a given year. In addition, the rule that requires contemporary written acknowledgment (§ 170(f)(8)(D)) no longer applies if the donee organization files a return that includes similar content. See subsection 2.11(f). The charitable sector benefits because they have been pressured by donors to fill forms out in lieu of providing a standard acknowledgment. The proposed regulations required the reporting of the donors' tax ID numbers/FNS, and charities were concerned that it could lead to theft.

C. Code § 4960 proposes a new 21 percent excise tax on tax-exempt organizations (modeled on § 162(m)) for (i) any "remuneration" paid to a covered employee that exceeds $1 million (whether or not such amounts are reasonable) and (ii) on "excess parachute payments" paid to a covered person under a separation agreement (i.e., severance payments that exceed 3 times the person's annual compensation averaged over the past five years). In this regard "covered employees" include the top five most highly compensated employees (or former employees) from the tax year or anyone who was a covered employee from any preceding taxable year beginning in 2017. "Remuneration" is defined as "all wages" under § 3401(a), excluding Roth contributions, paid by a tax-exempt organization or related party with respect to employment of the covered person. See subsection 5.4(b).[5.1]

CAVEAT
The intermediate sanctions and excess benefit rules of Code § 4958 still apply.

[5.1] For a more detailed discussion of the scope of Code § 4960 and the 2019 Interim Guidance, see Section 5.4.

CAVEAT

The Act extends these new executive compensation limitations to tax-exempts not limited to 501(c)(3)s or 501(c)(4)s, but including businesses, federal and state and local entities under § 115(1), and political organizations. Unlike the intermediate sanctions excise tax, § 4960 tax applies to the organization itself, not a covered employee or organizational manager.

The excess tax applies to deferred compensation remuneration, which is viewed as paid where it is no longer subject to a substantial risk of forfeiture under § 457(f)(3)(B). Thus, amounts that are "vested" but not yet received by a covered employee will be subject to tax.[5.2]

D. There is a new, unrelated business income tax (UBIT) on transportation, parking, and gym fringe benefits unless the amounts are deductible under Code § 274 because they are treated as part of the employee's taxable compensation. Note that this has been repealed under the Taxpayers Certainty and Disclosure Act of 2019.

E. The unrelated business income tax rate is now 21 percent, which will provide relief to many exempt organizations that have been paying as much as 35 percent on unrelated taxable income. However, this rate reduction may be offset by the new rule that net operating losses from one activity may no longer offset income from another activity. Tax-exempt organizations will need to calculate tax on each unrelated business separately.

QUERY

May all "investment" activities be treated as one activity for offsetting purposes? Will each of the gains and losses have to be separately stated? Treasury will need to publish regulations to resolve this issue.

F. There is now a new 1.4 percent tax on net investment income of certain colleges and universities defined as "applicable educational institutions" (i) that have at least 500 tuition-paying students, (ii) that have more than 50 percent of tuition-paying students located in the United States, and (iii) whose assets aggregated at fair market value are at least $500,000 per student at the end of the preceding taxable year. See Section 14.1. Related

[5.2] There is a special carve-out to payments made to licensed medical professionals, such as physicians and veterinarians, so that the compensation related to performance to medical services will not count toward the $1 million threshold. Accordingly, healthcare organizations will need to track time allocated between medical services and administrative services.

organizations to colleges and universities are required to have their assets and net income considered when determining whether the institution meets the asset-per-student threshold and for purposes for determining net investment income.

CAVEAT

This new legislation is targeted at highly compensated college and university athletic coaches and presidents, some of whom have million-dollar salaries.

CAVEAT

The new Bipartisan Budget Act of 2018 clarifies the Tax Act to provide that the "at least 500" and "more than 50 percent" of students tests both refer only to tuition-paying students.

CAVEAT

This new excise tax is estimated to raise approximately $1.8 billion in revenue over ten years and affect only about 35 institutions.

G. A related organization will include one in which the educational institution (a) controls or is controlled by (b) one or more persons who control the institution or (c) are supported organizations or supporting organizations with respect to the institution. The foregoing rules will require Treasury Regulations to clarify the scope of the new provision.

H. Section 170(l) is amended to eliminate the special rule and now denies deductions for college booster seats including season tickets.

2. Provisions That Did Not Survive the Tax Act

It is important to examine a number of provisions that were considered by the House and Senate but that did not survive the Conference Committee. The following provisions may well be reconsidered the next time extensive tax legislation is considered by Congress. Beware of the potential that some, if not all, of these provisions will be in play in the near future.

A. In the application of the initial tax on a disqualified person pursuant to the intermediate sanctions rules, the rebuttable presumption of reasonableness would have been eliminated. (See subsection 5.4(c)(ii).) Procedures would be promulgated

by the IRS to establish that an organization has performed minimum standards of due diligence (essentially the same as those that pertain in connection with the previously described presumption) with respect to a transaction or other arrangement involving a disqualified person (proposed IRC § 4958(d)(3)). The existing rule by which an organization manager's participation in a transaction ordinarily is not "knowing" participation for purposes of the intermediate sanctions rules if the manager relied on professional advice would be eliminated (proposed IRC § 4958(g)). The definition of a disqualified person, for purposes of the intermediate sanctions rules, would be expanded to include investment advisors and athletic coaches at private educational institutions (see proposed IRC § 4958(f)(1)(G), proposed revision of IRC § 4958(f)(8)(B)).[5.3]

B. The private foundation's excise tax would be reduced to a single rate of 1.4 percent (revised IRC § 4940(a), proposed repeal of IRC § 4940(e)). Also a rule would be enacted stating that an entity cannot be a private operating foundation as an art museum unless the museum is open during normal business hours to the public for at least 1,000 hours annually (proposed IRC § 4942(j(6)).

C. A sale or licensing by an exempt organization of the entity's name or logo (including any related trademark or copyright) would be treated as an unrelated business regularly carried on (proposed IRC §§ 512(b)(20), 513(k)). Income derived from such licensing would be included in the organization's gross unrelated business income, notwithstanding the exclusion for certain types of passive income (including other forms of royalties). See subsection 8.5(d). The unrelated business income tax would not apply to research limited to publicly available research (see IRC § 512(b)(9)). The application of UBIT to state and local retirement plans (proposed IRC § 511(d)) would be clarified.

D. Charitable organizations would be allowed to make statements relating to political campaigns in the ordinary course of program activities, where the expenses are de minimis (proposed IRC § 501(s)), a very controversial proposal opposed by both the Independent Sector and the Council on Foundations.

E. The tax exemption for professional sports leagues (IRC § 501(c)(6)) would be repealed.

[5.3] The intermediate sanctions rules would become applicable to labor organizations (IRC § 501(c)(5) entities) and business leagues (IRC § 501(c)(6) entities) (proposed revision of IRC § 4958(e)(1)).

F. The standard mileage rate for the use of an automobile for charitable purposes would be adjusted to take into account the variable costs of operating the vehicle rather than the existing law's 14-cents-per-mile deduction.

G. Additional reporting requirements for sponsoring organizations of donor-advised funds would be enacted, consisting of the average amount of grants expressed as a percentage of asset value and a statement as to whether the organization has a policy as to the frequency and minimum level of distributions (proposed IRC § 6033(k)(4)).

At the end of its spring term, the Supreme Court issued a decision that some have speculated could lead to governmental outsourcing of more activities to nonprofits. The case, *Manhattan Community Access Corp. v. Halleck et al.*, 587 U.S. ___ (2019), involved the question of whether a nonprofit was a "state actor" when New York City delegated the operation of public access channels to it. A cable operator typically operates public access channels itself unless the local government elects to operate them or selects a private entity to do so. If found to be a state actor, the organization would be subject to the First Amendment. In this case, New York City designated a nonprofit to operate the public access channels of a New York cable system. The nonprofit, MNN, aired a film that was critical of it, but later barred the film's producers from future access to the channels. The producers brought suit on grounds that this action violated their First Amendment free-speech rights. The five–four split focused on whether operating public access channels is a traditional, exclusive public function, with the majority ruling that very few functions are exclusive public functions. Consistent with this ruling, if the government delegates an activity to a private organization, such as a nonprofit, and does not direct its operations or act in partnership with it, the nonprofit's speech-related activities will not be subject to First Amendment limits.

3. CARES Act

The newly enacted Coronavirus Aid, Relief, and Economic Security Act (commonly known as "CARES Act") includes a number of provisions designed to encourage charitable contributions of cash to both individuals and corporations. Individual donors making gifts to qualified charities may deduct up to 100 percent of their 2020 adjusted gross income over and above the usual cap of 60 percent (or 50 percent if charitable contributions are made through a