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the law of tax-exempt organizations

Twelfth Edition

2022 Cumulative Supplement

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Bruce R. Hopkins

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A LETTER TO THE READER

It is with a heavy heart that we relay the news to you that Bruce Richard Hopkins, JD, LLM, SJD passed away on October 31, 2021. Bruce's love for the law and for writing resulted in a wonderful relationship with Wiley that lasted for better than 30 years. Throughout that time, Bruce penned more than 50 books as well as writing *Bruce R. Hopkins' Nonprofit Counsel* (a newsletter published monthly for 40 years). Bruce's texts are practical guides about nonprofits written for both lawyers *and* laypeople, many of which are considered vital to law libraries across the country. The ideas just kept flowing.

Beloved by many, Bruce was often referred to as the “Dean of Nonprofit Law.” His teaching muscle was built over a period of 19 years when he was Professional Lecturer in Law at George Washington University National Law Center. As Professor from Practice at the University of Kansas, School of Law, Bruce exercised his generative spirit teaching and mentoring younger colleagues. Always the legal scholar, he could brilliantly take complicated concepts and distill them down into easily understood principles for beginners, seasoned colleagues, and those unfamiliar with the subject matter. He was a presenter and featured speaker, both nationally and internationally, at numerous conferences throughout his career, among them Representing and Managing Tax-Exempt Organizations (Georgetown University Law Center, Washington, DC) and the Private Foundations Tax Seminar (El Pomar Foundation, Colorado Springs, Colorado). He practiced law in Washington, DC and Kansas City, Missouri, for over 50 years, receiving numerous awards and forms of recognition for his efforts.

Bruce will be dearly missed, not solely for his contributions to the Wiley catalog, but because he was a wonderful person who was loved and respected both by all of us at Wiley and by all of those he encountered.

About the Author

BRUCE R. HOPKINS was the principal in the Bruce R. Hopkins Law Firm, LLC, Kansas City, Missouri. He concentrated his practice on the representation of tax-exempt organizations. His practice ranged over the entirety of law matters involving exempt organizations, with emphasis on the formation of nonprofit organizations, acquisition of recognition of tax-exempt status for them, the private inurement and private benefit doctrines, governance, 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, the law of charitable giving, and fundraising law issues.

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, DC.

Mr. Hopkins was the series editor of Wiley's Nonprofit Law, Finance, and Management Series. In addition to being the author of *The Law of Tax-Exempt Organizations, Twelfth Edition*, he was the author of *The Tax Law of Charitable Giving, Sixth Edition*; *The Tax Law of Private Foundations, Fifth Edition*; *The 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; Bruce R. Hopkins' Nonprofit Law Dictionary*; *IRS Audits of Tax-*

Exempt Organizations: Policies, Practices, and Procedures; *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*. He was the coauthor, with Thomas K. Hyatt, of *The Law of Tax-Exempt Healthcare Organizations, Fourth Edition*; with Alicia M. Beck, of *The Law of Fundraising, Fifth Edition*; with David O. Middlebrook, of *Nonprofit Law for Religious Organizations: Essential Questions & Answers*; with Douglas K. Anning, Virginia C. Gross, and Thomas J. Schenkelberg, of *The New Form 990: Law, Policy, and Preparation*; also with Ms. Gross, of *Nonprofit Governance: Law, Practices & 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 wrote *Bruce R. Hopkins' Nonprofit Counsel*, a monthly newsletter, published by John Wiley & Sons.

Mr. Hopkins maintained a website providing information about the law of tax-exempt organizations, at www.brucerhopkinsbooks.com. Material posted on this site includes a current developments outline concerning this aspect of the law, discussions of his books, and various indexes that accompany his newsletter.

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 was listed in *The Best Lawyers in America*, Nonprofit Organizations/Charities Law, 2007–2021.

Mr. Hopkins was the Professor from Practice at the University of Kansas School of Law, where he taught courses on the law of tax-exempt organizations.

Mr. Hopkins earned his JD and LLM degrees at the George Washington University, his SJD at the University of Kansas, and his BA at the University of Michigan. He was a member of the bars of the District of Columbia and the state of Missouri.

Preface

This 2022 cumulative supplement is the third supplement to accompany the twelfth edition of *The Law of Tax-Exempt Organizations*. The cumulative supplement covers developments in the law of exempt organizations as of the close of 2021.

Enactment of what is informally known as the Tax Cuts and Jobs Act (TCJA) at the close of 2017 has dominated the exempt organizations current developments scene in recent months. The Department of the Treasury and the IRS have been issuing guidance, primarily final regulations, in the aftermath of the TCJA, such as in the context of the bucketing (or silo) rule for computation of unrelated business taxable income, taxation of certain private colleges' and universities' endowment income, and taxation of the excess compensation paid by exempt organizations to certain of their executives. This guidance is summarized in this cumulative supplement. The law causing inclusion as unrelated business income items of the value of certain types of fringe benefits was repealed.

Another item of legislation, the Taxpayer First Act, brought more statutory law to the tax-exempt organizations setting. This statute instituted mandatory electronic filing of exempt organizations' returns, provided some relief for organizations that may otherwise have their exemptions revoked for failure to file returns, and established a statutory Independent Office of Appeals in the IRS. These new laws are also summarized in this cumulative supplement.

The Office of Audit fiscal year 2022 Annual Audit Plan, made public in the fall of 2021, reflects the Treasury

Inspector General for Tax Administration's audit priorities concerning the IRS. Planned audits of the IRS in the tax-exempt organizations context by TIGTA will (1) assess the IRS's ability to identify exempt organizations potentially involved in illegal or other nonexempt activities and the processes in place when potential nonexempt activities are identified; (2) evaluate the IRS's efforts to ensure sponsoring organizations' compliance with qualification and reporting requirements; (3) evaluate the Exempt Organization's function oversight controls and procedures when issuing proposed adverse IRC § 501(c)(3) exempt status determination letters; (4) assess the efficiency of the streamlined application process for recognition of exempt status under IRC § 501(c)(3), including whether the application provides the IRS with sufficient information to approve or deny organizations recognition of exempt status and use of resources and processing time in making these determinations; (5) determine whether the Exempt Organizations function effectively monitors exempt organizations' compliance with written advisories; and (6) assess customer service operations for taxpayer inquiries related to exempt organizations.

The Department of the Treasury and the IRS released their 2021–2022 Priority Guidance Plan on September 28, 2021. Gone are the TCJA projects, although there is a new entry concerning proposed regulations regarding allocation of expenses in computing unrelated business taxable income and addressing how changes made to the net operating loss rules by the CARES Act apply for purposes of the bucketing rule.

Also on the Priority Guidance Plan listing are the proposed regulations concerning donor-advised funds. As of the date of publication of this cumulative supplement, these regulations have yet to emerge.

The IRS continues to invigorate the law of tax-exempt organizations with private letter rulings in areas such as the commerciality doctrine, the organizational and operational tests, the private inurement and private benefit doctrines, nonqualification of organizations as exempt business leagues, and the unrelated business rules. Summaries of these and other IRS rulings are interspersed throughout this cumulative supplement (not cited as precedent, of course).

Courts are also contributing their fair share of law developments. The most dramatic of the opinions are the ones finding that the California attorney general's demands for disclosure of charities' donor information (via Form 990, Schedule B) are unconstitutional. Free speech and privacy rights are implicated. (The Treasury Department has relieved most categories of exempt organizations of the burden of disclosing this type of information.) These and other court opinions are summarized herein.

An unfortunate subject is the interplay between the law of tax-exempt organizations and the law of tax shelters (or, from some perspectives, abusive tax schemes). Interest in this area continues to grow, leading to a new chapter of the book on this subject, which is included in this cumulative supplement. Indeed, the U.S. Government Accountability Office, in early October 2019, issued a report on the subject (summarized herein).

Thanks go to research assistant Greg Gietzen, for his assistance in completing footnotes. Thanks also go to the senior editor, Brian T. Neill, and production editor, Sharmila Srinivasan, for their assistance and support in connection with creation of this cumulative supplement.

Bruce R. Hopkins
October, 2021

About the Online Resources

The Law of Tax-Exempt Organizations, 12th Edition 2022 Cumulative Supplement is complemented by seven online resources. Please visit www.wiley.com/go/hopkins/lawoftaxexempt12e-2022supp to download the following tables in PDF format to use alongside the 12th edition.

- Cumulative Table of Cases
- Cumulative Table of IRS Revenue Rulings
- Cumulative Table of IRS Revenue Procedures
- Cumulative Table of IRS Private Determinations Cited in Text
- Cumulative Table of IRS Private Letter Rulings, Technical Advice Memoranda, and Counsel Memoranda
- Cumulative Table of Cases Discussed in Bruce R. Hopkins' Nonprofit Counsel
- Cumulative Table of IRS Private Determinations Discussed in *Bruce R. Hopkins' Nonprofit Counsel*

Book Citations

Throughout this book, 14 books by the author (in some instances as coauthor), all published by John Wiley & Sons, are referenced as follows:

1. *IRS Audits of Tax-Exempt Organizations: Policies, Practices, and Procedures* (2008): cited as *IRS Audits*
2. *The Law of Fundraising,* Fifth Edition (2014): cited as *Fundraising*
3. *The Law of Intermediate Sanctions: A Guide for Nonprofits* (2003): cited as *Intermediate Sanctions*
4. *The Law of Tax-Exempt Healthcare Organizations,* Fourth Edition (2014): cited as *Healthcare Organizations*
5. *The New Form 990: Law, Policy, and Preparation* (2009): cited as *New Form 990*
6. *Nonprofit Governance: Law, Practices & Trends* (2009): cited as *Nonprofit Governance*
7. *The Nonprofits' Guide to Internet Communications Law* (2003): cited as *Internet Communications*
8. *Planning Guide for the Law of Tax-Exempt Organizations: Strategies and Commentaries* (2004): cited as *Planning Guide*
9. *The Tax Law of Private Foundations,* Fifth Edition (2018): cited as *Private Foundations*
10. *Starting and Managing a Nonprofit Organization: A Legal Guide,* Seventh Edition (2017): cited as *Starting and Managing*

11. *The Tax Law of Associations* (2006): cited as *Associations*
12. *The Tax Law of Charitable Giving,* Sixth Edition (2021): cited as *Charitable Giving*
13. *The Tax Law of Unrelated Business for Nonprofit Organizations* (2005): cited as *Unrelated Business*
14. *Tax-Exempt Organizations and Constitutional Law: Nonprofit Law as Shaped by the U.S. Supreme Court* (2012): cited as *Constitutional Law*.

The second, fourth, ninth, and twelfth of these books are annually supplemented.

Updates on all of the foregoing subjects (plus *The Law of Tax-Exempt Organizations*) are available in *Bruce R. Hopkins' Nonprofit Counsel*, the author's monthly newsletter, also published by John Wiley & Sons.

PART ONE
Introduction to the Law of Tax-Exempt Organizations

CHAPTER ONE
Definition of and Rationales for Tax-Exempt Organizations

§ 1.1 DEFINITION OF *NONPROFIT ORGANIZATION*

(a) *Nonprofit Organization* Defined

p. 5, note 7. *Insert prior to existing text:*

This point is sometimes overstated, as illustrated by a state's supreme court's proclamation that “[n]on-profit corporations do not have owners,” adding that “non-profit corporations do not have shareholders or any other way for third parties (whether individuals or entities) to assert a similar ‘ownership’ role” (Farrow v. Saint Francis Medical Center, 407 S.W.3d 579, 593 (Sup. Ct. Mo. 2013)).

p. 5, note 7. *Insert as second paragraph:*

An individual, desiring to engage in certain activities appropriate for a nonprofit entity, formed, with advice of legal counsel, a nonprofit corporation. Matters did not go well with this entity, programmatically or financially. This individual, who was the corporation's incorporator and president, and a director, filed a retroactive election for S corporation status for the entity as of the date of incorporation. This was done in an effort to enable him to report passthrough operating losses on his personal income tax returns. To this end, he claimed that he held an ownership interest in the organization equivalent to that of a shareholder. The IRS disagreed, disallowing the passthrough losses. The U.S. Tax Court upheld the IRS's position, rejecting the argument that this individual held “exclusive beneficial ownership” of the corporation and writing that “there is no interest in a nonprofit corporation equivalent to that of a stockholder in a for-profit corporation who stands to profit from the success of the enterprise” (Deckard v. Comm'r, 155 T.C. No. 8 (2020)).

p. 5, note 8, second line. *Insert following first comma:*

Charleston Area Medical Center, Inc., CAMC Health Education and Research Institute, Inc. v. United States, 940 F.3d 1362 (Fed. Cir. 2019); Wichita Center for Graduate Medical Education v. United States, 917 F.3d 1221 (10th Cir. 2019);

p. 5, note 8, third line. *Insert* and *following semi-colon*.

p. 5, note 8, fourth line. *Delete text following closing parenthesis and insert period*.

§ 1.2 DEFINITION OF *TAX-EXEMPT ORGANIZATION*

p. 8, note 35. *Insert following existing text:*

The Department of the Treasury, on June 3, 2021, issued its report on tax expenditures for fiscal years 2021–2030; the tax expenditure associated with the income tax charitable contribution deduction in this report is the fifth largest (at $883.5 billion).

CHAPTER TWO
Overview of Nonprofit Sector and Tax-Exempt Organizations

§ 2.1 PROFILE OF NONPROFIT SECTOR

p. 22, last paragraph, second line. *Insert* and types *following number*.

p. 23. *Delete text, including footnotes, following first complete paragraph and insert:*

According to data provided by the IRS, as of the close of the federal government's fiscal year 2019, there were 1,718,233 recognized tax-exempt organizations.[21] Within this group of organizations are 1,365,744 charitable (including educational, scientific, and religious) entities, 79,808 social welfare organizations, 62,700 business leagues, 49,126 social clubs, 45,888 labor and agricultural organizations, 41,756 fraternal beneficiary organizations, 28,575 veterans' organizations, 15,560 domestic fraternal beneficiary societies, 9,406 cemetery companies, 6,050 voluntary employees' beneficiary association, 5,373 benevolent life insurance associations, 4,421 title-holding corporations, 1,677 state-chartered credit unions, 671 holding companies for pensions and other entities, 668