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the law of tax-exempt healthcare organizations

4th Edition

Thomas K. Hyatt and Bruce R. Hopkins

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Contents

The Law of Tax-Exempt Healthcare Organizations

Fourth Edition

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To my boys, Sean and Conor, and my mother Anne, the English teacher

—TKH

To my colleagues in the Health Care Practice Group at Polsinelli PC

—BRH

Preface

This is the fourth edition of *The Law of Tax-Exempt Healthcare Organizations*. The first edition was published in 1995 and featured a mere 680 pages. In this edition, we will be approaching twice that content. This seems a good opportunity to pause and reflect on what has transpired in the nonprofit healthcare sector over these past 17 years.

In our original edition, tax-exempt healthcare organizations and the IRS were focused on joint ventures with taxable entities; the creation of integrated delivery systems; the proper tax status for managed care organizations; and the appropriateness of providing benefits for the recruitment and retention of physicians. It is telling that the chapters describing these scenarios were among the least in need of revision for this edition.

At present, there are new developments occupying the attention of healthcare organizations and the IRS. These include health reform; the governance of healthcare organizations; the compensation of executives; the continued refinement of Form 990; and a host of new acronyms for their shared alphabet soup, including ACOs (accountable care organizations), RHIOs (regional health information organizations), and QNHIIs (qualified nonprofit health insurance issuers).

Certainly the most dramatic development in the field of healthcare in 2012 was the U.S. Supreme Court's decision in *National Federation of Independent Business v. Sebelius* upholding most of the Affordable Care Act as constitutional. The Affordable Care Act has done much to impact the law of tax-exempt healthcare organizations. It established new requirements for qualification as a charitable hospital that are proactively focused on outreach, service, and billing and collection practices. On a broader level, by providing for insurance coverage for millions of Americans who previously had none and relied on charity, the Affordable Care Act brought into question for some the need to continue to provide tax exemption for nonprofit hospitals that will be providing less charity care. The Act also calls on the Internal Revenue Service to assist in the implementation of many of its provisions, a development sure to further drain the already limited resources of this agency.

In recent years, the IRS has renewed its efforts to oversee, monitor, make more transparent, and understand the nonprofit tax-exempt sector. This is evidenced in compliance check investigations, focused audit activity, Form 990 expansion, field guidance, and continuing education and outreach. The Service has taken a particular interest in nonprofit governance (and state attorneys general have converted that shared interest into action). As the IRS has stated many times, in its view a well-governed organization is a compliant organization. Much of its effort is on display in the Form 990, and its requests for governance information, under the mantra of transparency, often include the proviso that the form “requests information about policies not required by the Internal Revenue Code.” Still, as the Advisory Committee on Tax-Exempt and Government Entities (ACT) so aptly noted, the IRS can “drive behavior merely by asking about specific governance practices.”

There has clearly been a change during this period in the type of guidance used by the IRS for educational purposes in the tax-exempt healthcare sector. Lost to the dustbin of history are general counsel memoranda and continuing professional education texts. These forms of guidance were the primary means of communicating the IRS's analytical and policy positions throughout the 70s, 80s, and 90s. In the 2010s, they are virtually unheard of. Instead, the IRS uses its new tools of check sheets, staff memos, fact sheets, extensive substantive instructions for the Form 990, and website educational pieces.

An excellent example of the adage that everything old is new again is found in the Affordable Care Act and its accompanying guidance and proposed regulations. A central piece of the Clinton administration health reform proposal in 1994 for charitable hospitals involved the requirement of outreach into the community to determine health needs and devising a plan for meeting those needs. The Clinton health reform plan did not become law. Now, under the Affordable Care Act, charitable hospitals are required to undertake just such a community health needs assessment in order to continue to qualify as charitable tax-exempt organizations. It's déjà vu all over again.

This is also something of a turning point for our book. Over the course of three editions, the book has grown to exceed 1100 pages in length. In order to avoid the need to install wheels on the book in the fourth edition to ensure its continued portability, we have elected to move the tables and appendices of the book into our new companion website. (One of the authors was a bit slow to warm to the idea of moving content to the website instead of continuing to have it in the book. It was the younger of us; go figure. He has since come around and joined the twenty-first century.) The website will be an invaluable addition to the book and will also permit more recent developments to be brought to your attention in between editions and supplements. Meanwhile, the appearance of the book has changed, too. Our publisher, Wiley, has made a major commitment to the development of content for the growing nonprofit sector. The book is now part of the new Wiley Nonprofit Authority series and has been modernized. We hope you like it.

As always, we offer our sincere appreciation to Jennifer MacDonald, Claire New, and Susan McDermott at Wiley for their support, guidance, and patience, and our assistants Sharlaine Anapu and Cynthia Gurrola and our colleagues at Dentons and Polsinelli Shughart for their assistance and their wisdom.

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Bruce R. Hopkins
April 2013

About the Authors

Thomas K. Hyatt is a partner in the law firm Dentons US LLP, resident in the Washington, DC office. His practice is focused on corporate and tax-exempt organization issues for nonprofit organizations. He has particular expertise in legal issues affecting tax-exempt healthcare providers and in governance and public policy issues affecting tax-exempt higher education institutions. Mr. Hyatt has represented organizations including public and private hospitals, multihospital systems, integrated delivery systems, academic medical centers, home health agencies, health maintenance organizations, continuing care retirement communities, provider associations, physician clinics, faculty practice plans, physician-hospital organizations, and shared services organizations in such matters. He also frequently works with nonprofit governing boards and board committees to address such issues as regulatory compliance, fiduciary duty, conflicts of interest, bylaws development and revision, senior management compensation and benefits, chief executive contracts and transition, fundraising, lobbying and political campaign activity, board development, policy development, adoption of best governance practices, membership matters, corporate restructuring, mergers, and joint ventures. He is admitted to practice in the District of Columbia and Pennsylvania.

Mr. Hyatt is a member of the American Health Lawyers Association (AHLA), the American Bar Association, and the District of Columbia Bar. He served as a member of AHLA's Board of Directors from 1992 to 1998. Mr. Hyatt is one of the inaugural Fellows of AHLA. He is the Chair Emeritus and on the faculty of the annual Tax Issues in Healthcare

Organizations seminar sponsored by AHLA, and is also the past chair of AHLA's Tax and Finance Practice Group. In 2004, Mr. Hyatt received AHLA's David J. Greenburg Service Award. He also serves as Senior Fellow for Public Policy with the Association of Governing Boards of Universities and Colleges. He is listed in the 2005–2013 editions of *Best Lawyers in America* and as a DC Super Lawyer. He has also been listed in Chambers USA Healthcare, District of Columbia since 2012. Mr. Hyatt is a licensed consultant for the Standards for Excellence Institute. He frequently lectures on business and tax planning issues for nonprofit organizations and has written numerous articles for publication on tax-exempt-organization topics. In addition to *The Law of Tax-Exempt Healthcare Organizations, Fourth Edition*, he is the author of a chapter, entitled “Tax Exemption Issues for Healthcare Organizations,” in the *Health Law Practice Guide* (New York: Thomson/West).

Mr. Hyatt is a 1979 cum laude graduate of Boston College, and received his law degree in 1982 from the University of Pittsburgh, where he served as editor-in-chief of the *Journal of Law and Commerce*.

Bruce R. Hopkins is a senior partner in the law firm Polsinelli PC, practicing in the firm's Kansas City, Missouri, and Washington, DC, offices. He specializes in the representation of tax-exempt organizations, including healthcare organizations. His practice ranges 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, 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, Internet communications developments, the law of charitable giving (including planned 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 is the series editor of Wiley's Nonprofit Law, Finance, and Management Series. In addition to coauthoring *The Law of Tax-Exempt Healthcare Organizations, Fourth Edition*, he is the author of *The Law of Tax-Exempt Organizations, Tenth Edition*; *Planning Guide for the Law of Tax-Exempt Organizations: Strategies and Commentaries*; *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*; *The Tax Law of Charitable Giving, Fourth Edition; The Law of Fundraising, Fourth 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, Sixth Edition*; *Nonprofit Law Made Easy*; *Charitable Giving Law Made Easy*; *Private Foundation Law Made Easy*; *Fundraising 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*; *The Second Legal Answer Book for Nonprofit Organizations*; and *The Nonprofit Law Dictionary*; and is the coauthor, with Jody Blazek, of *Private Foundations: Tax Law and Compliance, Third Edition*; also with Ms. Blazek, of *The Legal Answer Book for Private Foundations*; 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 New Form 990: Law, Policy, and Preparation*; 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 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, at www.nonprofitlawcenter.com. Material posted on this site includes current developments outlines concerning this aspect of the law, summaries of court opinions, discussions of his books, various indexes for his newsletter, and a “What's New” listing of recent developments in exempt organizations 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, 2007–2013.

Mr. Hopkins earned his JD and LLM degrees at the George Washington University National Law Center 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.

Book Citations

Throughout this book, 10 books by Bruce R. Hopkins (in some cases as co-author), all published by John Wiley & Sons, Inc., are referenced in this way:

	Book	Cited As
1.	*IRS Audits of Tax-Exempt Organizations: Policies, Practices, and Procedures* (2008)	Irs Audits
2.	*The Law of Fundraising, Fourth Edition* (2009)	Fundraising
3.	*The Law of Tax-Exempt Organizations, Tenth Edition (2011)*	Tax-Exempt Organizations
4.	*The Law of Intermediate Sanctions: A Guide for Nonprofits* (2003)	Intermediate Sanctions
5.	*Planning Guide for The Law of Tax-Exempt Organizations: Strategies and Commentaries* (2004)	Planning Guide
6.	*Private Foundations: Tax Law and Compliance, Third Edition* (2008)	Private Foundations
7.	*Starting and Managing a Nonprofit Organization: A Legal Guide, Sixth Edition* (2013)	Starting and Managing
8.	*The Tax Law of Charitable Giving, Fourth Edition* (2010)	Charitable Giving
9.	*The Tax Law of Unrelated Business for Nonprofit Organizations* (2005)	Unrelated Business
10.	*Tax-Exempt Organizations and Constitutional Law: Nonprofit Law as Shaped by the Supreme Court (2012)*	Constitutional Law

The second, third, sixth, and eighth of these books are annually supplemented. Also, updates on all of the foregoing subjects (plus *The Law of Tax-Exempt Healthcare Organizations*) are available in *Bruce R. Hopkins' Nonprofit Counsel*, a monthly newsletter, also published by Wiley.