the law of fundraising

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Preface

This 2017 cumulative supplement is the second supplement to accompany the fifth edition of this book. The supplement covers developments in the law of charitable fundraising as of the close of 2016.

From a law standpoint, what would have been the most significant development in the realm of charitable fundraising occurred when the Department of the Treasury and the IRS published proposed regulations to implement the alternative to the general charitable gift substantiation requirement. Pursuant to this alternative approach, donee organizations would have been able to file information returns with the IRS that report the required substantiation information about contributions. The fundraising community has become 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 alternative had been implemented, administrators of charitable organizations would have to make the decision as to whether to stay with the general substantiation regime or begin filing information returns with the IRS. This regulatory effort collapsed, however, when concerns about donor confidentiality and identity, and a heavy dose of political maneuvering, brought it down. The IRS, on January 7, 2016, withdrew the proposed regulations.

A section has been added to the book, addressing the matter of 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 toward 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 have 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, the import of the IRS’s new streamlined application for recognition of exemption, fundraisers’ compensation, and more law concerning raffles conducted by charities.

Talk of federal tax reform is rampant. While the likelihood of any major tax law changes in the coming months is slim, there are a number of proposals being floated that would directly and indirectly have an impact on the law of fundraising. We have included a table summarizing these proposals in this supplement.

We appreciate the assistance we have received from John Wiley & Sons in the preparation of this cumulative 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 cumulative supplement.

Bruce R. Hopkins
Alicia M. Beck
January, 2017
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. His practice ranges 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.