

**BRUCE R. HOPKINS LAW FIRM LLC**

**CURRENT DEVELOPMENTS IN THE LAW  
FOR TAX-EXEMPT ORGANIZATIONS**

**Treasury and IRS Regulations, Rulings, and Other Pronouncements,  
Court Opinions, Proposed and Enacted Legislation,  
and other Current Developments**

**Current as of August 25, 2020**

**Bruce R. Hopkins  
Bruce R. Hopkins Law Firm, LLC  
411 Nichols Road  
Kansas City, Missouri 64112  
816-931-2525  
[brucerhopkins@brucerhopkinslaw.com](mailto:brucerhopkins@brucerhopkinslaw.com)**

**follow BRHopkins\_\_NP:Law on Twitter**

## **CURRENT DEVELOPMENTS IN LAW FOR TAX-EXEMPT ORGANIZATIONS**

This outline consists of ten parts: summaries of (1) the Internal Revenue Service's Exempt Organizations Division's FY 2020 Program Letter (2) the Treasury Department-IRS 2019-2020 Priority Guidance Plan; (3) Tax Cuts and Jobs Act guidance; (4) current developments in the law pertaining to tax-exempt organizations in general; (5) current developments in the federal law of particular pertinence to public charities and private foundations; (6) current developments pertaining to unrelated business activities of exempt organizations; (7) current developments relating to the tax law of charitable giving; (8) current developments relating to the law of fundraising; (9) recent legislation; and (10) miscellaneous other current developments in the law concerning nonprofit organizations.

### **I. TE/GE FY 2020 PROGRAM LETTER & FY 2019 ACCOMPLISHMENTS**

#### **A. Program letter issued on October 16, 2019. Overall elements:**

1. TE/GE Commissioner Tammy Ripperda wrote in cover letter that TE/GE “will continue to pursue the most egregious noncompliance by evolving our technology tools and data analytics.”

2. Program letter summarizes TE/GE compliance platform, which, from an EO standpoint, consists of five “portfolio programs”: compliance strategies; data-driven approaches; referrals, claims, and other casework; compliance contacts; and determinations. Letter states that “[d]ata is used to identify and address existing and emerging high-risk areas of noncompliance and steer the decisions on how to best apply optimal resources.”

3. Compliance strategies are those approved by TE/GE's Compliance Governance Board. Strategies approved by Board so far focus on hospital organizations with unrelated business income where expenses materially exceed gross income, investment and nonmember income received by social clubs, nonexempt charitable trusts that underreport income or overreport charitable contributions, successor entities with respect to for-profit organizations that are seeking exempt charitable recognition, private foundation loans to disqualified persons, and private inurement and benefit issues.

4. As to determinations, TE/GE “continues to expect a large volume of determination application receipts” and “will continue to look at process efficiencies, as well as expect to hire more revenue agents to address the work and offset anticipated attrition losses.”

#### **B. EO Division summarized FY 2019 accomplishments (March 23, 2020) (Pub. 5329):**

1. Determinations – closed 101,880 applications.
2. Compliance program overview:
  - a. Compliance strategies.

- b. Data-driven examinations.
  - c. Referrals, claims, and other casework.
  - d. Compliance contacts.
3. Examination process improvements.

## **II. TREASURY-IRS 2019-2020 PRIORITY GUIDANCE PLAN PROJECTS (MARCH 6, 2020)**

### **A. Tax-Exempt Organizations Law Projects**

- 1. Guidance on computation of unrelated business taxable income for separate trades or businesses (IRC § 512(a)(6)) (Notice 2018-67).
- 2. Guidance on certain issues relating to the excise tax on excess remuneration paid by applicable tax-exempt organizations (IRC § 4960).
- 3. Regulations on excise tax on net investment income of certain private colleges and universities (IRC § 4968).
- 4. Guidance concerning qualified transportation fringe benefits, including application of unrelated business taxable income rule (IRC § 512(a)(7)).
- 5. Guidance regarding methods of allocating expenses relating to dual-use facilities (IRC § 512(a)(1)).
- 6. Proposed regulations regarding excise taxes on donor-advised funds and fund management in reflection of 2006 statutory law (IRC § 4966); Notice 2017-73 published on Dec 4, 2017.
- 7. Guidance regarding private foundations' investment in partnership in which disqualified persons are also partners (IRC § 4941).
- 8. Final regulations concerning church tax inquiries and examinations (IRC § 7611); proposed regulations were issued in 2009.
- 9. Promulgation of final regulations and additional guidance on supporting organizations (IRC § 509(a)(3)); proposed regulations issued on February 18, 2016.
- 10. Guidance implementing changes to IRC § 529.
- 11. Final regulations and other guidance on qualified ABLE programs (IRC § 529A); proposed regulations were published in 2015.
- 12. Regulations explaining computation of unrelated business taxable income of voluntary employees' beneficiary associations and supplemental unemployment benefit

trusts (IRC §§ 501(c)(9), (17), 512); proposed regulations issued in 2014; final regulations issued on December 9, 2019.

13. Final regulations concerning IRS authority to disclose exempt organization information to state officials (IRC § 6104(c)); proposed regulations were published in 2011.

14. Update to Rev. Proc. 92-94 (IRC §§ 4942, 4945).

15. Regulations concerning fractions rule (IRC § 514(c)(9)(E)).

16. Final regulations concerning IRC § 506; temporary and proposed regulations were published in 2016.

17. Revision of the group exemption rules (presently in Rev. Proc. 80-27).

18. Guidance as to circumstances under which a LLC can qualify for recognition of tax exemption as a charitable organization.

19. Guidance implementing electronic filing requirements for exempt organizations, triggered by enactment of Taxpayer First Act.

#### **B. Charitable Giving Law Projects**

1. Guidance as to disclosure of contributions to noncharitable organizations (IRC § 6033) (Rev. Proc. 2018-38).

2. Guidance regarding charitable contributions of inventory (IRC § 170(e)(3)).

3. Regulations providing rules governing availability of charitable contribution deduction when taxpayer receives or expects to receive state or local tax credit (IRC § 170) (REG-112176-18).

#### **C. Other Projects**

1. Revenue ruling as to whether contributions of money received through crowdfunding site to pay for medical expenses are excludible from gross income on ground that contributions are gifts (IRC § 102).

2. Development of regulations regarding the Independent Office of Appeals.

#### **D. Treasury Inspector General for Tax Administration 2020 Annual Audit Plan (Oct. 7, 2019) – planned audits in tax-exempt organizations context:**

1. Determine whether IRS processes are sufficient to detect potentially noncompliant activities by exempt organizations.

2. Assess overall effectiveness of TE/GE Division's Compliance, Planning, and Classification Unit Exempt Organizations examination selection processes.

3. Review TE/GE Division's efforts to identify and examine exempt organizations with unreported or underreported unrelated business income tax.

4. Assess IRS's efforts to ensure that exempt organizations with highly compensated employees comply with excise tax reporting requirements.

5. Evaluate IRS's processing controls and guidance related to excise taxes on net investment income of certain private colleges and universities.

6. Assess implementation of laws that impose additional exemption requirements on hospital organizations.

### **III. TAX CUTS AND JOBS ACT GUIDANCE**

#### **A. Bucketing Rule (IRC § 512(a)(6))**

1. IRS, on August 21, 2018, issued request for comments as to calculation of unrelated business taxable income for tax-exempt organizations with more than one unrelated business and provided interim rules, including use of North American Industry Classification System codes (Notice 2018-67).

2. Medical marijuana dispensary cases offer criteria for determining existence of two or more businesses of organization (Patients Mutual Assistance Collective Corporation v. Commissioner (Tax Ct., Nov. 29, 2018); Alternative Health Care Advocates v. Commissioner (Tax Ct., Dec. 20, 2018)).

3. Bluebook (JCS-1-18, issued in late December 2018): It is intended that Treasury/IRS consider whether it would be appropriate in certain cases to permit an organization that maintains an investment portfolio to treat multiple investment activities as one unrelated business.

4. Treasury Department and IRS, on April 23, 2020, issued proposed regulations concerning this body of law (REG-106864-18) (see VI A 15).

#### **B. Fringe Benefit Expenses and UBI (IRC § 512(a)(7))**

1. IRS, on Dec. 10, 2018, issued interim guidance to assist tax-exempt organizations in determining any increase in amount of their unrelated business taxable income attributable to parking expenses in connection with qualified transportation fringes rules (Notice 2018-99); IRS provided certain exempt organizations waiver of addition to tax for underpayment of estimated income tax payments required to be made on or after Dec. 17, 2018, to extent underpayment results from law changes concerning these fringes (Notice 2018-100).

2. Bluebook: Determination of unrelated business taxable income associated with providing qualified transportation fringes, including parking facilities used in connection with qualified parking, is intended to be consistent with the determination of deduction disallowance rule (IRC § 274). Technical correction may be necessary.

3. Draft technical corrections legislation (IX C 12): Provision and IRC § 274 need to be “conformed.”

4. Provision retroactively repealed by Taxpayer Certainty and Disaster Relief Act of 2019 (Further Consolidated Appropriations Act, 2020, Division Q (Pub. L. No. 116-94)), signed into law on December 20, 2019 (Act § 302).

**C. Tax on Excess Compensation (IRC § 4960)**

1. IRS, on January 2, 2019, issued interim guidance (92 pages) regarding the excise tax imposed on amounts of remuneration in excess of \$1 million and any excess parachute payment paid by an applicable tax-exempt organization to a covered employee (Notice 2019-9).

2. Bluebook: Applicable tax-exempt organizations are intended to include state colleges and universities.

3. Draft technical corrections legislation would “clarify” that state colleges and universities are ATEOs.

4. Treasury Inspector General for Tax Administration, on June 5, 2019, issued report recommending that Commissioner, TE/GE Division, complete a compliance strategy to identify and bring into compliance organizations that fail to pay excise tax (report no. 2019-14-032).

5. Department of Treasury and IRS, on June 5, 2020, published proposed regulations in amplification of law imposing excise tax on most types of tax-exempt organizations in connection with remuneration in excess of \$1 million and excess parachute payments paid by these organizations (REG-122345-18).

**D. Tax on Colleges’ Investment Income (IRC § 4968)**

1. Bluebook: Where related organization is not controlled by institution or is not supporting organization, assets and net investment income that are not intended or available for use or benefit of educational institution are not taken into account in determining tax.

2. Proposed regulations to accompany statutory law were issued on June 28, 2019 (REG-106877-18).

**E. 60-Percent Limit on Cash Contributions (IRC § 170(b)(1)(G))**

1. Bluebook: 60-percent limit for cash contributions is intended to be applied after (and reduced by) the amount of noncash contributions to public charities. Technical correction may be necessary.

2. Draft technical corrections legislation: 60-percent limit applicable to cash contributions to public charities needs to be “coordinated” with 50-percent limit applicable to noncash contributions.

**F. Guidance Implementing Changes to IRC § 529** (Notice 2018-58).

**G. Guidance on Increased Contribution Limit to ABLE Accounts (IRC § 529A)** (Notice 2018-62).

**H.** Treasury Inspector General for Tax Administration favorably evaluated IRS’s efforts to implement Act (Tax Cuts and Jobs Act: Assessment of Implementation Efforts (2019-44-027 (April 18, 2019))).

#### **IV. LAW PERTAINING TO TAX-EXEMPT ORGANIZATIONS IN GENERAL**

##### **A. Tax-Exempt Status in General**

Tax-exempt charitable (IRC § 501(c)(3)) organizations have been the subject of many IRS rulings and court opinions.
---

1. Qualification for tax exemption in IRC § 501(c)(3) setting:

a. IRS rulings favorable to organizations, in general [no recent developments]

b. IRS rulings denying recognition of exemption as to or revocation of exemption of organizations, in general; such action because of:

(1) Operation in substantially commercial manner (see IV B).

(2) Failure to operate primarily for exempt purposes (violation of operational test) (IRS Private Letter Rulings (PLRs) 202001019, 202001020, 202004014, 202005023, 202012013, 202014017, 202014022, 202015017, 202015019, 202015021, 202015027, 202016020-202016023, 202016025, 202016027, 202017034, 202019028, 202022006, 202022007).

(3) Failure to provide IRS with records or documentation (see IV N 4).

(4) Inactivity (PLRs 202001025, 202004013, 202024015).

(5) Failure to provide adequate information on application for recognition of exemption (see IV I 1).

(6) Failure to file annual information returns (see IV J 1).

(7) Failure to maintain adequate records (PLRs 201906012, 201906013).

(8) Failure to meet organizational test (PLRs 202001019, 202001021, 202004014, 202004015, 202005023, 202007018, 202009026, 202012013, 202014017, 202014022, 202015017, 202015019, 202016021, 202016023, 202022006, 202022007).

(9) Organization failed organizational test because principles of foreign law involved (Stiftung) prevented entity from amending its articles to come into compliance with test (PLR 201947020).

(10) Provision of employment services to members, who are sports officials for local schools (PLRs 201945029, 201951015).

(11) Organizing fine dining experiences for organization's members (PLR 202004015).

(12) Conduct of substantial recreational activities (PLR 202014022).

(13) Conduct of farmers' market (PLR 202021025).

(14) Violation of private inurement doctrine (see IV C).

(15) Violation of private benefit doctrine (see IV D).

Other types of tax-exempt organizations have been the subject of many IRS rulings and court opinions.
---

## 2. Qualification for tax exemption in other settings:

### a. Developments concerning single-parent title-holding companies (IRC § 501(c)(2) entities):

(1) Organization denied recognition of exemption because its parent is not a tax-exempt organization (PLR 202001027).

### b. Developments concerning tax-exempt social welfare organizations (IRC § 501(c)(4) entities):

(1) Organization that maintains common areas associated with condominium properties, and enforces covenants, held to not qualify as social welfare entity (PLRs 201933015, 202014018, 202015028, 202021024).

(2) Association of umpires denied recognition of exemption because its primary activity is collecting payment for officiating services



and passing in on to them, which was cast as private benefit (PLR 201820020, 201951011).

(3) Organization denied recognition of exemption because it is primarily operating for economic benefit or convenience of member business property owners (PLR 201907013); same outcome in case of business development park (PLR 201933014) and industrial park (PLR 201951014).

(4) Organization selling medicinal marijuana products denied recognition of exemption on ground that its primary activity is carrying on business with public in manner similar to for-profit organizations (PLR 201941028).

(5) Organization denied recognition of exemption because it is a networking and referral group operating for its members' economic benefit (PLR 202009025).

(6) IRS denied recognition of exemption as social welfare organization to entity having as its principal purpose opposition to a candidate for U.S. Senate (an incumbent); organization initially advised IRS that 90 percent of its revenue would be expended for public education, yet spent substantial portion of its revenue on direct political expenditures, primarily television advertisements, mailers, and allocable fundraising, legal, and administrative support services (PLR 202022009)

c. Developments concerning tax-exempt labor, agricultural, horticultural organizations (IRC § 501(c)(5) entities):

(1) Organization's activities consist of educating public regarding the values and contributions of horse racing and greyhound racing industries to its state's economy, particularly entertainment and tourism sectors, and benefits of permitting electronic gaming alongside pari-mutuel betting at racing facilities; IRS rejected this entity's attempt to qualify as a tax-exempt agricultural organization because it does not have as objects betterment of the conditions of persons engaged in the raising or improvement of livestock and it lacks a membership that is engaged in the business of agriculture (PLR 201905005).

(2) Tax exemption revoked due to substantial gaming activities (PLR 202015036).

d. Developments concerning tax-exempt trade, business, and professional associations (IRC § 501(c)(6) entities):

(1) Reporting exception amount for associations with nondeductible lobbying expenses (IRC § 6033(e)(3)) is no more than \$119 for 2020 (IRS Revenue Procedure (Rev. Proc.) 2019-44).

(2) Networking organization of non-competing businesses and professionals denied recognition of exemption because it is not promoting common interests of a line of business and is performing particular services (referrals) for its members (PLRs 201931009, 201941025, 201945028, 201951010, 202007021, 202008009, 202009027, 202010004, 202015020).

(3) Organization denied recognition of exemption because it is providing particular services to its members in form of negotiating to obtain favorable terms in members' contracts regarding supplies pricing (PLRs 201907007, 201931013).

(4) Organization of soccer referees denied recognition of exemption because it is providing particular services to its members by arranging employment opportunities for them, resulting in impermissible private benefit (PLR 201924019); same outcome for association of volleyball officials (PLR 201931010).

(5) Organization denied recognition of exemption where its function is to offer early-stage companies investment opportunities for its members; particular services ruled provided to entrepreneurs and members (PLR 201944014).

(6) Organization denied recognition of exemption because its purpose is to provide forum for exchange of information to assist users and potential users of software application (PLR 202013016).

(7) Nonprofit membership organization operating scheduling service for food truck operators held to not qualify as exempt business league principally because it is performing particular services for its members; entity also held to be engaging in business normally carried on in for-profit manner (PLR 202015022).

(8) Organization formed to increase efficiency and performance of member networks ruled not exempt business league because it is providing services for "economy and convenience" of its members (PLR 202015025).

(9) Group of franchise owners failed to secure recognition of exemption (PLR 202017028).

(10) Group of franchise owners formed to promote profitability and improve business conditions for owners denied recognition of exemption as business league because no promotion of line of business, provision of particular services for members, and serving of private interests (PLR 202018008).

(11) Association of bridal salons denied recognition of exemption because its primary activity of advertising constitutes performance of particular services for its members (PLR 202034010).

e. Developments concerning tax-exempt social clubs (IRC § 501(c)(7) entities):

(1) Clubs lost or denied exemption due to excessive nonmember income (PLRs 201933017, 201948009, 202011007, 202015023).

(2) Organization renting property to fraternity had its exemption as social club revoked; IRS ruled that it failed the mingling requirement and improperly received all its income from the public (PLR 201927023).

(3) Organization denied recognition of exemption because its sole function is provision of death benefits to its members (PLRs 201941026, 202015018, 202015024).

(4) Automobile ownership club denied recognition of exemption in part because its annual car show is business open to public (PLR 201948009).

(5) Organization formed to sidestep alcohol sales restrictions ruled not bona fide club (PLR 202017037).

(6) IRS, relying on percentages guideline that excludes unusual amounts that are not derived from active conduct of businesses not traditionally carried on by exempt clubs, ruled that income from sale of emission credits will not disturb club's tax exemption because sale will be new source of income for club and sale activity will be nonrecurring event (PLR 202019027).

(7) Club's members pay no dues whatsoever; all revenue flowing to entity on recurring basis is from sales of apparel, corporate sponsorships, and other contributions; recognition of exempt denied for violating 35-percent rule (PLR 202022008).

(8) Organization denied recognition of exemption because it failed to provide IRS with requisite information (PLR 202034012).

f. Rulings concerning fraternal organizations (IRC § 501(c)(8) entities):

(1) Organization failed to qualify for exemption because it does not operate under lodge system and does not provide benefits; is essentially a social group (PLRs 201951012, 202003007).

g. Rulings and court opinion concerning voluntary employees' beneficiary associations (IRC § 501(c)(9) entities) [no recent developments].

h. Rules concerning domestic fraternal societies (IRC § 501(c)(10) entities) [no recent developments].

i. Rules concerning teachers' retirement fund associations (IRC § 501(c)(11) entities) [no recent developments].

j. Rules concerning cooperatives (IRC § 501(c)(12) entities):

(1) Taxpayer Certainty and Disaster Relief Act of 2019 eliminated from 85-percent income-from-membership requirement certain forms of grants, contributions, or other assistance (IRC § 501(c)(12)(J)) (Act § 301).

k. Rulings, etc., concerning cemetery companies (IRC § 501(c)(13) entities) [no recent developments].

l. Developments concerning credit unions (IRC § 501(c)(14) entities) [no recent developments]

m. Rulings, etc., concerning small property and casualty insurance companies (IRC § 501(c)(15) entities) [no recent developments].

n. Rulings, etc., concerning crop operations finance corporations (IRC § 501(c)(16) entities) [no recent developments].

o. Rulings, etc., concerning supplemental unemployment benefit trusts (IRC § 501(c)(17) entities) [no recent developments].

p. Rulings, etc., concerning veterans' organizations (IRC § 501(c)(19) entities) [no recent developments].

q. Rulings, etc., concerning black lung benefits trusts (IRC § 501(c)(21) entities) [no recent developments].

r. Rulings, etc., concerning multi-parent title-holding companies (IRC § 501(c)(25) entities) [no recent developments].

s. Rulings, etc., concerning qualified health insurance issuers (IRC § 501(c)(29) entities) [no recent developments]

t. Rulings, etc., concerning farmers' cooperatives (IRC § 521 entities) [no recent developments].

u. Rulings, etc., concerning political organizations (IRC § 527 entities) [no recent developments].

v. Rulings, etc., concerning homeowners' associations (IRC § 528 entities):

(1) Residential real estate management association granted extension of time to elect treatment as homeowners' association (PLR 201918006).

w. Developments concerning qualified tuition programs (IRC § 529 entities) [no recent developments].

x. Developments concerning qualified ABLE accounts (IRC § 529A entities) (see foregoing item):

(1) IRS, on Oct. 9, 2019, issued proposed rules, incorporating guidance provided in Notice 2018-62, which reflects changes wrought by Tax Cuts and Jobs Act.

y. Rulings concerning the tax status of political subdivisions, state instrumentalities, integral parts of state, and the like:

(1) By reason of exclusion rule of IRC § 115: trust functioning as settlement fund for benefit of states and other governments (PLR 201930004); entity functioning as purchaser and seller of commodities for benefit of member § 115 entities (PLR 202019026); nonprofit corporation assisting member municipality-owned energy utilities in providing service to jurisdictional residents (PLR 202031003).

(2) By reason of doctrine of intergovernmental immunity [no recent developments].

(3) By reason of being integral part of state or city [no recent developments].

(4) By classification as state instrumentality [no recent developments].

3. It is the IRS's position that, inasmuch as marijuana is a controlled substance under federal law, its production and distribution is illegal. Thus, a nonprofit organization involved in dispensing marijuana-based products will be denied recognition of exemption as a charitable entity on the grounds of illegal activity and operations that are contrary to public policy. The IRS adopted that stance in denying recognition of exemption to a nonprofit organization providing financial assistance to patients in need who are adversely affected by the cost of medical treatments using cannabis-based compounds (PLR 201917008). Likewise (PLR 202014019)

4. IRS determined that an organization could not be exempt because it engaged in illegal activities, which apparently were activities to obstruct administrative of the

revenue laws, as detailed in a plea agreement entered into by its executive director (PLR 201924018).

5. Organization denied recognition of exemption as educational organization because a substantial part of its activities was networking and social events (PLR 201931012).

6. Organization denied recognition of exemption as charitable entity because substantial amount of its activities consists of provision of commercial-type insurance (PLR 202015035).

7. Hospitals that are required to meet community health needs assessment requirements (IRC § 501(r)(3)) have deadline for performing any CHNA requirement due to be completed on or after April 1, 2020, and before December 31, 2020, postponed until December 31, 2020 (Notice 2020-56).

## **B. Commerciality Doctrine**

1. Elements evidencing commerciality (*Living Faith, Inc. v. Commissioner* (950 F.2d 365 (7th Cir. 1991)):

- a. Sales of goods and/or services to public (this element raises a presumption of commerciality).
- b. Direct competition with for-profit companies.
- c. Pricing methodology (presence of profit).
- d. Advertising and other marketing (use of jingles).
- e. Hours of operation.
- f. Charging of fees.
- g. Use of employees (v. volunteers).
- h. Training of employees.
- i. Lack of charitable gifts (v. sole reliance on fee-for-service revenue).

2. Recent summary of doctrine by IRS concerning organization providing services to authors: It was “set up as a commercial printing operation,” in that more than an insubstantial part of its activities “consists of providing services for fees comparable to for-profit entities”; this organization was said to “exhibit several factors indicative of commercial operations,” including “regular and ongoing book sales, competition with other publishers, common retail pricing structures, marketing and advertising, and reliance on sales and fees versus contributions” (PLR 201710033).

3. IRS declared other evidence of commerciality: free wifi, existence of website, provision of power outlets for patrons' use (PLR 201645017).

4. IRS found commerciality in connection with organization establishing chapters and charging fees; it was characterized by IRS as "offering a product or service for a fee that is not furthering an educational or charitable exempt purpose" and engaging in an activity "indicative of a for-profit, commercial operation" (PLR 201712017).

5. IRS: Tax-exempt organizations "should not duplicate services or facilities provided by commercial entities" (PLR 201801014).

6. Other recent rulings finding operations in substantially commercial manner (PLRs 201826015, 201832019, 201846007 (host of tribute band concerts), 201911010 (provision of food and drinks to public), 201918019 (development of blockchain technology), 201926014 (competition with for-profit company), 201934008 (operation of coffeehouse, with employees and radio advertising), 201940011 (provision of legal, accounting, billing, human resources, and personnel services to health care companies), 201941029 ("collaboration" of for-profit businesses), 202004011 (operation of automobile repair and service shop), 202004012 (leasing of facility to public), 202005021, 202032008 (operation of restaurant), 202007019 (operation of coffee shop), 202016019 (operation of tavern), 202016028 and 202020024 (consulting services), 202031010 (operation of used car dealership), and 202032007 (marketing and retailing events)).

7. In extraordinary application of commerciality doctrine, nonprofit organization formed to combat organized theft and fraud that supports opioid and heroin addiction by utilizing innovative software in conjunction with retailers and law enforcement agencies, was denied recognition of exemption as charitable entity, with ITS invoking doctrine by characterizing organization as merely providing "services for a fee to retail stores"; better analysis would have been to recognize exemption as entity promoting health and lessening burdens of government, with services to retailers cast as means to larger exempt ends (PLR 202021026).

8. Instances where IRS reached same end by characterizing the entities' primary activity as unrelated business (PLRs 201803009, 201925015, 201925017).

9. Instance where IRS used commerciality doctrine and unrelated business rules (PLR 201918019).

10. Instance where revocation of exemption was based on operations for a substantial nonexempt purpose (management services for automobile repair shop and real estate holdings) (PLR 201926016).

### **C. Private Inurement**

The doctrine of private inurement, proscribing unreasonable transactions with insiders, is applicable to charitable organizations and many other categories of tax-exempt organizations.

1. Private inurement led to revocation of exemption (PLRs 201829023, 201830017, 201843010, 201843011, 201906013).

2. Organization raising funds for benefit of orphaned children of one family, even though they are needy and not related to board members; individuals are preselected (PLR 201923026).

3. Organization borrowed money from two board members at interest rate that was double the rate organization later obtained from a bank (PLR 202004012).

#### **D. Private Benefit**

The doctrine of private benefit, proscribing unreasonable transactions with anyone, is applicable to charitable organizations. IRS is enamored with private benefit doctrine; the agency applies it in selective ways.

1. Organizations held to not qualify for recognition of tax exemption by reason of private benefit doctrine (PLRs 202014016, 202015026, 202016017, 202016018, 202016029, 202017030, 202017031, 202019029, 202032007, 202034011).

2. Organization maintaining historic building denied recognition of exemption because its members have rights to revenue generated by entity's activities (PLR 201944015).

3. Nonprofit organization licensing software to customers requires services of third-party providers trained by it; because training is provided without charge, IRS ruled that customers are receiving substantial private benefit (PLR 201944016). (Note: If organization charged for these services, the IRS would have ruled that commerciality doctrine precluded exemption!)

4. Membership nonprofit organization was denied recognition of exemption as charitable entity in part for failure of operational test, in that entity commercially conducts public tours on land it uses; IRS concluded that organization was primarily formed to ensure that the members adhere to their obligations under contract with landlord; this seen by IRS as conferring of substantial private benefit on members (PLR 202022006).

5. Foundation's proposed grants to public entities to offset difference between purchase of gasoline and diesel vehicles and higher cost of electric vehicles ruled to not entail private benefit because of negligible and minimal benefits to disqualified person electrical utility (PLR 202034001).



## **E. Intermediate Sanctions**

The intermediate sanctions rules are applicable with respect to public charities and social welfare organizations. Developments concerning these rules shape the law of self-dealing, private inurement, and private benefit.

1. IRS (was) looking at use of rebuttable presumption of reasonableness and initial contract exception, in aftermath of findings in final reports on hospitals, colleges, and universities; as to former, focus on use of appropriate comparability data when setting compensation.

2. Interplay with private inurement doctrine, private benefit doctrine, and self-dealing rules; IRS determined that revocation is appropriate, rather than application of excess benefit transaction rules (PLRs 202001022, 202001023, 202024016).

3. IRS ruled that various uses of charity's funds by disqualified person could not be regarded as compensation because of no intent to so treat the transfers, so that funds transfers were automatic excess benefit transactions (PLR 202024016).

## **F. Influencing Legislation**

Public charities are not allowed to engage in a substantial amount of activities that constitute attempts to influence legislation.

1. Annual per-person, -family, or -entity dues limitation to qualify for reporting exception regarding certain exempt organizations with nondeductible lobbying expenditures is \$119 or less for 2020 (Rev. Proc. 2019-44).

2. Organization denied recognition of exemption on ground it is action organization, in that its primary activity (obtaining statehood for a "political unit") can only be attained by enactment of legislation (PLR 201932017).

## **G. Political Campaign Activity**

Public charities are not allowed to participate in political campaign activities. Other tax-exempt organizations may be able to engage in limited political campaign activity, although certain expenditures may be taxable as exempt functions under the political organizations rules (IRC § 527(f)).

1. Operation of political action committee by for-profit subsidiary of public charity, and contents of resources-sharing arrangement between the parties, cause charity to be considered engaged in political campaign activity (PLR 202005020).

## **H. Structural Issues**

Public charities may, within limitations, participate in partnerships and other joint ventures.

1. Charitable organizations allowed to participate in partnerships without loss of tax-exempt status [no recent developments].

2. Charitable organizations allowed to participate in joint ventures with taxable partner(s) without loss of tax-exempt status [no recent developments].

Public charities and other tax-exempt organizations may, within limitations, utilize taxable subsidiaries. Tax-exempt organizations may be involved in mergers. There are special rules concerning conversions of for-profit entities to exempt organizations.

3. Charitable organizations held able to utilize taxable subsidiaries without endangering their tax-exempt status [no recent developments].

4. By contrast, organization was denied recognition of tax exemption as charitable entity in part because and its for-profit subsidiary were “indistinguishably entangle[d]” (PLR 201918019).

5. Likewise, public charity was ruled to be engaged in political campaign activity because of campaign activity by its for-profit subsidiary and political action committee; subsidiary and PAC lacked separate employees, office space, and equipment; IRS could not find protective “guardrails” in this context (PLR 202005020).

6. Application of constructive ownership rules (IRC §§ 318, 512(b)(13)(D)(ii)) to conclude that tax-exempt organization controls other entities [no recent developments].

7. Status of developments pertaining to whole-hospital (entity) joint ventures [no recent developments].

8. Rulings as to mergers:

a. IRS considered merger of supporting organization into supported organization; transfer of money and investment property to supported organization ruled to be an unusual grant (PLR 201909015) (see V A 9).

9. Developments concerning use of limited liability companies [no recent developments].

10. IRS incorrectly ruled that nonprofit organization, issuing stock to individuals, where stock is authorized under state law and does not pay dividends, has corporate structure that precludes recognition of exemption as charitable entity (PLR 201835009).

11. IRS incorrectly ruled that entity cannot qualify as public charity because it is a successor to a for-profit entity (PLR 201902032).

12. Court ruled that where organization’s management’s initial intent was charitable, then changed to subsequent and ultimate profit intent, the organization can deduct its business expenses because it had profit motive (IRC § 183), thus validating notion that switch in position as to intent is permissible, with successor entity evaluated

on basis of its actual operations, not its management’s original intent (*WP Realty, LP v. Commissioner* (Tax Ct., Sep. 16, 2019)).

## **I. Exemption Recognition Application Process and Notice Requirements**

Nearly all organizations, to be recognized as tax-exempt charitable entities, are required to file an application for recognition of tax exemption with the IRS (IRC § 508(a)).

1. IRS denied recognition of exemption on ground applicant did not provide sufficient information on substance of its activities (PLRs 201941030, 201951013, 202009028).

2. Court, on May 30, 2019, decided market-rate legal fees and costs must be paid, pursuant to Equal Access to Justice Act, to lawyers representing organization that suffered viewpoint discrimination by IRS employees during application-for-recognition processing, due to IRS’s “bad faith” (*True the Vote, Inc. v. Internal Revenue Service* (D.D.C.)).

3. TIGTA, in Jan. 6, 2020 report (2020-10-001), blasted IRS for failing to penalize thousands of social welfare organizations and their officials because of notice (Form 8976) violations; TIGTA identified 9,774 organizations that were potentially required to file notice but did not; organizations potentially subject to penalties totaling more than \$48.4 million and officers potentially subject to penalties totaling over \$47.5 million; TIGTA offered eight recommendations, some of which were rejected by IRS.

5. IRS issued proposed revenue procedure setting forth updated procedures under which recognition of tax exemption may be obtained on group basis (Notice 2020-36).

6. IRS retroactively revoked organization’s tax-exempt status (PLR 202019029).

## **J. Annual Information Returns, e-Postcards, Political Organization Reports, and Excise Tax Return**

Nearly all tax-exempt organizations are required to file annual information returns (Form 990, 990-EZ, or 990-PF) with the IRS (IRC § 6033).

1. IRS revoked (or proposed revocation of) tax-exempt status of organizations for failure to file annual information returns [no recent developments].

2. Organizations qualified for exemption from annual information return filing requirement [no recent developments].

3. IRS, on April 5, 2019, announced final regulations in support of revised Form 4720 to accommodate payment of excise taxes pursuant to IRC §§ 4960 (excess compensation) and 4968 (net investment income of certain colleges and universities) (T.D. 9855).

4. IRS, on December 13, 2019, issued guidance as to implementation of Taxpayer First Act's requirements that annual information returns and related forms be filed electronically (IR-2019-206); correction issued on December 17, 2019.

## **K. Disclosure Requirements**

1. Disclosure requirements of IRC § 6104(d) do not give rise to a private cause of action (*Doan v. Vietnamese Buddhist Association of Sacramento* (E.D. Cal, July 2, 2019)).

2. Two provisions of New York law relating to elections and campaigning, that require certain categories of tax-exempt organizations to publicly disclose their donors, held to unconstitutionally burden their First Amendment rights of free speech and freedom of association and thus are facially invalid (*Citizens Union of the City of New York v. Attorney General of the State of New York* (S.D.N.Y. (Sep. 30, 2019))).

3. Court enjoined the governor of New Jersey and other defendants from enforcing state law that compels disclosure of identities of donors to "independent expenditure committees" and enforces compliance with law's financial-reporting and money-handling requirements, on grounds that law unconstitutionally infringes on plaintiff's First Amendment rights and because it is unconstitutional as applied to plaintiff as it will chill its First Amendment rights by deterring potential contributors from contributing to organization (*Americans for Prosperity v. Grewal* (D. N.J. (Oct. 2, 2019))).

4. Final regulations issued on May 26, 2020, relieving most categories of tax-exempt organizations of obligation to report contributors' names and addresses as part of Form 990 or Form 990-EZ, Schedule B (T.D. 9898).

a. Donor disclosure rules remain in place for exempt charitable organizations and political organizations.

b. As to charitable organizations, regulations are brought into conformity with statute (IRC § 6033(b)(5)).

c. Treasury Department stated that IRS does not need this donor information.

d. Tax-exempt organizations still need to retain this information and provide it to IRS on examination.

e. Prior regulations posed risk of inadvertent disclosure of protected information.

f. Preamble takes notice of concerns that supporters of causes or organizations face reprisals if their status as contributors is revealed and that fear of reprisals may have chilling effect on contributions and participation.

g. Preamble recognizes that this chilling effect implicates constitutional rights of free speech and freedom of association.

h. New regulations reduce burdens on exempt organizations and IRS.

## **L. Governance Developments**

1. State nonprofit corporation acts and other state law developments, including litigation; principles of fiduciary responsibility; board member liability.

2. Board composition and federal tax law rules.

3. Sources of nonprofit governance principles:

a. Watchdog agencies.

b. Sarbanes-Oxley Act of 2002.

c. Treasury Department's Voluntary Best Practices (Nov. 2005).

d. Committee for Purchase proposed best practices (Dec. 16, 2005)

e. IRS's draft Model Good Governance Practices for charitable organizations (Feb. 2, 2007); these practices abandoned in Feb. 2008.

f. Senate Finance Committee staff paper (2004).

g. The American National Red Cross Governance Modernization Act of 2007 (H.R. 1681) was signed into law on May 11, 2007.

h. On February 14, 2008, IRS replaced draft of Model Good Governance Practices with paper on governance of charitable organizations.

i. Form 990, particularly Part VI.

j. Panel on Nonprofit Sector recommendations ("Principles for Good Governance and Ethical Practice") (2015 ed.).

k. Import of IRC § 501(q) (concerning boards of tax-exempt credit counseling organizations).

l. Issuance by IRS of annual report, FY 2011 work plan (see I).

m. California Nonprofit Accountability Act.

4. Governance policies, procedures, protocols, practices:

a. Those that are generally applicable:

- (1) Conflict-of-interest.
  - (2) Document retention and destruction.
  - (3) Whistleblower.
  - (4) Travel and other reimbursement (accountable plan).
  - (5) Executive compensation.
  - (6) Gift acceptance.
  - (7) Investment.
  - (8) Form 990 review.
- b. Others:
- (1) Charity care, community health needs assessment, billing and collection (hospitals).
  - (2) Conservation easement.
  - (3) Joint venture.
  - (4) Documentation of meetings.
  - (5) International and domestic grantmaking.
  - (6) Chapters, affiliates, branches.
  - (7) Fundraising.
  - (8) Tax-exempt bond compliance.
- c. State law may require one or more policies.

5. Governance issues:

- a. Governing board size.
- b. Governing board composition.
- c. Role of governing board.
- d. Organization effectiveness and evaluation.
- e. Board effectiveness and evaluation.
- f. Frequency of board meetings.

- g. Term limits.
- h. Board member compensation.
- i. Audit committee.
- j. Other committees.
- k. Compliance with law.
- l. Categories of expenditures.
- m. Disclosures to public.
- n. Mission statement.
- o. Code of ethics.
- p. Fundraising practices.

6. Nonprofit organization had one individual as its director, officer, and operator of its activities; this individual was not forthcoming with information about organization's operations and finances, resulting in application by U.S. Tax Court of its *Bubbling Well Church's* "logical inference" standard (*David Muresan Scientific Research Foundation v. Commissioner*, Feb. 5, 2018)).

7. Role of IRS in nonprofit governance:

a. IRS use of private benefit doctrine (see III D), with heavy reliance on (often misconstrued) *Bubbling Well Church v. Commissioner* (1980).

b. IRS: Organization cannot qualify as exempt charitable entity if it has small board:

(1) Organization cannot qualify as tax-exempt, charitable entity inasmuch as it has board of directors consisting of only two individuals, automatic unwarranted private benefit found (PLRs 200736037, 200737044).

(2) Organization cannot qualify as tax-exempt, charitable entity, in part because it was not operated by "community-based board of directors" (or because board "lacks members who are representative of the community") (PLR 200828029).

(3) Organization cannot qualify as tax-exempt, charitable entity, in part because it lacked independent board (PLRs 200830028, 201252021).

(4) Organization cannot qualify as tax-exempt, charitable entity, in part because two individuals exercise “absolute control” over organization (PLR 200843032).

(5) Organization cannot qualify as tax-exempt, charitable entity, in part because its three directors have “unfettered control” over organization and its assets (PLR 200845053). Query: Where is legitimate control supposed to be?

(6) One-person boards are evidence of private benefit (PLRs 201016088, 201242016 (entity attempted to qualify as business league)); yet IRS did not raise the issue in subsequent ruling (PLR 201733016).

(7) Organization did not constitute an exempt synagogue, in part because there is no “public oversight” of its board (PLRs 201242014, 201325017). Query: How does this square with First Amendment’s Religion Clauses?

(8) Organization denied exemption because one individual held all officer positions and there was no public oversight of it (PLR 201252021).

(9) Organization with board of five individuals held ineligible for exemption in part because entity is governed by “small group of individuals,” who have “exclusive control over the management of [the entity’s] funds and operations” (PLR 201421022).

(10) Organization seeking to qualify as exempt synagogue denied recognition of exemption in part because it has three-individual board (PLR 201427018).

(11) Health care organization denied recognition of exemption as charitable organization because its six-member board of directors “does not have a majority of directors representing the community” (PLR 201436050).

(12) Health care organization denied recognition of exemption in part because its 28-person board (nearly all physicians) does not represent “broad interests of community” (PLR 201440020).

(13) Organization with one director held to not qualify for tax exemption because, in part, it does not have a community-based board (PLR 201525014).

(14) Individual, as founder of organization, is its president, executive director, sole employee, and one of three board members; she was held to be in “complete control” of entity, resulting in private inurement (PLR 201540019).



(15) As condition of exemption, IRS forced organization to expand its board from one individual to three unrelated individuals (and add another individual as an officer) (PLR 201541013).

c. IRS: Organization cannot qualify as exempt charitable entity if it has board of related individuals:

(1) Organizations held to not qualify as charitable entity because all of their board members are members of same family (PLR 200916035, 201016088).

(2) President of organization engaged in many forms of private inurement, all of which happened, IRS concluded, because there was a “family-based governing board” (201113041).

(3) Board of nonprofit organization, with majority of related individuals, held to constitute per se evidence of violation of private benefit doctrine (PLR 201203025).

(4) Two classes of members in ostensible social club held to constitute private inurement (PLR 201204018).

(5) Organization said by IRS to be unduly controlled by members of a family, with the governing body consisting of president’s “family members or professional friends” (PLR 201209011).

(6) Organization was denied recognition of exemption as charitable organization, in part because it refused to expand its three-person board of directors, two of whom are related, to “place control in the hands of unrelated individuals” (PLR 201218041).

(7) Organization was denied recognition of exemption, in part because it did not expand its closely related board (of five) (PLR 201221022).

(8) Organization was denied recognition of exemption, in part because it would not expand its two-person related board; organization’s board did not do so on ground that “no one shares our vision” (PLR 201236033).

(9) Organization denied recognition of exemption in part because it is governed by board, with all members from same family; that was held indicative of private inurement (PLR 201302040).

(10) Organization denied recognition of exemption in part because its governing board is comprised of five related individuals (PLR 201421022).

(11) Organization declined to expand three-individual related board; entity denied recognition of exemption for other reasons (PLR 201507026).

(12) Organization expanded three-individual related board; entity denied recognition of exemption for non-governance reasons (PLR 201526020).

(13) Organization with three-individual related board denied exemption in part because two married to each other; reliance on Rev. Rul. 61-170 (PLR 201801013).

(14) IRS wrote: “Generally, a governing board that consists primarily of family members or of members who share a domestic life, does not constitute an independent body, and has an inherent conflict of interest when placed in a position to approve financial transactions involving other members of the family unit” (PLR 202001023).

d. IRS: Tax exemption is to be denied where entity did not adopt a policy:

(1) Private benefit found in part because entity did not have conflict-of-interest policy (PLRs 200830028, 200843032, 201221022).

(2) Organization failed to gain recognition of exemption in part because it lacked executive compensation policy (PLR 200843032).

e. Discrepant (and correct) determinations:

(1) Small governing body controlled by founders does not preclude exemption but creates need for organization to be “open and candid” (PLR 200846040).

(2) Organization had board of three family members; IRS wrote that “this factor alone is not enough to deny [recognition of] exemption” (PLR 201232034).

(3) IRS was not troubled by four-person board of private foundation, all of whom are members of same family (PLR 201244020).

(4) IRS: “While an organization will not be denied exemption merely because it is controlled by related individuals, such a situation provides an obvious opportunity for abuse and calls for an open and candid disclosure of your organization and operations” (PLR 201332013).

f. IRS ruled that board is comprised of representatives of “community it serves,” without explanation (PLR 201711014).

g. Lifetime board positions:

(1) Arrangement where board members have lifetime appointments held organization ineligible for recognition of exemption in part because it constituted potential for private inurement (PLR 201233017).

(2) Same, although private benefit doctrine was invoked (PLR 201236033).

h. Focus on directors', officers' lack of competence:

(1) IRS disparaged qualifications of applicant's director, conjuring *significant voice* test (PLR 201332013).

(2) President of conservation easement donee organization held to "not possess the knowledge, training or experience to make educated decisions on whether each conservation easement serves a contribution purpose" (PLR 201405018).

i. Government agency's acts are ultra vires where (1) it has acted outside the bounds of its statutory authority or (2) acts without applicable authority (*City of Arlington, Texas v. Federal Communications Commission* (Sup. Ct. 2013)).

j. Does IRS have the authority (jurisdiction) to regulate in field of nonprofit governance? Implications of *Steele v. United States* (on appeal), *Loving v. Internal Revenue Service*, and *Ridgeley v. Lew*, along with *California Independent System Operator Corporation v. Federal Energy Regulatory Commission* (D.C. Cir. 2004).

## **M. Procedural Rules and Practices**

1. IRS issued administrative procedural rules for 2020:

a. Revised procedures for obtaining private letter rulings and information letters issued by Associate Chief Counsel (TE/GE) and others within the IRS, and for determination letters issued by the TE/GE Division and others within the IRS (Rev. Proc. 2020-1).

b. Revised procedures explaining when and how Associate Chief Counsel offices provide technical advice, by means of technical advice memoranda, and explaining rights that taxpayer has when field office requests TAM (Rev. Proc. 2020-2).

c. Revised inventory of areas on which IRS will not issue letter rulings or determination letters (Rev. Proc. 2020-3).

d. Revised procedures for issuance of determination letters on issues under the jurisdiction of the Director, EO Rulings and Agreements; revocation or modification of determination letters; guidance on exhaustion of administrative

remedies for purposes of declaratory judgments (IRC § 7428); and guidance on user fees for requesting determination letters (Rev. Proc. 2020-5).

**N. IRS Audit Activity**

1. IRS audit authority (IRC § 7602).
2. IRS audit plans sometimes revealed in Exempt Organizations work plans (see D).
3. Church audit rules (IRC § 7611):
  - a. Church tax inquiries.
  - b. Church tax examinations.
    - c. Appropriate high-level Treasury official (magistrate judge held, on November 18, 2008, that the Director, Examinations has been improperly designated by IRS as that official (*United States v. Living Word Christian Center* (D. Minn.)); IRS filed objections on December 3, 2008; church responded to them on December 15, 2008; district court adopted magistrate’s report on January 30, 2009; IRS decided to not appeal this decision (appeal deadline expired on March 31, 2009).
    - d. IRS proposed regulation changes on July 31, 2009 (REG-112756-09); high-level official proposed is Director, Exempt Organizations; hearing held on January 20, 2010.
    - e. Status of IRS church inquiries/examinations.
      - f. Court held that Director, Exempt Organizations, holds too low a rank in IRS bureaucracy to qualify as high-level Treasury official (*United States v. Bible Study Time, Inc.* (D.S.C., Mar. 13, 2018)).
      - g. Church audit rules do not apply with respect to audits of ministers (*Rowe v. United States* (E.D. La., May 16, 2018)).
      - h. IRS noted that a church tax inquiry, then a church tax examination, was “personally approved” by the Commissioner, TE/GE Division (PLR 201921014).
  4. IRS denied/revoked tax-exempt status for organizations’ failure to respond to IRS request for information (PLRs 201940010, 202001020, 202001021, 202001024, 202003005, 202003006, 202004014).
  5. U.S. Government Accountability Office, “Tax Exempt Organizations: IRS Increasingly Uses Data in Examination Selection, but Could Further Improve Selection Processes” (GAO-20-454 (June 2020)).

## **O. Tax Shelter/Abuse Developments**

1. Promoter of “business” facilitating charitable contribution and subsequent distribution of timeshares, alleged by federal government to be operating a “bogus tax scheme,” held subject to penalties (IRC § 6700) because appraisals involved were not qualified and values of property were overstated (*Tarpey v. United States* (D. Mont., Mar. 19, 2019)).

2. In “abusive tax scheme” case involving “bogus charitable contributions,” court held that federal government’s complaint seeks only equitable relief; injunctive relief and disgorgement held to be equitable remedies not triable by jury (*United States v. Meyer* (S.D. Fla.)).

3. Organization denied recognition of exemption as charitable entity primarily because it did not engage in any charitable activities but instead operated program whereby ostensible donors would make ostensible gifts, yet retain control over gift property and purchase it back at lower value (PLR 201834013).

4. Organization generating gifts of limited liability company interests held functioning in manner similar to S corporation tax shelter scheme (Notice 2004-30); tax exemption revoked (PLR 201944017); National Outreach Foundation case (docketed in Tax Ct, (Nov. 14, 2019)).

5. U.S. Government Accountability Office issued report, made public on October 7, 2019, titled “Tax-Law Enforcement: IRS Could Better Leverage Existing Data to Identify Abusive Schemes Involving Tax-Exempt Entities” (GAO-19-491).

6. IRS created position of Promoter Investigations Coordinator (IR-2020-41).

7. Treasury Inspector General for Tax Administration determined that TE/GE examiners did not always document whether abusive tax shelter promoter penalties (IRC § 6700) were warranted in cases involving tax-advantaged bonds and workpapers were “incorrectly completed” (Bond Promoter Misconduct Procedures Should Be Improved” (2020-10-106 (Mar. 6, 2020)).

8. Developments concerning syndicated conservation easement programs (see VII B 4, 5).

9. U.S. Court of Appeals for Tenth Circuit, on June 2, 2020, upheld imposition of abusive tax shelter promotion penalty in connection with solar energy scheme as plan organized and sold by promoters who knowingly made false or fraudulent statements about material matters (IRC § 6700(a)); promoters falsely told buyers of plan that they were entitled to solar-energy tax credits and depreciation deductions; promoters were also found to have made gross valuation overstatements (*United States v. RaPower-3, LLC*).

## **P. Other Federal Tax Law Developments**

1. IRS granted organization's request for extension of time within which to file election by tax-exempt controlled entity to not be treated as an exempt entity (IRC § 168(h)(6)(F)(ii)(I)) (PLRs 201952005, 201952006, 202001009, 202001010, 202004008).

2. If C corporation makes payment to or for use of charitable organization and receives or expects to receive a tax credit that reduces state or local tax in return for payment, corporation may treat payment as meeting requirements for ordinary and necessary business expense to extent of credit; similar outcome results where payment is made by business entity other than C corporation that is regarded as separate from its owners and where credit pertains to tax other than state or local income tax (Rev. Proc. 2019-12).

3. Staff of Joint Committee on Taxation, in late December 2018, published a general explanation of the Tax Cuts and Jobs Act (JCS-1-18).

4. IRS issued interim guidance regarding excise tax (IRC § 4960) on remuneration in excess of \$1 million any excess parachute payment paid by an applicable tax-exempt organization to a covered employee (Notice 2019-09).

5. Department of Treasury and IRS, on March 5, 2019, issued a statement reaffirming their commitment to a tax regulatory process, advancing regulatory principles, which "encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law."

6. Joint Committee on Taxation, on March 20, 2019, published overview of federal tax system in effect for 2019 (JCX-9-19).

7. National Taxpayer Advocate, in April 3, 2019, blog, advocated "better-designed, rights-based IRS notices," recommending that they be developed in reliance on "insights from the available psychological, cognitive, and behavioral science research"; NTA cautioned that "[p]eople can only handle so much information at once; too much information can increase their cognitive burden, which will hinder understanding and decision-making."

8. Senate Finance Committee Chairman Charles Grassley (R-IA) and Ranking Member Ron Wyden (D-OR), in an April 3, 2019, letter to Commissioner of Internal Revenue Charles Rettig, urged IRS to enforce tax laws in connection with "recent, widely reported, college admissions scandal"; payment of bribes to college administrators by high-net-worth parents "obviously should not be treated as legitimate charitable deductions," letter said; some "illicit payments" were made as stock transfers and senators want IRS to "fully enforce the law with regard to any resulting gain recognition"; similar payments by means of private foundation grants should, senators wrote, be investigated as potential acts of self-dealing.

9. Rev. Rul. 68-489 continues to reflect the views of the IRS in context of grantmaking, including international grantmaking, conducted by public charities (IRS Infor. Ltr. 2019-0007 (March 18, 2019, made public on July 3, 2019)).

## V. MATTERS PERTAINING TO PUBLIC CHARITIES AND PRIVATE FOUNDATIONS

### A. Public Charity/Private Foundation Classification Rules

Charitable (IRC § 501(c)(3)) organizations are presumed to be private foundations (IRC § 508(b)). This presumption is rebutted by qualification as a public charity (IRC § 509(a)). Public charities are principally of three types: (1) institutions (e.g., churches, colleges, universities, health care entities (IRC §§ 170(b)(1)(A)(i)-(v), 509(a)(1)), (2) publicly supported charities (IRC §§ 170(b)(1)(A)(vi) and 509(a)(2)), and (3) supporting organizations (IRC § 509(a)(3)).

1. Department of Treasury and IRS, on December 22, 2012, issued final regulations to implement certain of the statutory rules enacted in 2006 applicable to Type III supporting organizations, concerning relationship tests, including definition of term *functionally integrated*, reiteration of a responsiveness test and integral part tests for these entities, and spelling out other rules for Type III organizations, including content of the annual notification that Type III supporting organizations must provide to supported organizations (T.D. 9605):

a. Meaning of *operated in connection with* (Type III rules) (Reg. § 1.509(a)-4(i)(1)).

b. Revised responsiveness test, involving relationships with trustees, directors, and officers of supporting and supported organizations, and *significant voice* requirement favoring supported organizations (Reg. § 1.509(a)-4(i)(3)).

c. Definition of *functionally integrated* (IRC § 4943(f)(5)(B); Reg. § 1.509(a)-4(i)(4)(i)).

d. Integral part test for functionally integrated Type III supporting organizations; focus on *direct furtherance* activities; also, supporting organization can be parent of supported organization(s) or support governmental entity (Reg. § 1.509(a)-4(i)(4)(ii)).

e. Integral part test for non-functionally integrated Type III supporting organizations (payout requirement (see below) and revised attentiveness test) (Reg. § 1.509(a)-4(i)(5)(ii), (iii); Reg. § 509(a)4T(i)(5)(B)).

f. Notification requirement (IRC § 509(f)(A); Reg. § 1.509(a)-4(i)(2)).

g. Prohibition on support of foreign charities (IRC § 509(f)(B); Reg. § 1.509(a)-4(i)(10)).

h. Entity cannot be Type I or III supporting organization if supported organization is controlled by certain donors (IRC § 509(f)(2); Reg. § 1.509(a)-4(f)(5)(i)).

i. Seven additional regulation projects are embedded in discussion of final regulations or in final regulations themselves, involving clarification of application of responsiveness test, clarification of significant voice test, new rules for supporting organizations with respect to governmental entities, new definition of *parent*, expansion of rules describing expenditures of non-functionally integrated Type III supporting organizations, rules as to whether program-related investments will count toward distribution requirement, and definition of *control* in connection with Type I or III relationship test.

2. Pension Protection Act of 2006 changes in law concerning donor-advised funds:

A donor-advised fund is a fund within a charitable organization, to which a person contributes, with the gift placed in the fund, often named after the donor, where the donor or other designee has the ability to advise as to charitable grantees and/or investment options.

a. Donor-advised fund formally defined (IRC § 4966); other rules in IRC § 4967.

b. Employer-sponsored disaster relief assistance funds are not donor-advised funds (Notice 2006-109).

c. Evidence of *advisory privilege*.

d. Contributions, for maintenance in donor-advised fund, to certain sponsoring organizations are not deductible.

e. Donor required to obtain certain contemporaneous written acknowledgement.

f. Excess business holdings rules are applicable.

g. Certain transactions are automatic excess benefit transactions.

h. Certain distributions from donor-advised fund are taxable.

i. Reporting and disclosure rules.

3. IRS issued summary of approaches under consideration at Treasury and IRS in connection with various issues regarding donor-advised funds (Notice 2017-73), including:

a. Ban on treatment of distributions from donor-advised funds as public support for ultimate charitable recipients.



b. Treatment of distributions from donor-advised funds for funding of benefit events.

c. Treatment of distributions from donor-advised funds to satisfy donor's or donor-advisor's charitable pledge.

d. Matter of transfers of funds by private foundations to donor-advised funds.

e. Resulting comments include those from Tax Section of Bar Association of New York (Feb. 28, 2018), The Philanthropy Roundtable (Mar. 5, 2018), Community Foundation Public Awareness Initiative (Mar. 5, 2018), and National Philanthropic Trust (Mar. 5, 2018).

4. Status of proposed regulations.

5. National Philanthropic Trust, on November 12, 2019, issued its annual report on donor-advised funds.

6. IRS agent, in examination report, stated that the donor-advised funds law includes "regulations that are precise and specific" (PLR 201922038).

7. Developments as to church status:

a. Organization lost its status as church, even though it satisfied some of IRS's 14-point criteria, because it failed *associational test* (*Foundation of Human Understanding v. United States* (U.S. Ct. Fed. Cl. (2009), *aff'd*, (Fed. Cir. 2010)), *cert. den.*, Mar. 21, 2011)).

b. IRS ruled that entity could not qualify as (virtual) church because it failed associational test (PLR 201232034).

c. Organization held to not qualify as church because it did not meet associational test and failed majority of IRS criteria (PLR 201221022).

d. IRS ruled that entity with no place of worship and no regular worship services cannot constitute church (PLRs 201235022, 201242014, 201251018).

e. IRS stated that synagogue (and, by extension, all churches) should be subject to "public oversight" (PLRs 201242014, 201325017).

f. Organization held to not qualify as church because it did not meet IRS 14-element criteria (*Good v. Commissioner* (2012)).

g. IRS ruled that public policy doctrine precludes practice of polygamy, being illegal, in apostolic (IRC § 501(d)) entity (PLR 201310047).

h. IRS ruled that, to be exempt, church must have “regular worship services conducted at a regular location with a regular congregation” (PLR 201325017); likewise (PLRs 201327018, 201609006).

i. Electronic ministry held religious organization but not church due to failure to meet associational test (PLR 201420020).

j. Organization ruled to not qualify as church due to failure to meet associational test and 14-point test (and because of private inurement) (PLR 201921014).

k. Individual selling religious merchandise by means of internet was found liable for federal income tax on net proceeds, with court rejecting his argument that he was functioning as a church (*Lloyd v. Commissioner* (Tax Court, June 22, 2020)).

8. Proposed grant held unusual grant in that all criteria for this type of grant (Reg. §§ 1.170A-9(f)(g)(ii), 1.509(a)-3(c)(4)) are satisfied (PLRs 201923027, 202023012, 202034007, 202034008).

9. Proposed grant, involving transfer by private foundation winding down its operations to public charity to establish endowment funds, ruled unusual grant (PLR 202031009).

10. Court ruled that trustees of supporting organization breached their duties of fiduciary responsibility to supported organization, principally duty of loyalty and duty of disclosure (*Cohen v. Minneapolis Jewish Federation* (W.D. Wis., Dec. 14, 2017)); court, following trial, found other breaches of fiduciary duty, ruled that trustees of supporting organization had to personally pay fees and costs of supported organization, and removed trustees from board of supporting organization (Sep. 28, 2018); decisions affirmed, with appellate court writing that “[w]e do not think it necessary to add to the district court’s explanation of these decisions, all of which are either compelled by law (including the law of contracts and the Internal Revenue Code) or within the scope of remedial discretion allowed to a court by Wisconsin’s law of trusts ” (7th Cir., Sep. 13, 2019).

11. Conversion of Type III supporting organization to private foundation, with settlement payments to supported organizations, ruled to not violate intermediate sanctions, self-dealing, qualifying distribution, and taxable expenditures rules (PLR 201825004).

12. IRS ruled organization not qualified for exemption as charitable entity; also ineligible to be supporting organization of business league because its financial support not confined to charitable purposes (PLR 201844013).

13. IRS issued new delegation order as to abatement of qualified first tier Chapter 42 taxes (IRC § 4962(b)) (Del. Order 7-11 (rev. 1) (effective July 2, 2018); authority to abate significant excise tax amounts delegated to Director, Exempt Organizations.

14. Donald J. Trump Foundation and members of Trump family, sued by New York attorney general, on June 14, 2018, for ostensible violations of federal and state charity laws, including self-dealing and political campaign activity; Foundation also under criminal law investigation in NY.

15. IRS changed public charity status of entity from that of donative-type publicly supported charity (IRC § 170(b)(1)(A)(vi)) to that of service provider-type publicly supported charity (IRC § 509(a)(2)) (PLR 201903021).

16. IRS changed public charity status of entity from that of school (IRC § 170(b)(1)(A)(ii)) to that of publicly supported charity status (IRC § 170(b)(1)(A)(vi)) (PLR 201903022).

17. IRS changed public charity status of entity from that of supporting organization (IRC § 509(a)(3)) to that of publicly supported charity status (IRC § 509(a)(2)) (PLR 201922031).

18. IRS changed status of charitable entity from publicly supported entity (IRC § 509(a)(2)) to other category of publicly supported charity (IRC § 170(b)(1)(A)(vi)) (PLR 201933018).

19. IRS changed status of charitable entity from that of hospital facility to publicly supported charity (IRC § 170(b)(1)(A)(vi)) (PLR 201933019).

20. IRS modified its 1975 guidelines for determining private schools' eligibility for tax exemption by adoption of racially nondiscriminatory policy regarding students and operations in accordance with that policy (Rev. Proc. 75-50) by providing, as third way to publicize the policy, display of notice of policy on organizations' primary publicly accessible Internet homepage in manner reasonably expected to be noticed by visitors to homepage (Rev. Proc. 2019-22, effective May 28, 2019).

21. Court held that Mayo Clinic is educational organization, for purposes of IRC §§ 170(b)(1)(A)(ii) and 514(c)(9)(C)(i), on ground that primary-purpose test in regulation is unlawful because Congress did not include it in statute as it did in IRC § 170(b)(1)(A)(iii); on basis of all relevant law, applicable canons of statutory construction, and absurdity of outcome, this opinion is error (*Mayo Clinic v. United States* (D. Minn., Aug. 6, 2019), appeal filed on Oct. 4, 2019).

22. Tax-exempt community foundation and corporation that is supporting organization with respect to it ruled single entity for tax law purposes (PLRs 201936002, 201936003).

23. IRS ruling illustrated need for use of supporting organization (or perhaps school) by tax-exempt business league (PLR 202017035).

## **B. Self-Dealing Rules**

A private foundation generally may not engage in an act of self-dealing with a disqualified
---

person (IRC § 4941).

1. In the following situations, the IRS ruled that the transaction or transactions did not constitute self-dealing:

Self-dealing exceptions: where reasonable compensation is paid for personal services, where benefit is incidental and tenuous, or certain transactions involving an estate.

- a. Ruling illustrates concept of *expectancy* of a private foundation; here, interests in a corporation and two limited liability companies held in a trust to be distributed to foundation on death of individual (PLR 201849009).
- b. Foundations received rulings as to application of estate administration exception (PLRs 201849009, 201850012).
- c. Trustor's proposed irrevocable transfer to trust of nonvoting interests in limited liability company, the only assets of which are promissory notes from disqualified persons (those described in IRC § 4946(a)(1)(G)), ruled to not constitute act of direct or indirect self-dealing (PLR 201907004).
- d. Payments for services provided by disqualified person, by means of disregarded entities, to private foundation to enable foundation to offer "charitable consulting" services and investment services to foundation and other charities ruled not self-dealing by application of personal services exception (PLR 201937003).
- e. Implications of charitable deduction reduction case (VII A 2 k) in indirect self-dealing context (*Dieringer v. Commissioner* (9th Cir., Mar. 12, 2019)); disqualified persons manipulated value of private foundation assets while held in estate, reducing value of property distributed to private foundation.
- f. Payments for services provided by disqualified person, by means of disregarded entities, to private foundation to enable it to offer "charitable consulting" services and investment services to foundation and other charities ruled to not be acts of self-dealing because the payments are sheltered by the personal services exception (Priv. Ltr. Rul. 201937003).
- g. Individual convicted of seven counts of tax evasion, was sentenced to 33 months in prison and ordered to pay \$146,404 in restitution; one count involved establishment of private foundation, then causing it to pay his children's high school and college tuition (*United States v. Wright* (6th Cir. (Dec. 19, 2019))).
- h. Exchange between spouse and charitable trust ruled not self-dealing because spouse's status as disqualified person will arise only as result of transaction (PLRs202016002-202016006).

i. IRS ruled that distribution by charitable lead annuity trust, following all annuity payments to two charities, of remaining trust assets to remainder beneficiaries (all disqualified persons with respect to trust) will not constitute self-dealing (PLR 202021001).

j. Foundation's proposed grants to public entities to offset difference between purchase of gasoline and diesel vehicles and higher cost of electric vehicles ruled to not be self-dealing because of negligible and minimal benefits to disqualified person electrical utility (PLR 202034001).

### **C. Mandatory Distributions**

A private foundation must pay out for charitable purposes, with respect to a year, an amount equal to 5 percent of its investment asset base, in the form of qualifying distributions (IRC § 4942).

1. Set-asides, and modifications and extensions of set-asides, approved (PLRs 202009030, 202010007, 202011012, 202017032, 202017036, 202023011, 202025001, 202032005).

2. Value of private foundation's real property, subject to conservation easement, held excludible in computing its minimum investment return and payment of expenses for maintenance and exempt use of property held qualifying distributions (PLR 202024014).

3. Foundation's proposed grants to public entities to offset difference between purchase of gasoline and diesel vehicles and higher cost of electric vehicles ruled qualifying distributions because of public health and environmental benefits (PLR 202034001).

### **D. Excess Business Holdings**

A private foundation may not have excess business holdings in a business enterprise, unless it is a functionally related business (IRC § 4943).

1. [no recent developments].

### **E. Jeopardy Investments**

A private foundation may not engage in speculative (jeopardizing) investments; program-related investments are not covered by these rules (IRC § 4944).

1. [no recent developments].

### **F. Taxable Expenditures**

A private foundation may not expend funds for lobbying (with exceptions), for political activity (with exceptions), for grants to individuals (without prior IRS program approval), or for

noncharitable purposes (taxable expenditures) (IRC § 4945).

1. Awards of scholarships, fellowships, and the like held to comply with IRC § 4945(g)(1) and thus not constitute taxable expenditures (PLRs 202001026, 202002017-202002020, 202004016-202004021, 202005024, 202005026, 202006013, 202006014, 202007020, 202009029, 202009031, 202009032, 202010005, 202010006, 202010008, 202011009-202011011, 202011013, 202011014, 202014021, 202015029-202015033, 202016030, 202016031, 202017029, 202017033, 202017038, 202017039, 202018007, 202019030, 202019031, 202020023, 202020025, 202021022, 202021022, 202023009, 202023010, 202026003, 202026004, 202032006, 202034006, 202034009).

2. One of these approved individual grant programs provides financial support to allow individuals employed by charitable organizations to go on sabbaticals (PLR 201945030).

3. IRS approved employer-related grant program procedures (PLRs 201811018, 201826016).

4. Private foundation's grant to fund religious journalism project ruled to constitute qualifying distribution and not be taxable expenditure (PLR 201851003).

5. Private foundation's scholarship grants to children and grandchildren of members of association ruled made on objective and nondiscriminatory basis (PLR 201919018).

6. IRS granted abatement request in case where private foundation made scholarship grants without prior IRS approval (PLR 201940013); foundation sought abatement in 2004.

7. Grant from private foundation held to qualify as an unusual grant; grant request was made by third party on behalf of grantee (PLR 201952009).

8. Foundation's proposed grants to public entities to offset difference between purchase of gasoline and diesel vehicles and higher cost of electric vehicles ruled not taxable expenditures because of public health and environmental benefits (PLR 202034001).

#### **G. Termination of Status**

By a variety of means, a private foundation may terminate its private foundation status (IRC § 507).

1. Transfers of private foundation's assets to new private foundations held to qualify under IRC § 507(b)(2) (PLR 202017026).

#### **H. Tax on Net Investment Income**

1. Taxpayer Certainty and Disaster Relief Act of 2019 changed tax to single rate of 1.39 percent, effective for tax years beginning after date of enactment (Act § 206).

A private foundation must pay a 2 percent tax on its net investment income (IRC § 4940).

**I. Tax Paid by Foreign Private Foundations**

1. [no recent developments]

**J. Disqualified Persons** [no recent developments]

Insiders with respect to private foundations are termed “disqualified persons” (IRC § 4946). They include trustees, directors, officers, key employees, family members, controlled entities, and substantial contributors.

**K. Charitable/Split-Interest Trusts**

1. [no recent developments].

**VI. MATTERS PERTAINING TO UNRELATED BUSINESS**

**A. Unrelated Business Rules in General**

A tax-exempt organization generally must pay tax on net income derived from the conduct of a business that is regularly carried on and that is not substantially related to exempt purposes (IRC §§ 511-514).

1. Interrelationship of commerciality doctrine and unrelated business rules.
2. The following are recent instances where the IRS ruled that a tax-exempt organization may participate in a partnership or limited liability company without incurring any unrelated business income tax: [no recent developments].
3. The following are recent instances where the IRS ruled that an activity is not an unrelated business or otherwise that a transaction will not cause imposition of unrelated business income tax [no recent developments].
4. The following are recent instances where the IRS or court ruled that an activity is an unrelated business or otherwise that a transaction will cause imposition of unrelated business income tax [no recent developments].
5. Medical marijuana dispensary cases offer criteria for determining existence of two or more businesses of organization (*Patients Mutual Assistance Collective Corporation v. Commissioner* (Tax Ct., Nov. 29, 2018); *Alternative Health Care Advocates v. Commissioner* (Tax Ct., Dec. 20, 2018)).
6. IRS, on Dec. 10, 2018, issued interim guidance to assist tax-exempt organizations in determining any increase in amount of their unrelated business taxable

income attributable to parking expenses in connection with qualified transportation fringes rules (Notice 2018-99); IRS provided certain exempt organizations waiver of addition to tax for underpayment of estimated income tax payments required to be made on or after Dec. 17, 2018, to extent underpayment results from law changes concerning these fringes (Notice 2018-100).

7. Department of Treasury and IRS, on Dec. 9, 2019, published final regulations interpreting statutory limitation (IRC § 512(a)(3)(E)(i)) on the amount of investment income tax-exempt voluntary employees' beneficiary associations and supplemental unemployment benefit trusts may treat as nontaxable exempt function income in any year, with result being that limit applies to total amount of investment income earned during year (T.D. 9886).

8. Taxpayer Certainty and Disaster Relief Act of 2019 retroactively repealed fringe benefit/unrelated business income provision (IRC § 512(a)(7)) (Act § 302).

9. Bucketing rule proposed regulations (see III A):

a. North American Industry Classification System codes is method used for determining whether tax-exempt organization has more than one unrelated business; use of only first two digits of six-digit codes; regulations do not include any principles of law on point.

b. Investment activities generally treated as separate unrelated business (most forms of passive unrelated business income are excluded from tax); these activities are confined to qualified partnership interests, S corporation interests, and debt-financed property interests.

c. Partnership interest is *qualified* if exempt organization holds direct interest in partnership that meets de minimis test or control test.

d. Deemed payment arrangements involving controlled organizations and provision of insurance by controlled foreign corporations are separate businesses.

e. Impact on public support tests.

f. Application of charitable deduction rules and specific deduction rules.

g. Allocation of deductions.

## **B. Exceptions to Unrelated Business Taxation**

A tax-exempt organization generally does not have to pay the unrelated business income tax on dividends, royalties, rents from real property, interest, capital gain, and certain other income.
---

1. Instances where IRS or court ruled that income was exempt from unrelated income taxation because it constituted *royalties* (IRC § 512(b)(2)) [no recent developments].



2. For 2020, limitation regarding exemption of annual dues required to be paid by member to an agricultural or horticultural organization (IRC § 512(d)(1)) is \$171 (Rev. Proc. 2019-44).

3. For 2020, exception from unrelated business taxation involving low-cost articles is applicable with respect to articles with a cost of no more than \$11.20 (Rev. Proc. 2019-44).

4. Private foundation received favorable ruling as to application to it of rules concerning tax treatment of rent; rent cast as rent from real property (IRC § 512(b)(3)(A)(i)) and thus excludable from unrelated business income (IRC § 512(a)(1)), except to extent attributable to debt-financed property (IRC §§ 512(b)(4), 514); services provided to occupants ruled to be of type not defeating rental income exclusion (Reg. § 1.512(b)-1(c)(5)) (PLR 201849009).

5. Game of standard flash, conducted at bingo sessions, is not itself a bingo game because winners are not determined in presence of all persons placing wagers in the game; game may not be bifurcated so that part of it may be classified as bingo (TAM 202002010).

6. Real estate investment trust's share of parking revenues held to qualify as rents from real property; services to tenants held not disqualifying (PLR 202013006).

7. Law that tax deduction is not allowed for amount that is allocable to tax-exempt income (IRC § 265(a)(1)) does not apply in connection with charitable deduction in unrelated business taxable income context (IRC § 512(b)(10)) because charitable contribution "is not allocable to tax-exempt income, but instead arises from a donor's charitable intent to voluntarily transfer money or property without receiving any benefit in return" (Chief Couns. Adv. Mem. 202027003).

### **C. Unrelated Debt-Financed Income Rules**

Income derived from debt-financed property may be taxable as unrelated business income (IRC § 514).

1. Regulations were proposed, on November 22, 2016, with respect to allocations of items by partnerships that have debt-financed property and have one or more (but not all) qualified tax-exempt organization partners; this proposal would amend existing regulations to facilitate compliance, regarding certain allocations resulting from common business practices, with statutory law; this proposal relates to "fractions rule" (REG-136978-12).

## **VII. MATTERS PERTAINING TO CHARITABLE GIVING**

### **A. Contribution Rules in General**

Income, gift, and estate tax deductions are available for contributors to charitable organizations (IRC §§ 170, 2522, and 2055).

1. IRS or court determined in the following instances that a transfer of money or property qualified for the general federal income, estate, or gift tax charitable contribution deduction [no recent developments].

2. IRS or court determined in the following instances that a transfer of money or property did not qualify for the general federal income, estate, or gift tax charitable contribution deduction:

a. Claimed charitable deduction for gift of land improvements denied because donors did not own the property involved (*Presley v. Commissioner* (Tax Ct., Oct. 15, 2018)), *aff'd*, Tenth Cir. (Oct. 25, 2019)).

b. Estate's charitable contribution deduction had to be reduced, by reason of post-death intrafamily manipulations that caused property of considerably lesser value than that originally bequeathed to pass to private foundation that was established by decedent (*Dieringer v. Commissioner* (9th Cir., Mar. 12, 2019)).

c. Unreimbursed expenses held incurred, in whole or in part, for personal purposes and thus not deductible as charitable gifts; individual's activities not coordinated with charitable organization and thus likewise not deductible (*Oliveri v. Commissioner* (Tax Ct., May 28, 2019)).

d. Payments made to ministers by members of church congregation held not *gifts* (*Brown v. Commissioner* (Tax Ct., June 10, 2019); *Felton v. Commissioner* (Tax Ct., Oct. 10, 2018)).

3. Rulings as to applicability of special rules concerning deductibility of certain publicly traded stock to private foundations (*qualified appreciated stock*) [no recent developments].

4. IRS issued rules as to inflation-adjusted amounts for 2020 (Rev. Proc. 2019-44): Insubstantial benefit limitations for contributions associated with charitable fundraising campaigns (IRC § 513(h)):

a. Low-cost article (\$11.20).

b. Guidelines using \$5, \$25, and \$50 limits (\$11.20, \$56, and \$112).

5. IRS, on June 11, 2018, issued notice that it will be defining concept of *charitable gift* in relation to emerging state laws attempting state-and-local-tax limitation (\$10,000) workaround (Notice 2018-54); proposed regulations issued on August 13, 2018, applying concept of *quid pro quo* generally requiring reduction of charitable deduction by amount of SALT credit, with 15 percent de minimis exception (REG-112176-18); final regulations issued on June 11, 2019 (T.D. 9864).

6. Also, on June 11, 2019, Treasury and the IRS issued notice providing a safe harbor for payments made by certain individuals (Notice 2019-12). Under this safe

harbor, an individual who itemizes deductions and makes a payment to a charitable organization in return for a state or local tax credit may treat the portion of the payment that is or will be disallowed as a charitable contribution deduction as a payment of state or local tax for purposes of the deduction cap. This disallowed portion of the payment may be treated as a payment of state or local tax in connection with the cap when and to the extent an individual applies the state or local tax credit to offset the individual's state or local tax liability.

7. U.S. Tax Court, on Sep. 26, 2018, declined to resolve two charitable deduction tax issues by summary judgment, because there are genuine issues of material fact: a matter of anticipatory assignment of income and one of compliance with substantiation and appraisal rules (*Chrem v. Commissioner*).

8. Court held, on January 31, 2019, that charitable contribution of interest in real property was not deductible because it was in form of nondeductible partial interest (*Mann v. United States* (D. Md.)).

9. Appellate court held, on April 29, 2019, that donors of conservation easement are liable for the 40-percent penalty for their gross misstatement of value of the easement (IRC § 6662(h)), even though the initial determination of deficiency included reference to only the 20-percent penalty (IRC § 6662(a)); court held that IRS complied with applicable procedure (IRC § 6751(b)) (which apparently allows for more than one *initial* determination of deficiency (*Roth v. Commissioner* (10th Cir.))).

10. Independent Sector-commissioned report on charitable giving and tax incentive options published on June 5, 2019.

11. Corporation with charitable contribution deduction carryovers ruled required to use year-by-year NOL absorption computation to determine charitable contribution carryover adjustment (IRC § 172(b)(2)) and required to first reduce its current-year charitable contributions by the adjustment (IRC § 170(d)(2)(B)) before reducing its earlier years' charitable contribution carryover (CCAM 201928014).

12. Congressional Research Service issued report, dated September 19, 2019, titled "Tax Issues Relating to Charitable Contributions and Organizations" (R45922).

13. Joint Economic Committee (Republicans) issued report titled "Reforming the Charitable Deduction" (No. 5-19 (Nov. 2019)).

14. Charitable giving in 2019 is estimated to have totaled nearly \$450 billion.

15. Taxpayer Certainty and Disaster Relief Act of 2019 (§ 204) suspended limitations on deductibility of cash gifts by individuals (60 percent) and corporations (10 percent) to public charities for disaster relief efforts.

a. Gift must have been made in 2018 or 2019, or within 60 days after enactment of Act (February 18, 2020).

b. Donor must obtain substantiation of gift, including acknowledgement that it was used, or is to be used, for relief efforts (IRC § 170(f)(8)).

c. Donee may not be supporting organization or sponsoring organization (for establishment or maintenance of donor-advised fund).

18. Trust granted extension of time to make election (Reg. § 1.642(c)-1(b)(1)) to treat contributions made in one year as contributions made in prior year (IRC § 642(c)) (PLR 202001014).

19. Congressional Research Service published “The Charitable Deduction for Individuals: A Brief Legislative History” (R46178 (Jan. 14, 2020)).

20. IRS Office of Chief Counsel compiled synopsis of 121 charitable contribution cases decided between 2012 and April 14, 2020 (CCAM 202020002).

21. Law that tax deduction is not allowed for amount that is allocable to tax-exempt income (IRC § 265(a)(1)) does not apply in connection with charitable deduction in unrelated business taxable income context (IRC § 512(b)(10)) because charitable contribution “is not allocable to tax-exempt income, but instead arises from a donor’s charitable intent to voluntarily transfer money or property without receiving any benefit in return” (Chief Couns. Adv. Mem. 202027003).

22. Treasury Department and IRS, on August 7, 2020, issued package of final regulations, including guidance as to when payments for business purposes to charitable organizations qualify for business expense deduction and application of the quid pro quo principle to donors who receive or expect to receive benefits from third party (T.D. 9907).

23. Tax Court upheld charitable deductions for transfers of real estate, holding that property was not conveyed in exchange for zoning board approvals and that donor had donative intent (*Emanouil v. Commissioner* (Aug. 17, 2020)).

## **B. Developments Concerning Conservation Easements**

1. \$1.8 million charitable deduction for contribution of conservation easement disallowed because transferor of easement, a real estate developer, expected substantial benefit in form of increase in value of surrounding residential lots by reason of use of eased property as park (*Wendell Falls Development, LLC v. Commissioner* (Tax Ct., April 4, 2018); motion for reconsideration denied (Nov. 20, 2018)).

2. Charitable deduction (\$15.2 million) for gift of conservation easement denied because extinguishment provision in the deed does not comply with the extinguishment regulation (Reg. § 1.170A-14(g)(6)(ii)) because it includes factors, such as the value of improvements, that could decrease amount of proceeds donee would receive below the minimum amount that donee is required to receive (*PBBM-Rose Hill, Limited v. Commissioner* (5th Cir., Aug. 14, 2018)).

3. Conservation easement placed on golf course did not give rise to claimed \$10.4 million charitable deduction because gift did not satisfy conservation purpose requirements; area deemed “heavily managed” (*Champions Retreat Golf Founders, LLC v. Commissioner* (Tax Ct., Sep. 10, 2018)); appellate court reversed, holding that charitable deduction is available for contribution of conservation easement over property including private golf course; court concluded easement met two standards for deductibility, despite presence of golf course on property (11th Cir. (May 13, 2020)).

4. Senate Finance Committee Chairman Charles Grassley (R-IA) and Ranking Member Ron Wyden (D-OR), on March 27, 2019, launched a Committee investigation into potential abuse of syndicated conservation transactions, which, according to a Committee press release, “may have allowed some taxpayers to profit from gaming the tax code and deprived the federal government of billions of dollars in revenue.”

5. On March 28, 2019, Reps. Mike Thompson (D-CA) and Mike Kelly (D-PA) announced introduction of Charitable Conservation Easement Program Integrity Act of 2019 (H.R. 1992); proposal is designed to shut down abuses by placing cap on partners’ deductions for conservation contributions made by partnerships, other than family partnerships.

6. IRS, on July 12, 2018, updated data concerning syndicated conservation easement transactions, showing 8:1 average return ratio for top 10 percent of syndications.

7. Tax Court once again ruled, on Dec. 27, 2018, that there is no charitable deduction for gift of easement with moving boundaries, declining to heed Fifth Circuit’s “ease off” message (*Pine Mountain Preserve, LLLP v. Commissioner*).

8. Congressional Research Service, in November 1, 2019, report, updated its analysis of charitable conservation contributions (IN11141).

9. IRS announced, on November 12, 2019, significant increase in enforcement actions in connection with syndicated conservation easement transactions (IR-2019-182).

10. Commissioner of Internal Revenue stated at conference, on November 15, 2019, that IRS is “not going to back down” in going after syndicated conservation easements and “artificial appraisals.”

11. IRS official announced at conference, on November 18, 2019, that IRS is crafting guidance on conservation easement transactions.

12. Federal government, in connection with first of its complaints in conservation easement syndication tax shelter cases, persuaded court to not dismiss case, particularly in relation to the government’s claim of fraud (*United States v. Zak* (N.D. Ga. (December 10, 2019))).

13. Constructive denial clause ruled to not be inconsistent with requirement that restriction on use of real property be granted in perpetuity (CCAM 202002011).

14. Tax Court held that retention by donor of right to build single-family units in certain areas covered by contributed easement caused easement to fail in-perpetuity requirement, so that charitable contribution deduction was precluded (*Carter v. Commissioner* (Feb. 3, 2020)).

15. U.S. Court of Appeals for Sixth Circuit ruled that donor of façade easement is not entitled to charitable contribution deduction for its gift because contribution agreement accords donee 45-day window within which to protect certain changes to façade airspace (April 14, 2020); petition for rehearing filed (June 1, 2020) (*Hoffman Properties II, LP v. Commissioner*).

16. Tax Court held that easement deed violated “protected in perpetuity” requirement (IRC § 170(h)(5)(A), as interpreted by Reg. § 1.170A-14(g)(6)) because donor’s share of potential extinguishment proceeds is insufficient, with formula held inconsistent with regulations (*Coal Property Holdings, LLC v. Commissioner* (Oct. 28, 2019)); *TOT Property Holdings, LLC v. Commissioner* (Nov. 22, 2019)); *Railroad Holdings, LLC v. Commissioner* (Feb. 5, 2020); *Oakbrook Land Holdings, LLC v. Commissioner* (May 12, 2020); *Woodland Property Holdings, LLC v. Commissioner* (May 13, 2020)); *Hewitt v. Commissioner* (June 17, 2020)); *Plateau Holdings, LLC v. Commissioner* (June 23, 2020); *Lumpkin One Five Six, LLC v. Commissioner* (June 23, 2020); *Lumpkin HC, LLC v. Commissioner* (June 23, 2020); *Village at Effingham, LLC v. Commissioner* (July 9, 2020); *Riverside Place, LLC v. Commissioner* (July 9, 2020); *Maple Landing, LLC v. Commissioner* (July 9, 2020); *Englewood Place, LLC v. Commissioner* (July 9, 2020); *Smith Lake, LLC v. Commissioner* (July 13, 2020); *Belair Woods, LLC v. Commissioner* (July 22, 2020); *Cottonwood Place, LLC v. Commissioner* (August 4, 2020); *Red Oak Estates, LLC v. Commissioner* (August 4, 2020)).

17. Tax Court majority held that regulation concerning judicial extinguishment of easement restrictions and appropriate resulting sales proceeds (1) was properly promulgated in accordance with Administrative Procedure Act and (2) is substantively valid pursuant to analysis under *Chevron* tests (*Oakbrook Land Holdings, LLC v. Commissioner* (May 12, 2020); *Lumpkin One Five Six, LLC v. Commissioner* (June 23, 2020)).

18. In valuing conservation easement, court favored donor’s expert’s determination of underlying property’s pre-gift value and split difference between sides’ expert’s analysis of after value (*Johnson v. Commissioner* (June 8, 2020)).

19. Donor’s credible, sincere, and persuasive testimony was major factor in warding off imposition of accuracy-related penalties in conservation easement case (*Hewitt v. Commissioner* (June 17, 2020)).

20. IRS Office of Chief Counsel announced, on June 25, 2020, time-limited settlement offer to certain taxpayers with pending docketed Tax Court cases involving syndicated conservation easement transactions (IR-2020-130); offer reiterated on July \_\_, 2020 (IR-2020-152).

### **C. Planned Giving**

Certain forms of partial-interest giving result in a charitable contribution deduction (e.g., IRC § 170(f)(2)(A)).

1. The IRS issued the following private letter rulings with respect to charitable remainder trusts (IRC § 664):

a. Reformation of trust to correct scrivener’s errors approved [no recent developments].

b. IRS declined to recognize charitable remainder unitrust as tax-exempt charitable organization due to private benefit inherent in payment of income interests (PLR 201935013).

c. IRS’s Office of Chief Counsel concluded that promotion using ostensible charitable remainder annuity trust as basis for position that capital gain on sale of highly appreciated property is permanently eliminated fails to “produce claimed tax results” and should be challenged (CCAM 2020-006).

2. Successful qualified reformations of remainder trusts:

a. After three attempts, trust reformed into qualified remainder trust (PLR 201947007).

3. Unsuccessful qualified reformations of remainder trust [no recent developments].

4. Developments concerning pooled income funds (IRC § 642(c)(5) entities) [no recent developments].

5. Developments concerning charitable lead trusts:

a. Charitable lead annuity trust ruled to terminate on designated termination date, with termination not giving rise to private foundation termination tax (PLR 201930017).

b. Formula to be used in determining income interest term of charitable lead annuity trust ruled permissible, with estate tax charitable deduction available (PLR 201933007).

### **D. Gift Recordkeeping, Substantiation, and Appraisal Rules**

These rules are the subject of IRC § 170(f)(8), (10), and (17)

1. Treasury Department, on July 27, 2018, issued final recordkeeping and substantiation regulations concerning charitable cash and noncash contributions (T.D. 9836), accompanying IRC § 170(f)(8), (11), (13), (16), and (17).

2. Recordkeeping requirements (IRC § 170(f)(17)):

a. Donor denied charitable deduction because of failure to meet recordkeeping requirements (*Simpson v. Commissioner* (summary opinion) (May 2, 2019)).

3. Substantiation requirements (IRC § 170(f)(8)):

a. Donors denied charitable deduction because of defective or nonexistent gift substantiation letter (*Oliveri v. Commissioner* (May 28, 2019); *Simpson v. Commissioner* (summary opinion) (May 2, 2019); *Grainger v. Commissioner* (Tax Ct., July 30, 2018); *Archer v. Commissioner* (Tax Ct., July 16, 2018)); *Ayissi-Etoh v. Commissioner* (July 9, 2018)); *Farolan v. Commissioner* (Tax Ct., May 30, 2018); *Fehr v. Commissioner* (Tax Ct., May 16, 2018); *Moore v. Commissioner* (Tax Ct., April 30, 2018); *Davis v. Commissioner* (Tax Ct., April 24, 2018)); *Presley v. Commissioner* (10th Cir., Oct. 25, 2019); *Brannan Sand & Gravel Co., LLC v. Commissioner* (June 4, 2020))

b. Form of substantiation:

(1) Usually provided by charitable donee by letter.

(2) Substantiation rules may be satisfied by provision in deed (*Big River Development, L.P. v. Commissioner* (Tax Ct., August 28, 2017)); *310 Retail, LLC v. Commissioner* (Tax Ct., Aug. 24, 2017)).

(3) Tax Court held that substantiation rules may be satisfied by provision in conservation easement agreement.

(4) Tax Court held that letter signed by mayor of township constituted requisite substantiation of bargain sale.

4. Appraisal requirements (IRC § 170(f)(11)):

a. Charitable deduction denied for gift of conservation easement because donor did not attach completed appraisal summary to tax return (*Belair Woods, LLC v. Commissioner* (Tax Ct., Sep. 20, 2018)); in deeply divided opinion, court held that letter and summary report inviting donor to conference did not satisfy requirements as to supervisory approval (IRC § 6751(b)(1)), requirements were satisfied with respect to three of penalties, and requirements were not met with respect to fourth penalty (Jan. 6, 2020)).

b. Court, on Jan. 31, 2019, held that contribution of personal property was not deductible because of faulty appraisals (*Mann v. United States* (D. Md.)).

c. Case where donor's omission of cost basis amount on Form 8283 caused loss of \$33 million charitable deduction affirmed (*Blau v. Commissioner* (D.D.C., May 24, 2019)).



d. IRS updated its website pages regarding virtual currency transactions to state that substantiation and appraisal requirements apply in connection with charitable gifts of such currency.

e. Charitable deduction (\$297,000) denied because appraisal summary attached to return was incomplete (*Loube v. Commissioner* (Tax Ct. Jan. 8, 2020)).

f. Court found preparation of appraisal summary “slipshod” and rejected valuation report prepared by lawyer, where it was not clear whether sales prices involved willing buyers and sellers or were “simply a way to resolve litigation disputes” (*Brannan Sand & Gravel Co., LLC v. Commissioner* (Tax Ct. June 4, 2020)).

g. In valuing conservation easement, court favored donor’s expert’s determination of underlying property’s pre-gift value and split difference between sides’ experts’ analysis of after value (*Johnson v. Commissioner* (Tax Ct. June 8, 2020)).

h. Court invoked substantial compliance doctrine to uphold charitable deductions, where flaws in appraisals were that they did not state they were prepared for tax purposes and did not state expected date of contribution (*Emanouil v. Commissioner* (Tax Ct. Aug. 17, 2020)).

## **VIII. FUNDRAISING REGULATION**

### **A. State Regulation**

1. State charitable solicitation act developments.
2. Court opinions [no recent developments].

### **B. Federal Regulation**

1. Application of exceptions from unrelated business rules (e.g., activity not regularly carried on, volunteer exception, donated goods exception).
2. Ostensible fundraising operations held commercial [no recent developments].
3. Recordkeeping, substantiation, and appraisal rules (VI C).
4. Court ruled that organization must lose its tax exemption because it undertook commercial coventure promotion (*Giving Hearts, Inc. v. Commissioner* (Tax Ct., July 29, 2019)).
5. Organization had tax exemption as charitable organization revoked, because its fundraising activity was considered to be primarily social in nature; IRS did not reveal percentage of grantmaking nor did it apply commensurate test (PLR 202001018).

## IX. STILL OTHER DEVELOPMENTS

There are a variety of federal law developments, other than in the tax law, of direct and indirect relevance to tax-exempt organizations.

### A. Final and Proposed Treasury/IRS Regulations, Rules, etc.

1. Inflation adjustments for 2019 (Rev. Proc. 2018-57):
  - a. Annual exclusion for gifts is \$15,000.
2. IRS issued draft of instructions to accompany Form 4720.

### B. Court Opinions

1. United States Supreme Court:
  - a. Court, on Jan. 21, 2020, declined to hear case, on expedited basis, concerning ongoing constitutionality of Patient Protection and Affordable Care Act now that shared-responsibility payment (a tax) is zero (*Texas et al. v. United States*).
  - b. Court, on June 22, 2020, denied petition for writ of certiorari in *Altera Corporation & Subsidiaries v. Commissioner* (see below).
  - c. Court, on June 30, 2020, ruled that states, once having implemented program providing financial assistance (such as scholarships) for access to private schools, cannot exclude religious schools from participation in program (pursuant to so-called Blaine amendments); state supreme court ruling striking down program held violation of Free Exercise Clause (*Espinoza v. Montana Department of Revenue*).
2. United States Courts of Appeals:
  - a. Court, on March 15, 2019, held that rental allowance exclusion for ministers (IRC § 107(2)) is not unconstitutional under Establishment Clause because it has secular purposes and meets historical significance test (*Gaylor v. Mnuchin* (7th Cir.)).
  - b. Court, on May 6, 2019, affirmed convictions of individual for tax evasion, wire fraud, money laundering, and false statements in case where this individual caused another individual to transfer all lottery winnings into account of tax-exempt organization, which were used for second individual's private gain (*United States v. Pearson* (8th Cir.)).
  - c. Court, on May 22, 2019, held that a lawsuit challenging the legality of an IRS notice concerning a listed transaction must be dismissed, in that court does

not have subject matter jurisdiction because lawsuit is barred by Anti-Injunction Act (*CIC Services, LLC v. United States* (6th Cir.)).

m. Court, on Dec. 18, 2019, held that individual mandate in Patient Protection and Affordable Care Act, as modified by Tax Cuts and Jobs Act (elimination of shared responsibility payment), is unconstitutional; case remanded to district court for determination as to provisions that are inseverable from ACA's remaining provisions; rehearing denied (8-6) on Jan. 29, 2020 (*Texas et al. v. United States* (6th Cir.)).

n. Court, on Dec. 30, 2019, held that nonprofit organization lacks standing to sue Treasury Department and Office of Controller of Currency in connection with these agencies' involvement in tax-credit program designed to advance availability of fair housing (*The Inclusive Communities Project, Inc. v. Department of Treasury and OCC* (5th Cir.)).

o. Court, on Jan. 10, 2020, affirmed judgment of district court, which sentenced former member of House to prison for various offenses, after he argued lower court erred by issuing problematic jury instructions, including definition of IRC § 501(c)(3) and 501(c)(4) organizations (*United States v. Stockman* (5th Cir.)).

p. Court, on Aug. 21, 2020, affirmed decision of district court holding that Federal Election Commission rule requiring disclosure of contributions for independent expenditures is invalid because it is too narrow in relation to authorizing statute (*Citizens for Responsibility and Ethics in Washington v. Federal Election Commission* (D.C. Cir.))

### 3. United States District Courts:

a. Court, on Nov. 7, 2019, held that tax-exempt organization functioned as individual's alter ego, enabling organization's corporate veil to be pierced so as to impute entity's income to individual for purpose of imposition of tax shelter penalty (IRC § 6700(a)) (*Tarpey v. United States*).

b. Court, on Nov. 13, 2019, held that lawsuit, claiming organization does not qualify for tax exemption, had to be dismissed because it is not court that can issue declaratory judgment on that issue (IRC § 7428) (*Allen v. Beirich et al.* (D. Md.)). (Note: This type of lawsuit is not allowable even in those courts because pleading may be filed there only by organization the exemption of which is at issue.)

c. Court, on Jan. 10, 2020, held that organization is unable to pursue its lawsuit that exemption from filing annual information returns accorded certain religious organizations is unconstitutional as violation of Establishment Clause; court held it lacks jurisdiction because claims are barred by Anti-Injunction Act and Declaratory Judgment Act, and organization lacks standing (*NonBelief Relief, Inc. v. Rettig*).

4. United States Tax Court:

a. Court, on July 7, 2020, denied business expense deductions to couple seeking to raise enrollment and money for exempt school because their efforts were “nonprofit endeavor[s]” (*Simpson v. Commissioner*).

5. United States Court of Federal Claims

a. [no recent developments].

6. United States Bankruptcy Courts

a. Court, on Aug. 23, 2019, refused to allow distribution of assets of public charity to other similar-purpose entities because Chapter 7 procedures not followed (*In re National Emergency Medicine Association* (U.S. Bankruptcy Ct., D.C.)).

b. Court, on Mar. 25, 2020, held that custodial IRA, although it is treated as tax-exempt entity (IRC § 408(h)), is not separate legal entity (*Lakeview Devel. Corp. v. UBS Financial Services, Inc.* (U.S. Bankruptcy Ct, D. Col.)).

**C. Enacted and Proposed Legislation**

1 Bill introduced on March 14, 2019, would amend definition of qualified amateur sports organization (IRC § 501(j)) by eliminating tax exemption for entities that substantially restrict athlete’s use or profit from his or her name, image, or likeness; measure, the Student-Athlete Equity Act, targets NCAA rule.

2 Sen. Ron Wyden (D-OR), on June 5, 2019, introduced legislation to prevent donors from claiming tax deductions for gifts to colleges and universities made before or during time family member is enrolled in institutions (proposed College Admissions Fairness Act (S. 1732)).

**D. Other Developments**

1. Joint Committee on Taxation staff, on Dec. 1, 2019, issued estimates of tax expenditures for fiscal years 2019-2023 (JCX-55-19); charitable contribution deduction is ninth largest tax expenditure (\$248.3 billion).

This communication is only for general informational purposes; it is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied on by a recipient in making decisions of a legal nature with respect to the topics and issues referenced herein. Each recipient is encouraged to consult independent legal counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create a lawyer-client relationship between Bruce R. Hopkins Law Firm, LLC, Bruce R. Hopkins, and a recipient.

**CIRCULAR 230 DISCLOSURE:** To comply with Treasury Department regulations, this is to inform you that any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties that may be imposed under the Internal Revenue Code or other applicable tax law or (2) promoting, marketing, or recommending to another party any transaction, arrangement, or other matter.