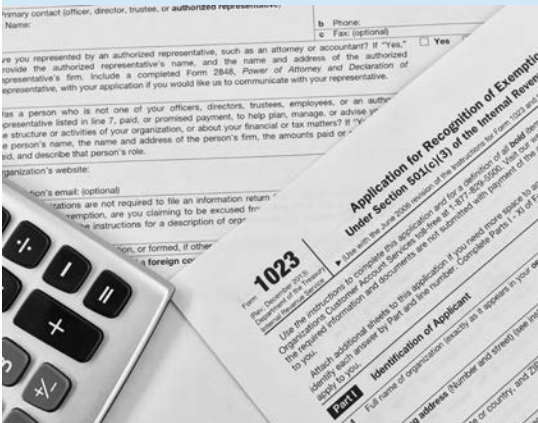


Oregon
State
Bar

CLE
Seminars

Best Practices for Completing IRS Form 1023: Recognition for Exemption as a 501(c)(3) Nonprofit Organization



*Cosponsored by the
Nonprofit Organizations Law Section*

**Friday, September 29, 2017
Noon–1:30 p.m.**

1.5 General CLE or Practical Skills credits

**BEST PRACTICES FOR COMPLETING IRS FORM 1023: RECOGNITION
FOR EXEMPTION AS A 501(C)(3) NONPROFIT ORGANIZATION**

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SCHEDULE

Presented by *Cynthia Cumfer, Portland*

11:30 Registration

11:45 Nonprofit Organizations Law Section Annual Meeting

Noon Filling Out Form 1023

- ◆ Practical tips for your nonprofit client
- ◆ Common problems with Form 1023
- ◆ Advising clients about Form 1023-EZ

1:30 Adjourn

FACULTY

Cynthia Cumfer, Portland. Ms. Cumfer is a retired attorney who provided legal services for nonprofit organizations for almost 38 years. She initiated and taught Nonprofit Law at Lewis and Clark Northwestern School of Law, the first law school in Oregon to offer the course. She has offered workshops to thousands of nonprofit organizations and to the attorneys, accountants, funders, and consultants who advise them. She is the coauthor of *The Oregon Nonprofit Corporation Handbook*, now in its fifth edition, an 850-page resource widely used by attorneys, accountants, and the Oregon nonprofit community. She was awarded the Oregon State Bar's Membership Service Award in 1996 and the Oregon State Bar Nonprofit Law Section's inaugural Award of Merit in 2016. She was profiled in the *Oregon State Bar Bulletin* in June 2017. Ms. Cumfer also has a Ph.D. in History from UCLA, taught a course, "The History of Nonprofit Organizations in the United States," at Reed College, and has given several keynote speeches on the history and importance of nonprofit organizations in the United States.

FILLING OUT THE FORM 1023

A Workshop for the Nonprofit Organizations Law Section
of the Oregon State Bar

Date: September 29, 2017

Cindy Cumfer, Attorney at Law, Retired

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GOALS

- Easily a day-long workshop.
- Over lunch, goal is:
 - to provide useful Information about filling out the Form 1023, including how to tell a story
 - to explore how to bridge disconnects between many nonprofit participants (your clients) and the law
 - to identify problem areas and solutions
 - to answer your questions and take your comments, so please send them in
 - all while digesting your meal.

OVERVIEW

- Understanding the Nonprofit Sector: what you should know about your nonprofit clients
- Form 1023
- Common Problems
- Form 1023-EZ

What you have: slides, Form 1023, ONCH Appendices (see Chapters 5-9 for Form 1023 resources)

[ONCH means *Oregon Nonprofit Corporation Handbook*, by Cindy Cumfer and Kay Sohl (5th ed., 2012): see last slide for information on how to get it or chapters from it]

UNDERSTANDING NONPROFITS: THE PUBLIC SECTORS

- Nonprofits are one of three public sectors: government, nonprofit, business
- The nonprofit sector is very diverse
- Very little understanding of the nature and differences of the nonprofit sector by clients and lawyers or of the implications of these differences

GOVERNMENT AND BUSINESS

- Government
 - Purpose: to regulate affairs of society
 - Compulsory
- Business
 - Purpose: to make a profit for “owners”
 - Noncompulsory

THE NONPROFIT SECTOR

- “Voluntary Associations”=noncompulsory
- Legal definition: not organized for “profit”—i.e., not to distribute profits to “owners”
- Purpose: people work together for some purpose that encompasses more than self-interest (economic profit)
- Diverse purposes: Oregon law categorizes as public benefit, religious, and mutual benefit
- Size: Some Oregon nonprofits are very large (foundations, hospitals, colleges, etc.), but 70% have budgets of less than \$100,000

LEGAL MODEL AND NONPROFIT REALITY

- Legal Model (based on for-profit corporate model)
 - Board runs organization
 - ED (if there is one) answers to board
 - Conflicts of interest and self-dealing are a big concern
- Reality for Most Smaller Nonprofits (70% or more)
 - Voluntary associations (not businesses) with one or small group of founders who have ideas and passion
 - Little money and income stream
 - Rely on volunteers to do work
 - Founders often want to run it and (often) to get paid to pursue their passion
 - Too much separation of founders from decision-making and operations kills passion and often the organization

CONSEQUENCES OF DIFFERENCES FOR NONPROFITS

- Nonprofit board constraints
 - Unpaid
 - Shorter board terms:
 - little board institutional memory
 - board education and info about org is lost
 - Wide variety of volunteer board personnel, abilities and familiarity with board roles
- Confusion about distinction between business and nonprofits
 - In closely held companies, partners/shareholders on boards often take salaries and other perks; this is a conflict of interest for founders sitting on nonprofit boards
 - Some in new nonprofits believe “nonprofit” means the organization cannot charge fees or “make money”
- Role of community norms vs. legal rules
 - Trust in founders vs. checks on power
 - Buy “local” over better outside pricing
 - Give to needy community members outside mission

NONPROFITS AND §501(c)

- **Audience: what have you noticed about areas of common client confusion/ignorance?**
- **Areas of Client Confusion:**
 - What does nonprofit mean? Can nonprofits make a “profit” by producing/selling goods and services?
 - Nonprofit (state status) is not the same as being tax-exempt (federal or state exemptions)
 - Many categories of federal tax exempt organizations
 - What (c)(3) tax exemption means:
 - generally no payment of income tax if related to exempt purpose or meets other exceptions
 - for most c(3)s (not those testing for public safety) and a few other exempt orgs (ONCH, Chapter 5, p. 110): charitable deduction
 - a (c)(3) may attract funding from foundations and individual donors

NONPROFITS AND 501(c)(3)

- **Areas of Client Ignorance:**
 - Explain meaning of nonprofit corporate status and IRS exemption to founders
 - Make sure your client understands that incorporation, DOJ registration, and the Form 1023 or 1023-EZ are not just paperwork it needs to file but it has real-life implications
 - Explain the compliance requirements for all this. Talk about “partly public money.”
 - Brainstorm with your client about how this info can be passed on.

§501(c)(3) ORGANIZATIONS

- Tip: Start planning with your client about exempt status issues **before** you do Articles, bylaws, conflicts policy, minutes for the first Board meeting, or hiring/payments to insiders.
- Your client must meet the requirements to be (c)(3):
 - organized (Articles of Incorporation or association and bylaws: see IRS Publication 557 (2017), p. 22 for the IRS language in the Articles) and
 - operated (check Articles and bylaws) for charitable, educational, religious, etc. purposes
- Limited lobbying and no political activity
- No inurement or insubstantial private benefit
- Two categories of c(3)s: private foundations and public charities

(See ONCH, Chapter 5 and IRS Publication 557)

FORM 1023: GENERAL TIPS

- Law school conditions us to think that as lawyers we are to use our legal skills to fill out Form 1023. True, but you are doing more: **you are telling a story.**
- The typical IRS agent spends about 10 minutes on a Form 1023. Your goal, if possible and truthful, is to draft the application so that the agent can read your story about who your client is and what it plans to do and easily see why your client is exempt. **Think like an agent.** If your client has potential issues, clearly and succinctly explain and document in a manner that allows the agent to approve the application.
- Be sure your client's Articles contain the language the IRS requires. (IRS Publication 557, p. 22) and that the bylaws are compliant.
- Be sure your application as a whole (your story) is consistent.
 - For example, don't say in Part V that you have no compensated directors but show you do in Part IX, line 17.
- Be sure you include all the material the IRS requests.

FORM 1023: MORE GENERAL TIPS

- Give your client as much wiggle room as possible (consistent with exempt purposes and activities) throughout the form. New nonprofits often don't know what direction their programs will take until they have a better picture of their funding and who might be interested in volunteering. Your nonprofit's exemption is limited to what it tells the IRS in the form.
- Don't volunteer information the IRS does not request.
 - For example: if you haven't completed a tax year, don't fill out Part IX.B.
 - Another example: keep your answers to Part IV succinct. You don't have to persuade the IRS that your org is wonderful or will be successful, just that it qualifies. The IRS will not make a donation, no matter how great your org is.
- Advise your client about filing the Form 990N while waiting.

AUDIENCE: OTHER TIPS?

For more detailed information on filling out Form 1023, see Chapter 6 of ONCH.

FORM 1023: Part I

- 5. Annual accounting period
- 6. Questions come to authorized rep: generally this should be you if you are the attorney
- 7. Get yourself authorized by IRS
- 9. IRS agent may review the website. You should review and make needed corrections before submission. Be sure that the website is consistent with the application, especially Part IV.
- 10. Many orgs are so small that they don't need to file these returns. If so, advise your client that it must file an electronic Form 990N. Mention in the application that the organization is aware of this.
- 11. If incorporated more than 27 months ago, warn client that c(3) exemption may not be retroactive to formation.

FORM 1023: Part II

- 1. The Oregon state stamp on the online Articles suffices for the certification.
- 3. An unincorporated associations can be exempt, but if it later incorporates, it must reapply for exemption. ALERT: Warn your client! It may choose to incorporate now to avoid this ugly problem.
- 5. Review the bylaws, especially the purpose clause, before you file.

FORM 1023: Part III

- 1 and 2. The Articles should reflect exactly the language the IRS wants (though you may add more). (See IRS Publication 557, p. 22) Put this info in or amend the Articles before filing to comply.

FORM 1023: Part IV

Cynthia Cumfer, Attorney at Law (Ret.)

- This is the heart of the form and where you present your client's story.
- Consider starting with a general background statement (generally one brief paragraph) that situates the IRS agent who has about 10 minutes. Generally, avoid explanations that focus on a founder. Explain any special issues briefly and reassuringly.
- Organize the narrative around exempt purpose activities, not all activities (e.g., not about how the org plans to raise money or how the board was recruited).
- ALERT: Clients often do not think in terms of exempt purposes, but what they plan to do to make the organization operational, such as fundraising and board development. Your job is to listen, question, and translate. Ferret out and describe generally the exempt purpose activities, past, present and planned, for this question. Use the other information for later questions on those topics.
- Past, present, and planned activities: for new organizations
 - For example, NP's purpose is to __. NP plans to carry out this purpose with the following programs: (1) __; (2) __; etc.

FORM 1023: Part V

Cynthia Cumfer, Attorney at Law (Ret.)

- On "planned activities": Talk carefully with your client to distinguish between visionary ideas that are not yet funded and actual plans to pay individuals and engage in transactions listed in these sections.
- On conflicts of interest:
- ALERT: This is an area where you often need to "translate" for your clients in the nonprofit sector who often do not instinctively understand the need for IRS conflicts rules and whose planned practices may trigger these rules.
- Develop a Conflicts Policy that meets the IRS rules (as well as Oregon state law and any funder or other applicable regulations about conflicts) and will work for your client.
- ALERT: Beware of the IRS sample conflicts policy. It does not satisfy Oregon nonprofit law nor, in cases, its own regulations.

FORM 1023: Part V

- 1a. “Proposed compensation” does not mean what the client would like to pay if only it had money. Talk to the client, but this is usually highly speculative.
- If your nonprofit does pay or has realistic plans to pay its officers, directors or trustees for any reason, it must be disclosed. Be sure your client follows its Conflicts Policy in setting payment and explain this and the reasonableness of compensation.
- 1b. Explain the reasonableness of any compensation for employees you list.

FORM 1023: Part V

- 2 and 3. “Planned relationships, transactions, or agreements” does not mean what the organization would do if it had funds that it does not have or has no firm commitment to receive.
- Read the instructions carefully to understand what disclosures you must make and what you can avoid.
- 4 and 5. Generally, you should work with your client so that you can answer all these questions “yes.” A good Conflicts policy should handle this.

FORM 1023 Part V

- 6. Non-fixed payments, while possible, are frowned on by the IRS. Get familiar with these rules if your client insists on this.
- ALERT: Talk to business-oriented clients about why bonuses and incentives tied to funds raised are scrutinized in the nonprofit world.
- 7-9. These are other potential conflicts areas scrutinized by the IRS. Be sure your client follows the IRS conflicts rules and document the reasonableness of any of these transactions to the IRS.

FORM 1023: Part VI

- Generally, member benefits should not exceed membership dues.
- Vague as to what “planned activities” means.
- Generally, individuals to whom you provide goods, services or funds must be part of a charitable class.
- Your client generally cannot provide goods, services or funds to a specific individual (e.g., a particular child in the community with special medical needs or scholarship funds), unless some special criteria are met.

FORM 1023: Part VII

- 1. The IRS generally does not treat as a successor organization an organization that operated as an unincorporated nonprofit and then incorporated. Explain this in Part IV so that it is clear that your org was not a successor to **another** organization.
- 2. If your organization does not meet the criteria in Schedule E, Questions 1-4, the IRS will not backdate its exemption to the date of your org's formation. Schedule E, Question 8 allows you to apply for 501(c)(4) status for the earlier period, but donations to the organization during that period were not deductible.
- 3. One possible additional exception is for organizations that got a (c)(3) exemption as an unincorporated association and later incorporated but did not know that they needed to reapply. Sometimes, the IRS shows mercy.

FORM 1023: Part VIII

- Part VIII inquires about a number of specific activities of interest to the IRS.
- 4. Generally, answer this very briefly. It's likely that this is another area where your client has grandiose expectations. Unless the client really does have plans they will execute, a one-sentence answer will often suffice. Possible "hot button" exceptions are vehicle, etc. donations (which have special rules) and receiving donations from another organization's website (does the other org keep some of the money?)
- 4d is problematic since many orgs have a website that goes to the entire planet and has a Donate Now button. Let your client know about potential charitable solicitation statutes in Oregon and other jurisdictions.

FORM 1023: Part VIII

- 10. If your client has or will develop intellectual property rights (e.g., in educational materials), the easy answer for the IRS is that the (c)(3) will retain all interest in those rights. Any other answer will need explanation.
- 12-14. Special rules apply to U.S. nonprofits doing work outside the U.S. The IRS has no jurisdiction outside the U.S. and needs reassurance that your client spends its funds properly and for exempt purposes. You'll need to advise your client on these rules and develop some bylaws provisions and policies to satisfy the IRS that U.S. tax-exempt dollars are being spent properly.

FORM 1023: Part IX

Part A: Statement of Revenue and Expenses

- You must accurately fill out any prior tax years.
- Uncompleted current year and future year income and expenses are always guesses. **Many filers spend way too much time on Part IX.** No one, especially nonprofits, can forecast their economic future. I generally told clients not to spend more than 10-15 minutes predicting the future. Use general rounded figures that will realistically put the IRS in the ballpark of what you are guessing now. The IRS generally is more interested in which categories you are filling in (that is, where you are allocating resources and expenditures), not the specific numbers.

FORM 1023: Part IX

Part A: Statement of Revenue and Expenses

- Be sure that your budget supports what you said in the rest of the application. Line 23 includes program expenses (other than salaries, rent, etc.) and generally should reflect the programs you listed in Part IV.
- Entries on some lines (like lines 3, 4, 16, and 17) can signal special problems or need to be cross-checked with info you provided elsewhere in the application.

FORM 1023: Part IX

Part B. Balance Sheet

- If you haven't completed a tax year, you don't need to fill this out.
- Often clients fill this out. If the client has been in operation less than three prior years, the Balance Sheet should correspond with the Financial Data. Have your client get accounting help if it needs it.

FORM 1023: Part X

- **This section has nothing to do with whether or not your organization is exempt.** Once the IRS has decided your organization is exempt, it uses this section to determine whether your (c)(3) organization is a public charity or a private foundation.
- 1-4. Private Foundations. Generally, private foundations are (c)(3)s that generally are funded by and controlled by one or a small number of private individuals or entities (like a family foundation) and so are subject to special scrutiny and rules. (See ONCH, Chapter 5, pp. 99-101 for a general description of private foundations and Hill and Mancino, *Taxation of Exempt Organizations*, Chapters 8-12 for more guidance.)

FORM 1023: PART X

- The Public Charity Status is complicated. See Chapter 5, pp. 99-107 of the ONCH for a general explanation of public charities and Chapter 7 for a more mind-numbing description of the organizations listed in Part X, 5g and h. See Hill and Mancino, *Taxation of Exempt Organizations*, Chapters 8-12 for more guidance. You need to understand the broad parameters of this to help clients check the correct box.
- Many organizations will qualify under both 5g and h. In these cases, the IRS will give the org a 5g classification, which is generally the more favorable of the two.
- Line 6a. Ignore this section and do not have your client sign the box below it. The IRS no longer issues Advance Rulings.

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FORM 1023: PART X

- Line 6b. If your organization has been in existence long enough to obtain a definitive ruling about its public charity classification (NOT its exemption), enter the information requested here. You or an accountant should check this information to be sure that the organization is meeting the public charity test.
- 7. The unusual grant exception is complicated. There is a brief description in the ONCH on page 157. If you read that and think your client may have unusual grants, your client probably needs an accountant's help to understand how this impacts its public charity classification and how it might be ameliorated.

Cynthia Cumfer, Attorney at Law (Ret.)

FINAL FORM 1023 CHECK

- Upon completion, review the application for consistency.
- Pay particular attention to Part IV and the financial statements to be sure **all information tells the same story.**

Cynthia Cumfer, Attorney at Law (Ret.)

FORM 1023: SCHEDULES

- Not enough time today to cover these but any questions?
- Be familiar with them so you know when you have to file them

Cynthia Cumfer, Attorney at Law (Ret.)

FORM 1023: Part XI and CHECKLIST

- Pay the fee as stated!
- Follow the order of the Checklist. Be sure to attach any of the Schedules that apply.

Cynthia Cumfer, Attorney at Law (Ret.)

COMMON PROBLEMS WITH FORM 1023

- Too much time on budgets
- Conflicts questions from IRS
- Use of buzz words that don't sound exempt, like "business," "political" and "advocacy." **Audience: other words?**
- Don't unnecessarily limit your client.
- **Audience: other common problems?**

Cynthia Cumfer, Attorney at Law (Ret.)

FORM 1023-EZ: SIMPLIFIED PROCESS

- Fee is \$275, not \$800
- Average processing time: 14 days vs. 97 days for the Form 1023
- ALERT: All exemption rules are the same as those for Form 1023 filers. Work with your client to ensure that it does qualify and will be operating in an exempt manner.
- IRS has switched agents from processing Form 1023s to correspondence audits of (c)(3)s that filed Form 1023-EZ
- Read carefully IRS Instructions for Form 1023-EZ (Rev. Jan. 2017) before you advise clients

FORM 1023-EZ: WHO CAN FILE

- Gross receipts less than \$50,000 during 3 years looking back and forward
- Assets not more than \$250,000
- Not a church, school, hospital, credit counselling agency, private operating foundation or certain other organizations
- Small orgs that lost tax exemption because of failure to file the Form 990-N if Form 1023-EZ is filed within 15 months of revocation

(This is a quick summary. Read Instructions for Form 1023-EZ for more exciting details!)

FORM 1023-EZ: WHAT FILERS SHOULD KNOW

- Electronic only. I always had the client file. **Audience, what about you?**
- Articles and bylaws must be in compliance, even though they are not filed
- Help client pick out Part II, Question 1 NTEE code that reflects exempt activity
- Parts III and IV assumes that the client understands the meaning of each of these very technical terms and concepts.
- **ALERT: Clients almost never do understand these terms. For them, this is just a box. Walk them through this carefully. If the client submits incorrect information and later the IRS audits the organization, the client may be liable for substantial penalties or loss of exemption when those agents that the IRS freed up for compliance comes after them.**

LEGAL RESOURCES

- Filling Out Form 1023
 - Substantially below cost rules: Rev Rul 71-529; 72-369; Airlie Foundation v. IRS, 283 F Supp2d 58 (DDC 2003)
 - Economic development orgs
 - Lessen burden of gov't: Monterey Public Parking Corp. v. US, 321 F Supp 972 (ND Cal 1970), aff'd on other grounds, 481 F2d 175 (9th cir 1973), though IRS refuses to follow in Rev Rul 78-86
 - Combat community deterioration: 26 CFR 1.501(c)(3)-1(d)(2); Rev Rul 76-147 (high income communities can combat deterioration)

LEGAL RESOURCES

- Trade or Business
 - 26 CFR 1.512; 26 CFR 1.513; Rev Rul 73-105
 - National Collegiate Athletic Ass'n v. Commissioner, 914 F2d 1417 (10th cir 1990)
- Political Activity and Lobbying
 - 26 CFR 1.501(c)(3)-1(c)(3)
 - Rev Ruls 78-248, 80-282, 86-95, 2007-41
 - Alliance for Justice at www.allianceforjustice.org
- See ONCH, Appendix 1 for a 30 page on source material for the entire book (part of your packet from the Bar)

Cynthia Cumfer, Attorney at Law (Ret.)

ORGANIZATIONAL RESOURCES

- IRS (<https://www.irs.gov/charities-non-profits>)
- Oregon Attorney General, Charities Activities Section (www.doj.state.or.us/charigroup/)
- Nonprofit Association of Oregon, (<http://nonprofitoregon.org/>)

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RESOURCES: WRITTEN MATERIALS

- ORS Chapter 65 and IRC, section 501(c)(3)
- Cumfer and Sohl, *The Oregon Nonprofit Corporation Handbook*:
 - book
 - toolkit for new nonprofits and exemption filers (Chapters 3-6) and a Board of Directors toolkit (Chapters 13-17) and
 - individual chapters from the *Handbook* (free or \$5), at <http://nonprofitpublications.net>
- OSB CLEs on Nonprofits
- IRS Publication 557 and Form 1023, on the IRS website, at <https://www.irs.gov/charities-non-profits>
- Hill and Mancino, *Taxation of Exempt Organizations*
- **Audience: Others?**

Appendix 1. Source Material

We have designed this Appendix primarily for attorneys, accountants and similar professionals who want to pursue the issues raised in this book in more depth. We also include some materials written for professionals within nonprofit organizations and for a wider audience. We've labelled these materials "Non-technical materials," and we list them at the beginning of each Chapter or section heading below so that they are easy for non-specialists to locate. Attorneys and accountants may also want to consult these sources. Because this Appendix is designed primarily for attorneys and accountants, we use citation shorthand familiar to them. We don't attempt to explain this to other readers because this kind of research really requires a certain kind of expertise. Please be aware that this Appendix does not attempt to provide a complete listing of legal or accounting sources pertaining to each topic. Obviously, such a project would be its own volume. We point you to a starting place and to sources that support the material in the chapters to which they refer.

General works on nonprofit organizations: Marilyn E. Phelan, *Nonprofit Enterprises: Corporations, Trusts and Associations* (Westlaw, updated Sept. 2011). General works on tax exempt organizations: Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* (2011), with Supplements.

Chapter 1

Should Your Organization Be a Nonprofit Corporation?

For a more detailed discussion of most of the legal structures discussed in this chapter, see *ADVISING OREGON BUSINESSES* Chapters 1-4, 7, 9 (Oregon State Bar: Rev. 2001 and 2007 Supp.). ORS Chapter 62 governs cooperatives. For unincorporated associations and trusts, see *MARILYN E. PHELAN, NONPROFIT ORGANIZATIONS: LAW AND TAXATION*, §1.3-1.9; *Leslie v. Bendl*, 92 Or App 519, 759 P2d 301 (1988), rev den 307 Or 245 (officers and directors of political committee have common law personal liability for acts that they authorize).

Chapter 2

The Structure and Types of Oregon Nonprofit Corporations

General: *Official Commentary to the Revised Oregon Nonprofit Corporation Act*, Special Issue OR L REV (1992).

Statutes: See ORS Chapter 65, especially:

65.301-.369—Board of Directors

65.371-.384—Officers

65.001(28) and (29)—Definitions of member and membership

65.131-.254—Members

65.774-.784—Inspection of records and reports to members

65.001(30), (37), and (39)—Types of nonprofit corporations.

Quasi-governmental nonprofits: Cynthia Cumfer, *Quasi-Governmental Nonprofit Organizations*, in *ADVISING NONPROFIT ORGANIZATIONS*, Chapter 6B (Oregon State Bar: 2002).

Public meeting and records laws. On the question of whether nonprofit corporations may be treated as public bodies for purposes of the public meeting and record laws, see ORS 192.410-.505 (public records inspection) and ORS 192.610-.710 (public meetings law). Prior to 1994, most nonprofits were guided by an Attorney General opinion that stated that “public bodies” subject to the public records and meeting laws did not include private nonprofits and cooperatives, including those set up to carry out public purposes. “Attorney General’s Public Records and Meetings Manual,” 44 AG 239 (September 1984). The Manual did indicate that the public meeting law applied to private groups that furnished advice to public bodies and to nonprofits that the state set up and controlled (for example, local alcoholism planning commissions). The Attorney General has since suggested that a public charter school may be subject to the public records law, depending on the scope of its contract. Opinion #8273, 49 AG 254 (September 13, 2000).

Oregon courts have established a functional equivalent analysis to determine if a nonprofit entity is subject to the rules governing public bodies. The Oregon Supreme Court characterized the Oregon State Bar, a private nonprofit corporation, as a public body subject to the public *records* law. *State ex rel Frohnmayer v. Oregon State Bar*, 307 Or 304, 767 P2d 893 (1989). Five years later, the court held that a private nonprofit organization that was engaged to handle a school district personnel matter did not exercise sufficient governmental functions to be classified as a public body for public records purposes. The court articulated criteria for determining when a private nonprofit became a public body. The Marks court cited with approval cases in other jurisdictions that held that, under a “functional equivalent” analysis, a charter school, an alumni federation of a state university and an incorporated county hospital were public bodies subject to public records laws. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). A year later the Court of Appeals found that the Rockaway Beach fire department, although operating somewhat independently under its own bylaws, obtained most of its funding from the city and was subject to enough city control that it was a city agency and thus was a public body subject to the public records law. *Laine v. City of Rockaway Beach, Oregon*, 134 Or App 655, 896 P2d 1219 (1995).

The public *meetings* law is more complex and applies to meetings of the “governing body” of a “public body.” In *Independent Contractors Research Institute v. Department of Administrative Services*, 207 Or App 78, 139 P3d 995 (2006), the Chief Procurement Officer of the state Department of Administrative Services (DAS) set up a volunteer advisory council to make recommendations to him about making purchases under a particular program. The court held that DAS was a pub-

lic body but that the Superintendent was an individual and not a governing body. Therefore, the meetings were not public meetings. The court noted in dicta that, unlike public meetings laws, the public records laws do not refer to a governing body and so do cover situations where records are kept by individual state officers.

Chapter 3

Setting Up Your Oregon Nonprofit Corporation

General: David E. Atkin, *Setting Up a Nonprofit Organization and Getting the Tax Exemption*, in *ADVISING NONPROFIT ORGANIZATIONS*, Chapter 1 (Oregon State Bar, 2001); Cynthia Cumfer, *Governance and Maintenance of Oregon Nonprofit Organizations*, in *ADVISING NONPROFIT ORGANIZATIONS*, *id.*, Chapter 2; Ross L. Laybourn, Jr., *The Oregon Attorney General's Role*, in *NONPROFITS IN THE HEADLINES*, Chapter 3 (Oregon State Bar, 2004).

Name: ORS 65.094 (choosing name); ORS 65.097 (reserving name); ORS 56.023 and 705.635 (using "bank" or "trust" in name).

Corporations Sole: Rev Rul 2004-27, IRB 2004-12 (IRS warning about fraudulent use of corporations sole); *US v. Gardner*, 2008 WL 906696 (D Ariz 2008) (court issued permanent injunction against Bethel Am Ministries for promoting corporate sole tax scams).

Trademarks: Stuart E. Foster and Timothy L. Jackle, *Sole Proprietors*, *ADVISING OREGON BUSINESSES* §1.25-1.31 (Oregon State Bar: Rev. 2001 and 2007 Supp.).

Articles: ORS 65.047 (provisions); ORS 65.051 (filing); ORS 65.111 (registered office and agent); ORS 65.044 (incorporators); ORS 65.301(3) (limitations of Board powers); ORS 65.241 (quorum), 65.244 (voting), 65.464 (amendments to Bylaws in membership corporations); ORS 65.307(2) (size of Board in membership corporations); ORS 65.324 (removal of Directors for cause in membership corporations); ORS 65.774(5)(b) (members' rights to records).

Bylaws: ORS 65.061.

Organizational meeting: ORS 65.057.

Department of Justice: ORS 128.650-.660; OAR 137-010-0005 through 0055 (regulation of public benefit corporations).

Doing business in another name: ORS Chapter 648.

Postal benefits: United States Postal Service Publication 417 (available on the USPS website at www.usps.com).

Chapter 4

Writing Bylaws

Members: ORS 65.001(28) and (29); ORS 65.131-.254.

Board of Directors: ORS 65.301-.369.

Committees: ORS 65.354.

Officers: ORS 65.371-.384.

Indemnity: ORS 65.387-.414.

Amendments to Bylaws: ORS 65.461-.467.

Email Notice: For a discussion of using electronic means for notice, see the discussion under Chapter 27 in this Appendix.

Discrimination: We are not aware of cases that consider the issue of discrimination in choosing Board members. Courts have considered the issue of discrimination in admitting members in cases brought under the public accommodations laws. *Roberts v. U.S. Jaycees*, 468 US 609 (1984) (Jaycees violated Minnesota's public accommodations laws by refusing to admit women); *New York State Club Assn v. City of New York*, 487 US 1 (1988) (club violated city's public accommodation ordinance by refusing to admit women); *Boy Scouts of America v. Dale*, 530 US 640 (2000) (Boy Scouts did not violate New Jersey's public accommodation law by refusing to allow gay man to be scoutmaster).

Chapter 5

Federal Tax-Exempt Status

Non-technical materials: The IRS has some materials that you may want to consult: Publication 557, *Tax Exempt Status for Your Organization*; Publication 4220, *Applying for 501(c)(3) Tax-Exempt Status*, and Publication 4221-PC, *Compliance Guide for 501(c)(3) Tax-Exempt Organizations*. All are available free on the IRS website at www.irs.gov. You may also want to consult the IRS article, *Life Cycle of a Public Charity*, at <http://www.irs.gov/charities/charitable/article/0,,id=122670,00.html>. Private foundations may want to consult IRS Publication 578, *Tax Information for Private Foundations and Foundation Managers*. After you have obtained your exemption, be sure to check out the IRS advice on staying exempt at www.stayexempt.irs.gov/VirtualWorkshop.aspx.

General: FRANCES R. HILL AND DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapters 2, 3, 4, 7, 32.

Who Qualifies for (c)(3) Status

General: William S. Manne, *Private Inurement*, in *ADVISING NONPROFIT ORGANIZATIONS*, Chapter 6C (Oregon State Bar, 2001).

Statutes: 26 USC §§501(c)(3); 26 USC §504 (excess lobbying by (c)(3) results in denial of (c)(4) status).

Regulations: 26 CFR §1.501(c)(3)-1; §1.504-1 and 504-2.

Cases: *Church of Scientology of California v. Commissioner*, 823 F.2d 1310 (9th cir 1987) (private inurement to founder); *United Cancer Council, Inc. v. Commissioner*, 165 F.3d 1173 (7th cir 1999) (professional fundraising firm was not insider to whom inurement rules apply).

Private Foundations and Public Charities

General: William S. Manne, *Private Foundations*, in *ADVANCED NONPROFIT LAW: BEYOND THE BASICS*, Chapter 2 (Oregon State Bar, 2002).

Statutes: 26 USC §507 (termination of private foundation status); §508 (private foundation rules); §509 (private foundation defined); §§4940-4948 (private foundation taxes); §§4958, 4961-4963 (excess benefits taxes).

Regulations: 26 CFR §§1.507-1 through 1.507-8; §§1.508-1 through 1.508-4; §§1.509(a)-1 through 1.509(e)-1, especially §1.509(a)-3 (what this book calls PSOs and FASOs); 26 CFR §1.509(a)-4 (supporting organizations); §§53.4940-1 through 4948-1; §§53.4958-0 through 4958-8; §§53.4961-1 through 4963-1.

Procedures

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶32.01-32.03 (general).

Statutes: 26 USC §508 (who must file Form 1023 and presumption about private foundation status).

Regulations: 26 CFR §1.508-1 (15 month and retroactivity rules); Rev Rul 67-390, 1967-2 CB 179; Gen Couns Mem 38740 (June 3, 1981) (incorporation of (c)(3) unincorporated association creates a new entity that must file a new Form 1023 for exemption); Rev Proc 92-85, 1992-2 CB 490 (extensions of time for filing Form 1023 to 27 months), modified by Rev Proc 93-28, 1993-2 CB 344.

(c)(4) Social Welfare Organizations

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 13.

Statutes: 26 USC §501(c)(4).

Regulations: 26 CFR §1.501(c)(4)-1.

(c)(5) Labor and Agricultural Organizations

Statute: 26 USC §501(c)(5)-1.

Regulations: 26 CFR §1.501(c)(5)-1.

(c)(6) Business Leagues

General: HILL AND MANCINO, TAXATION OF EXEMPT ORGANIZATIONS, Chapter 14.

Statute: 26 USC §501(c)(6)

Regulations: 26 CFR §1.501(c)(6)-1.

Cases: Guide International Corporation v. United States, 948 F2d 360 (7th cir 1991) (line of business requirement for business leagues); Associated Master Barbers & Beauticians of America v. Commissioner, 69 TC 53 (1977) (insurance is a profit-making business that cannot be conducted as a substantial activity by (c)(6) organizations).

(c)(7), (8) and (10) Social Clubs and Fraternities

General: HILL AND MANCINO, TAXATION OF EXEMPT ORGANIZATIONS, Chapter 16.

Statutes: 26 USC §§501(c)(7), (8), and (10); 26 USC §501(i).

Regulations: 26 CFR §1.501(c)(7)-1 (social clubs); Rev Rul 69-635, 1969-2 CB 126 (members in social club must commingle); Rev Rul 74-30, 1974-1 CB 137 (members of social club must have identity of purpose); 26 CFR §1.501(c)(8)-1 and (c)(10)-1 (fraternities)

Cases: Zeta Beta Tau Fraternity, Inc. v. Commissioner, 87 TC 421 (1986) (college fraternity exempt under (c)(7) is not entitled to more favorable tax treatment granted to fraternal organizations under (c)(10)).

(c)(19) Veterans Organizations

Statutes: 26 USC §501(c)(19)

Regulations: 26 CFR §1.501(c)(19)-1.

General Information for Tax-Exempt Groups:

Group Exemption

General: HILL AND MANCINO, TAXATION OF EXEMPT ORGANIZATIONS, §32.04.

Regulations: 26 CFR §601.201(n)(8); Rev Proc 80-27, 1980-1 CB 677, modified by Rev Proc 96-40, 1996-32 IRB 8.

User Fees

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, §32.07.

Regulations: Rev Proc 2011-8.

Chapter 6

Filling Out the Tax-Exempt Applications

Special Topics

Below cost rules: Rev Rul 71-529, 1071-2 CB 234 (substantially below cost); Rev Rul 72-369, 1972-2 CB 245 (donative element); *IRC 501(c)(3)-Substantially Below Cost* (IRS CPE for FY 1986); *Airlie Foundation v. Internal Revenue Service*, 283 F Supp2d 58 (DDC 2003) (court denied exemption to educational conference center because it operated center in commercial manner and did not provide enough services at substantially below cost).

Gaming: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶22.11[3]; OAR 137-025-0030 (Oregon nonprofit must have its tax-exempt status for at least one year to get bingo license).

Economic Development: An economic development program may be charitable under several rationales. It may lessen the burden of government. *Monterey Public Parking Corp. v. US*, 321 F Supp 972 (ND Cal 1970), *aff'd on other grounds*, 481 F2d 175 (9th cir 1973) (construction of public parking facility lessened burden of government); PLR 199932052 (May 14, 1999) ((c)(3) that promoted model Maglev transportation project that included the construction and operation of a parking garage lessened the burden of government). Economic development may also combat community deterioration. 26 CFR §1.501(c)(3)-1(d)(2) (combatting community deterioration is charitable); Rev Rul 74-587, 1974-2 CB 162 (organization designed to stimulate economic development in low income areas is exempt); Rev Rul 76-147, 1976-1 CB 151 (community improvement organization in high income community combats community deterioration and is exempt). The IRS will challenge economic development programs that permit inurement or improper private benefit. Rev Rul 78-86, 1978-1 CB 151 (IRS refused to follow holding of *Monterey Public Parking Corp. supra*, because of private benefit).

Development and Management of Facilities: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 4 (private benefit).

Joint Ventures: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 29.

Childcare: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶3.03[5].

Intellectual Property: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶3.04 (scientific research).

Contributions: JOSEPH P. TOCE, JR. ET. AL., *TAX ECONOMICS OF CHARITABLE GIVING*, Chapter 25 (2003).

International Nonprofits: FRANCES R. HILL AND DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapters 35 and 36.

Grants and Loans to Other Organizations: Rev Rul 68-489, 1968-2 CB 210 (accountability regulations).

Linked Organizations: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 27.

Schedules

Schedule A (Churches): HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶8.05[1].

Schedule B (Schools): HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶8.05[2].

Schedule C (Hospitals): HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶8.05[3] and [4].

Schedule D (Supporting Organizations): HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶8.07.

Schedule E (Retroactivity): HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶32.02[1][b]-[d].

Schedule F (Homes for Elderly and Low Income): Rev Rul 72-124, 1972-1 CB 145 (elderly); PLR 9438039 (June 29, 1994) (elderly); Elizabeth C. Kastenbergh and Joseph Chasin, *Elderly Housing* (IRS CPE for FY 2004); Rev Proc 96-32, 1996-20 IRB 14 (safe harbor guidelines for low income housing).

Schedule G (Successors): Rev Rul 67-390, 1967-2 CB 179.

Schedule H (Scholarships): HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶¶7.04[5], 9.02[2][a], 10.09[3][b], 11.03[4].

Chapter 7

Publicly Supported Organizations and Fee/Activity Supported Organizations

General: DAVID ROSS GRAY, *NONPROFIT FOUNDATIONS: A TAX GUIDE FOR CHARITABLE ORGANIZATIONS* (1978) and Supplements; FRANCES R. HILL AND DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 8.

Statutes: 26 USC §509(a) (listing (c)(3)s that are not private foundations); 26 USC §170(b) (referred to in §509(a)).

Regulations: 26 CFR §1.509(a)-2 (general); 26 CFR §1.170A-9 (on publicly-supported organizations); 26 CFR §1.509(a)-3 (on what this book calls fee-activity supported organizations); 26 CFR §1.509(a)-6 (status assigned to organizations that are both PSO and FASO); 26 CFR §1.509(d) (definition of support); 26 CFR §1.509(e) (definition of gross investment income); 26 CFR §1.507-6 (substantial contributors); 26 USC §507(d)(2)(C) (substantial contributor 10 year exceptions); 26 CFR §53.4946-1(f) (foundation managers); (26 CFR §1.509(a)-7 (reliance by contributors on definitive rulings on public charity status).

Chapter 8

Political Activity and Lobbying by Tax-Exempt Organization

Non-technical materials: The Alliance for Justice has some excellent materials available at a very low cost on political activities and lobbying. Their easy-to-read publications cover the IRS lobbying rules, federal tax and election laws, ballot measures, linked organizations, use of the Internet for lobbying and political activities and foundations that want to support advocacy. Some of the publications are older, so be sure that you update any information you rely on. You can reach them at Alliance for Justice, 11 Dupont Circle, NW, 2d floor, Washington, D.C. 20036; telephone 202.822.6070, or go to their website at www.allianceforjustice.org and follow the link to Publications.

General: FRANCES R. HILL AND DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapters 5, 6; David E. Atkin, *State and Federal Law*, in *NONPROFITS IN THE HEADLINES*, Chapter 4 (Oregon State Bar, 2004).

Political Activity

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 6.

Statutes: 26 USC §501(c)(3); §4955 (political expenditures tax).

(c)(3) Regulations: 26 CFR §1.501(c)(3)-1(c)(3) (on political activity); 26 CFR §53.4955-1 (tax penalties); Rev Rul 78-248, 1978-1 CB 154 (candidate questionnaires, voting records and scorecards), *amplified by* Rev Rul 80-282, 1980-2 CB 178 (voting records and scorecards); Rev Rul 86-95, 1986-2 CB 73 (candidate forums and debates); Rev Rul 2007-41, 2007-25 IRB 1421 (political campaigns including website issues); TAM 91-17-001 (Sept. 5, 1990) (issue advocacy); TAM 1999-07-021 (May 20, 1998) (issue advocacy).

Cases: *Branch Ministries, Inc. v. Rossotti*, 40 F Supp2d 15 (DDC 1999) (IRS revoked exemption of church that opposed candidacy of Bill Clinton in 1992).

(c)(4), (5) and (6) Regulations: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶¶13.04, 14.04[2], 15.04, 16.02[7], 16.03[6]; 26 CFR §1.501(c)(4)-1(a)(2)(ii); Rev Rul 81-95, 1981-1 CB 332 ((c)(4)'s primary activities promote social welfare and its less than primary participation in political

campaigns does not make it non-exempt); GCM 34233 (Dec. 30, 1969) (involvement in political campaigns is not an exempt purpose of (c)(5) and (6) groups).

Internet

Rev Rul 2007-41, 2007-25 IRB 1421, Situations 18-21.

Lobbying

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 5.

Statute: 26 USC §501(c)(3); §4911 and 4912 (lobbying taxes).

Substantial Parts Test

Statutes: 26 USC §501(c)(3); 26 USC §504; 26 USC §4912.

Regulations: 26 CFR §1.501(c)(3)-1(b)(3)(i) (insubstantial parts test); 26 CFR 1.501(c)(3)-1(c)(3)(ii); Rev Rul 70-449, 1970-2 CB 111 (testimony before Congressional committee at committee's request is not lobbying).

Cases: *Seasongood v. Commissioner*, 227 F 2d 907 (6th cir 1955) (less than 5% of time and efforts is insubstantial); *Haswell v. United States*, 500 F 2d 1133 (Ct.Cl. 1974), cert den. 419 US 1107, 95 S Ct 779 (1975) (subjective balancing test of all facts and circumstances); *Christian Echoes National Ministry, Inc. v. United States*, 470 F2d 849 (10th cir 1972) (upheld IRS revocation of exemption of religious organization that engaged in substantial lobbying and intervened in political campaigns).

Lobbying Election

Statutes: 26 USC §501(h) (subsection h election).

(c)(3) Regulations: 26 CFR §1.501(c)(3)-1(c)(3)(ii); 26 CFR §1.501(h)-1 to 3; 26 CFR §56.4911-0 through 10 (lobbying election and computation rules).

(c)(4) and Affiliated Groups

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶¶13.03, 14.04[1], 15.04, 16.03[6].

Cases: *Federal Election Commission v. Massachusetts Citizens for Life*, 479 US 238 (1986) (unconstitutional to restrict electioneering activities of (c)(4) advocacy group).

Statutes: 2 USC §1611 (Lobbying Disclosure Act provision that (c)(4)s that lobby cannot get federal grants or loans); 31 USC §1352 (prohibits all recipients of federal grants, loans and contracts from using those funds to lobbying federal legislative and executive officials).

(c)(4), (5) and (6) Regulations: TAM 200908050, 2009 WL 421204 (February 20, 2009) (website rules for linked organizations); Rev Rul 61-177, 1961-2 CB 117 ((c)(6) (business league can have lobbying as sole activity); Rev Rul 71-530, 1971-2 CB 237 (organization whose only activity is lobbying can qualify as exempt under (c)(4)).

Deductibility of Dues/Lobbying Tax

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶14.05.

Statutes: 26 USC §6033(e).

Regulations: 26 CFR §1.162-20; Rev Proc 98-19, 1998-1 CB 547 (deductibility rules).

Chapter 9

Business Activities by Tax-Exempt Organizations

General: FRANCES R. HILL AND DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapters 21-22; Sean Barnett.

Statutes: 26 USC §§511 (unrelated business income tax), 512 (unrelated business income and exceptions), 513 (unrelated trade or business) and 514 (debt-financed property).

Regulations: 26 CFR §1.511-1 to 1.514(g), especially §1.513-1 (definition of UBI). On web links and other UBI issues: PLR 200303062 (October 2, 2002). When an exempt organization carries on a business, this activity can implicate IRS positions on commerciality and partnerships with business: Rul 67-4, 1967-1 CB 121 (commerciality doctrine); Rev Rul 98-15, 1998-12 IRB 6 ((c)(3) hospital can form LLC with for-profit hospital management company); Rev Rul 2004-51, 2004-22 IRB 974 (joint ventures).

Cases: *Goldsboro Art League v. Commissioner*, 75 TC 337 (1980) (commerciality doctrine); *Presbyterian and Reformed Publishing Co. v. Commissioner*, 743 F2d 148 (3rd cir 1984) (commerciality doctrine); *Plumstead Theatre Society, Inc. v. Commissioner*, 74 TC 1324 (1980) (joint venture with business); *St. David's Health Care System v. U.S.*, 349 F3d 232 (5th cir 2003).

Trade or Business

Regulations: 26 CFR §1.513-1(b)

Regularly Carried On

Regulations: 26 CFR §1.513-1(c)

Cases: National Collegiate Athletic Ass'n v. Commissioner, 914 F2d 1417 (10th cir 1990) (revenue received by NCAA, an exempt organization, from program advertising in men's championship tournament is not revenue from an activity that is regularly carried on and is therefore not taxable).

Substantially Related To

Regulations: 26 CFR §1.513-1(d)(4)(iv) (when ads are unrelated business income); 26 CFR §1.512(a)-1(f)(2) (computation of advertising income); 26 CFR §1.513-1(d) (substantially related); 26 CFR §1.513-3 (conventions and trade shows); 26 CFR §1.513-4 (corporate sponsorship); 26 CFR §1.513-4(f), Examples 11 and 12 (corporate sponsorship and websites); 26 CFR §1.513-7 (travel and tours); Rev Rul 73-105, 1973-1 CB 264 (sales of merchandise in folk art museum related to its exempt purpose are not taxable but sales from scientific books and souvenir items unrelated to its exempt purpose are taxable); Rev Rul 80-296, 1980-2 CB 195 (sale of broadcast rights to college game is related to educational purpose of college and does not produce taxable income).

Cases: United States v. American College of Physicians, 475 US 834 (1986) (ads in AMA Journal are not substantially related to AMA's exempt purpose and are taxable).

Calculations

General: HILL AND MANCINO, TAXATION OF EXEMPT ORGANIZATIONS, Chapter 25.

Regulations: 26 CFR §1.513-1(d)(4)(iii) (dual use of facilities or personnel); 26 CFR §1.513-1(d)(4)(iv) (allocation rules for UBI activity that "exploits" exempt activity).

Exceptions

General: HILL AND MANCINO, TAXATION OF EXEMPT ORGANIZATIONS, Chapters 23, 24 and 26.

Statutes: 26 USC §§512, 513, 514.

Regulations: 26 CFR §1.512(b)-1 (special rules and exclusions); 26 CFR §1.514(a)-(1) (unrelated debt-financed income); §1.513-5 (bingo); 26 CFR §1.514(a)-(g) (exclusions from unrelated business income). The adjustments for inflation for low cost items are provided each year by the Treasury Department in Revenue Procedures.

Royalty Cases: Sierra Club, Inc. v. Commissioner, 86 F3d 1526 (9th cir 1996) (sale of mailing list yields passive royalty income that is not taxable); Oregon State University Alumni Ass'n v. Commissioner, 193 F3d 1098 (9th cir 1999) (affinity card income is royalty income); Arkansas State Police Assn v. Commissioner, 282 F3d 556 (8th cir 2002) (money paid by publisher to (c)(5) labor union to publish union's official publication is not royalty because union maintained control over publication).

Protecting Your Exempt Status

General: BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS*, Chapters 28 and 31 and Supplement (8th ed., 2003) (on structures to avoid loss of exemption for excess unrelated business income).

Chapter 10

Fiscal Sponsorship

Non-technical materials: *Fiscal Sponsorship: 6 Ways to Do It Right* (Study Center Press: 2005), by Gregory L. Colvin. This book can be obtained from Study Center Press, 1095 Market St., Suite 602, San Francisco, CA 94103, 1.888.281.3757, www.info@studycenter.org.

Regulations: Rev-Rul 67-149, 1967-1 CB 133 ((c)(3) providing financial assistance to other (c)(3)s is exempt); Rev Rul 68-489, 1968-2 CB 210 (accountability requirements for grants made by (c)(3)s to non-(c)(3) groups).

Chapter 11

State and Local Tax Exemptions

State and District

State Income Tax: ORS 317.080(1) (§501(c) and (d) organizations are exempt); ORS 317.080(9) (certain old age homes are exempt); ORS 748.414 (fraternal benefit societies are exempt); ORS 748.414 (fraternal benefit societies).

Tri-Met and Lane Transit: ORS 267.380(2)(b) ((c)(3)s except hospitals excluded from Mass Transit District taxation).

County Property Tax:

Statutes: General charitable exemptions are found at ORS 307.130-150.

Other nonprofit exemptions:

ORS 307.166—leasing by one exempt organization to another.

ORS 307.115—nonprofit holding property for park or public recreation.

ORS 307.157—nonprofit cemeteries.

ORS 307.160—public libraries.

ORS 307.195—nonprofit student housing.

ORS 307.210–nonprofit water associations.

ORS 307.220–nonprofit telephone associations.

ORS 307.241-.245, .370-.385–nonprofit housing for elderly.

ORS 307.471–school-rented student housing.

ORS 307.515-.548–low income housing.

ORS 748.414–fraternal benefit societies, except for real estate and office equipment.

Procedures for Most Nonprofits: ORS 307.162.

Leased Property by Exempt Organizations: ORS 307.112.

Regulations: OAR 150-307, especially 150-307.130 and 150-307.162.

Cases: *Cascade Raptor Center v. Lane County Assessor*, 2011 WL 4021408 (September 12, 2011) (nature education and wildlife center was exempt under Southwest Oregon Public Defender criteria in part because it could show an element of gift-giving in that its volunteers and contributions reduced the cost of its services for which it charged); *Theatre West of Lincoln City v. Dept. of Revenue*, 319 Or 114, 873 P2d 1083 (1994) (“literary” includes theatres); *YMCA v. Dept. of Revenue*, 308 Or 644, 784 P2d 1086 (1989) (YWCA’s gym is not used exclusively for charity since charity requires an element of giving); *Southwest Oregon Public Defender Services, Inc. v. Dept. of Revenue*, 312 Or 82, 817 P2d 1292 (1991) (public defender services funded by the state are charitable, since the organization has charity as its primary object; its services further its charitable object; and the performance of its service includes an element of giving when evaluated from perspective of recipient).

Chapter 12

Tax Returns for Tax-Exempt Organizations

Federal

General: FRANCES R. HILL AND DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶133.03.

State

Regulations: OAR 137-010-0015 and 10-0020 (form and contents of this annual report); OAR 137-010-0030 (payment of the required filing fees).

Successful Functioning: Board of Directors

Non-technical materials: OREGON DEPARTMENT OF JUSTICE, *GUIDE TO NON-PROFIT BOARD SERVICE* (available at <http://www.doj.state.or.us/charigroup/pdf/nonprofit.pdf> or by telephone listed in Appendix 2); FINANCIAL STEWARDSHIP RESOURCES, *IMPORTANT DOCUMENTS: A DIRECTORS AND OFFICERS WORKBOOK* (available at <http://financialsteward.org>).

Duties and Responsibilities of Board

General: MARILYN E. PHELAN, *NONPROFIT ENTERPRISES: CORPORATIONS, TRUSTS AND ASSOCIATIONS*, Chapter 4.

Statutes: ORS 65.301 and 65.357 (duties and standards)

Cases: *Stern v. Lucy Webb Hayes National Training School for Deaconesses*, 381 F Supp 1003 (DDC 1974) (rejects older standard that directors act as trustees and establishes a corporate standard); *American Baptist Churches of Metropolitan New York v. Galloway*, 710 NYS 2d 12 (2000) (employee and consultant of Baptist Church who set up “rival” nonprofit and used connections made while employed by Baptist Church to secure funding breached their duty of loyalty to Baptist Church); *Northeast Harbor Golf Club v. Harris*, 725 A 2d 1018 (Me 1999) (director of golf club usurped corporate opportunity when she used information acquired as director to engage in private speculative opportunities rather than promote those opportunities on behalf of the golf club).

Board Committees

Statute: ORS 65.354.

Officers

Statute: ORS 65.371-.384.

Replacing Directors and Officers

Statute: ORS 65.321 (resignation), .324-.331 (removal of directors), .334 (vacancies on board), .381 (resignation and removal of officers).

Personal Liability of Directors and Officers

General: Debra Kawecky and Leonard Henzke, *Employment Tax Update--Review of Current Litigation*, D-26 (IRS CPE for FY 2003) (IRS authors reminded exempt organizations examiners that

they should assess §6672 penalties against the responsible parties in an exempt organization that wilfully fail to collect and pay employee withholding taxes).

Statute: 26 USC §6672 (liability for failure to withhold federal taxes).

Cases: *Hirsovescu v. Shangri-La Corp.*, 113 Or App 145, 831 P2d 73 (1992) (nonprofit directors were not shielded from personal liability under ORS 65.369(1) for wrongful discharge, since it is an intentional tort).

Protection of Board and Officers

Statutes: ORS 65.369 (limited liability); ORS 65.407 (indemnification).

Chapter 18

Members and Membership Corporations

Statutes: ORS 65.131-.134 (admission of members); ORS 65.144 and ORS 65.151-.154 (rights and obligations); ORS 65.177 (delegates); ORS 65.214-.221 (notice of meetings); ORS 65.201-.204 (meetings); ORS 65.211 (action without meeting); ORS 65.222 (ballots); ORS 65.227-.254 (voting); ORS 65.437 and .464 (amendments of Articles and Bylaws); ORS 65.224 (members list and inspection by members); ORS 65.771-.782 (records and inspection by members); ORS 65.164-.167 (resignation and termination).

Cases: The rights of members and of membership corporations are a fairly fertile ground of litigation although Oregon appellate courts have not addressed these issues under the current statutes. Courts give considerable deference to the right of private associations to handle membership matters. Even so, holdings on when a nonprofit can expel its members vary depending on the property interest implicated in the membership and the type of nonprofit: *Bernstein v. Alameda-Costra Medical Assn*, 139 Cal App 2d 241, 293 P2d 862 (1956) (standard is whether medical association acts in good faith in expelling member); *Bernstein v. The Players*, 120 Misc 2d 998, 466 NYS 2d 897 (1983) (court upheld expulsion of member of social club who questioned financial transactions of the club); *Guinn v. Church of Christ of Collinsville*, 775 P2d 766 (Okla 1989) (court limits church's ability to discipline member after member left). Courts have considered whether the admission of members to nonprofit organizations falls under the public accommodations laws with uneven results: *Roberts v. U.S. Jaycees*, 468 US 609 (1984) (Jaycees violated Minnesota's public accommodations laws by refusing to admit women); *New York State Club Assn v. City of New York*, 487 US 1 (1988) (club violated city's public accommodation ordinance by refusing to admit women); *Boy Scouts of America v. Dale*, 530 US 640 (2000) (Boy Scouts had constitutionally protected freedom of association that permitted them to discriminate based on sexual orientation in spite of New Jersey public accommodation statute that forbade it).

Employees

Wage and Hour Laws

General: Lainie Dillon Decker, Christine Hammond, and Edward J. Reeves, *Wages and Hours: Fundamentals*, and Carol J. Bernick and Christine S. Totten, *Enforcement of Wage Statutes*, in *LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR*, Chapters 3 and 4 (Oregon State Bar: 2012)

Statutes: 29 USC §201, *et. seq.*; ORS Chapters 652 and 653.

Regulations: 29 CFR §778 (overtime); 29 CFR §785 (hours worked); OAR 839-020-0030 to 0051 (wage and hour).

Discrimination Issues

Statute: ORS 659A.309 (illegal to refuse to hire family members in some circumstances)

Personnel Policies

General: J. Michael Porter and Donald B. Potter, *Employment Actions in Contract*, *LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR*, Chapter 2 (Oregon State Bar: 2011).

Statutes: ORS 652.750 (employee has right to inspect and obtain copy of personnel records); ORS 659A.315 (restrictions on employer's right to restrict off-duty use of tobacco).

Family Leave

General: Eve L. Logsdon and Karen L. O'Connor, *Family Leave Laws*, *LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR* Chapter 21 (Oregon State Bar: 2011).

Statutes: 29 USC §2601, *et. seq.*; ORS 659A.150-.186.

Regulations: 29 CFR §825.100-.800; OAR 839-009-0200 *et. seq.*

Independent Contractors

Federal Income Tax Withholding

General: Clay D. Creps and Krista N. Hardwick, *Independent Contractors*, in LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR §16.2(c)(1) (Oregon State Bar: Rev. 2011) and cases cited therein; IRS Publication 1779, *Independent Contractor or Employee* (2011). The IRS material is available on the IRS website at *www.irs.gov*.

Regulations: Rev Rul 87-41, 1987-1 CB 296 (20 factor test).

Oregon Income Tax Withholding

General: Creps, *Independent Contractors*, in LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR, §16.2-2(a)(2) and (2)(d).

Statutes: ORS 316.162(2)(j) (withholding for independent contractors as defined in ORS 670.600); ORS 670.600 (definition of independent contractor).

State Unemployment

General: Creps, *Independent Contractors*, in LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR, §16.2-2(i).

Statutes: ORS 657.015 (definition of employee); ORS 657.025 (definition of employer); ORS 657.030 (exclusions from coverage); ORS 657.040(1) (independent contractor exceptions); ORS 657.072 (exclusions for certain religious organizations); ORS 657.092 (exclusions for events with gratuities, prizes, scholarships, or reimbursement of expenses).

Regulations: OAR 471-031-0005 *et. seq.*

Cases: Petersen v. Employment Division, 135 Or App 344, 898 P2d 210 (1995) (interprets independent contractor and independently established business tests of ORS 657.040(1)); Employment Division v. Surata Soy Foods, Inc., 63 Or App 221, 662 P2d 810 (1983) (cooperative members who receive patronage dividends for their work are employees subject to unemployment tax withholding).

On churches: ORS 657.072(1) purports to distinguish between churches and other religious organizations for purposes of unemployment taxation. The statute exempts ministers of churches from unemployment coverage. Oregon cases have held that both ORS 657.072(1)(a) and (1)(b) unconstitutionally favor churches over other religious organizations. In both situations, Oregon courts have required unemployment coverage by all religious organizations, including churches, in order to comply with the federal unemployment insurance law so that Oregon can retain federal

dollars. *Salem College and Academy v. Employment Division*, 298 Or 471, 695 P2d 25 (1985) (ORS 657.072(1)(a) is unconstitutional); *Employment Division v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989) (same); *Newport Church of Nazarene v. Hensley*, 335 Or 1, 56 P2d 386 (2002) (ORS 657.072(1)(b) is unconstitutional). The Court of Appeals has rejected a Free Exercise challenge to the unemployment tax statute. *Church at 295 S. 18th St., St. Helens v. Employment Division*, 175 Or App 114, 28 P3d 1185 (2001), rev den 333 Or 73, 36 P3d 974 (requiring church to acknowledge that it, not God, was evangelist's employer did not violate church's free exercise rights and evangelist was subject to tax, even though he was paid by tithe, not wage or salary).

Worker Compensation

General: Creps, *Independent Contractors*, in LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR, §16.2-2(j).

Statutes: ORS 656.005(13) defines employer and 656.005(30) defines worker. ORS 656.027 provides that all workers are exempt with exceptions.

Cases: *S.W. Floor Cover Shop v. National Council on Comp. Ins.*, 318 Or 614, 872 P2d 1 (1994) (reconciled statutory definition of worker with statutory definition of independent contractor in work compensation cases); *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 43 P2d 1106 (2002) (clarified *S.W. Floor Cover Shop's* holding).

Four factor right to control test: *Woody v. Waibel*, 276 Or 189, 554 P2d 492 (1976) (recognizes importance of control test); *Castle Home, Inc. v. Whaite*, 95 Or App 269, 769 P2d 215 (1989) (states four factors); *Cy Investment, Inc. v. National Council on Comp. Ins.*, 128 Or App 579, 876 P2d 805 (1994); *Trabosh v. Washington Co.*, 140 Or App 159, 915 P2d 1011 (1996); *Stamp v. DCBS*, 169 Or App 354, 9 P3d 729 (2000).

Two elements of relative nature of work test: *Woody v. Waibel*, *supra* (defines test); *Cy Investment, Inc. v. National Council on Comp. Ins.*, *supra*; *Trabosh v. Washington Co.*, *supra*; *Stamp v. DCBS*, *supra*.

Federal Wage and Hour

General: Creps, *Independent Contractors*, in LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR, §§16.2-2(k)(1).

Cases: *Brock v. Superior Care, Inc.*, 840 F2d 1054 (2d cir 1988) (five factors of independent contractor economic realities test under Fair Labor Standards Act); *Martin v. Selker Bros., Inc.*, 949 F2d 1286 (3rd cir 1991) (six factor economic realities test); *Mathis v. Housing Authority of Umatilla County*, 242 F Supp2d 777 (D Or 2002) (court uses Martin's six factor economic realities test to determine that Section 8 Coordinator of nonprofit organization was not independent contractor in overtime wage case); *Crossley v. Elliott*, 2011 WL 1107868 (D.C. Virgin Islands, 2011) (court uses general factors pointing to economic reality).

State Wage and Hour

General: Creps, *Independent Contractors*, in LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR, §16.2-2(k)(2).

Wage and hour statutes: ORS 653.010(2) (defines employee but excludes certain services performed for nonprofits); ORS 653.010(3) (defines employer).

Other types of wage claims: ORS 652.310(1) (defines employer); ORS 652.310(2) (defines employee).

Cases: State ex rel Roberts v. Bomareto Ent., 153 Or App 183, 956 P2d 254 (1998) (definition of employee in ORS 652.310 does not apply to ORS 653.010 which has a very expansive definition of employee); Northwest Advancement v. BOL, 96 Or App 133, 772 P2d 943 (1989), rev den 308 Or 315, U.S. cert den 495 US 932 (1990) (court used federal law and common law control test to find that door-to-door sales people were employees).

Chapter 21

Volunteers

Volunteers as Employees

Non-technical materials: Check the websites for SOLV (www.solv.org), Hands on Portland (www.handsonportland.org), and Community Nonprofit Resource Group (www.cnrg.org).

Federal Wage and Hour Law

Statutes: 29 USC §201 *et. seq.* (Federal Labor Standards Act). 29 USC §203(s)(1)(A)(ii) establishes that FLSA applies to employers that gross at least \$500,000 annually and (B) describes organizations subject to coverage although they gross less than \$500,000.

Regulations: 29 CFR §778.316 (parties cannot agree not to pay for overtime).

Cases: The cases considering when volunteers become employees are not entirely reconcilable. Some courts look at the economic realities and classify volunteers as workers if the nonprofit receives commercial benefits from their services. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 US 290 (1985) (court used economic realities test to hold that former drug addicts, derelicts and criminals who staffed commercial operations for long periods and expected in-kind benefits were workers for purposes of FLSA because they were not working solely for personal purposes); Archie v. Grand Central Partnership, 997 F Supp 504 (SDNY 1998) (former homeless and jobless who worked at various jobs in clerical, food-service and similar positions were workers since the nonprofit received direct economic benefit from their services). New DOL rules have mitigated the Alamo holding in some situations. Purdham v. Fairfax County School Board, 637 F3d 421 (4th cir 2010) (school board assistant was a volunteer golf coach under a DOL guidance

letter issued after the *Alamo* case that allowed employees to serve as volunteers if the volunteer work was different in kind from the work for which the employee was paid).

Other cases take the position that the volunteers are not workers if the volunteer is the main beneficiary of a job program, even if the nonprofit also benefits. *Isaacson v. Penn Community Services*, 450 F2d 1306 (4th cir 1971) (volunteers for nonprofit that developed positions to help conscientious objectors satisfy the national service requirement were not workers); *Williams v. Strickland*, 87 F3d 1064 (9th cir 1996) (participants in Salvation Army's work therapy programs served their own interests and were not employees where the rehabilitation program included counseling, church services and work therapy on a fulltime basis, including refinishing furniture and sorting donations for the thrift shop); *Solis v. Laurelbrook Sanitarium and School*, 642 F3d 518 (6th cir. 2011) (board school students who worked as part of vocational training and in accordance with religious school's beliefs about morality were not employees, since the students and not the school were the primary beneficiaries of the relationship).

State Wage and Hour Law

Statutes: ORS Chapters 652 and 653 (wage and hours laws).

Regulations: OAR 839-020-0030(2)(a) (each work week stands alone for purposes of overtime); OAR 839-020-0046(3) (time spent in work for charitable purposes at employer's request or under its direction or control is work time but time spent voluntarily outside of normal work hours is not work time); OAR 839-020-0115(3) (if FLSA and state standards are different, employers must comply with those most favorable to worker). Oregon has special wage and hour regulations for certain types of nonprofits. OAR 839-020-0125(2)(e) (hospitals and institutions for care of aged, sick or mentally ill) and (2)(f) (nonprofit amusement or recreational establishments); OAR 839-020-0150(1) (adult foster care) and (3) (soccer referees).

State Unemployment

Cases: *Oregon Festival of American Music v. Employment Department*, 204 Or App 479, 130 P3d 795 (2006) (nonprofit music festival was employer and contracting musicians were employees under the unemployment statutes).

Worker Compensation

Statutes: ORS 656.018(1)(a) (liability of employer for worker comp benefits is exclusive remedy for all injuries by subject workers); ORS 656.027 (subject workers and exceptions). ORS 656.039(1) allows employers to elect to cover nonsubject workers and make them subject workers. Various subsections of ORS 656.027 describe many nonprofit volunteers as nonsubject workers. See ORS 656.027(11), (14), (17) and (20). Read together, ORS 656.018, 656.027 and 656.039 seem to provide that volunteers listed in ORS 656.027 that become covered workers must use worker compensation as their exclusive remedy. However, ORS 656.005(30) defines "worker" as a person who engages to furnish services for remuneration. It is difficult to reconcile this definition with volunteers who receive nothing for their services.

Cases: *Smith v. State Accident Industrial Commission*, 144 Or 480, 23 P2d 904, 25 P2d 1119 (1933) (Grange member who donated labor was not a worker); *Oregon Country Fair v. National Council on Compensation Insurance*, 129 Or App 73, 877 P2d 1207 (1989) (Fair had to provide worker compensation coverage to individuals who were paid per diem for one month to prepare fair site because they were workers but volunteers at fair who worked 3 days for vouchers were not workers under ORS 656.027(10) exemption for those who provided services for room and board); *Hopkins v. Kobos Co.*, 186 Or App 273, 62 P3d 870 (2003) (resident of religious recovery home donated his labor to a private business that made a donation to the charity and was not a worker entitled to worker compensation coverage from the business because the resident did not expect to be paid).

Volunteer Liability

Cases: *Dunn v. Garcia*, 95 Or App 150, 768 P2d 419 (1989), rev den 307 Or 719 (abused boy scout did not have cause of action under *respondeat superior* against scoutmaster whose wife abused him for failure to counsel him, since scoutmaster's acts toward him were not motivated, even in part, by a purpose to serve the Scouts); *Erickson v. Christenson*, 99 Or App 104, 781 P2d 383 (1989), *appeal dismissed*, 311 Or 266, 817 P2d 758 (1991) (court reversed the trial court that dismissed *respondeat superior* claim by women who sued pastor and church for pastor's sexual relationship with her, since pastor established a confidential relationship with her that was within the scope of the pastor's employment); *Lourim v. Swenson*, 328 Or 380, 997 P2d 1157 (1999) (Boy Scouts may be liable under *respondeat superior* for sexual abuse by volunteer scout leader if part of leader's job was to gain trust of boys).

Protection for Volunteers

Statutes: 42 USC §14,501 *et. seq.* (Volunteer Protection Act); ORS 30.475-.492 (protection from liability for volunteers who transport elderly/people with disabilities and who clean-up hazardous waste).

Cases: *Armendarez v. Glendate Youth Center*, 265 F Supp 2d 1136 (D Ariz 2003) (volunteer director of nonprofit could not be personally sued under FLSA for unpaid wages because Volunteer Protection Act applied against any claims for harm).

Chapter 22

Funding: Obtaining Resources for Your Organization

Non-technical materials: CRAIG MCPHERSON, OREGON FOUNDATION DATABOOK, \$100, available from C&D Publishing at www.foundationdatabook.com/ororder.html; REBECCA PEATOW, ED., GUIDE TO OREGON FOUNDATIONS, 12th edition. \$46, available from 211 info, 621 SW Alder, #810, Portland, OR 97205, 503.226.3099. The IRS explanation of its rules about acknowledging donations can be found at <http://www.irs.gov/charities/article/0,,id=96102,00.html>. For information on social enterprise, go to

<http://www.redf.org/publications-intro.htm>. The address for the Oregon Community Foundation for management of endowment funds is 1221 SW Yamhill, #100, Portland, OR 97205, 503.227.6846. Contact information for organizations of fundraising professionals:

Association of Fund Raising Professionals of Oregon

P.O. Box 55512

Portland, OR 97238

503.715.3100

<http://www.afporegon.org/contact.aspx>

email: afp-oregon@comcast.net

Emerald Valley Development Officers

2852 Willamette Street

PMB OR #157

Eugene, OR 97405-8200

541.607.4062 (voicemail)

email: Laura Purkey at lpurkey@comcast.net

Solicitations

General: Cheryl Chasin, Susan Ruth and Robert Harper, *Tax Exempt Organizations and World Wide Web Fundraising and Advertising on the Internet* (IRS CPE for FY 2000) (available at IRS website at www.irs.gov); Ross Laybourn, Jr. *The Attorney General's Office: Internet Solicitation, Gaming, and Fundraising Issues*, in *ADVISING NONPROFIT ORGANIZATIONS*, Chapter 3 (Oregon State Bar, 2001).

Statutes: 18 USC §1037 (CAN-SPAM Act of 2003); 26 USC §6113 (solicitation disclosures by non (c)(3) organizations); ORS 128.801-.995 (Charitable Solicitation Act, including professional and commercial fundraisers).

Regulations: Notice 88-120, 1988-2 CB 454 (safe harbors for non-(c)(3) solicitations); OAR 137-010-0045 through 0055 (charitable solicitations act, including professional and commercial fundraisers, and charitable trust act).

Cases: For some important cases on the First Amendment restrictions on governmental regulation of charitable solicitations, see *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 US 781 (1988); *American Charities v. Pinellas County*, 189 F Supp 2d 1319 (MD Fla 2001); *Public Citizens, Inc. v. Pinellas County*, 321 F Supp 2d 1275 (MD Fla 2004).

Bingo and Gambling

Statutes: ORS 167.108-.166 (criminal gambling offenses); ORS Chapter 464 (state administrative regulation of legalized gambling).

Regulations: OAR 137-025-0020 through 137-025-0530.

Cases: *Evans v. Attorney General*, 148 Or App 133, 939 P2d 111 (1997) (state fined independent contractor who managed bingo for nonprofits and who was paid in excess of state administrative rules).

Chapter 24

Making a Budget

Regulations: OMB Circulars A-110, A-122 and A-133, available from www.whitehouse.gov/omb/circulars.

Chapter 26

Keeping Books and Preparing Financial Reports

Non-technical material: CHRISTINE MANOR, *QUICKBOOKS FOR NOT-FOR-PROFITS* (look for the latest version published by Sleeter Store and available at <http://sleeter.store.yahoo.com> by following the links for “Not-for-Profit”). For assistance in choosing accounting software, go to <http://www.aicpa.org/pubs/jofa/sep2003/johnston.htm>.

Accessing the Accounting Standards Codification:

Authoritative guidance on GAAP (Generally Accepted Accounting Principles) for nonprofits is found in the Accounting Standards Codification (ASC) published online by the Financial Standards Accounting Board. Access to ASC is free online. Go to <https://asc.fasb.org/> and follow the steps to log in to the free Basic View. You may also want to consider purchasing the AICPA accounting guide for Not-for-Profit Entities available at <http://www.cpa2biz.com>. Sources are identified here by ASC section and subsection number.

- Should You Use the Cash or Accrual Accounting Method -235-10-50-1
- Classification of Contributions 958-605-45, 958-605-30-4,
- Distinguishing Contributions from Purchases of Services or Goods ASC Glossary “exchange transactions”, 958-605-55-8,
- Unrestricted Expenses 958-225-45-7
- Three Classes of Net Assets-958-205-50-1B
- Recording Promises to Give 958-605-45-5, 958-605-30-4, 958-605-25
- Cost Allocation 958-720-45
- Accounting for Fundraising Costs 958-720-50, 985-720-45-29, Allocation of Joint Costs of Fundraising 958-720-50-2

- Accounting for In-Kind Contributions – Property and Equipment 958-605-25-2, 958-605-30-2, Services 958-605-50-1, Materials and Facilities 958-605-25
- Gains and Losses on Investments 958-320-35-11
- Accounting for Land, building , and equipment 988-360-10-50-1, 840-30-50-1, 958-360-50-1,
- Statement of Financial Position, ASC 958-45-1, ASC 958-210-55-4
- Statement of Activities, 958-225-45
- Statement of Cash Flows, 230-10-15-3, 230-10-45-24
- Statement of Functional Expenses: ASC 958-205-45-4
- Government Funds Accounting Requirements 958-606-45-4 (addressing governmental sources using cost reimbursement contracts)

Regulations: OMB Circular A-122, available at <http://www.whitehouse.gov/omb/circulars/a122>.

Chapter 28

Evaluating Your Organization’s Financial Health

Non-technical material: KATHERINE DEYOUNG, *HOW TO CONDUCT AN INTERNAL AUDIT (A GUIDE FOR SMALL NONPROFIT ORGANIZATIONS)*, to be published by Financial Stewardship Resources (www.financialstewards.org) in 2012. This is a notebook that walks you through an overview of how you handle your finances. It offers tools to help you evaluate the strength of your internal controls, verify your financial figures, and examine the processes by which your finances are handled.

Chapter 29

Electioneering and Lobbying Rules for All Nonprofit Corporations

Federal Campaign Rules

Non-technical material: *A GUIDE TO THE CURRENT RULES FOR FEDERAL ELECTION* (2011), published by the Campaign Legal Center (available free online at www.campaignlegalcenter.org). This is a summary of the Citizens United case and the effect that it has had on campaign spending. It is an overview and is not written from the perspective of nonprofit organizations.

Statutes: 2 USC §§431-455 (Federal Election Campaign Act); 116 Stat 81 (Bipartisan Campaign Reform Act of 2002, aka McCain-Feingold Law).

Cases: *Citizens United v. FEC*, 558 US 8 (2010) (unlimited expenditures by independent PACs); *SpeechNow.org v. FEC*, 599 F3d 686 (DC Cir 2010) (unlimited contributions by individuals to independent PACs); *Club for Growth*, 2010 WL 3184267 (FEC 2010); *Commonsense Ten*, 2010 WL 3184269 (FEC 2010) (unlimited contributions by corporations, unions, and individuals to independent PAC).

Regulations: 11 CFR Parts 100, 102, 104-106, 108-111, 114; Rev Rul 2004-6, 2004-4 IRB 328 (describes when public advocacy expenditures by §501(c) organizations may be expenditures for an exempt function subjecting the organization to tax under §527(f)).

Federal Lobbying Rules

Statutes: 2 USC §1601-1612 (Federal Lobbying Disclosure Act).

Cases: *National Association of Manufacturers v. Taylor*, 582 F3d 1 (DC Cir 2009) (federal lobbying rules are constitutional).

State Campaign Rules

Non-technical material: ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL (Oregon Secretary of State, 2010) (available free online at www.oregonvotes.org/doc/publications/campaign_finance).

Statutes: ORS Chapter 260.

Regulations: OAR 165-012, especially 165-012-0005 (the provisions of the CAMPAIGN FINANCE MANUAL are part of the administrative regulations for ORS Chapter 260).

Cases: *State ex rel Crumpton v. Keisling*, 160 Or App 406, 982 P2d 3 (1999), rev den, 329 Or 650 (2000) (definition of express advocacy for expenditures in support of or opposition to candidate involving usage of “union bosses”).

State Lobbying Rules

Statutes: ORS 171.725-.785.

Regulations: OAR 199-010-0005 through 199-010-0150.

Federal Funds for Lobbying

Statutes: 2 USC §1611 ((c)(4)s that lobby cannot get federal grants or loans); 31 USC §1352 (restrictions on using federal funds to lobby federal officials).

Regulations: 48 CFR §3.801 et. seq.; 70 FR 57455-01; OMB Circular A-122, Cost Principles for Non-profit Organizations, May 10, 2004 (restrictions on using federal funds for lobbying and political activities).

Political Expenditures Tax

Statutes: 26 USC §527.

Regulations: 26 CFR §1.527-1 through 1.527-9; Rev Rul 2003-49, 2003-20 IRB 903 (question and answer format on how to comply with the notice and reporting requirements for §527 organizations); Rev Rul 2004-6, 2004-4 IRB 328.

Chapter 30

Compliance: Ongoing Maintenance of Your Nonprofit

Access to Books and Records

Statutes: ORS 65.224 (membership list and inspection); ORS 65.771-.782 (recordkeeping requirements and inspection by members)

Reports and Registrations

Statutes: ORS 65.647-.657, 65.787 (administrative dissolution and annual report); ORS 128.650-.660 (Attorney General requirements).

Regulations: OAR 137-010-0005 through 0055.

E-Mail Notices

Statutes: One big issue for nonprofits is whether notice that is required at various places in ORS Chapter 65 can be sent by email. ORS 65.034(2) states that notice may be communicated in various forms, including “teletype or other form of wire or wireless communication...” The statute was written in 1989 before email was widely used and it is not clear whether wireless communication includes email. Washington enacted a special statute to authorize email, but the statute includes some restrictions to mitigate the changeability of email addresses. RCW 24.03.009 and 24.03.080. The Oregon legislature has amended ORS Chapter 65 to recognize the use of the Internet by nonprofits but has not amended ORS 65.034(2) to add email to the list of ways notice can be communicated. ORS 65.337(3)(b); ORS 65.341.

The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) provides that records relating to any transaction that affects interstate or foreign commerce may be in electronic form. 15 USC §7001. The law allows a state to supersede §7001 by adopting the Uniform Electronic Transactions Act. Oregon has done this in ORS Chapter 84. ORS 84.061 states that Chapter 84 supersedes E-SIGN. ORS 84.004(16) defines a transaction as an action to conduct business, commerce or governmental affairs. If a law requires a person (which includes a legal entity) to send

information in writing, the sender may satisfy the law by using an electronic means if both parties have consented and the sender does not inhibit the ability of the recipient to print or store the electronic record. ORS 84.022(1).

One big question for nonprofits is whether nonprofits are conducting “business, commercial or governmental affairs” in their “transactions.” The Oregon law provides no additional guidance nor does the Uniform Laws Annotated. The commentary to the Uniform Laws describes “transactions” but does not provide any nonprofit examples. It does note that a “transaction” must be between two or more people and does not encompass unilateral signatures. For example, signing a health care power of attorney is not a transaction. Uniform Laws Annotated, Uniform Electronic Transactions Act, §2 (West: 2002).

If your nonprofit engages in commercial operations, those operations are almost certainly covered. However, Oregon law is much less clear about whether a nonprofit’s use of e-mail to deliver notice of meetings, for example, is a transaction that is covered. The cautious approach is to use the statutory methods of delivery. If a nonprofit uses e-mail, it may want to comply with ORS 84.022(1) above by getting the consent of the recipients, if possible.

Releases

Cases: *Mann v. Wetter*, 100 Or App 184, 785 P2d 1064 (1990), rev den 309 Or 645, 789 P2d 1387 (agreement releasing scuba diving school from liability upheld); *Silva v. Mt. Bachelor, Inc.*, 2008 WL 2889656 (D Or 2008) (ski release upheld).

Terrorism

Non-technical material: *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grant-makers Need to Know* (Council on Foundations and others, 2004) (an older but very readable summary that is available for free at www.cof.org); U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities (undated, circa 2006) (available from the U.S. Department of Treasury website).

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 32.04.

Statutes and Executive Orders: USA Patriot Act of 2001, Pub L No. 107-56, 115 Stat 272 (2001); 26 USC §501(p) (authorizes IRS to suspend exemption of organization listed as terrorist); Exec Order No. 13,224, 66 Fed Reg 49,079 (September 25, 2001), amended by Exec Order No. 13,258, 67 Fed Reg 44,751 (July 3, 2002) and Exec Order No. 13,284, 68 Fed Reg 4,075 (January 28, 2003).

Regulations: Rev Proc 2008-9, 2008-2, IRS 258.

Cases: *Global Relief Foundation, Inc. v O’Neill*, 315 F3d 748 (7th cir), cert den, 540 US 1003 (2003) (court denied GRF’s injunction and upheld freezing of assets); *Holy Land Foundation for Relief & Dev. v. Ashcroft*, 333 F3d 156 (DC cir 2003), cert den 540 US 1218 (2004) (court upheld government designation of HLF as a terrorist organization); *Boim v. Holy Land Foundation*, 549 F3d 685 (7th cir 2008) (organization that donates to terrorists may be civilly liable for damages caused by terrorists); *Al Haramain Islamic Foundation, Inc., v. U.S. Department of Treasury*, 660 F3d 1019 (9th cir

2011) (government froze assets of Oregon charity and declared it a terrorist organization; the court held that the government's classification was reasonable, that the government had violated due process in making the classification but that the violations were harmless; that the government's failure to get a warrant was unreasonable; and that another nonprofit that wanted to coordinate its advocacy with the organization had the free speech right to do so).

Guidelines: U.S. Department of the Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* 6 (undated, circa 2006).

Special Rules for Tax-Exempt Groups

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chapter 33.

Inspection and Copying

Statutes: 26 USC §6104(d); 2.

Regulations: 26 CFR §301.6104 (public inspection and web rules); T.D. 8818, 1999-17 IRB 3 (April 26, 1999) (inspection and copying rules); Notice 2008-49, 2008-20 IRB 979 (Form 990-T forms that are not public).

Acknowledging Donations

Statutes: 26 USC §170(f)(8) (substantiation of gift over \$250),

Regulations: 26 CFR §6115 (disclosure of quid pro quo contributions over \$75); 26 CFR 1.170A-13(f), 1.6115-1; Rev Pro 66-49, 1966-2 CB 1257 (donations); Rev Rul 67-246, 1967-2 CB 104 (*quid pro quo* rules), amplified by Rev Proc 90-12, 1990-1 CB 471 (*quid pro quo* rules).

The IRS explanation of its rules about acknowledging donations can be found at <http://www.irs.gov/charities/article/0,,id=96102,00.html>.

Change in Activities

General: HILL AND MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, ¶32.13.

Group Exemptions

Regulations: Rev Proc 80-27, 1980-1 CB 490, §6 (annual information); 26 CFR §601.201(n)(8)(iv) (annual information).

Schools

Regulations: Rev Proc 75-50, 1975-2 CB 587 (racial nondiscrimination rules).

Excess Benefits Transactions

General: Cynthia Cumfer, *Structure and Governance*, NONPROFITS IN THE HEADLINES Chapter 1 (Oregon State Bar, 2004); Laura Kalick, *The IRS Focuses on Automatic Excess Benefit Transactions and Compensation*, TAXATION OF EXEMPTS 3 (July/August 2004); FRANCES R. HILL AND DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶4.04 (2002); Lawrence M. Brauer and Leonard J. Henzke, Jr., 'Automatic' Excess Benefit Transactions Under IRC 4958 (IRS CPE for FY 2004), at <http://www.irs.gov/charities/article/0,,id=119768,00.html>.

Statutes: 26 USC §4958.

Regulations: 26 CFR §53.4958-0 through 53.4958-8.

Chapter 31

Reviewing and Changing Your Articles and Bylaws

Statutes: ORS 65.431-.467.

Chapter 32

Merging With Another Corporation or Selling Your Assets

Non-technical: THOMAS A. McLAUGHLIN, NONPROFIT MERGERS AND ALLIANCES: A STRATEGIC PLANNING GUIDE (2010) (a very readable book with good information).

Statutes: ORS 65.481-.534.

Chapter 33

Dissolving Your Nonprofit Corporation

Statutes: ORS 65.621-.674.

Appendix 2. List of Tax and Regulatory Agencies

State

Attorney General/Oregon Department of Justice

Charitable Activities Section

1515 SW 5th, #410

Portland, OR 97201

www.doj.state.or.us

971.673.1882

503.229.5120 — fax

503.378.5938 — TDD

This is the place to file your registration with the Attorney General if you incorporate as a public benefit nonprofit and to file the Form CT-12. For gaming rules (bingo and the like, not soccer), go to www.doj.state.or.us/ChariGroup/Howtoraffle.htm and type “gaming” into the search box.

Bureau of Labor and Industry (BOLI)

Technical Assistance for Employers

800 NE Oregon, Suite 1045

Portland, OR 97232

www.boli.state.or.us

971.673.0761

971.673.0762 — fax

BOLI is the source for information about state employment laws, regulations and seminars for employers.

Oregon Department of Revenue

955 Center St. NE

Salem, Oregon 97301-2555

www.gov/DOR

503.378.4988

800.356.4222

503.945.8738 — fax

503.945.8100—transit tax exemptions

This is the address for estimated tax payments. Check website for addresses for other payments.

Oregon Government Standards and Practices Commission
3218 Pringle Rd SE, Suite 220
Salem, OR 97302-1544
www.gspc.state.or.us
503.378.5105
503.373.1456 — fax
This agency regulates state legislative lobbying.

Oregon Secretary of State
Corporations Division and Elections Division
255 Capitol Street NE, #151 (corporations) and #501 (elections)
Salem, OR 97310-1327
www.sos.state.or.us
503.986.2200—corporations
503.373.7414—elections

The Secretary of State's Corporations Division is where you file your incorporation papers as a nonprofit corporation and your annual report. The Elections Division regulates political activity. For the state *Campaign Finance Manual*, go to www.oregonvotes.org/doc/publications/campaign_finance.

You can get free copies of recent corporate filings online from the Corporations Division. Go to the Business Names menu, type in the name of the corporation, click on the corporation's name in the next menu, and go to the Summary History of corporate filings at the bottom of the page. If there is an image next to the name of a document that was filed, you can click on the image and the document will appear. You can copy it for free. Otherwise, you will need to pay a small filing fee to get it from the Corporations Division.

State of Oregon Employment Department
875 Union Street NE
Salem, Oregon 97311
www.emp.state.or.us
800.237.3710
877.517.5627
503.947.1472 — fax

The Employment Department offers job fairs and recruitment and handles the unemployment tax and benefit audits.

Federal

Federal Election Commission
999 E Street NW
Washington, D.C. 20463
www.fec.gov
800.424.9530
202.219.3336 — TTY

The FEC regulates broadcast communications in political campaigns.

Department of Treasury
Internal Revenue Service Center
Kansas City, MO 64999

This is where you file Form 1099 and Transmittal Form 1096 and Form 941, the Quarterly Tax Report when no payment is made.

Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0027

This is the address to file Form 990, the Annual Tax Return, and Form 2758, the Extension of Time to File Annual Return.

The Internal Revenue Service is online at *www.irs.gov*. To get IRS Publications online, go to *www.irs.gov* and type in "Publication" and its number in the Search box. The IRS has different offices for different purposes. For those most likely to be of interest to users of this book:

Internal Revenue Service
P. O. Box 12192
Covington, KY 41012-0192
1.877.829.5500 for filing assistance

This is the office where you file the Form 1023 and Form 1024, the Applications for Tax-exempt Status.

Internal Revenue Service
P.O. Box 105083
Atlanta, GA 30348-5083

Here you file Form 941, the Quarterly Tax Report when you are making a payment.

Internal Revenue Service
Attn: EIN Operation
Cincinnati, OH 45999

This is where you file Form SS-4 — Application for Employer ID Number (EIN).

To get your EIN by fax, fax Form SS-4 to 859.669.5760

To get your EIN by phone, call 800.829.4933

To get your EIN online, go to *www.irs.gov/businesses/* and search for "EIN." At the EIN screen, look for "Apply for an EIN Online."

Small Business Administration
www.sba.gov

To get information about making a business plan (under small business").

Social Security Administration
Data Operations Center
Wilkes-Barre, Pennsylvania 18769-0001
www.ssa.gov

File Forms W-2 and W-3 here.

U.S. Department of Labor
Frances Perkins Bldg.
200 Constitution Avenue NW
Washington, D.C. 20210
www.dol.gov
1.866.487.2365
TTY: 1.877.889.5627
For information on wage and hour and employment law.

U.S. Equal Employment Opportunity Commission
1801 L Street NW
Washington, D.C. 20507
www.eeoc.gov
1.800.669.4000
TTY: 1.800.669.6820
For information on civil rights laws.

U.S. Senate
Office of Public Records
232 Hart Senate Office Building
Washington, D.C. 20510-7116
www.senate.gov
202.224.3121
For registration for federal lobbyists, go to *www.senate.gov* and follow links to Legislation and Records and Lobbying Disclosure.

