
COMPLETE GUIDE TO NONPROFIT ORGANIZATIONS

LAW • TAXATION • OPERATIONAL PLANNING

2007 CUMULATIVE SUPPLEMENT

Penina Kessler Lieber, J.D.
Donald R. Levy, J.D.



Civic Research Institute

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Edited By
Penina Kessler Lieber, J.D.
Donald R. Levy, J.D.



Civic Research Institute

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How to Use This Supplement

This 2007 supplement to *Complete Guide to Nonprofit Organizations* is keyed to your main volume and brings that volume up-to-date. The original volume should only be used in conjunction with the current supplement. This supplement covers new legislation and significant cases decided since the publication of the original volume as well as recent developments in the field. It adds new sections as well as two all-new chapters to the original volume—Chapter 1A on public charities and Chapter 11 on government issues for health care organizations.

Coordinating Supplement Text With Original Text. Supplement paragraph numbers match those in the main volume. Each supplement entry is keyed to its corresponding paragraph (§) and page number in the original text, and italic instruction lines tell you exactly where each addition or change belongs in relation to the original. To get a quick overview of the portions of the main volume that have been updated, check the Supplement Table of Contents. For specific changes to main paragraphs and subsections, read the supplement and main volume text together. All-new chapters, paragraphs, and subsections are identified in brackets as “[New].”

Using the Cumulated Finding Aids. A cumulative Table of Cases, Tables of Federal and State Statutes and Regulations and Index appear at the end of the supplement. These finding aids cover both the main volume and the supplement. Entries that refer to material in the supplement are preceded by the letter “S.” For example, the reference S1.2[3] refers to § 1.2[3] in the supplement, while the reference 1.4 refers to § 1.4 in the main volume. If an entry refers you to both 1.2[3] and S1.2[3], look in both the main volume and the supplement. Use only the current, cumulative tables and index, which will direct you to the most current information. You should no longer use the old tables or index that appear in the original volume.

Foreword

Americans are known for being generous to a fault. When the *Toronto Star* compared American and Canadian charitable giving, it asked “Why can’t a Canadian tycoon be more like a Yank?”¹ The *Star*’s conclusion that “private largesse has always been a defining American ethic” was supported by the announced consolidation of the Gates and Buffett fortunes, an event that raises American philanthropy to even more gigantic and transformative levels.

In 2005, *The Complete Guide to Nonprofit Organizations* analyzed critical areas of concern for lawyers, accountants, volunteers, and professionals who work with nonprofit organizations. Our authors targeted important issues: nonprofit organizational form and structure, private foundation tax implications, “special purpose” and noncharitable exempt organizations, intermediate sanctions/excess benefit transactions, nonprofit employee benefits, intellectual property relating to copyright licensing and technology transfer, healthcare conversion foundations and community benefit statutes, charitable solicitation regulation, faith based government programs, and cross-border philanthropy in light of current terrorism concerns. Our authors possess deep and practical expertise in each area of the law and have provided comprehensive overviews of emerging trends and developments.

During this past year, Congressional scrutiny prompted fears of excessive regulatory reforms within the nonprofit sector. Despite the hue and cry, however, the threatened reforms did not materialize to the extent they were anticipated. On August 17, 2006, President Bush signed The Pension Protection Act of 2006,² legislation that amended the Employee Retirement Income Security Act and modified certain provisions relating to charitable contributions, tax-exempt organizations, and supporting organizations.³ Although it emasculated Type III supporting organizations and increased penalties under the Intermediate Sanctions, the legislation is far from the assault that was expected.

This Supplement updates existing chapters with timely information and current references. We have added two new chapters to cover the “public char-

¹ David Olive, “Generous, But Not to a Fault,” *Toronto Star*, June 25, 2006, pp. A12-13.

² Pub. L. No. 109-280, 120 Stat. 780 (2006).

³ The Act’s provisions that specifically relate to exempt organizations are found at Title XII and include Subtitle A, Charitable Giving Incentives, and Subtitle B, Reforming Exempt Organizations—incentives to encourage charitable donations by a two-year exclusion from gross income for distributions of up to \$100,000 from IRAs if made to a qualified charitable exempt donee; selected new regulations to reform exempt organizations with respect to annual notification rules, information sharing with state charity officials, unrelated business income, donor advised funds, and non-fully integrated supporting organizations.

ities” and to discuss the new accountability of nonprofit healthcare organizations. These chapters are intended to round out the scope of the book. We did not update Chapter 9 which discusses issues for faith-based nonprofit organizations. Although ongoing efforts to enlarge government funding of faith-based organizations has continued, no significant legislation was enacted that changes the prior discussion. Our continuing thanks go to our committed authors, both new and old, who have devoted significant time and effort to this project. They are preeminent in their fields, and we are very proud to count them among our contributing authors.

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About the Supplement Editors and Contributors

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Penina Kessler Lieber practices exclusively in the area of nonprofit and tax-exempt law. As an attorney with the Pittsburgh office of Obermayer Rebmann Maxwell & Hippel LLP, she works with nonprofit organizations in a broad range of matters, including corporate restructuring, governance, employment, licensing/accreditation, financing, public-private partnerships, joint ventures, and litigation before state and federal tax authorities and the courts. She has been selected as a Pennsylvania “Super Lawyer” for 2005. Ms. Lieber is an adjunct professor of law at the University of Pittsburgh School of Law, where she also served as director of the law school’s Global Nonprofit Law Program, an interdisciplinary academic research program studying the law of international philanthropy. Ms. Lieber is a frequent author and lecturer on nonprofit legal topics. Publications include *The Tax Treatment of NGOs: Legal, Fiscal and Ethical Standards for Promoting NGOs and their Activities* (Kluwers Law International, 2003) and numerous articles. In 2001, she participated as an invited speaker at the International Conference on Tax and the Non-Profit Sector held in Johannesburg, South Africa and spoke at a Symposium on “Cross Border Charitable Giving” at the University of Pittsburgh School of Law. She was a participant in the Third Europhil Trust Roundtable held in Barbados and has visited with many nongovernmental organizations throughout the world.

A member of Phi Beta Kappa, Ms. Lieber was a summa cum laude graduate of the University of Pittsburgh and a Woodrow Wilson Fellow at Harvard University. She has an M.A. in English Literature and a J.D. from the University of Pittsburgh School of Law, where she was a member of the Law Review. She served as a judicial law clerk on the U.S. Court of Appeals for the Third Circuit, and was a two-term appointed member of the Disciplinary Board of the Supreme Court of Pennsylvania. In 2002, Ms. Lieber was named Special Counsel to the Office of Attorney General of Pennsylvania in the Hershey Trust litigation. Ms. Lieber is active within the professional, academic, and nonprofit communities. She serves on the Editorial Board of the ABA’s Judge’s Journal and is a member of the ABA Judicial Division, Exempt Organizations Committee of the Tax Section and the Business Law Section. She is active in the Pennsylvania Bar Association as a member of its Board of Governors, Board of Directors of the Pennsylvania Bar Institute, the Board of Trustees of the Pennsylvania Bar Foundation, and the House of Delegates. She was former Chair of the Pennsylvania Bar Association’s Charitable Organizations

Committee and the Attorney Discipline Committee, as well as a member of the Executive Committee of the Pennsylvania Bar Association's Commission on Women in the Profession. Ms. Lieber was recently appointed by the Pennsylvania Supreme Court to the state's IOLTA (Interest on Lawyers Trust Accounts) Board. She is a director of the ARCS Foundation (Achievement Rewards for College Scientists Foundation) and Solicitor to the boards of many nonprofit organizations.

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Donald R. Levy is an attorney and author-editor of many law books. He graduated from Harvard College and Harvard Law School and afterwards was awarded a prize-winning MBA in accounting from New York University. Mr. Levy was associated with a leading Wall Street defendants' practitioner in accountants' liability, and much of his career was later spent in employee benefits, human resources, and taxation. He was a vice president at Johnson & Higgins and then became a vice president at United States Tobacco Company. His publishing activity developed in post-retirement, after a few years with Prentice Hall and Research Institute of America. During this time he also served as a senior consultant with William M. Mercer, Inc. He is the sole author of the original *IRA Answer Book*, which is now going into its fourteenth edition, and has co-authored and/or edited books on estate planning, executive compensation, managed care, 403(b) plans, HIPAA, cash balance, planning for the affluent, insurance topics, annuities, and employment severance. He has lectured before a number of professional and university groups and has served as a trustee of philanthropic and educational organizations.

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also accepted the “Pro Bono Firm of the Year” award from the NYS Bar Association in recognition of the firm’s 9/11 work. In 2003, she received the Commissioner’s Award, the highest honor the Commissioner of Internal Revenue can bestow, for her “timely, creative and nimble response to 9/11’s unprecedented legal challenges.” She earned her J.D. at Columbia University School of Law, a Ph.D. in Medieval Studies from Yale University, and a B.A. magna cum laude from Princeton University, where she was elected to Phi Beta Kappa.

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Jeannie Carmedelle Frey, J.D.

Jeannie Carmedelle Frey is Senior Vice President of Legal Affairs and General Counsel of Resurrection Health Care, a nonprofit Catholic-sponsored health system in Chicago, Illinois. Ms. Frey is a graduate of the University of Colorado at Boulder and Yale Law School. She served as chair of the Nonprofit

Corporations Committee of the Business Law Section of the American Bar Association from 2002 to 2005. Ms. Frey was the lead editor for the second edition of the *Guidebook for Directors of Nonprofit Corporations* (ABA, 2002) and as a member of the ABA Coordinating Committee on Nonprofit Governance, the primary author of the *Guide to Corporate Governance in the Wake of Sarbanes-Oxley* (ABA, 2005). In 2000, she received the Outstanding Nonprofit Lawyer Award from the ABA Nonprofit Corporation's Committee. She is also a member of the American Health Lawyers Association and the Illinois Association of Hospital Attorneys.

Tammy D. Fried, J.D.

Tammy D. Fried is a senior associate in the Tax Department of Proskauer Rose LLP. Ms. Fried advises not-for-profit tax-exempt organizations, including Section 501(c)(3) entities such as hospitals and other healthcare organizations, arts organizations, educational institutions, private foundations, and public charities on a wide range of issues, including obtaining and maintaining tax-exempt status, avoiding excess benefit transaction taxes (the intermediate sanctions) and excise taxes on foundations, avoiding UBTI, conducting permissible grant-making activities, entering into joint ventures, tax-exempt bond issues, self-dealing issues applicable to private foundations, and planning asset acquisitions. Ms. Fried also advises other tax-exempt organizations such as Section 501(c)(6) business leagues and Section 501(c)(4) social welfare organizations on general governance issues and other topics, including lobbying and conducting political activities. For the past eight years, she has coordinated and spoken at Proskauer Rose's annual seminar on tax-exempt law (known as the Trick or Treat Tax-Exempt Seminar) held every October. Her general tax practice also covers various issues of federal and state income taxation arising from corporate acquisitions and reorganizations, real estate transactions, stock and debt offerings, and financial instruments. Ms. Fried earned her law degree at Columbia University School of Law and her undergraduate degree from the Wharton School at the University of Pennsylvania.

Jacob I. Friedman, J.D.

Jacob Friedman is Chair of the Tax Department at Proskauer Rose LLP and heads its Non-Profit/Exempt Organizations practice group. Mr. Friedman advises Proskauer Rose's philanthropic and other not-for-profit clients on fiduciary and tax exemption issues and their specialized tax problems, including unrelated business income tax ramifications of diverse investments, intermediate sanctions, and joint venture structuring. For the past ten years, Mr. Friedman has spoken at Proskauer Rose's annual seminar on tax-exempt law (known as the Trick or Treat Tax-Exempt Seminar) held every October. He is a 1975 honors graduate of New York Law School and received an L.L.M. degree in taxation from the New York University School of Law in 1978. Mr. Friedman is an adjunct professor of law in New York Law School's graduate tax program.

Linus J. Grikis, J.D.

Linus Grikis is a partner in the law firm McDermott Will & Emory, LLP, where he maintains a general health law practice focusing on the representation of hospitals, health systems, and other health care clients. He routinely provides regulatory and transactional representation of hospitals and other health care entities in connection with mergers, acquisitions, joint ventures, and other transactions matters. He is a graduate of the University of Kansas, University of Tulsa College of Law, and Loyola University-Chicago College of Law (LL.M.). Mr. Grikis is a member of the Chicago Bar Association, the American Health Lawyers Association, and the Quarterly Lecture Committee of the Illinois Association of Healthcare Attorneys.

Christopher M. Jedrey, J.D., Ph.D.

Christopher Jedrey is a partner in the law firm McDermott Will & Emory, LLP, where he specializes in federal and state health care regulatory matters; federal, state, and local tax exemption requirements; and charitable trusts and corporation law. He is a graduate of the University of Massachusetts at Amherst, Harvard University, and Boston College Law School. Mr. Jedrey is a frequent lecturer at programs sponsored by Massachusetts Continuing Legal Education, Inc., Healthcare Financial Management Association, Massachusetts Medical Society, Massachusetts Hospital Association, American Bar Association, and Boston Bar Association. He is also co-chairman of the Health Care Law Subcommittee of the American Bar Association Exempt Organization Committee and a member of the Massachusetts Attorney General's Advisory Committee on Public Charities.

Gregory N. Kidder, J.D.

Gregory Kidder is an associate in the Washington, D.C. office of Steptoe & Johnson LLP. He has extensive experience with controversy and planning issues involving tax-exempt organizations. He graduated from Harvard Law School in 2002.

Lloyd H. Mayer, J.D.

Lloyd Mayer is an associate professor at the University of Notre Dame Law School and Of Counsel with the law firm of Caplin & Drysdale, Chartered. Prior to joining the Notre Dame faculty in the fall of 2005, he was a member of the exempt organizations practice group of Caplin & Drysdale in Washington, D.C. Before joining Caplin & Drysdale in 1996, he clerked for two years with the Honorable Lowell A. Reed, Jr., of the United States District Court for the Eastern District of Pennsylvania. Mr. Mayer teaches on a variety of tax-related topics, including tax-exempt organizations. He has also represented tax-exempt organizations of all types on a wide variety of issues, including election law, intermediate sanctions, international activities, lobbying and political activities, private foundation rules, public disclosure requirements, qualification for tax

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Patricia Nelson, J.D.

Patricia Nelson is an attorney with Fish & Richardson P.C. Her practice is concentrated in copyright, licensing, and U.S. and international trademarks, for clients in the technology, new media, academic, and entertainment industries. She received her B.A. degree from the University of Vermont, and her J.D. magna cum laude from Suffolk University Law School, where she concentrated in intellectual property law. Ms. Nelson is a frequent speaker on copyright, licensing, e-commerce, and other intellectual property issues to groups such as Massachusetts Continuing Legal Education, the New England Press Association, the Massachusetts Software Council, the Boston Bar Association, the Berkman Center for Internet and Society at Harvard Law School, and Emerson College. She has published in *Mass High Tech*, and is a contributor to and editor of *Perle & Williams on Publishing Law*, published by Aspen Law and Business. Ms. Nelson is co-chair of the Boston Bar Association Intellectual Property Section, and past co-chair of the Boston Bar Association Arts, Entertainment, and Sports Committee, and is a member of the Board of Directors of Arts/Boston and the Volunteer Lawyers for the Arts.

Mark A. Pacella, J.D.

Mark Pacella received his B.A. from the University of Pittsburgh in 1981 and his J.D. from the Antioch School of Law in 1984. He maintained a general law practice before joining the Pennsylvania Office of Attorney General in November 1987. Since September 1999, he has served as the Chief Deputy Attorney General of the Charitable Trusts and Organizations Section, which performs the attorney general's supervisory role over property committed to charitable purposes. Mr. Pacella is a past president of the National Association of State Charity Officials (NASCO), an affiliate of the National Association of Attorneys General, and serves on several NASCO committees. He is also a member of the Pennsylvania Bar Association's Charitable Organizations, Government Lawyers, and Health Care committees.

Jennifer I. Reynoso, J.D.

Jennifer I. Reynoso is Counsel at Simpson Thacher & Bartlett LLP, where she practices in the Exempt Organizations Department. She advises a variety of public charities and private foundations on structural and operating issues, including governance, reorganizational, and domestic and international grant-making. She also has experience advising donors on charitable-giving techniques. Ms. Reynoso is a frequent author and speaker on topics relevant to public charities and private foundations. She received her J.D. summa cum laude

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Douglas N. Varley, J.D.

Douglas N. Varley is a member of the Washington, D.C. office of Caplin & Drysdale. Mr. Varley's practice primarily focuses on advising exempt organizations, particularly private foundations. He has guided the design of major grant-making programs and has participated in the development of national public educational campaigns targeted on a range of significant policy issues. In addition to helping a diverse array of nonprofit organizations comply with the rules governing lobbying and political activities, his areas of expertise include international philanthropy, restrictions on executive compensation, transactions with for-profit organizations, and minimizing unrelated business income tax. Mr. Varley received his B.A. in 1989 from Stanford University and his J.D. in 1994 from Yale Law School. He has written numerous articles on tax-exempt organizations and has spoken at national meetings, including the Council on Foundations Annual Conference, the ABA Tax Section's Exempt Organizations Committee, and the ALI-ABA program on Tax-Exempt Charitable Organizations. Before embarking on his legal career, Mr. Varley administered grantmaking programs for college and university faculty at the National Endowment for the Humanities.

Catherine W. Wilkinson, M.B.A., C.P.A.

Catherine Wilkinson is a member of the tax practice at the law firm of Steptoe & Johnson LLP in Washington, D.C. Ms. Wilkinson provides tax planning and advice to tax-exempt organizations and represents corporations, including publicly traded corporations, closely held entities, and tax-exempt organizations and individuals in designing and negotiating executive compensation arrangements. This advice includes use of incentive and performance-based compensation and deferred compensation, stock options and other forms of equity compensation, compensation paid in connection with a change in control, and the application of the intermediate sanction rules to the compensation of executives of tax-exempt organizations. In addition, Ms. Wilkinson represents corporations, partnerships, tax-exempt organizations, and individuals in complex federal and state tax audits and investigations. These include routine civil audits of domestic and international organizations and investigations relating to tax shelters and charges of tax fraud and evasion.