APPENDIX A

Sources of Tax-Exempt Organizations Law

The law as described in this book is derived from many sources. For those not familiar with these matters and/or wishing to understand precisely what the “law” regarding tax-exempt organizations is, the following explanation is intended to be of assistance.

FEDERAL LAW

At the federal (national) level in the United States, there are three branches of government as provided for in the U.S. Constitution. Article I of the Constitution established the U.S. Congress as a bicameral legislature, consisting of the House of Representatives and the Senate. Article II of the Constitution established the presidency. Article III of the Constitution established the federal court system.1

Congress

Congress created the legal structure underlying the federal law for nonprofit organizations, including the law concerning tax exemption for them. Most of this law is manifested in the tax law and thus appears in the Internal Revenue Code. Other laws written by Congress that can affect tax-exempt organizations include the postal, antitrust, and securities laws.

Statutory Law in General. Law consists of primary and secondary sources. (The latter are referenced at the close of this Appendix.) The principal primary source of the federal tax law is legislation. Other primary sources of this body of law are administrative and judicial.

Tax laws for the United States are required to originate in the House of Representatives (U.S. Constitution, Article I §7). In practice, federal tax laws originate in either the House or the Senate. Usually, the nation’s tax laws are formally written by the members and staff of the House Committee on Ways and Means and the Senate Finance Committee. A considerable portion of this work is performed by the staff of the Joint Committee on Taxation, which consists of members of the House and the Senate. Frequently, these laws are generated by work initially done

1In general, see Constitutional Law § 1.2(a)–(c).
at the House subcommittee level, usually the Subcommittee on Oversight or the Subcommittee on Select Revenue Measures. Most tax legislation is the subject of hearings before the House Ways and Means Committee and the Senate Finance Committee. Nearly all of this legislation is finalized by a House–Senate conference committee, consisting of senior members of the House Ways and Means Committee and the Senate Finance Committee.

A Congress sits for two years, which is termed a “session.” Each Congress is sequentially numbered. For example, the 116th Congress is meeting during the calendar years 2019 and 2020. A legislative development that took place in 2019 is referenced as occurring during the 116th Congress, 1st Session (116th Cong., 1st Sess. (2019)).

A bill introduced in the House of Representatives or the Senate during a particular Congress is given a sequential number in each house. For example, the 1,000th bill introduced in the House of Representatives during the 116th Congress is cited as “H.R. 1000, 116th Cong., 1st Sess. (2019)”; the 1,000th bill introduced in the Senate during the 116th Congress is cited as “S. 1000, 116th Cong., 1st Sess. (2019).”

A tax bill, having passed the House and Senate, and usually blended by a conference committee, is sent to the President for signature. Once signed (if it is), the measure becomes law, causing enactment of one or more new and/or amended Code sections. As is the case with any act that has passed Congress, it is assigned a public law (Pub. L.) number. Thereafter, it is given a United States statutes designation (citation) and becomes part of the United States Code (USC).

Legislative History. A considerable amount of the federal tax law for non-profit organizations is found in the legislative history of these statutory laws. Most of this history is in congressional committee reports. Reports from committees in the House of Representatives are cited as “H. Rep.” (see, e.g., Chapter 1, note 37); reports from committees in the Senate are cited as “S. Rep.” (see, e.g., Chapter 1, note 87); conference committee reports are cited as “H. Rep.” The Internal Revenue Service (IRS) wrote that committee reports are “useful tools in determining Congressional intent behind certain tax laws, and helping examiners apply the law properly.”

Transcripts of the debate on legislation, formal statements, and other items are printed in the Congressional Record (Cong. Rec.). The Congressional Record is published every day one of the houses of Congress is in session and is cited as “__ Cong. Rec. __ (daily ed., [date of issue]).” The first number is the annual volume number; the second number is the page in the daily edition on which the item begins. Periodically, the daily editions of the Congressional Record are republished as a hardbound book and are cited as “__ Cong. Rec. __ ([year]).” As before, the first number is the annual volume number and the second is the beginning page number. The bound version of the Congressional Record then becomes the publication that contains the permanent citation for the item.

Internal Revenue Code. The Internal Revenue Code, the current version of which is the Internal Revenue Code of 1986, as amended, is the principal source

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2Internal Revenue Manual (IRM) 4.75.13.6.2 § 3.
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of the federal tax law. This Code is officially codified in Title 26 of the USC and referenced throughout this book as the IRC (see Chapter 1, note 5). The USC consists of 50 titles. The IRC imposes income, estate, gift, generation-skipping, excise, and employment taxes, and includes penalties and other provisions concerning the administration of federal taxation.

The IRC includes subtitles (of which there are 11), chapters, subchapters, parts, and sections. Code sections are divided into subsections, paragraphs, subparagraphs, and clauses. The most relevant of the subtitles are:

<table>
<thead>
<tr>
<th>Subtitle Contents</th>
<th>IRC Sections</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Income Taxes</td>
<td>1–1563</td>
</tr>
<tr>
<td>B Estate and Gift Taxes</td>
<td>2001–2704</td>
</tr>
<tr>
<td>C Employment Taxes</td>
<td>3101–3510</td>
</tr>
<tr>
<td>D Excise Taxes</td>
<td>4041–5000</td>
</tr>
<tr>
<td>F Procedure and Administration</td>
<td>6001–7873</td>
</tr>
<tr>
<td>G Joint Committee on Taxation</td>
<td>8001–8023</td>
</tr>
</tbody>
</table>

Sections of the IRC are arranged in numerical order. When the IRS cites an IRC section, it does not usually reference the title, subtitle, chapter, subchapter, or part. It references a Code section as “IRC §” (as does this book). As noted, IRC sections are divided into subsections, paragraphs, subparagraphs, and clauses. For example, IRC § 170(b)(1)(A)(vi) is structured as follows:

1. IRC § 170—Code section, arabic number
2. Subsection (b)—lowercase letter in parentheses
3. Paragraph (1)—arabic number in parentheses
4. Subparagraph (A)—capital letter in parentheses
5. Clause (vi)—lowercase roman numeral in parentheses

Inasmuch as IRC sections are arranged in numerical order, this practice sometimes leads to the need to show a Code section number followed by a capital letter that is not in parentheses. An example of this is IRC § 529A, which created tax exemption for ABLE programs.

The IRC is generally binding on the courts. As the IRS has written, the courts “give great importance to the literal language of the Code, but the language does not solve every tax controversy.” Thus, courts also consider the legislative history

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3 The IRS, in a peculiar understatement, advises its examiners that “it is often necessary to cite Internal Revenue Code sections in reports and to taxpayers in support of a position on an issue” (IRM 4.75.13.6.1.2 § 1).
4 According to the IRS, this structure results in “ease of use” of the IRC (IRM 4.75.13.6.1 § 2).
5 IRC § 6050L is a part of the federal tax law concerning deductible charitable giving and can be applicable with respect to tax-exempt organizations.
6 IRM 4.75.13.6.1.
underlying a Code section, its relationship to other Code sections, tax regulations, and various IRS pronouncements.

Executive Branch

A function of the Executive Branch in the United States is to administer and enforce the laws enacted by Congress. This “executive” function is performed by departments and agencies and “independent” regulatory commissions (such as the Federal Trade Commission or the Securities and Exchange Commission). The federal tax laws are administered and enforced overall by the Department of the Treasury.

Tax Regulations. The Code of Federal Regulations (CFR) is a codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the federal government. The CFR is divided into 50 titles representing broad areas subject to federal regulation. Each title is divided into chapters that usually bear the name of the issuing agency. Each chapter is subdivided into parts covering specific regulatory areas. Title 26 of the CFR consists of the federal tax regulations.

One of the ways in which the Department of the Treasury executes its functions is by the promulgation of regulations (Reg.), which are designed to interpret and amplify the related statute (see, e.g., Chapter 1, note 60). A tax regulation has two basic numbering parts: a prefix and the IRC section involved. Prefix 1 is assigned to income tax regulations, 20 to estate tax regulations, 25 to gift tax regulations, 301 to administrative regulations, and 601 to procedural regulations. Generally, tax regulations are subject to a public notice and comment process (see below).

Tax regulations interpreting the IRC are initially written by the Legislative and Regulations Division or the Tax Exempt and Government Entities Office of Associate Chief Counsel (Technical), IRS; the Department of the Treasury must approve regulations for them to take effect. There are three classes of tax regulations:

1. Proposed regulations. Proposed regulations provide guidance concerning the Treasury Department’s interpretation of an IRC section but usually do not have authoritative weight (because they are in proposed form); thus they are not binding on taxpayers and IRS examiners and other revenue agents. On occasion, however, the IRS will announce that a proposed regulation can be relied on until the regulation is published in final form. The public is accorded an opportunity to comment on a proposed regulation; a public hearing on the proposal may be held if sufficient written requests are received. Proposed regulations become effective when adopted by a Treasury Decision and become final regulations.

2. Temporary regulations. Temporary regulations are often issued soon after a major statutory law change to provide guidance to the public and IRS employees with respect to procedural and computational matters. Temporary regulations are authoritative and have the same weight as final regulations. Public hearings are not held on temporary regulations.
3. **Final regulations.** Final regulations are issued after public comments on the regulations in proposed form are evaluated. They supersede any temporary regulations and obviously replace the proposed regulations on the subject. A final regulation is effective as of the day it is published in the Federal Register as a Treasury Decision, unless otherwise stated.

Tax regulations (like other rules made by other government departments, agencies, and commissions) generally have the force of law, unless they are overly broad in relation to the accompanying statute or are unconstitutional, in which case they can be rendered void by a court. These regulations are not binding on courts; they are, however, binding on the IRS. If temporary and proposed regulations have been issued in connection with the same Code provision and the text of both is similar, examiners’ positions should be based on the temporary regulations. If neither temporary nor final regulations have been issued, IRS examiners may use a proposed regulation to support a position; they should, however, indicate that the proposed regulation lacks authoritative weight but is the best (at least from the standpoint of the IRS) interpretation of the statutory law involved that is available. Regulations do not always reflect changes in the law. Generally, a final regulation is effective as of the date a related proposed or temporary regulation was published.7

A temporary regulation must also be issued as a proposed regulation.8 A temporary regulation expires by operation of law within three years after the date of its issuance.9

Pursuant to an analytic model in place for decades, there are two types of final tax regulations: legislative and interpretative. The standard of review by a court applicable to a final regulation differed between these types of regulations. A legislative regulation is a final regulation issued under a specific grant of congressional authority to prescribe a method of executing a statutory provision. In this instance, an IRC provision will state: “The Secretary shall provide such regulations …”10 In contrast, an interpretative regulation is promulgated pursuant to the Treasury’s general authority to prescribe regulations.11 Courts accorded a higher degree of deference to a legislative regulation than to an interpretative one.

The deference accorded a legislative regulation was so high that the regulation had controlling weight unless it was arbitrary, capricious, or manifestly contrary to the underlying statute.12 This standard of deference is sometimes referred to as the **Chevron** deference in reflection of a 1984 case.13 Thus, when reviewing

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7 IRC § 7805(b)(1)(B). These regulations are published in the Federal Register; proposed regulations are notices of proposed rulemaking.
8 IRC § 7805(e)(1).
9 IRC § 7805(e)(2).
10 E.g., Snap Drape, Inc. v. Comm’r, 98 F.3d 194 (5th Cir. 1996).
11 IRC § 7805(a).
13 E.g., Belt v. EmCare, Inc., 444 F.3d 403, 416, note 35 (5th Cir. 2006); Klamath Strategic Investment Fund, LLC v. United States, 2007-1 U.S.T.C. ¶ 50,410 (E.D. Tex. 2007). In **Klamath**, the regulation at issue was held to be an interpretative regulation.
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a legislative regulation, a court was to “not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”\textsuperscript{14}

The foregoing dichotomy as to classification of regulations and the accompanying deference standard is no longer valid. Due in large part to a considerable number of inconsistent court opinions on the point,\textsuperscript{15} “confusion reign[ed]”\textsuperscript{16} as to the standards to be applied by courts in determining the validity of a tax (or other) regulation. Historically, the deference standard applicable with respect to tax regulations was a multifactor analysis enunciated by the Supreme Court in 1979. This test was as follows:

In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed upon it, the consistency of the [IRS] Commissioner’s interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.\textsuperscript{17}

This approach as to agencies’ interpretation of ambiguous statutes was dramatically altered by the Supreme Court in 2011, when it jettisoned the National Muffler standard and held that the Chevron deference standard, which merely requires that the regulation at issue be a reasonable interpretation of congressional intent, is applicable with respect to tax regulations.\textsuperscript{18} The Court observed that the petitioners in the case did “not advance [] any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency.”\textsuperscript{19} Consequently, the Court continued, it is “not inclined to carve out an approach to administrative review good for tax law only.”\textsuperscript{20}

The Court, in Chevron, wrote that the “power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”\textsuperscript{21} The Court acknowledged that the formulation of the policy might


\textsuperscript{15}E.g., Swallows Holding, Ltd. v. Comm’r, 515 F.3d 162 (3d Cir. 2008).

\textsuperscript{16}Berg, “Judicial Deference to Tax Regulations: A Reconsideration in Light of National Cable, Swallows Holding, and Other Developments,” 61 Tax Law. (No. 2) 545 (Winter 2008).


\textsuperscript{18}Mayo Found. for Medical Education and Research v. United States, 562 U.S. 44 (2011).

\textsuperscript{19}Id. at 55.

\textsuperscript{20}Id.

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require “more than ordinary knowledge respecting the matters subjected to agency regulation.”22 In the 2011 opinion, the Court wrote: “Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretative choices for statutory implementation at least as complex as the ones other agencies must make in administering their statutes.”23 Concluded the Court: “We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to [the 1984 case] to the same extent as our review of other regulations.”24

Deference notwithstanding, a court is first expected to determine if a government agency has jurisdiction over the matter(s) contained in a regulation.25 When it does this, a court should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies.26 In the federal tax law context, for example, a court of appeals voided regulations issued by the IRS to regulate paid tax-return preparers on the ground that the IRS lacked that authority in relation to statutory law.27 As to deference, this appellate court held that the IRS’s interpretation in the regulations failed at the first step in the deference analysis28 because “it is foreclosed by the statute.”29

The Administrative Procedure Act30 (APA) requires federal government agencies to adhere to notice and comment procedures in the case of rules or regulations that are intended to have the force of law but not in instances of “interpretative rules, general statements of policy, or rules of agency organization, procedure or practice.”31 This is a different dichotomy from the court-fashioned law referenced previously.32 Consequently, it would appear that all tax regulations are substantive regulations to which the APA’s notice and comment requirements

22Id. at 844 (internal quotation marks omitted).
24Id. The deference analysis is a two-step one: A court first decides if Congress has addressed the issue at hand in the statute; if it has not, the court then determines if the agency interpretation is reasonable.
25City of Arlington v. Federal Communications Commission, 133 S. Ct. 1863 (2013), where the Court wrote: “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority” (at 1868).
27Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir.). This court noted that the Supreme Court directed that the “fox-in-the-henhouse syndrome is to be avoided … by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority” (City of Arlington v. Federal Communications Commission, 133 S. Ct. 1863, 1874 (2013)). Likewise, a court held that the IRS lacks the statutory authority to regulate the preparation and filing of ordinary refund claims (Ridgely v. Lew, 55 F. Supp. 3d 89 (D.D.C. 2014)).
28See supra note 24. The court added that the IRS’s interpretation also failed the second step because “it is unreasonable in light of the statute’s text, history, structure, and context.”
29In its deference analysis, the court inexplicably cited to Chevron (supra note 21) rather than to Mayo (supra note 23).
31Id. § 553(b).
32The U.S. Tax Court wrote: “In the case of regulations, tax law has used a different basis to distinguish between legislative and interpretive rules” (Swallows Holding, Ltd v. Comm’r, 126 T.C. 96, 176 (2006), rev’d, supra note 15.)
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apply. Generally, as noted, the Department of the Treasury follows a notice and comment procedure with respect to its regulations. It has been suggested that the department does this at its discretion, maintaining the position that tax regulations are merely “interpretative” for APA purposes and thus not subject to the APA notice and comment requirements.

A tax regulation may be made retroactive; this type of regulation can be reviewed by a court for abuse of discretion. The IRS “does not have carte blanche” authority to issue retroactive regulations. The efficacy of a retroactive regulation is tested against these factors: whether or to what extent the taxpayer justifiably relied on settled law or policy and whether or to what extent the putatively retroactive regulation alters that law or policy; the extent to which the prior law or policy has been implicitly approved by Congress, as by legislative reenactment of the pertinent Code provision(s); whether retroactivity would advance or frustrate the interest in equality of treatment among similarly situated taxpayers; and whether according retroactive effect would produce an inordinately harsh result.

Revenue Rulings and Procedures. Within the Department of the Treasury is the IRS. The IRS is the nation’s tax-collection agency. The IRS, headquartered in Washington, D.C. (its National Office), has regional and field offices throughout the nation.

The IRS’s jurisdiction over tax-exempt organizations is principally lodged within the Exempt Organizations Division, which is responsible for planning, managing, directing, and executing nationwide activities for exempt organizations. The director of this division reports to the Commissioner, Tax Exempt and Government Entities Division. The director supervises the activities of the offices of Customer Education and Outreach, Rulings and Agreements, and Examinations.

The IRS (from its National Office) prepares and disseminates guidance interpreting tax statutes and tax regulations. This guidance has the force of law, unless it is overly broad in relation to the statute and/or Treasury regulation involved, or is unconstitutional. The Internal Revenue Bulletin (I.R.B.), published weekly, is the publication used by the IRS to announce official IRS rulings and procedures, and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. Historically, every six months, the I.R.B.s were republished as hardbound books, with the resulting publication termed the Cumulative Bulletin (C.B.). As a cost-cutting measure, however, the IRS ceased publication of the C.B., the last of these semiannual bound collections of the I.R.B.s was the 2008-2 edition. The IRS also announced that it has eliminated its printing and distribution of paper copies of the I.R.B. Yearly subscriptions sold by the Superintendent of Documents, however, are unaffected.

35Snap Drape, Inc. v. Comm’r, 98 F.3d 194, 202 (5th Cir. 1996).
The IRS publishes in the I.R.B. all substantive rulings necessary to promote uniform application of the federal tax laws, including rulings that supersede, revoke, modify, or amend rulings previously published in the I.R.B. All published rulings apply retroactively, unless otherwise indicated. Procedures pertaining solely to matters of internal IRS management are not published in the I.R.B. Nonetheless, statements of internal practices and procedures that affect the rights and duties of taxpayers are so published.

IRS public determinations on a point of law usually are in the form of “revenue rulings” (Rev. Ruls.) (see, e.g., Chapter 3, note 29); those that are rules of procedure are termed “revenue procedures” (Rev. Proc.) (see, e.g., Chapter 2, note 87). A Rev. Rul. represents the conclusion(s) of the IRS on application of the law to the facts stated in the ruling. Some Rev. Ruls. are based on positions taken by the IRS in private letter rulings or technical advice memoranda. A Rev. Proc. is issued to assist taxpayers in complying with procedural issues. The purpose of these rulings and procedures is to promote uniform application of the tax laws. IRS employees must follow them; taxpayers may rely on them or appeal their positions to the courts. Revenue rulings and revenue procedures are rarely accorded a public notice and comment process.

Revenue rulings and revenue procedures that have an effect on previous rulings use these terms to describe the effect:

- **Amplified** describes a situation where a change is not being made in a prior published position of the IRS but the prior position is being extended (amplified) to apply to a variation of the original fact situation.
- **Clarified** is used in instances where the language in a prior ruling is being made clearer because the original language has caused or may cause confusion.
- **Distinguished** describes a situation where a ruling makes reference to a previously published ruling and points out one or more essential differences between the two rulings.
- **Modified** is used where the substance of a previously published position is being changed.
- **Obsoleted** describes a previously published ruling that is not considered determinative with respect to future transactions. The term is most commonly used in a ruling that lists previously published rulings that are obsolete because of changes in the statutory law or regulations. A ruling may also be rendered obsolete because the substance of it has been included in subsequently adopted regulations.
- **Revoked** describes situations where the position of the IRS in a previously published ruling is not correct, and the correct position is being stated in a new ruling.
- **Superseded** describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling or rulings. The term is used by the IRS when it is desirable to republish in a single ruling a series of situations and the like that were previously
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published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, modified and superseded describes a situation where the substance of a previously published ruling is being changed in part and is being continued without change in part, and the IRS desires to restate the valid portion of the previously published ruling in a new ruling that is self-contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

• Supplemented is used in situations in which a list is published in a ruling and that list is expanded by adding items in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

• Suspended is used in rare situations to show that a previously published ruling will not be applied pending some future action, such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of an IRS study.

The IRS considers itself bound by its revenue rulings and revenue procedures. These determinations are the “law,” particularly in the sense that the IRS regards them as precedential, although they are not binding on the courts. Rulings do not have the force and effect of regulations. In applying rulings, the effects of subsequent legislation, regulations, court decisions, and other rulings and procedures need to be considered.

Thus, as in the case of the IRS, not all agency determinations are in the form of regulations. Agencies charged with applying a statute “necessarily make all sorts of interpretive choices and … not all of those choices bind judges to follow them.”38 Even where not binding, these agency choices “certainly may influence courts facing questions the agencies have already answered,” and, in this type of instance, the “fair measure of deference to an agency administering its own statute has been understood to vary with circumstances.”39 The weight given to an agency’s interpretation in this context depends on the “degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”40 (This is known as Skidmore deference.) It has been held that a revenue ruling is entitled to Skidmore (not Chevron) deference.41 The same is the case with respect to a revenue procedure.42

Other IRS Pronouncements. The IRS also issues forms of “public” law in the name of “notices” and “announcements” as well as “Delegation Orders.” Notices, announcements, and Delegation Orders are published in the I.R.B.

Announcements are public pronouncements on matters of general interest, such as the effective dates of temporary regulations and clarification of rulings and

39 Id.
41 Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002).
42 Tualatin Valley Builders Supply v. United States, 522 F.3d 937 (9th Cir. 2008).
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form instructions. They are issued when guidance of a substantive or procedural nature is needed quickly. Announcements can be relied on to the same extent as revenue rulings and revenue procedures, when they include specific language to that effect. Announcements are identified by a two-part number, representing the year involved and a sequence number (e.g., Ann. 2015-25).

Notices are public announcements that are identified in the same manner as announcements (e.g., Notice 2015-50). Notices are being frequently used to publish interim guidance in connection with new legislation, which can be relied on until corresponding regulations are published.

Commissioner Delegation Orders formally delegate, by the commissioner of Internal Revenue, authority to perform certain tasks or make certain decisions to specified employees of the IRS. Agreements entered into by IRS personnel pursuant to these orders are binding on taxpayers and the agency. Delegation Orders are identified by a number, sometimes followed by a revision date (e.g., Del. Order 250).

The IRS issues plain-language publications to explain aspects of the federal tax law. They typically highlight changes in the law, provide examples of IRS positions, and include worksheets. These publications, which do not necessarily cover all positions for a given issue, are not binding on the IRS. Although the publications are a good source of general information, IRS examiners are not supposed to cite to them in support of a position.

There is not much law on the matter of judicial deference in this context. One court wrote that “[i]t is hornbook law that informal publications all the way up to revenue rulings are simply guides to taxpayers, and a taxpayer relies on them at his peril.”43 Another court held that “authoritative sources of Federal tax law are in the statutes, regulations, and judicial decisions and not in… informal guidance.”44

Much of the law there is in this area concerns IRS form instructions. Some courts have taken the position that IRS form instructions assist in tax reporting but do not in themselves serve to stipulate tax law consequences.45 A court cited to IRS publications and form instructions in support of its conclusions in a tax law case.46 Another court observed that “general principles of equity dictate that the IRS should not be allowed to issue instructions for completing its forms and later disavow those instructions.”47

Private Determinations. In contrast to these forms of “public” law, the IRS (again from its National Office) also issues “private” or nonprecedential determinations. These documents principally are private letter rulings and technical advice memoranda. As a matter of law, these determinations may not be cited as legal authority.48 Thus, a court wrote that IRS private letter rulings “cannot be used or

43Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978).
45United States v. Josephberg, 562 F.3d 478 (2d Cir. 2009).
47Wilkes v. United States, 50 F. Supp. 2d 1281, 1286–1287 (M.D. Fla. 1999), aff’d, 201 F.3d 394 (11th Cir. 2000).
48IRC § 6110(k)(3).
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cited as precedent; they cannot be used to advance a particular interpretation of the Internal Revenue Code; and they cannot be used for their substance.49 The practice of the U.S. Tax Court is to refuse to consider these private determinations.50 Nonetheless, these pronouncements can be valuable in understanding IRS thinking on a point of law and, in practice (the statutory prohibition notwithstanding), these documents are cited as IRS positions on issues, such as in court opinions,51 articles, and books.52

The IRS issues private letter rulings in response to written questions (termed ruling requests) submitted to the agency by individuals and organizations. An IRS district office may refer a case to the IRS National Office for advice (termed technical advice); the resulting advice is provided to the IRS district office in the form of a technical advice memorandum. In the course of preparing a revenue ruling, private letter ruling, or technical advice memorandum, the IRS National Office may seek legal advice from its Office of Chief Counsel; the resulting advice was provided, until recently, in the form of a general counsel memorandum. These documents are eventually made public, albeit in redacted form. The chief counsel advice memorandum has replaced the general counsel memorandum.

Private letter rulings and technical advice memoranda are identified by seven-digit or nine-digit numbers, as in “Priv. Ltr. Rul. 201926007” (see, e.g., Chapter 1, note 2). The first two (or four) numbers are for the year involved (here, 2019), the next two numbers reflect the week of the calendar year involved (here, the 26th week of 2019), and the remaining three numbers identify the document as issued sequentially during the particular week (here, this private letter ruling was the seventh one issued during the week involved).

The agency, pursuant to court order,53 issues rulings denying or revoking tax-exempt status. These exemption denial and revocation letters initially were identified by eight numbers, followed by an “E.” This practice was discontinued by the IRS, however; these letters are now being issued as private letter rulings.

50 E.g., Nat’l Education Ass’n of the United States v. Comm’r, 137 T.C. 100 (2011); Abdel-Fattah v. Comm’r, 134 T.C. 190 (2010).
51 E.g., Glass v. Comm’r, 471 F.3d 698 (6th Cir. 2006).
52 E.g., A “series of similar letter rulings might help the attorney predict for the client the IRS’s probable approach in a given situation” (Lederman and Mazza, Tax Controversies: Practice and Procedure, Third Edition (San Francisco: LexisNexis, 2009)) at 778. There, it is observed that private letter rulings constitute authority for avoiding the substantial understatement penalty (IRC § 6662(d)(2)(B)).

Indeed, even the IRS occasionally references its private letter rulings and technical advice memorandum in its analysis of the law of tax-exempt organizations, stating that, while they “are not to be taken as precedent,” they are “described” in its writings “for illustrative purposes” (e.g., “Fund Raising,” Topic L, 1982 Exempt Organizations Continuing Professional Education Text). In Nat’l Education Ass’n of the United States v. Comm’r, 137 T.C. 100 (2011), in support of one of its arguments, the NEA cited an unpublished IRS field service memorandum and an unpublished private letter ruling; the IRS objected to these citations (then distinguished them) but it in turn cited two unpublished technical advice memoranda. Moreover, Congress occasionally cites private letter rulings, such as the instance where the House Committee on Ways and Means observed, after citing several IRS letter rulings, that these rulings “are some indication of IRS administrative practice” (H. Rep. No. 104-586, 104th Cong., 2d Sess., at 136, n. 14 (1996)).

Regulatory Review

For years, federal government regulations have been subject to review by the Office of Management and Budget. Historically, few tax regulations were determined to be “significant regulatory actions” as that phrase was defined by executive order (E.O. 12866), determined to have significant economic impacts on business under the Regulatory Flexibility Act, or considered major rules under the Congressional Review Act. In addition, tax regulations and other tax law guidance was exempt from the executive order’s requirements by reason of an agreement, reached in 1983, between the Treasury Department and the OMB. That agreement was reflective of Treasury’s view that its regulations and other guidance do not have any economic effect, in that the economic effect is attributable solely to the underlying statutory law.

This Treasury/OMB arrangement was changed by reason of a superseding agreement dated April 11, 2018. This agreement provides the terms under which the OMB, by means of its Office of Information and Regulatory Affairs, will review “tax regulatory actions.” OIRA’s review is triggered if a proposed tax regulation is likely to result in a rule that may raise “novel legal or policy issues,” have an annual effect on the nation’s economy of at least $100 million, or create a “serious inconsistency or otherwise interfere with an action taken or planned by another agency.”

Treasury agreed to submit to the OIRA, quarterly, a notice of planned tax regulatory actions that describes each action, identifies any significant policy changes proposed or resulting from the action, and articulates the basis for determining whether the action is covered by the agreement. The OIRA agreed to generally complete its review of an action within 45 days.

Nature of Guidance

The IRS considers only guidance published in its Internal Revenue Bulletin to be authoritative. Authoritative guidance is guidance the public can consider as binding on the IRS. The U.S. Government Accountability Office issued a report in 2016 stating that the IRS “lacks documented procedures for deciding what type of guidance to issue” (GAO-16-720). Another GAO conclusion: “Policies and procedures that identify factors to consider when deciding among different guidance types could help [the] IRS ensure that the selected form of guidance reflects what is known about the binding nature of various types of guidance.”

Thus, the IRS may express its views in a revenue ruling, announcement, or notice, and have those views be authoritative, or state its position in a document such as a private letter ruling or technical advice memorandum, which is not authoritative. The importance of a topic does not always correlate with the “type of guidance” issued.

Judiciary

The federal court system has three levels: trial courts (including those that initially hear cases where a formal trial is not involved), courts of appeals (“appellate” courts), and the U.S. Supreme Court. The trial courts include the various federal
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district courts (at least one in each state, the District of Columbia, and the U.S. territories), the U.S. Tax Court, and the U.S. Court of Federal Claims. There are 13 federal appellate courts (the U.S. Court of Appeals for the First through the Eleventh Circuits, the U.S. Court of Appeals for the District of Columbia, and the U.S. Court of Appeals for the Federal Circuit).

Cases involving tax-exempt organization issues at the federal level can originate in any federal district court, the U.S. Tax Court, and the U.S. Court of Federal Claims. Under a special declaratory judgment procedure available only to charitable organizations and farmers’ cooperatives, cases can originate only with the U.S. District Court for the District of Columbia, the U.S. Tax Court, and the U.S. Court of Federal Claims. Cases involving tax-exempt organizations are considered by the U.S. Courts of Appeals and the U.S. Supreme Court.

Most opinions emanating from a U.S. district court are published by the West Publishing Company in the “Federal Supplement” series (“F.Supp.,” “F.Supp. 2d,” or “F.Supp. 3d”). Thus, a citation to one of these opinions appears as “__ F.Supp. __,” “__ F.Supp. 2d __,” or “__ F.Supp. 3d __,” followed by an identification of the court and the year of the opinion. The first number is the annual volume number, and the other number is the page in the book on which the opinion begins (see, e.g., Chapter 1, note 69). Some district court opinions appear sooner in Commerce Clearinghouse or Prentice Hall publications; occasionally, these publications will contain opinions that are never published in the Federal Supplement series.

Most opinions emanating from a U.S. Court of Appeals are published by the West Publishing Company in the “Federal Reporter” series (usually “F.2d” or “F.3d”). Thus, a citation to one of these opinions appears as “__ F.2d __” or “__ F.3d __,” followed by an identification of the court and the year of the opinion. The first number is the annual volume number; the other number is the page in the book on which the opinion begins (see, e.g., Chapter 1, note 66). Appellate court opinions appear sooner in Commerce Clearinghouse or Prentice Hall publications; occasionally these publications contain opinions that are never published in the Federal Second or Federal Third series. Opinions from the U.S. Court of Federal Claims are also published in the Federal Second or Federal Third series. Opinions from the U.S. Tax Court are published by the U.S. government (Government Printing Office) and are usually in the form of “regular opinions” and cited as “__ T.C. __” followed by the year of the opinion (see, e.g., Chapter 3, note 2). Some Tax Court opinions that are of lesser precedential value (because they primarily involve determinations of fact and application of well-established rules of law) are published by the federal government as “memorandum decisions” and are cited as “__ T.C.M. __” followed by the year of the opinion (see, e.g., Chapter 3, note 18). As always, the first number of these citations is the annual volume number, and the second number is the page in the book on which the opinion begins. Commercial publishers publish regular opinions and memorandum decisions.

U.S. district court and Tax Court opinions may be appealed to the appropriate U.S. Court of Appeals. For example, cases in the states of Maryland, North

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54The Tax Court was created in 1942; its predecessor was the Board of Tax Appeals. Some B.T.A. decisions retain precedential value.
55This court was created (renamed) in 1982; its predecessor was the U.S. Claims Court.
56IRC § 7428.
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Carolina, South Carolina, Virginia, and West Virginia are appealable (from either court) to the U.S. Court of Appeals for the Fourth Circuit. Cases from any federal appellate or district court, the U.S. Tax Court, and the U.S. Court of Federal Claims may be appealed to the U.S. Supreme Court.

District courts must follow the decisions of the court of appeals for the circuit in which they are located. If the court of appeals that is potentially involved in a case has not rendered a decision on a particular issue, the district court may reach its own decision or follow the decision of another circuit court that has rendered a decision on the issue. A circuit court is not bound by a decision of another circuit court.

The U.S. Supreme Court usually has discretion as to whether to accept a case.57 This decision is manifested as a “writ of certiorari.” When the Supreme Court agrees to hear a case, it grants the writ (“cert. gr.”); otherwise, it denies the writ (“cert. den.”) (see, e.g., Chapter 3, note 6).

In this book, citations to Supreme Court opinions are to the “United States Reports” series, published by the U.S. government, when available (“__U.S. __,” followed by the year of the opinion) (see, e.g., Chapter 1, note 1). When the United States Reports series citation is not available, the “Supreme Court Reporter” series, published by the West Publishing Company, reference is used (“__ S. Ct. __,” followed by the year of the opinion). As always, the first number of these citations is the annual volume number, and the second number is the page in the book on which the opinion begins. There is a third way to cite Supreme Court cases, which is by means of the “United States Supreme Court Reports—Lawyers Edition” series, published by The Lawyers Co-Operative Publishing Company and the Bancroft-Whitney Company, but that form of citation is not used in this book. Supreme Court opinions appear earlier in the Commerce Clearinghouse or Prentice Hall publications.

In most instances, court opinions are available on Westlaw and LEXIS in advance of formal publication.

Decisions made at various levels of the court system are considered to be interpretations of the tax laws and may be used by examiners and taxpayers to support a position. Some court opinions lend more weight to a position than others. An opinion emanating from a case decided by the U.S. Supreme Court becomes the “law of the land” and takes precedence over decisions of lower courts. The IRS must follow Supreme Court decisions. In that sense, Supreme Court decisions have the same weight as the Internal Revenue Code. Decisions made by lower courts are binding on the IRS only for the particular taxpayer and the years litigated. Adverse decisions of lower courts do not require the IRS to alter its position for other taxpayers.

Action on Decisions. It is the policy of the IRS to announce at an early date whether it will follow the holding(s) in certain court cases; such an announcement is an action on decision (AOD). An AOD is issued at the discretion of the IRS only on unappealed issues that have been decided adverse to the position of the government. Generally, an AOD is issued when guidance would be helpful to IRS

57The IRS observed that “[o]nly a limited number of tax cases are heard” by the Court (IRM 4.75.13.6.8.6 § 1).
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personnel working with the same or similar issues. Unlike a tax regulation or a revenue ruling, an AOD is not an affirmative statement of the IRS’s position. It is not intended to serve as guidance to the public and is not to be cited as precedent.

An AOD may be relied on within the IRS only as to the conclusion, applying the law to the facts in the particular case at the time the AOD was issued. IRS examiners are to exercise caution when extending the recommendation of an AOD to another case, where the facts may be different. An AOD may be superseded by legislation, regulations, rulings, court opinions, or a subsequent AOD.

An AOD may state that the IRS acquiesces in the holding of a court in a case and that the IRS will follow it in disposing of cases with the same facts; this acquiescence indicates neither approval nor disapproval of the reasons relied on by the court for its conclusions. An acquiescence in result only indicates IRS disagreement or concern with some or all of those reasons. Nonacquiescence signifies that, although no further review was sought, the IRS does not agree with the holding of the court and generally will not follow it in disposing of cases involving other taxpayers. With respect to an opinion of a circuit court of appeals, a nonacquiescence indicates that the IRS will not follow the holding on a nationwide basis; the agency will, however, recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit court.

AODs are published in the I.R.B. and thereafter in the appropriate C.B. An examiner is required to include in the citation to a court opinion any acquiescence (acq.), acquiescence in result only (acq. in result), or nonacquiescence (nonacq.).

STATE LAW

Legislative Branches

Statutory laws in the various states are created by their legislatures. There are no specific references to state statutory laws in this book (although most, if not all, of the states have such forms of law relating, directly or indirectly, to charitable giving, such as those pertaining to deductions and fundraising).

Executive Branches

The rules and regulations published at the state level emanate from state departments, agencies, and the like. For tax-exempt organizations, these departments are usually the office of the state’s attorney general and the state’s department of state. There are no specific references to state rules and regulations in this book.

Judiciary

Each of the states has a judiciary system, usually a three-tiered one modeled after the federal system. Cases involving nonprofit organizations are heard in all of these courts. There are no references to state court opinions in this book.

State court opinions are published by the governments of each state. The principal ones are published by the West Publishing Company. The latter sets of opinions are published in “Reporters” relating to court developments in various regions throughout the country. For example, the “Atlantic Reporter”
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PUBLICATIONS

Articles are secondary sources of legal authority. Although not legally binding, they can be cited by courts, particularly when describing development of the law. Also, as research tools, they contain useful summaries of the applicable law. In addition to the many law school “law review” publications, the following periodicals (not an inclusive list) contain material that is of help in following developments in the law concerning tax-exempt organizations:

Advancing Philanthropy (Association of Fundraising Professionals)
Bruce R. Hopkins’ Nonprofit Counsel (John Wiley & Sons)
The Chronicle of Philanthropy
Daily Tax Report (Bloomberg, Bureau of National Affairs)
Exempt Organization Tax Review (Tax Analysts)
Foundation News (Council on Foundations)
Giving USA (Center on Philanthropy, Indiana University)
The Journal of Taxation (Warren, Gorham & Lamont)
The Journal of Taxation of Exempt Organizations (Faulkner & Gray)
The Philanthropy Monthly (Non-Profit Reports)
Tax Law Review (Rosenfeld Launer Publications)
The Tax Lawyer (American Bar Association)
Tax Notes (Tax Analysts)
Taxes (Commerce Clearinghouse)