CONTENTS

List of contributors xxiv
Preface xxxv
Abbreviations xlix

PART I Economic findings and theories on nonprofit organizations 1

1 The nonprofit sector: introductory remarks
What kind of nonprofit sector, what kind of society? Comparative policy reflections 3

HELMUT K. ANHEIER
I Introduction 3
A Nonprofits as service providers 4
B Nonprofits and civil society 6
C Social accountability 9
II Implications 11
III Scenarios 13
A NPM scenario 14
B Social capital scenario 14
C Accountability scenario 14
D The corporate scenario 14
E The mellow weakness scenario 15
F Roles for the state 15
IV Summary and conclusions 16

2 Good and not so good governance of nonprofit organizations: factual observations from the USA and Europe

2.1 Good and not so good governance of nonprofit organizations: factual observations from the USA 20

JOHN A. EDIE
I Introduction 21
CONTENTS

II Media reports: examples of not so good governance 22
III Response to the media: who is pushing for change? 25
IV Four key events leading to improved good governance 27
   A Senate finance committee’s “white paper” 28
   B Report of the Panel on the Nonprofit Sector 28
   C US Senate Passage of S. 2020 29
   D California legislation 29
V Examples of good governance 30
   A Independent audit 31
   B Independent audit committee 31
   C Public access to audited financial statements 32
   D Compensation of CEO approved by full board of directors 32
   E Conflict of interest policy 33
   F Whistleblower policy 33
   G Travel policy 34
VI Private sector pressure for good governance 35
   A BBB Wise Giving Alliance (Arlington, Virginia) 35
   B BoardSource (Washington, DC) 36
   C Council on Foundations (Washington, DC) 36
   D Forum of Regional Associations (Washington, DC) 37
VII Summary and conclusions 37

2.2 Good and not so good governance of nonprofit organizations: factual observations from foundations in Germany 39

CHRISTOPH MECKING
II Not so good foundation governance 42
   A Problem cases 42
   B A lack of publicity 47
III Good foundational governance 48
   A Government monitoring 48
   B Self-regulation 50
   C Principles of good foundational practice 52
IV Summary and conclusions 59

3 Economic theories of nonprofit organizations
3.1 The economics of nonprofit organizations 60

HENRY HANSMANN
II Structure and role 60
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>vii</th>
</tr>
</thead>
<tbody>
<tr>
<td>III Managerial agency problems</td>
<td>63</td>
</tr>
<tr>
<td>IV Entry and exit</td>
<td>65</td>
</tr>
<tr>
<td>V Refining the nondistribution constraint: executive compensation</td>
<td>68</td>
</tr>
<tr>
<td>VI Cooperatives versus nonprofits</td>
<td>69</td>
</tr>
<tr>
<td>VII Summary and conclusions</td>
<td>71</td>
</tr>
</tbody>
</table>

3.2 **Principal–agent theory and nonprofit accountability** 73

RICHARD STEINBERG

| I Introduction | 74 |
| II Principal–agent theory in economics | 75 |
| A The problem defined | 75 |
| B Types of principal–agent problems | 76 |
| C Solving principal–agent problems | 78 |
| D Shortcomings of agency theory | 80 |
| III Applications: donors as principals, organizations as agents | 83 |
| A Quantity problems | 85 |
| B Leadership gifts | 88 |
| C Excessive fundraising and administrative expenditures | 89 |
| D Quality mismatch when donor-principals are homogeneous | 92 |
| E Quality mismatch when donor-principals are heterogeneous | 93 |
| IV Customers and clients as principals, nonprofit organizations as agents | 96 |
| V Internal agency problems | 99 |
| A Overview – interpreting empirical results | 100 |
| B Excessive compensation | 102 |
| C Financial incentive plans | 105 |
| VI Summary and conclusions | 113 |

PART II  **The nonprofit sector: private law, trust law, tax law in selected countries** 127

4 Anglo-American countries

4.1 **Nonprofit organizations in the United States** 129

JAMES J. FISHPAN

| I Introduction | 130 |
| II The nondistribution constraint | 131 |
| III Public benefit and mutual benefit organizations | 132 |
| IV Private law, trust law, and corporate law | 133 |
| A Unincorporated associations | 134 |
| B The charitable trust | 135 |
viii

CONTENTS

C Nonprofit corporations 136

V Tax law relating to nonprofits 139

A State tax exemption: regulation and enforcement 139
B Federal tax law 140
C The functions of federal tax law 141
D Federal tax taxonomy: the charitable non-charitable distinction 143
E The charitable nonprofits: section 501(c)(3) organizations 143
F The public charity-private foundation distinction 144
G Restrictions on private foundations 146
H Evaluation of the private foundation restrictions 148

VI Fiduciary obligations 149

A Trust law: the duty of prudence 149
B Trust law: the duty of loyalty 150
C The nonprofit corporation: the board of directors 150
D Nonprofit corporate law: the duty of care 151
E The duty of loyalty 152
F Private law approaches 155
G State regulation of fiduciary and other obligations: the attorney general 155
H Federal regulation of fiduciary obligations 158

VII Charitable solicitation 161

A State regulation 161
B Federal regulation of charitable solicitation 165

VIII Summary and conclusions 166

4.2 Harmonising nonprofit law in the European Union: an English perspective and digest 170

HUBERT PICARDA

I Introduction 171

II General themes 173

A The contrast between the common law and civil law: reconciliation problems 173
B The impulse to codification and cross-border initiatives in Europe 175
C The comparable techniques of synthesis of views 176
D The need for a core vocabulary 177
E The flood of policy and statist agenda into the “third sector” and the law in England 178
F Overview of the English Charities Act and its problem area 178
contents

G Specific cross-border European initiatives to preclude money laundering abuse by terrorists and criminals of charities and the third sector and for the development of the European association and other strategies 183

III Organisational law 184
   A Trust 184
   B Company 184
   C Unincorporated association (volunteers) 185
   D Industrial and provident societies: charitable housing associations 185
   E Charitable incorporated organisations (CIOs) 185

IV Duties of trustees and directors in relation to loyalty and duty of care 186
   A Duty of loyalty 187
   B Keeping to the objects 187
   C Duty to avoid or remedy conflict of interests 188
   D Duty of care 191

V Enforcement of those duties and the enforcers 192
   A Enforcement of those duties 192
   B Enforcers 192
   C Methods of enforcement 194

VI Summary and conclusions 195

5 Germanic countries

5.1 Nonprofit organizations in Germany 197

THOMAS VON HIPPEL

I Introduction 200
   A The term “nonprofit organizations” 200
   B Empirical information 200

II Institutional law 200
   A Association 200
   B Foundation 202
   C Other legal forms for nonprofit organizations 203

III Tax law 205
   A Status of a tax-exempt organization 205
   B Tax benefits 208

IV Fiduciary obligations of the board members 210
   A Duty of care 210
   B Duty of loyalty 211
   C Duty of prudence (investment of assets) 211
5.2 Nonprofit organizations in the Netherlands

Tymen J. Van der Ploeg

I Introduction 230
A The term "nonprofit organizations" 230
B Empirical information 230

II Institutional law 231
A Legal forms 231
B The association 231
C The foundation 233

III Tax law relating to nonprofits 234

IV Fiduciary obligations of the board members 236
A Introduction 236
B Duty of loyalty and duty of care 237
C Duty of prudence (investment of assets) 239
D Duty of obedience 241

V Governance and enforcement 241
A Internal governance 241
B External supervision 248
Contents

C Rights of third parties 254
D Reporting, auditing, and disclosure 256
VI Charitable solicitation 258
VII Economic activities, enterprises, and creditor protection 259
A Economic activities 259
B Nonprofit organizations and enterprises 259
C Creditor protection 260
VIII Recent reforms, reform proposals, standards of best practice 261
A Recent reforms 261
B Reform proposals 262
C Best practices 263
IX Summary and conclusions 263

6 Romanic countries

Nonprofit organizations in France 265

Katrin Deckert

I Introduction 268
A The term “nonprofit organization” 268
B Empirical information 268
C General remarks on the legal environment in France 269
II Institutional law 272
A Associations 272
B Foundations 280
III Tax law relating to nonprofits 285
IV Fiduciary obligations of board members 287
A Introduction 287
B Duty of loyalty 287
C Duty of prudence 288
D Duty of obedience 291
E System of civil liability in nonprofit organizations 293
V Governance and enforcement 293
A Internal governance 293
B State supervision 307
C Rights of third parties 312
D Reporting, auditing and disclosure 313
VI Charitable solicitation 319
VII Economic activities, enterprises and creditor protection 319
A Economic activities 319
B Creditor protection 322
CONTENTS

VIII Recent reforms, reform proposals, standards of best practice 323
IX Conclusion 324

7 Transformation countries
7.1 Nonprofit organizations in Hungary 325

ZOLTÁN CSEHÍ
I Introduction 327
A The term “nonprofit organizations” 327
B Hungarian Nonprofit Act: special rules and benefits for registered charities 331
C Empirical information 333

II Institutional law 334
A Purpose and characteristics 334
B Requirements of the NPO Act 338
C Establishment 340
D Winding up 343

III Fiduciary obligations of the board members 345
A Introduction 345
B Duty of loyalty 348
C Duty of prudence 350
D Duty of obedience 351
E Incompatibility rules of registered NPOs 353

IV Governance and enforcement 355
A Internal governance 355
B State supervision 363
C Rights of third parties 367
D Reporting 369

V Economic activities, enterprises and creditor protection 374
A Economic activities 374
B Creditor protection 375

VI Recent reforms, reform proposals, standards of best practice 376

VII Summary and conclusions 377

7.2 Nonprofit organizations in the Czech Republic 379

KATEŘINA RONOVSKÁ
I Introduction 381
A The term “nonprofit organisations” 381
B Empirical data 383

II Institutional law 383
A Legal forms 383
CONTENTS

B Associations 384
C The foundation, the endowment fund, the public benefit institution 388

III Tax law relating to nonprofits 396
A General 396
B Survey of tax privileges 397

IV Fiduciary obligations of the board members 398
A Introduction 398
B Duty of loyalty 398
C Investment of assets (duty of prudence) 400
D Duty of obedience 401

V Governance and enforcement 401
A Internal governance 401
B External supervision 407
C Rights of third parties 411
D Reporting, auditing, disclosure 413

VI Charitable solicitation 416

VII Economic activities, enterprises and creditor protection 417
A Economic activities 417
B NGOs and enterprises 418
C Creditors’ protection 420

VIII Recent reforms, proposals, standards of best practice 421
A Recent reforms and proposals 421
B Best practice 425

IX Summary and conclusions 426

7.3 Nonprofit organizations in the People’s Republic of China 428

THOMAS VON HIPPEL/KNUT B. PIßLER

I Introduction 431
A The term “nonprofit organizations” 431
B Empirical information 431

II Institutional law 432
A Foundations 434
B Social organizations (associations) 439
C Civil non-business institutions 442
D Charitable trusts 444
E Foreign nonprofit organizations 446

III Tax law relating to nonprofits 446

IV Fiduciary obligations of the board members 447
A Duty of loyalty 447
B Duty of prudence (investment of assets) 450
C “Duty of obedience” 454

V Governance and enforcement 455
A Internal governance 456
B State supervision (external supervision) 461
C Rights of third parties 462
D Reporting, auditing, and disclosure 465

VI Charitable solicitation 468
VII Economic activities, enterprises, and creditor protection 469
A Economic activities 469
B Nonprofit organizations and enterprises 470
C Creditor protection 470

VIII Recent reforms, reform proposals, standards of best practice 470
A Recent reforms 470
B Reform proposals 471
C Best practice 473

IX Conclusion 474
A Growing significance of NPOs 474
B Increased regulation 474
C Skepticism regarding NPOs 475
D Thoughts on liberalizing NPO regulations 475
E Legal uncertainty 476

PART III The board of nonprofit organizations 479

8 The board of nonprofit organizations: law and practice
8.1 The board of nonprofit organizations: puzzling through the gaps between law and practice – a view from the United States 481

EVELYN BRODY

I Introduction 482

II Discussion 486
A To whom (or what) are board duties owed? 486
B Organizational type, organizational size 489
C Inside the black box: board/management relations 491
D Group authority, individual responsibility 506
E Are charity members shareholder-substitutes? 519
F What really happens to a wayward charity fiduciary? 522

III Summary and conclusions: how can practice be improved? 529
8.2 The board of nonprofit organizations: some corporate governance thoughts from Europe  531

KLAUS J. HOPT

I Nonprofit organizations and corporate governance: an introduction from a European perspective  532
   A The state of the discussion in Europe  532
   B Deficits of control in nonprofit organizations and ways out  534

II The board of nonprofit organizations: what can be learned from the corporate governance discussion?  539
   A The board of nonprofit organizations: differences between the United States and Europe  539
   B The board of nonprofit organizations in Europe  540

III Organization and functioning of the board of nonprofit organizations  543
   A One-tier/two-tier boards  543
   B Composition and size of the board  545
   C Board committees  549
   D Remuneration and audit in particular  550
   E Education, professionalization and evaluation  553

IV Responsibility of the board of nonprofit organizations  554
   A Duties of the board of a nonprofit organization  554
   B Liability of the board of a nonprofit organization  557
   C Enforcement, legal and non-legal  559

9 The duty of obedience
9.1 Rediscovering the duty of obedience: toward a trinitarian theory of fiduciary duty  564

ROB ATKINSON

I Introduction  566

II Identifying the duty of obedience  569
   A Locating the duty of obedience in the tripartite scheme of fiduciary duties  569
   B Locating the duty of obedience in four fiduciary contexts  578

III Normative analysis: evaluating the duty of obedience  611
   A Normative analysis of the weak form of the duty of obedience  612
   B Dead hand control in the law of charity  614

IV Summary and conclusions  618
9.2 Duty of obedience: the German perspective  619

Rainer Hüttemann

I Introduction 619
II Law of foundations 620
   A Dead-hand control 620
   B Alteration of purpose under § 87 German Civil Code 624
   C Other amendments of the articles of a foundation 625
   D State laws 626
   E Enforcement of the duty of obedience 627
   F Current reform proposals 628
III Charitable associations and corporations 629
IV Duty of obedience and charitable giving 630
V Impacts of tax relief 631

PART IV Good governance of nonprofit organizations: activities and regulatory problems 635

10 Fundraising

10.1 The regulation of fund-raising by charities and voluntary organisations in England and Wales 637

Peter Luxton

I Introduction 637
II Public charitable collections 641
III Fund-raising 653
IV Trading 657
V EU regulation 659
VI Self-regulation 660
VII Summary and conclusions 660

10.2 Comparing regulation of fundraising: self-regulation or governmental regulation? 662

Wino J. M. van Veen

I Introduction 663
II Governmental regulation 665
   A Fundraising and legislation: general remarks 665
   B Legitimacy of government regulation of fundraising 668
   C The instruments of government regulation 669
   D Compliance and effectiveness of government regulation 675
III Self-regulation of fundraising 679
   A Defining self-regulation 679
CONTENTS xvii

B Legitimacy of self-regulation 682
C Instruments of self-regulation 684
D Standards for fundraising 688
E Self-regulation: concluding remarks 692

IV Comparing government regulation and self-regulation 693
A Authorization versus accreditation 693
B Punitive versus preventive 694
C Informing the public 695
D The mechanisms: implementation and enforcement 696

V Summary and conclusions: government regulation or self-regulation? 697

11 Asset management in nonprofit organizations 699

11.1 Asset management in nonprofit organizations 699
CARSTEN CARSTENSEN

I Introduction 699

II Economic aspects of asset management 700
A The role of foundations 700
B Fundamentals 701
C Fulfilment of the foundation’s purpose 701
D Preservation of the foundation’s capital 701
E Disposition of the proceeds 703
F Asset management 703

III Asset management and the tax law 704
A Payout in time 704
B Asset management and economic activity 705
C Asset management and securities transactions 705
D Asset management and real estate 705
E Asset management and alternative investments 706

IV Special rules for the association 707
A Membership fees and donations 707
B Preservation of the association’s capital 707
C Trustee function of the association? 707

V Summary and conclusions 708

11.2 Legal standards for capital investments by foundations in hedge funds according to German and American law 709
MAXIMILIAN HAAG AND ANDREAS RICHTER

I Introduction 710
II Specific characteristics and risks of capital investment in hedge funds 712
   A Fund structure and management 712
   B The fund’s investment strategies 714

III Legal standards for investments by charitable organizations 715
   A Founder’s will and duty of loyalty 715
   B Precept of secure and lucrative investment 718
   C Precept of timely use of funds 726
   D Prohibition of favoritism 729
   E Additional restrictions in US tax law 731
   F Liability of the foundation bodies for breaches of duty 735

IV Summary and conclusions 738

12 Nonprofit organizations and economic activities/enterprises

12.1 Nonprofit organizations and economic activities/enterprises 740

CARL HEMSTRÖM
   I General background 741
   II Foundations and nonprofit associations 746
      A Background 746
      B Introduction 747
      C Management and economic activities 754
      D Accounts and reports 759
      E Auditing 763
      F Liquidation 767

12.2 Nonprofit organizations and enterprises: the Danish foundation law as an example 770

SØREN FRIIS HANSEN
   I Outline of Danish law on foundations 770
      A General principles for nonprofit organizations in Danish law 770
      B Foundations in Danish law 772
      C Tax treatment of foundations under Danish law 777
   II Corporate governance in Danish enterprise foundations 780
      A The Danish management system 780
      B Accounting and state supervision 782
   III Financial performance of enterprises controlled by enterprise foundations (the Studies by Thomsen et al.) 784
   IV Summary and conclusions 786
CONTENTS

12.3 The protection of members and creditors of nonprofit organisations 789

SUSANNE KALSS
I Introduction 789
II Protection of creditors 791
A General 791
B Limitation of activities of nonprofit organisations, in particular associations 792
C Minimum capital requirements – principle of capital maintenance 798
D Accounting, auditing, disclosure 800
E Insolvency law 803
F Liability of organs and members 804
III Protection of members 806
A Rights of voice 807
B Right to entrance fees and membership fees 808
C Member protection under competition law 810
IV Summary and conclusions 812

PART V Good governance of nonprofit organizations: self-regulation, disclosure and supervision 813

13 Self-regulation
Foundation governance in Switzerland 815
THOMAS SPRECHER
I From corporate governance to foundation governance 816
A Corporate governance 816
B Common points and differences 816
C Foundation governance 817
II Foundation governance in Switzerland 818
A Basis 818
B Self-regulation efforts 820
C The Swiss NPO Code 823
D The Swiss Foundation Code 825

14 Disclosure, reporting, auditing
14.1 Financial reporting by nonprofit organizations: United States developments 829
STANLEY SIEGEL
I Introduction 830
## CONTENTS

A  Fundamental issues concerning the character, objectives, reliability and availability of nonprofit financial reporting  831
B  An overview of pre-1990 financial reporting by nonprofits  834

II  The current accounting principles governing nonprofit financial reporting – the business enterprise model extended  835
A  The FASB takes over regulation of nonbusiness financial accounting  835
B  The present GAAP framework applicable to nonprofit  836

III  Financial disclosure under the federal income tax laws: Form 990 and Guidestar  842
A  Form 990: the Internal Revenue Service administers public financial disclosure by nonprofits  842
B  Analyzing the Form 990 disclosures: relevance, reliability and disclosure standards  843

IV  Possible future directions – mandatory audit and public reporting, “social accounting” – costs, benefits and questions  845
A  Arguments for and against mandatory disclosure on the SEC model  845
B  “Social accounting” for the nonprofit organization  846

14.2  Charity Commission regulation of the charity sector in England and Wales: the key role of charity audit regulation  849

GREYHAM DAWES

I  Key features of the registered charity sector in England and Wales  850

II  How the Charity Commission monitors and regulates the sector  851
A  ‘Proportionality’ and the ‘risk-based’ approach  851
B  ‘Cause for concern’ criteria for regulatory intervention by the Commission  852
C  The basic information return for all registered charities  853
D  Summary Information Returns (SIR) – simple basic public domain data  855
E  Regulatory uses of charities’ filed annual reports and audited accounts  856
F  Regulatory compliance – a policy of persuasion before enforcement  857
G  Charity inquiries summarised on the Commission’s website  858

III  Regulating the quality of charity audit reports  859
A  The framework of professional audit regulation  859
Contents

B The auditing Practices Board and its charity auditing standard (PN11) 865
C Auditors’ ‘whistle-blowing’ obligations to the regulator 868
D ‘Non-standard’ audit reports – a regulatory ‘trigger’ 869
E The Charity Commission’s ‘directions to independent examiners’ 876
F Additional requirements for accruals accounts 877
G Charities subject to statutory audit 878
H Special requirements for accruals accounts 879

IV Promoting best practice in charity ‘governance’ for self-regulation 879
A The problem: charity trustees are normally all or mostly non-executives (volunteers) 880
B The solution: delegation to agents and (for larger charities) to paid executives 880
C The ‘voluntary’ principle of charity trusteeship 881
D Conflict-of-interests: ‘staff-trustees’; ‘user-trustees’ 882
E Trustee-appointment/removal powers 884
F Delegation of trustee-powers: the charity law ‘duty of care’ 884
G ‘Internal controls’ as an aspect of governance 885
H Further developments: impact of corporate and other governance codes 885
I Best-practice ‘hallmarks’ for benchmarking charities 888
J SORP-Compliance Guides for special needs 890
K The ‘charity membership’ issue 890

V Future developments 891
Appendix: the Public Oversight Board, the Audit Inspection Unit and Professional Audit Regulation 892

15 Enforcement by state supervision and tax authorities
15.1 The Charity Commission for England and Wales 896

Richard Fries

I Overview 896
II Origins of the Charity Commission 898
III The Charity Commission and regulation 899
IV The status of the Charity Commission 900
V Composition of the Commission 901
VI Strategy and objectives of the Charity Commission 903
VII Functions and powers of the Charity Commission 904
A Registration 904
xxii CONTENTS

B Political activity and campaigning 906
C Supervision 907
D Support and guidance 907
E Investigation 908
F Limits on the powers of the Commission 908

VIII Accountability of the Charity Commission 909

IX Conclusion 910

X Annex – Scotland and Northern Ireland 912

15.2 Internal Revenue Service and States Revenue Department oversight of nonprofit organizations in the United States 914

JOHN D. COLOMBO

I Background 915

II Federal procedural oversight 916
A Inception 916
B Lifetime 917
C End of life 920

III Federal substantive issues 920
A Charitable purpose 920
B Limitations on exempt status 921
C Special rules applicable to private foundations 929

IV State revenue department procedural oversight 930

V State revenue department substantive issues 931

VI Overlap between tax oversight and state attorney general oversight 932

VII Future policy questions 934
A A central organizing principle? 934
B Commercial activities and exemption 936
C The role of disclosure and Form 990 937
D The general role of tax authorities in charitable oversight 938

15.3 Tax law as an instrument to strengthen the corporate governance of the nonprofit sector 940

THOMAS VON HIPPEL AND W. RAINER WALZ

I Introduction: Tax cobbler, stick to your last 941

II Tax review 941
A Procedure of tax review 941
B Issues of tax review 942

III The impact of tax law concepts on corporate governance issues 943

IV Corporate government policy via tax law 944
A Foreign experiences with tax law 944
B The slow ways of civil law reform in Germany 944
C Justifying tax law as a useful policy tool 946
D Practical evidence of reform efficiency 948
VI Identifying useful tax law concepts 948
A Current German tax law 949
B Reform suggestions 951

Index 956