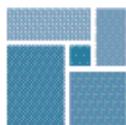


Politics and the Pulpit: 2004

A Guide to the Internal
Revenue Code Restrictions
on the Political Activity
of Religious Organizations



THE PEW
FORUM
ON RELIGION
& PUBLIC LIFE

During every election cycle, many religious congregations find themselves wondering what role, if any, they can play in the political process. Can a minister, rabbi, imam or other member of the clergy endorse a candidate from the pulpit or speak on issues of interest to voters? Is a church or other house of worship legally permitted to register voters or issue voter guides? Answers to these and many other questions are contained in *Politics and the Pulpit: A Guide to the Internal Revenue Restrictions on the Political Activity of Religious Organizations*.

Politics and the Pulpit sets out in plain English the rules governing political activity that apply to non-profit organizations (including churches and other religious groups) that are exempt from taxation under section 501 (c) (3) of the Internal Revenue Code. The report was written by Deirdre Dessingue, Associate General Counsel of the United States Conference of Catholic Bishops. Ms. Dessingue is a leading expert on the taxation of religious organizations, and she has written a straightforward and practical guide to the law on these matters. The report also has been vetted by a number of other prominent legal experts in this field.

The current rules have been in place since 1954, when Congress amended the Internal Revenue Code to impose limits on the political activities of religious and certain other tax-exempt, non-profit organizations. In recent years, some have voiced strong opposition to these limits, especially for religious groups, arguing that they amount to an unfair abridgement of free speech. Others, including some religious leaders, have vigorously defended the rules, asserting that they correctly prevent churches from getting too deeply involved in partisan politics.

The Pew Forum on Religion & Public Life takes no position in this debate. Instead, the Forum commissioned this publication in order to inform religious groups and others on the provisions and meaning of the law as it is currently written. *Politics and the Pulpit* fits perfectly into the Forum's overall mission, which is to act as a clearinghouse of impartial information as well as a non-partisan facilitator of discussions on issues at the intersection of religion and public affairs.

Politics and the Pulpit is published with the understanding that the Forum is not engaged in rendering legal, accounting or other professional advice. If legal advice or other professional assistance is required, the services of a qualified professional should be sought.

Luis Lugo
Director
Pew Forum on Religion & Public Life
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During election campaigns, candidates seek votes wherever they can be found, including gatherings at churches and other religious organizations.* Election news stories frequently report candidate appearances in pulpits and even clergy endorsements of particular candidates. Significant confusion remains about the rules governing political activity by religious organizations. This publication seeks to clarify these rules. It explains in detail the origin and scope of the restrictions that are imposed by the Internal Revenue Code on tax exempt organizations, including religious organizations. It also provides a bibliography for further, more technical, reading on the subject.

BACKGROUND

1. • Where do the restrictions on religious organizations' participation in the political process come from?

The Internal Revenue Code prohibits intervention in political campaigns by organizations, including religious organizations, as a condition for exemption from federal income tax under section 501(c)(3) of the Code.¹ Although there are a number of other restrictions that might affect participation by religious organizations in the political process, including state and local laws regulating various political activities, as well as federal laws, such as the Federal Election Campaign Act, the IRS prohibition will be the primary focus of this publication.

* Throughout this document, the term "churches" refers to churches, synagogues, temples, mosques and other religious congregations. "Religious organizations" includes churches as well as other types of religious organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.

2. Has the political activity prohibition always been part of the Internal Revenue Code?

No. The prohibition on political campaign activity did not become part of the Internal Revenue Code until 1954, when an amendment to section 501(c)(3) was introduced by then-Senator Lyndon B. Johnson during Senate floor debate on the 1954 Internal Revenue Code. The prohibition was added to the Code without hearings, testimony or comment by any tax-exempt organizations. Although there is no legislative history to indicate definitively why Johnson sought enactment of the political activity prohibition, neither is there any evidence that the prohibition was targeted at political activity by religious organizations.²

3. Are religious organizations singled out by the political activity prohibition in the Internal Revenue Code?

No. All organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code are subject to the political activity prohibition. Thus, religious organizations are treated no differently than schools, hospitals, social services agencies, colleges and universities, scientific organizations, museums and all other charitable organizations exempt under section 501(c)(3) of the Code. None of these organizations may intervene in political campaigns.

4. Doesn't the First Amendment to the U.S. Constitution protect the right of religious organizations to engage in political activity?

The First Amendment provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...” Although the Internal Revenue Code prohibition against political activity does burden the exercise of religion in that it requires a religious organization to choose between receiving the benefits of tax exemption and intervening in a political campaign on the basis of its religious beliefs, not every burden on religious exercise is constitutionally prohibited. Courts generally have been unsympathetic to First Amendment challenges to the political activity prohibition. In 2000, the Court of Appeals for the D.C. Circuit upheld the constitutionality of the political activity prohibition as applied to a church, concluding that the prohibition did not violate either the establishment clause or the free exercise clause of the First Amendment.⁵ [See Sidebar, page 4]

BRANCH MINISTRIES v. ROSSOTTI CASE

Four days before the 1992 presidential election, the Church at Pierce Creek (“Church”) in Binghamton, New York, placed a full-page advertisement in *USA Today* and *The Washington Times*. The ad began with the heading: “Christians Beware: Do not put the economy ahead of the Ten Commandments.” The ad cited Biblical passages, and stated that Governor Bill Clinton supported abortion on demand, homosexuality and the distribution of condoms to teenagers in public schools. The ad concluded with the question: “How then can we vote for Bill Clinton?” At the bottom of the ad, in fine print, the following notice appeared: “This advertisement was co-sponsored by The Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek.”

Following the special church audit procedures, the IRS revoked the Church’s section 501(c)(3) tax exemption on the grounds that it violated the political activity prohibition. The Church challenged the IRS in court, claiming that revocation of its tax-exempt status violated section 501(c)(3), both the free speech and free exercise clauses of the First Amendment, and the Religious Freedom Restoration Act. The Church also claimed that it had been singled out for prosecution among other churches on account of its political views. The district court dismissed the case, concluding that the IRS had authority under the Internal Revenue Code to revoke the Church’s tax-exempt status, and that revocation of the Church’s tax-exempt status did not violate the Religious Freedom Restoration Act or the free speech or free exercise clauses of the First Amendment. The court also concluded that in revoking the Church’s tax-exempt status the IRS had not engaged in selective prosecution or viewpoint discrimination.

The Church appealed the decision of the district court. The Court of Appeals for the D.C. Circuit affirmed the district court’s decision on every count. Among other things, the court of appeals noted that the Church had an alternative means of engaging in political activity, because the Church could establish a related, separately incorporated organization under section 501(c)(4)* of the Code that could express opinions about candidates and even establish a PAC through which political contributions might be made. Of course, no tax-deductible Church funds could be used to support the political activities of the section 501(c)(4) organization or its PAC.

* Section 501(c)(4) organizations are exempt from taxation, but contributions to them are not deductible.

IRS RESTRICTIONS ON POLITICAL INTERVENTION AND LOBBYING

5. What political activities are prohibited under the Internal Revenue Code?

Religious organizations, as well as all other organizations exempt from tax under section 501(c)(3) of the Internal Revenue Code, are prohibited from participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for elective public office.⁴ This prohibition encompasses a wide array of activities. It precludes direct political activity, such as the making of statements, whether oral, written or in an electronic medium, supporting or opposing any candidate, political party or political action committee (“PAC”), creating a PAC,⁵ rating candidates⁶ and providing or soliciting financial support (including loans⁷ or loan guarantees) or in-kind support for any candidate, political party or PAC. It also precludes indirect political activity of a sort that reflects bias for or against any candidate, political party or PAC, such as distribution of biased voter education materials or conduct of a biased candidate forum or voter registration drive.

6. Must religious organizations restrict their discussion of issues during election campaign periods?

No. The political activity prohibition does not restrict issue discussions that are not linked to support for or opposition to candidates. Religious organizations need not restrict or alter their discussion of issues during election campaign periods. The fact that candidates may align themselves on one side or another of an issue does not adversely affect the ability of religious organizations to engage in discussions of that issue.⁸ That being said, a religious organization may nonetheless violate the political activity prohibition if it communicates preferences for or against particular candidates as part of its issue discussion. The IRS has advised that for an issue advocacy communication to violate the political activity prohibition, it must contain some reasonable overt indication of support of or opposition to a particular candidate, rather than being a message restricted to an issue.⁹

7. Are religious organizations permitted to engage in lobbying activities?

Yes. The political activity prohibition does not apply to the lobbying activities of religious organizations, although the lobbying activities of all 501(c)(3) organizations are limited under the Internal Revenue Code. Specifically, if a religious organization engages in lobbying, its lobbying activities (as measured by time, effort, expenditures and other relevant factors) may not constitute more than an insubstantial part of the organization's total activities during a particular year.¹⁰ Lobbying includes both direct lobbying (directly contacting legislators, whether federal, state or local) and grass-roots lobbying (asking members of the public to contact legislators or to support or oppose particular legislation.)¹¹ Neither the Code nor the IRS Regulations define what "insubstantial" means in terms of any specific percentage, although a few older court cases suggest that insubstantial lobbying would be something between 5 and 15 percent of the organization's total activities.¹²

Churches and certain affiliated religious organizations are ineligible to take advantage of the lobbying election that is available under section 501 (h).¹³ Section 501(h) enables other section 501(c)(3) organizations to opt into a system of fixed permissible lobbying expenditures in lieu of the general insubstantial lobbying limitation described above. The amount of permissible lobbying expenditures is linked to the amount of an organization's expenditures for exempt purposes. Larger organizations are able to make higher lobbying expenditures, subject to an overall \$1 million limit.

8. Are religious organizations permitted to participate in referendums, constitutional amendments and similar ballot initiatives?

Yes. Referendums, constitutional amendments and similar ballot initiatives are classified as lobbying activities for purposes of the Internal Revenue Code.¹⁴ As such, they are subject to the insubstantial lobbying limitation, not the political activity prohibition.

9. What are the consequences if a religious organization engages in excessive lobbying?

If a religious organization's lobbying activities constitute more than an insubstantial part of its total activities, the organization's section 501(c)(3) tax exempt status may be revoked, which means that its income for the year would become subject to income tax.¹⁵

10. Does the political activity prohibition apply to the political activities of clergy and other religious leaders?

The Internal Revenue Code prohibition against political activity applies to religious organizations as tax-exempt organizations, not to the political activities of clergy or other religious leaders undertaken in their individual capacities and not as representatives of their religious organizations.¹⁶ Thus, clergy or other religious leaders, in their individual capacities and outside the context of any religious organization function or publication, may endorse or oppose candidates and otherwise participate in election campaigns. In doing so, however, religious leaders should indicate clearly that their actions are personal and not undertaken as representatives of their religious organizations.¹⁷

11. When are the political activities of clergy or other religious leaders attributed to their religious organizations?

The political activities of clergy or other religious leaders are attributed to their religious organizations when they are undertaken during worship services or other organization-sponsored functions, or in official organization publications.¹⁸ Political activity will also be attributable to the religious organization if a member of the clergy or other religious leader indicates that he or she is acting on behalf of his or her religious organization or if the organization's funds, facilities or other assets are used to support the political activity.

12. Who is considered a candidate?

A candidate is an individual who offers himself or herself, or is proposed by others, as a contestant for an elective public office, whether federal, state or local.¹⁹ The point at which an individual becomes a candidate must be determined on the basis of all the relevant facts and circumstances. An individual who has formally announced his or her intention to seek election is obviously a candidate, but an individual can be considered a candidate even before any formal announcement of candidacy is made, if actions are taken by the individual or by others to further the goal of candidacy.²⁰ Merely being a prominent political figure does not, by itself, make one a candidate.²¹

13. What rules apply with respect to candidates for non-elective office?

Section 501(c)(3) does not prohibit political campaign activity with respect to candidates for appointive political office.²² If, however, an appointment is made by or must be confirmed by a legislative body (e.g., Justice of the Supreme Court), activity in support of or in opposition to the appointment would be classified as lobbying, which is subject to the insubstantial lobbying limitation.²³

14. May candidates appear in pulpits during worship services?

It depends. All relevant facts and circumstances must be evaluated to determine whether a candidate's appearance in a pulpit during worship services (or at other activities sponsored by a religious organization) violates the political activity prohibition.²⁴ If the clergy member endorses the candidate or takes up a collection for the candidate's benefit, if the clergy member invites only one candidate for a particular office to address the congregation or if there are other demonstrations of approval for the candidate or his campaign for office, the religious organization will violate the political activity prohibition.

If, on the other hand, all candidates for a particular office are given equal opportunity to address the congregation, no collections are taken for any candidate and there are no demonstrations of approval or disapproval of any candidate, the religious organization will not violate the political activity prohibition.²⁵

For example, the IRS has indicated that it is permissible for a church to invite all candidates for a particular office to address its congregation, one each on successive Sundays, as part of its regular worship services, provided that each candidate is given an equal opportunity to address and field questions on a wide variety of questions from the congregation, and the introduction of each candidate includes no editorial comment or indication of approval or disapproval.²⁶

15. What if the candidate appears in a non-candidate capacity?

It is not uncommon for candidates who are public figures or who possess particular expertise independent of their candidacies to appear at events sponsored by a religious organization, e.g., groundbreaking, commemorative celebrations, annual conventions or other meetings. Provided that the candidate has not been invited to showcase his or her candidacy, such appearances generally do not violate the political activity prohibition.²⁷ When a candidate is invited to appear not as a candidate but in his or her individual capacity, it is not necessary to provide equal access to all other candidates for the particular office. However, in advertising the event and in introducing the candidate, no mention should be made of his or her candidacy or the impending election. The candidate must speak as an individual and not as a candidate. No campaigning or fundraising may take place in connection with the event.²⁸ A candidate who is a public figure may attend worship services and be acknowledged by the clergy member on the same basis as any other visiting dignitary, without mention of his or her campaign or candidacy.²⁹

16. What if the candidate is a member of the clergy?

The same rules would apply. If the candidate/clergy member participates in a worship service in his or her capacity as a candidate, then all candidates for a particular office must be given equal opportunity to address the congregation, no collections may be taken for the candidate and no other demonstrations of approval or disapproval for any candidate may take place. If the candidate/clergy member appears in a worship service in his or her capacity as a clergy member, it is not necessary to provide equal access to all other candidates for the particular office. In advertising the event and in introducing the clergy member, no mention should be made of his or her candidacy or the impending election. No campaigning or fundraising should take place in connection with the clergy member's appearance.

VOTER EDUCATION AND OUTREACH

17. May religious organizations become involved in voter education?

Yes. Religious organizations may educate voters about the issues and about candidates' positions on the issues. However, voter education activities must be free from bias for or against any candidate or political party.³⁰

18. May religious organizations publish or distribute voter guides?

Yes. Religious organizations may publish or distribute unbiased voter guides for the purpose of educating voters.³¹ The term "voter guide" refers either to a compilation of candidates' positions based upon candidates' responses to questions posed or to a neutral compilation of candidates' positions on the issues. In order to ensure that they are unbiased, voter guides should: include all candidates for a particular office; cover a broad range of issues of interest to voters that would be faced by candidates for the particular office sought; evidence no bias in the selection of questions posed or issues presented; present all candidates' responses; and contain no editorial comment or other indications of approval or disapproval of any candidate's positions.³²

19. Why must a broad range of issues be covered in voter education materials?

The range of issues that must be covered in voter education materials depends on the nature of the office sought by the candidate.³³ For example, it is not necessary to pose questions on foreign policy to a candidate for the local school board.³⁴ Voter education should cover a wide range of issues that would be faced by a candidate for a particular office. Presenting only a narrow range of issues clustered around a particular topic runs the risk of exhibiting bias for or against particular candidates by implicitly inviting readers to compare candidates' positions on the narrow range of issues or to evaluate candidates based on the religious organization's position on these issues. All relevant facts and circumstances must be considered in determining whether particular voter education materials distributed by religious organizations violate the political activity prohibition.³⁵

20. May religious organizations publish or distribute legislators' voting records?

Yes. Religious organizations may, under certain circumstances, publish legislators' voting records for the purpose of educating voters.³⁶ For example, a compilation of the voting records of all members of Congress on a wide range of issues that is made available to the public during a campaign period would not violate the political activity prohibition, provided that it contains no editorial comment or other indications of approval or disapproval of any member's voting record.³⁷ Factors that will be considered in determining whether a voting record distributed by a religious organization violates the political activity prohibition are: whether legislators are identified as candidates for re-election; whether legislators' voting positions are compared with the positions of other candidates or of the religious organization; the timing, manner and circumstances in which the voting record is distributed; and the range of issues covered by the voting record.³⁸

21. May religious organizations distribute voter education materials prepared by a candidate, political party or PAC?

No. Voter education materials prepared by candidates, political parties or PACs are inherently biased, since they have been prepared to present certain candidates in a more favorable light and thus enhance their chances for election.³⁹ Religious organizations that distribute such materials would violate the political activity prohibition.

22. May religious organizations sponsor candidate forums?

Yes. Religious organizations may sponsor unbiased candidate forums or debates for the purpose of educating voters.⁴⁰ In order to ensure that its candidate forum is unbiased, the religious organization should not indicate its views on the issues being discussed, comment on candidate responses or otherwise indicate approval or disapproval of any candidate, party or position. All legally qualified candidates should be invited to participate. Questions should cover a broad range of issues of interest to the public that the candidate would face if elected. Each candidate should be given an equal opportunity to present his or her views on the issues

discussed.⁴¹ During a primary election, a religious organization may sponsor a candidate forum or debate that is limited to legally qualified candidates seeking the nomination of a particular political party.⁴²

On occasion, the number of legally qualified candidates for a particular office is so large that it is impractical for a religious organization to conduct a forum or debate to which all candidates are invited. In such circumstances, the organization may adopt reasonable, objective criteria for determining which candidates to invite, and should apply the criteria consistently and non-arbitrarily to all candidates.⁴³ For example, an organization that conducted a candidate forum and invited the two major party candidates as well as up to four candidates who had reached a 15 percent share of popular support according to a credible, independent poll would not violate the political activity prohibition.⁴⁴

23. May religious organizations conduct voter registration and get-out-the-vote drives?

Yes. Religious organizations may conduct voter registration and get-out-the-vote drives, provided that they are not biased for or against any candidate, political party or voting position.⁴⁵ Voter registration and get-out-the-vote drives should not be conducted in cooperation with any political party and should not target members of a particular party. Communications about voter registration or get-out-the-vote drives should be limited to urging people to register to vote or to vote, along with listing the hours and places for registering or voting. They should either mention no candidates or all candidates, without favoring one candidate over any other. Communications should not mention any political party except to identify the party affiliation of candidates named.⁴⁶

RELIGIOUS ORGANIZATION FACILITIES AND PUBLICATIONS

24. May the facilities of religious organizations be used for civic or political events?

Religious organizations may permit the use of auditoriums and gymnasium facilities to serve as polling places on Election Day without violating the political activity prohibition. A religious organization may also rent its facilities to candidates or political parties provided that the facilities are not made available for free or at a reduced charge, are made available to candidates on the same basis as they are to other users and are made available to all candidates on an equal basis. Moreover, the religious organization renting its facility cannot advertise, promote or provide other services in connection with the political event.⁴⁷ Income from the rental of the facilities generally will not be subject to unrelated business income tax, provided no ancillary services are provided in connection with the facility rental.⁴⁸

25. Do special rules apply to Web sites belonging to religious organizations?

No. The same rules governing political activity generally apply to materials posted on Web sites sponsored by religious organizations.⁴⁹ The IRS has issued no special guidelines with respect to Web site activity. An activity that violates the political activity prohibition in another medium will also violate the political activity prohibition if conducted through a Web site sponsored by a religious organization.

26. May religious organizations sell paid political advertising in their publications?

Under certain circumstances, religious organizations may sell paid political advertising without violating the political activity prohibition. The political advertising must be accepted on the same basis as other non-political advertising, must be identified as paid political advertising and must be available on an equal basis to all candidates. Further, the religious organization must expressly state that it does not endorse the candidates whose ads appear. Additional factors, such as the manner in which the religious organization solicits political ads and the manner in which political ads are presented, will also be considered.

For example, a religious organization that actively solicited ads from one candidate but merely accepted ads from other candidates would not be considered to have made the ads available on an equal basis.⁵⁰ Once a religious organization accepts paid political advertising, it may not selectively decline ads from candidates whose views may not accord with those of the organization. Religious organizations may not accept free or reduced-rate political ads, as this would constitute an in-kind contribution to the candidate. Religious organizations are subject to unrelated business income tax on the income from their paid political advertising.⁵¹

27 • May a religious organization sell or rent its mailing list to a candidate, political party or PAC?

A religious organization may sell or rent its mailing list without violating the political activity prohibition, provided it sells or rents the list to the candidate, political party or PAC on the same basis on which it rents the list to others, and the list is available to all other candidates on the same basis.⁵² A religious organization may not provide its mailing list to a candidate, political party or PAC without charge or on a selective or preferential basis, as this would constitute an in-kind contribution to the candidate, party or PAC. Sale or rental of mailing lists to candidates, political parties or PACs may subject the religious organization to unrelated business income tax liability if the transaction is not structured as a licensing arrangement.⁵³

ENFORCEMENT

28. What are the penalties if a religious organization violates the political activity prohibition?

Unlike lobbying by a religious organization, which is merely limited, political campaign activity by a religious organization is strictly prohibited.⁵⁴ Thus, the organization's 501(c)(3) tax exemption may be revoked if it engages in any prohibited activity. This means that the organization's income for the year would become subject to income tax. An excise tax on political expenditures may also be imposed on the religious organization as well as on the clergy member or other leader who authorized the political expenditures.⁵⁵ Depending on the circumstances, the excise tax may be imposed in addition to revocation of tax exemption or instead of revocation of tax exemption.⁵⁶ Generally, if the political expenditure is unintentional, the amount is small and the religious organization institutes operational changes to prevent future political expenditures, the IRS will not seek revocation of exemption.⁵⁷

29. Does the IRS target churches for enforcement of the political activity prohibition?

No. There are special audit procedures that the IRS must follow before commencing any inquiry about potential violation of the political activity prohibition by a church.⁵⁸ The IRS may begin a church tax inquiry only if the Director, Exempt Organizations, Examinations, reasonably believes, based on facts and circumstances recorded in writing, that the church may not be qualified for section 501(c)(3) tax exemption, including potential violations of the political activity prohibition. Once an inquiry is begun, the IRS must follow special procedures set forth in the Internal Revenue Code in its further dealings with the church.⁵⁹ Thus, the IRS does not have unfettered discretion to investigate activities by churches, including violations of the political activity prohibition, and must obtain high-level authorization before doing so. Generally, IRS inquiries about potential violations of the political activity prohibition by churches are initiated based upon facts reported by the media or complaints submitted by third parties.

APPENDIX

Selected Examples from IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* (September 2003)

EXAMPLES OF IMPERMISSIBLE POLITICAL INTERVENTION:

Minister B is the minister of Church K. Church K publishes a monthly church newsletter that is distributed to all church members. In each issue, Minister B has a column titled “My Views.” The month before the election, Minister B states in the “My Views” column, “It is my personal opinion that Candidate U should be reelected.” For that one issue, Minister B pays from his personal funds the portion of the cost of the newsletter attributable to the “My Views” column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the church. Since the endorsement appeared in an official publication of Church K, it constitutes campaign intervention attributed to Church K. [Pub. 1828, at 7 (Example 2)]

Minister D is the minister of Church M. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concludes by stating, “It is important that you all do your duty in the election and vote for Candidate W.” Since Minister D’s remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention attributable to Church M. [Pub. 1828, at 8 (Example 4)]

EXAMPLES OF PERMISSIBLE POLITICAL ACTIVITY:

Minister A is the minister of Church J and is well known in the community. With their permission, Candidate T publishes a full-page ad in the local newspaper listing five prominent ministers who have personally endorsed Candidate T, including Minister A. Minister A is identified in the ad as the minister of Church J. The ad states, “Titles and affiliations of each individual are provided for identification purposes only.” The ad is paid for by Candidate T’s campaign committee. Since the ad was not paid for by Church J, and the endorsement is made by Minister A in a personal capacity, the ad does not constitute campaign intervention by Church J. [Pub. 1828, at 7 (Example 1)]

Minister C is the minister of Church L and is well known in the community. Three weeks before the election he attends a press conference at Candidate V’s campaign headquarters and states that Candidate V should be reelected. Minister C does not say he is speaking on behalf of his church. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church L. Since Minister C did not make the endorsement at an official church function, in an official church publication or otherwise use the church’s assets, and did not state that he was speaking as a representative of Church L, his actions did not constitute campaign intervention attributable to Church L. [Pub. 1828, at 8 (Example 3)]

ENDNOTES

- 1 To qualify for 501(c)(3) tax-exempt status under the Internal Revenue Code an organization must meet the following requirements:
 - The organization must be organized and operated exclusively for religious, educational, scientific, or other charitable purposes,
 - Net earnings may not inure to the benefit of any private individual or shareholder,
 - No substantial part of its activity may be attempting to influence legislation,
 - The organization may not intervene in political campaigns, and
 - No part of the organization's purposes or activities may be illegal or violate fundamental public policy.IRS Publication 1828, *Tax Guide for Churches and Religious Organizations 5* (September 2003) [hereinafter "Pub. 1828"]. The IRS has noted that "[c]hurches that meet [these requirements] are automatically considered exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS." *Id.* On the other hand, "[u]nlike churches, religious organizations that wish to be tax-exempt generally must apply to the IRS for tax-exempt status unless their gross receipts do not normally exceed \$5,000 annually." *Id.* at 5.
- 2 Hypotheses about the origins of the political activity prohibition abound. See, e.g., Judith Kindell & John Reilly, *Election Year Issues*, FY 2002 IRS Exempt Organizations Technical Instruction Program 448-451 (August 2001) [hereinafter "*Election Year Issues*"]; Deirdre Halloran & Kevin Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 Cath.Law. 105, 106-108 (1998), which suggests that the prohibition represented LBJ's response to support provided by certain tax-exempt organizations to Dudley Dougherty, LBJ's challenger in the 1954 primary election. The most comprehensive article on the history of the 1954 amendment is probably Patrick L. O'Daniel's *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C.L.Rev. 733 (2001).
- 3 *Branch Ministries v. Rosvotti*, 211 F.3d 137 (D.C. Cir. 2000).
- 4 Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).
- 5 Treas. Reg. § 1.527-6(g); *Election Year Issues* at 365, 473-474. Although a religious organization may not itself create a PAC, it may create a related, separately incorporated section 501(c)(4) organization that may establish a PAC. See *Branch Ministries v. Rosvotti*, 211 F.3d 137, 143 (D.C. Cir. 2000); *Election Year Issues* at 477-478.
- 6 Even nonpartisan rating of candidates as "approved," "not approved" or "approved as highly qualified" on the basis of experience, professional ability and character, constitutes prohibited political activity, even though in certain cases all candidates were rated as "qualified." See G.C.M. 39441 (September 27, 1985); *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989).
- 7 See T.A.M. 9812001 (August 21, 1996), where the IRS concluded that a loan to a political organization constituted a political contribution even though market rate interest was charged and the loan was repaid; *Election Year Issues* at 384.
- 8 *Election Year Issues* at 344-346.
- 9 *Id.* The IRS has identified certain factors tending to show that an advocacy communication violates the political activity prohibition: (1) the communication identifies a candidate for public office; (b) the timing of the communication coincides with an election campaign; (c) the communication targets voters in a particular election; (d) the communication identifies the candidate's position on the issue that is the subject of the communication; (e) the position of the candidate on the issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications. See Rev. Rul. 2004-6, 2004-4 I.R.B. 328 (January 26, 2004).

- 10 Pub. 1828 at 5-6.
- 11 Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).
- 12 See *Haswell v. U.S.*, 500 F.2d 1133 (Ct. Cl. 1974) (16-20 percent of budget spent on lobbying was too much); *Murray Seasongood v. Comm'r*, 227 F.2d 907 (6th Cir. 1955) (less than 5 percent of time and effort spent on lobbying was within acceptable limits).
- 13 I.R.C. §§ 501(h)(5); 4911(f)(2). Churches and certain affiliated religious organizations requested that they be made ineligible.
- 14 Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).
- 15 Pub. 1828 at 6. Under section 4912(c)(2)(B) of the Code, the 5 percent excise tax imposed on the excess lobbying expenditures of section 501(c)(3) organizations does not apply to churches and certain affiliated religious organizations.
- 16 Pub. 1828 at 7; *Election Year Issues* at 363.
- 17 Pub. 1828 at 7; *Election Year Issues* at 364.
- 18 *Id.*
- 19 Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).
- 20 See *Election Year Issues* at 342; T.A.M. 9130008 (April 16, 1991).
- 21 See *Election Year Issues* at 342.
- 22 See *Election Year Issues* at 339; Notice 88-76, 1988-2 C.B. 392. Under certain circumstances, religious organizations may incur tax liability under section 527 of the Code for expenditures to support or oppose non-elective candidates.
- 23 See G.C.M. 39694 (January 21, 1988).
- 24 See Pub. 1828 at 8-9; *Election Year Issues* at 380-382.
- 25 See Pub. 1828 at 8.
- 26 See *id.* at 9 (Example 1, left-hand column).
- 27 See generally *id.* at 9-10; *Election Year Issues* at 381-382.
- 28 See *Election Year Issues* at 381.
- 29 See Pub. 1828 at 9 (Example 1, right-hand column).
- 30 See generally Pub. 1828 at 10; *Election Year Issues* at 370-372.
- 31 See *Election Year Issues* at 370.
- 32 See *Election Year Issues* at 371-372; Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 2).
- 33 See *Election Year Issues* at 375.
- 34 *Id.* at 371, n. 20.
- 35 *Id.* at 376.
- 36 See *Election Year Issues* at 370-371.
- 37 See Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 1). *But see* Rev. Rul. 80-282, 1980-2 C.B. 178, where the IRS approved the distribution of a biased incumbent voting record only in a very limited circumstance in which the voting record did not identify incumbents who were candidates for re-election, distribution was not timed to coincide with any election but was one of a series of regularly distributed

voting records, distribution was not targeted to areas where elections were occurring, and the voting record was distributed to a limited membership group and not broadly to the public.

- 38 See *Election Year Issues* at 370.
- 39 See *id.* at 372.
- 40 See generally Pub. 1828 at 8-9; *Election Year Issues* at 372-375.
- 41 See Rev. Rul. 86-95, 1986-2 C.B. 73; Pub. 1828 at 8; *Election Year Issues* at 375.
- 42 See, e.g., *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989).
- 43 See *Election Year Issues* at 374. Under Federal Election Commission rules, the sponsoring organization may limit participation based upon pre-established objective criteria, but any candidate debate must include at least two candidates and may not promote or advance one candidate over another. See 11 C.F.R. § 110.13(b).
- 44 See T.A.M. 9635003 (April 19, 1996).
- 45 See generally Pub. 1828 at 6; *Election Year Issues* at 378-379.
- 46 See *Election Year Issues* at 379. The IRS has advised that sponsoring organizations may use voter registration lists to identify unregistered voters, but may not use such lists to target voters of a particular party. See T.A.M. 9117001 (September 5, 1990), in which the IRS concluded that a voter registration drive targeted to conservative voters violated the political activity prohibition. On the other hand, targeting historically disadvantaged groups is generally permissible. See, e.g., P.L.R. 9223050 (March 10, 1992), in which the IRS concluded that grants for registering homeless people to vote was not a prohibited political activity for the private foundation sponsor.
- 47 See *Election Year Issues* at 383.
- 48 See I.R.C. § 512(b)(3); Pub. 1828 at 13.
- 49 See *Election Year Issues* at 382.
- 50 See *id.* at 384.
- 51 See I.R.C. § 513(c); Pub. 1828 at 12.
- 52 See Pub. 1828 at 10-11; *Election Year Issues* at 383-384.
- 53 See I.R.C. § 513(h)(1)(B), which provides that the sale, exchange or rental of mailing lists among section 501(c)(3) organizations is not an unrelated trade or business. Courts have concluded generally that income from the licensing of mailing lists to non-section 501(c)(3) organizations is non-taxable royalty income under section 512(b)(2) of the Code.
- 54 The IRS interprets the political activity prohibition as absolute. See Pub. 1828 at 7; *Election Year Issues* at 352.
- 55 See I.R.C. § 4955(a)(1) and (b)(1); Pub. 1828 at 11; *Election Year Issues* at 353-363. In order to avoid a second tier excise tax under section 4955, a religious organization must "correct" any political expenditure by recovering the expenditure to the extent possible, and by adopting safeguards to insure against future political expenditures.
- 56 See Preamble, Final Regulations on Political Expenditures by Section 501(c)(3) Organizations, 60 Fed. Reg. 62,209 (December 5, 1995); *Election Year Issues* at 353-354.
- 57 See *Election Year Issues* at 354.
- 58 See I.R.C. § 7611. These special audit rules apply only to churches and organizations claiming to be churches.
- 59 See Pub. 1828 at 22.

SELECTED BIBLIOGRAPHY

IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* (September 2003) [available at www.irs.gov]

American Views on Religion, Politics, and Public Policy, Pew Forum on Religion & Public Life/Pew Research Center (July 2003)

Description of Present-Law Rules Relating to Political and Other Activities of Organizations Described in Section 501(c)(5) and Proposals Regarding Churches, Hearing before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives (May 14, 2002) [JCX-39-02]

Lobbying and Political Activities of Tax-Exempt Organizations, Hearings before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, 100th Cong., 1st Sess. (March 12-13, 1987) [Serial 100-15]

Ellen P. Aprill, *Churches, Politics and the Charitable Contribution Deduction*, 42 B.C.L.Rev. 843 (2001)

Stephen L. Carter, *God's Name in Vain—The Wrongs and Rights of Religion in Politics*, Basic Books, NY (2000)

Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C.L.Rev. 903 (2001)

Alan L. Feld, *Rendering Unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C.L.Rev. 931 (2001)

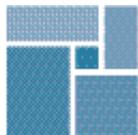
Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C.L.Rev. 771 (2001)

Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C.L.Rev. 875 (2001)

Judith E. Kindell & John Francis Reilly, *Election Year Issues*, FY 2002 IRS Exempt Organizations Technical Instruction Program 335 (August 2001) [available at www.irs.gov]

Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of The Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C.L.Rev. 733 (2001)

Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C.L.Rev. 805 (2001)



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