



Politics and the Pulpit 2008

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



THE PEW
FORUM
ON RELIGION
& PUBLIC LIFE

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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 political issues of interest to voters? Is a church or other house of worship legally permitted to register voters or distribute voter guides? Answers to these and many other questions are contained here.

This guide sets out in plain English the rules governing political activity that apply to nonprofit organizations (including churches and other religious groups) that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code. The 2008 edition of the guide updates versions published by the Pew Forum on Religion & Public Life in 2004 and 2002. 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 groups and certain other tax-exempt nonprofit organizations. In recent years, some have voiced strong opposition to these limits, especially as they are applied to 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 Forum takes no position in this or any other policy debate. The Forum commissioned this publication solely to better inform religious groups and others on the provisions and meaning of the law as it is currently written. The Forum's overall mission is to deliver timely, impartial information 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.

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 that are exempt from federal income tax under section 501(c)(3),¹ including religious organizations. The restrictions are one of the conditions of maintaining tax-exempt status. Although other restrictions – including state and local laws regulating various political activities as well as federal laws, such as the Federal Election Campaign Act – also may affect participation by religious organizations in the political process, the Internal Revenue Code prohibition is the primary focus of this publication.

2. Has this prohibition on political campaign intervention always been part of the Internal Revenue Code?

No. The prohibition on political campaign intervention 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 a 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 campaign intervention prohibition, neither is there any evidence that the prohibition was targeted at political campaign intervention by religious organizations.²

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

No. All organizations that are recognized as exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code are subject to the prohibition against political campaign intervention. Thus religious organizations are not treated more harshly than schools, hospitals, social services agencies, colleges and universities, scientific organizations, museums or other charitable organizations exempt under section 501(c)(3) of the Code. None of these organizations may intervene in political campaigns.

Note: Throughout this document, the term “churches” refers to churches, synagogues, temples, mosques and other religious congregations. The term “religious organizations” has a broader meaning, including both churches and other types of religious organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.

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 campaign intervention may burden the exercise of religion to the extent that a religious organization must choose between the receipt of the benefits of tax exemption and intervention in a political campaign, not every burden on religious exercise is constitutionally prohibited. To date, courts have been unsympathetic to First Amendment challenges to the political campaign intervention prohibition. Most recently, the Court of Appeals for the D.C. Circuit upheld the constitutionality of the political campaign intervention 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.³ (See Sidebar, page 5.)

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 federal income tax under section 501(c)(3) of the Internal Revenue Code, are prohibited from participating or intervening, directly or indirectly, in a 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 campaign intervention, including 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 candidates;⁶ 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 campaign intervention of a sort that reflects bias for or against any candidate, political party or PAC, such as distributing biased voter education materials or conducting a biased candidate forum or voter registration drive.

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

No. The political campaign intervention prohibition does not restrict discussions of issues that are not linked to support for or opposition to candidates. Religious organizations need not restrict or

BRANCH MINISTRIES v. ROSSOTTI CASE

Four days before the 1992 presidential election, the Church at Pierce Creek (“Church”) in Binghamton, N.Y., 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 Gov. 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 campaign intervention 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 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 U.S. 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, and that organization 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.

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 restrict the ability of religious organizations to engage in discussions of that issue.⁸ That said, a religious organization may nonetheless violate the political campaign intervention prohibition if it communicates preferences for or against particular candidates as part of its issue discussions.

7. When would an issue discussion violate the political campaign intervention prohibition?

The IRS has advised that for an issue discussion to violate the political campaign intervention prohibition, it must contain some reasonably overt indication of support for or opposition to a particular candidate.⁹ A communication is particularly at risk of violating the political campaign intervention prohibition if it makes reference to candidates or voting in a specific upcoming election. The IRS has identified the following factors as relevant when determining whether an advocacy communication constitutes political campaign intervention: (a) whether the communication identifies one or more candidates for a public office; (b) whether the communication expresses approval or disapproval of one or more candidates' positions and/or actions; (c) whether the communication is delivered close in time to an election; (d) whether the statement makes reference to voting or an election; (e) whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office; (f) whether the communication is part of an ongoing series of communications on the same issue that are independent of the timing of any election; and (g) whether the timing of the communication and identification of the candidate are related to a non-electoral event, such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.¹⁰

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

Yes. The political campaign intervention prohibition does not extend to the lobbying activities of religious organizations. The lobbying activities of all 501(c)(3) organizations are limited under the Internal Revenue Code. A religious organization would jeopardize its tax-exempt status only if its lobbying activities (as measured by time, effort, expenditures and other relevant factors) constitute more than an "insubstantial" part of its total activities during a particular year.¹¹ Lobbying includes both direct lobbying (directly contacting legislators, whether federal, state or local) and grassroots lobbying (asking members of the public to contact legislators or to support or oppose particular legislation.)¹² 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.¹³ Churches and

certain affiliated religious organizations are ineligible to take advantage of the lobbying election that is available under section 501(h) of the Code.¹⁴ Section 501(h) provides that other section 501(c)(3) organizations may 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.

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

Yes. Referenda, constitutional amendments and similar ballot initiatives are classified as lobbying activities for purposes of the Internal Revenue Code.¹⁵ As such, they are subject to the insubstantial lobbying limitation, not the political campaign intervention prohibition.

10. 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.¹⁶

11. Does the political campaign intervention prohibition apply to the political activities of clergy and other religious leaders?

The Internal Revenue Code prohibition against political campaign intervention applies to religious organizations as tax-exempt organizations and to the actions of clergy or other religious leaders acting as representatives of their religious organizations. The prohibition does not apply to the political activities of clergy or other religious leaders undertaken in their individual capacities.¹⁷ Thus, clergy or other religious leaders, in their individual capacities and outside the context of any religious organization-sponsored function or publication, may endorse or oppose candidates and otherwise participate in election campaigns. When engaging in personal political activity, however, clergy and religious leaders should take steps to ensure that their actions are not imputed to their religious organizations.¹⁸

12. 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.¹⁹ Political activity also will be attributed 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.

13. 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.²⁰ 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 may 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.²¹ Merely being a prominent political figure does not, by itself, make one a candidate.²²

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

Section 501(c)(3) does not prohibit political campaign intervention with respect to candidates for appointive political office.²³ If, however, an appointment (e.g., Supreme Court justice) is made by or must be confirmed by a legislative body, activity in support for or in opposition to the appointment would be classified as lobbying, which is subject to the insubstantial lobbying limitation.²⁴

15. 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 campaign intervention prohibition.²⁵ 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 campaign intervention 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 campaign intervention prohibition.²⁶ 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.²⁷

16. What if the candidate appears in a noncandidate capacity?

It is not uncommon for candidates who are public figures (including incumbent office holders, sports figures, celebrities, etc.) or who possess particular expertise independent of their candidacies to appear at events sponsored by religious organizations (e.g., groundbreakings, 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 campaign intervention prohibition.²⁸ 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 competing candidates. 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, and a nonpartisan atmosphere should be maintained.²⁹ 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.³⁰

17. 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, competing candidates 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 at a worship service in his or her capacity as a clergy member, it is not necessary to provide equal access to competing 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

18. **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.³¹

19. **May religious organizations publish or distribute voter guides?**

Yes. Religious organizations may publish or distribute unbiased voter guides for the purpose of educating voters.³² The term "voter guide" refers generally 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 candidates or their positions.³³

20. **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.³⁴ For example, it is not necessary to pose questions on foreign policy to a candidate for the local school board.³⁵ 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 will be considered in determining whether voter education materials violate the political campaign intervention prohibition.³⁶

21. **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.³⁷ 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 campaign intervention prohibition, provided that it contains no editorial comment or other indications of approval or disapproval of any member's voting record.³⁸ Factors that will be considered in determining whether a voting record distributed by a religious organization violates the political campaign intervention 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 breadth or narrowness of the issues presented in the voting record.³⁹

22. **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.⁴⁰ Religious organizations that distribute such materials would violate the political campaign intervention prohibition.

23. **May religious organizations sponsor candidate forums?**

Yes. Religious organizations may sponsor unbiased candidate forums or debates for the purpose of educating voters.⁴¹ In order to ensure that a candidate forum is unbiased, a 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, or ask candidates to endorse the organization's positions, agendas or platforms. All legally qualified candidates should be invited to participate. Questions should be presented by an independent, nonpartisan panel and 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.⁴²

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.⁴³ 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.⁴⁴ 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 campaign intervention prohibition.⁴⁵

24. 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.⁴⁶ 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 vote or register 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.⁴⁷

RELIGIOUS ORGANIZATION FACILITIES AND PUBLICATIONS

25. 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 campaign intervention 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 out its facility cannot advertise, promote or provide other services in connection with the political event.⁴⁸ Income from the rental of the facilities generally will not be subject to unrelated business income tax, provided no ancillary services (e.g., supplying catering services for the event) are provided in connection with the facility rental.⁴⁹

26. Do special rules apply to websites belonging to religious organizations?

No. The same rules governing political activity generally apply to materials posted on websites sponsored by religious organizations.⁵⁰ An activity that violates the political campaign intervention prohibition in another medium will also violate the political campaign intervention prohibition if conducted through a website sponsored by a religious organization. If a religious organization establishes a link on its website, it is responsible for the consequences of establishing and maintaining that link, even if it has no control over the content of the linked site. To lessen the risks of violating the political campaign intervention prohibition, religious organizations should periodically monitor linked content.⁵¹

27. Do links to candidate-related materials constitute political campaign intervention?

Not necessarily. The IRS will evaluate all facts and circumstances with respect to candidate-related links to determine whether political campaign intervention has occurred, including the context for the link on the religious organization's website; the exempt purpose, if any, served by offering the link; whether all candidates are represented; and the directness of the link between the religious organization's website and the webpage containing materials favoring or opposing candidates.⁵²

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

Under certain circumstances, religious organizations may sell paid political advertising without violating the political campaign intervention 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.⁵³ Once a religious organization accepts paid political advertising, it may not selectively decline ads from candidates whose views do not agree with those of the organization. Other factors to be considered in determining whether the provision of paid political advertising constitutes political campaign intervention include whether advertising is available only to candidates and not to the general public; whether the fees charged to candidates for advertising are the customary and usual fees; and whether the advertising activity is an ongoing

activity.⁵⁴ 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.⁵⁵

29. 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 campaign intervention 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.⁵⁶ A religious organization may not provide its mailing list to a candidate, political party or PAC without charge, at a reduced charge or on a selective or preferential basis, as this would constitute an in-kind contribution. Other factors to be considered in determining whether the selling or renting of mailing lists constitutes political campaign intervention include whether mailing lists are available only to candidates and not to the general public; whether the fees charged to candidates for mailing lists are the customary and usual fees; and whether the mailing list activity is an ongoing activity.⁵⁷ 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.⁵⁸

ENFORCEMENT

30. What are the penalties if a religious organization violates the political campaign intervention prohibition?

Unlike lobbying by a religious organization, which is limited but not prohibited, political campaign intervention by a religious organization is strictly prohibited.⁵⁹ 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.⁶⁰ Depending on the circumstances, the excise tax may be imposed in addition to revocation of tax exemption or instead of revocation of tax exemption.⁶¹ 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 tax-exempt status.⁶²

31. Does the IRS target churches for enforcement of the political campaign intervention prohibition?

No. There are special audit procedures that the IRS must follow before commencing any inquiry about potential violation by a church of the political campaign intervention prohibition.⁶³ 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 campaign intervention 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.⁶⁴ Thus, the IRS does not have unfettered discretion to investigate activities by churches, including violations of the political campaign intervention prohibition, and must obtain high-level authorization before doing so. Generally, IRS inquiries about potential violations by churches of the political campaign intervention prohibition are initiated based upon facts reported by the media or complaints submitted by third parties.

IRS ISSUES GUIDANCE FOR 2008 ELECTION

In anticipation of the 2008 election season, the IRS issued formal guidance to assist organizations exempt from tax under section 501(c)(3) of the Internal Revenue Code in understanding the prohibition against political campaign intervention. This guidance includes 21 examples, each involving a single type of activity and designed to illustrate how facts and circumstances are applied in determining whether a tax-exempt organization has engaged in prohibited political campaign intervention. The IRS cautions that combining more than one type of activity may result in an interaction among such activities that could alter the determination of whether political campaign intervention has occurred. Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (June 18, 2007).

The IRS website contains a number of helpful resources relating to the prohibition against political campaign intervention for section 501(c)(3) tax-exempt organizations. These include reports on IRS Political Activity Compliance Initiatives for 2004 and 2006, the script of a 2006 IRS phone forum on political campaign intervention, the history of the political campaign intervention prohibition and relevant articles from annual Exempt Organizations Continuing Professional Education Texts. See: Charities, Churches, and Educational Organizations – Political Campaign Intervention, www.irs.gov/charities/charitable/article/0,,id=155030,00.html.

EXAMPLES OF IMPERMISSIBLE POLITICAL INTERVENTION

Minister B is the minister of Church K, [a section 501(c)(3) organization]. 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 re-elected.” 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 attributable to Church K. [Pub. 1828, at 7 (Example 2)]

Minister D is the minister of Church M, [a section 501(c)(3) organization]. During regular services of Church M shortly before the election, Minister D preaches 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)]

Minister F is the minister of Church O, a section 501(c)(3) organization. The Sunday before the November election, Minister F invites Senate Candidate X to preach to her congregation during worship services. During his remarks, Candidate X states, “I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday.” Minister F invites no other candidate to address her congregation during the senatorial campaign. Because these activities take place during official church services, they are attributed to Church O. By selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O’s actions constitute impermissible political campaign intervention. [Rev. Rel. 2007-41, at 1423 (Situation 9)]

Church P, a section 501(c)(3) organization, maintains a website that includes such information as biographies of its minister, times of services, details of community outreach programs and activities of members of its congregation. B, a member of the congregation of Church P, is running for a seat on the town council. Shortly before the election, Church P posts the following message on its website, “Lend your support to B, your fellow parishioner, in Tuesday’s election for town council.” Church P has impermissibly intervened in a political campaign on behalf of B. [Rev. Rul. 2007-41, at 1426 (Situation 21)]

EXAMPLES OF PERMISSIBLE POLITICAL ACTIVITY

Minister A is the minister of Church J, [a section 501(c)(3) organization], 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, [a section 501(c)(3) organization], 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 re-elected. 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 do not constitute campaign intervention attributable to Church L. [Rev. Rul. 2007-41, at 1422 (Situation 5)]

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 the organization's activities may involve attempts to influence legislation;
- The organization may not intervene in political campaigns; and
- The organization's purposes or activities may not be illegal or violate fundamental public policy.

IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* 3 (Rev. September 2006) [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 3.

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. Rossotti* [hereinafter "*Branch Ministries*"], 211 F.3d 137 (D.C. Cir. 2000).

⁴ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii); Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (June 18, 2007).

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* at 143; *Election Year Issues* at 477-478.

⁶ *See* Rev. Rul. 67-71 C.B. 125 [rating candidates for school board]. 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 (Sept. 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 (Aug. 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.*

¹⁰ Rev. Rul. 2007-41 at 1424.

¹¹ Pub. 1828 at 5-6.

¹² Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

¹³ See *Haswell v. U.S.*, 500 F.2d 1133 (Ct. Cl. 1974) (16-20 percent of budget spent on lobbying was too much); *Murray Seasingood 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).

¹⁴ I.R.C. §§ 501(h)(5); 4911(f)(2). Churches and certain affiliated religious organizations requested that they be made ineligible for the section 501(h) lobbying election.

¹⁵ Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

¹⁶ 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.

¹⁷ Rev. Rul. 2007-41 at 1422; Pub. 1828 at 7; *Election Year Issues* at 363.

¹⁸ Rev. Rul. 2007-41 at 1422; Pub. 1828 at 7; *Election Year Issues* at 364.

¹⁹ *Id.*

²⁰ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii); Rev. Rul. 2007-41 at 1421.

²¹ *Election Year Issues* at 342; T.A.M. 9130008 (April 16, 1991).

²² *Election Year Issues* at 342.

²³ *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 nonelective candidates.

²⁴ See G.C.M. 39694 (Jan. 21, 1988).

²⁵ Rev. Rul. 2007-41 at 1424; Pub. 1828 at 8-9; *Election Year Issues* at 380-382.

²⁶ Rev. Rul. 2007-41 at 1423; Pub. 1828 at 8.

²⁷ *Id.* at 9 (Example 1, left-hand column).

²⁸ See generally Rev. Rul. 2007-41 at 1423; Pub. 1828 at 9-10; *Election Year Issues* at 381-382.

²⁹ Rev. Rul. 2007-41 at 1423-4; *Election Year Issues* at 381.

³⁰ Pub. 1828 at 9 (Example 1, right-hand column).

³¹ See generally Rev. Rul. 2007-41 at 1421; Pub. 1828 at 10; *Election Year Issues* at 370-372.

³² Rev. Rul. 2007-41 at 1421; *Election Year Issues* at 370.

³³ *Election Year Issues* at 371-372; Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 2).

³⁴ *Election Year Issues* at 375.

³⁵ *Id.* at 371, n. 20.

³⁶ Rev. Rul. 2007-41 at 1421; *Election Year Issues* at 376.

³⁷ Rev. Rul. 2007-41 at 1421; *Election Year Issues* at 370-371.

³⁸ 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.

³⁹ *Election Year Issues* at 370.

⁴⁰ *Id.* at 372.

⁴¹ Rev. Rul. 2007-41 at 1421-2; Pub. 1828 at 8-9; *Election Year Issues* at 372-375.

⁴² Rev. Rul. 2007-41 at 1422-3; Rev. Rul. 86-95, 1986-2 C.B. 73; Pub. 1828 at 8; *Election Year Issues* at 373.

⁴³ See, e.g., *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989).

⁴⁴ *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).

⁴⁵ See T.A.M. 9635003 (April 19, 1996).

⁴⁶ Rev. Rul. 2007-41 at 1422; Pub. 1828 at 6; *Election Year Issues* at 378-379.

⁴⁷ Rev. Rul. 2007-41 at 1422; *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 (Sept. 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 were not prohibited political activities for the private foundation sponsor.

⁴⁸ See Rev. Rul. 2007-41 at 1425 (Situation 17); *Election Year Issues* at 383.

⁴⁹ I.R.C. § 512(b)(3); Pub. 1828 at 13.

⁵⁰ Rev. Rul. 2007-41 at 1425-6.

⁵¹ *Id.* at 1426.

⁵² *Id.*

⁵³ *Election Year Issues* at 384.

⁵⁴ Rev. Rul. 2007-41 at 1425.

⁵⁵ I.R.C. § 513(c); Pub. 1828 at 12.

⁵⁶ Pub. 1828 at 10-11; *Election Year Issues* at 383-384.

⁵⁷ Rev. Rul. 2007-41 at 1425.

⁵⁸ 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.

⁵⁹ The IRS interprets the political activity prohibition as absolute. See Pub. 1828 at 7; *Election Year Issues* at 352.

⁶⁰ 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 ensure against future political expenditures.

⁶¹ See *Preamble*, Final Regulations on Political Expenditures by Section 501(c)(3) Organizations, 60 Fed. Reg. 62,209 (Dec. 5, 1995); *Election Year Issues* at 353-354.

⁶² *Election Year Issues* at 354.

⁶³ I.R.C. § 7611. These special audit rules apply only to churches and organizations claiming to be churches. In its Political Activity Compliance Initiative for 2006, the IRS indicated that IRS “[a]gents must follow Section 7611 inquiry/examination procedures and the Director, Examinations, must *personally* review the complete case file to determine if a reasonable belief exists and must *personally* approve and sign church inquiry and examination letters involving churches.” (http://www.irs.gov/pub/irs-tege/paci_procedures_feb_22_2006.pdf)

⁶⁴ Pub. 1828 at 22.

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