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## **POLITICAL SPEECH AND NONPROFIT TAX ISSUES**

The Internal Revenue Code (“IRC”) exempts from federal taxation entities organized and operated for religious purposes, including churches and religious charities. I.R.C. § 501(a), (c)(3) (2006). This benefit, however, does not come without conditions. For a church or religious charity to remain tax-exempt, they must not engage in certain kinds of political activity. A church or religious charity jeopardizes its tax-exempt status if it engages in what the IRS calls “campaign intervention” or if it engages in more than an “insubstantial amount” of lobbying. *See* I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1.

### **I. Campaign intervention**

IRC § 501(c)(3) states that a church or religious charity can only maintain its tax-exempt status if it “does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” *See* Treas. Reg. § 1.501(c)(3)-1. A church or religious charity that engages in these activities is deemed an “action organization” for the purpose of IRC § 501(c)(3) and can have its tax-exempt status revoked. To be considered an action organization, the church or religious charity must intervene in a political campaign on behalf of a candidate for public office.

#### **A. Who is a “candidate for public office”?**

The IRS’s definition of “candidate for public office” is clear, but very broad. IRS regulations define a candidate as “an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.” Treas. Reg. § 1.501(c)(3)-1. Essentially, if the candidate for the office in question may be elected, he is a candidate under the IRS’s definition, regardless of whether the office sought is a municipal, state, or federal office or whether the individual has officially declared himself or herself as a candidate.

## **B. What is campaign intervention?**

Similar to the definition of “candidate for public office,” the idea of campaign intervention is very broad, but not nearly as clear. Although campaign intervention does not include all political activity, it does “include, . . . the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to . . . a candidate.” Treas. Reg. § 1.501(c)(3)-1. The written or oral statements in question do not have to expressly endorse or oppose a candidate. *See, e.g.*, Rev. Rul. 78-248, 1978-1 C.B. 154 (holding that the distribution of a facially neutral candidate questionnaire constitutes campaign intervention if its questions appear biased or are structured in a biased manner). However, nonpartisan political activity is typically permissible. The IRS does not have a bright-line rule for determining what is partisan campaign intervention and what is nonpartisan political activity. Rather, it makes determinations on a case-by-case basis looking at all the “facts and circumstances” of each case. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421. Political activity can include express and issue advocacy, publishing of voter education materials, voter registration and voting drives, and the hosting of candidate forums. In some circumstances, a candidate’s use of a church’s or religious charity’s resources or links posted on a church’s or religious charity’s webpage can turn into campaign intervention. Further, although pastors and leaders of religious charities can engage in political activity as individuals, they must be sure that cannot be attributed to their organizations.

### **i. Express and issue advocacy**

The plain language of IRC § 501(c)(3) prohibits a church or religious charity from making statements directly supporting or opposing a candidate for public office. *See* I.R.C. § 501(c)(3) (stating that “[c]orporations . . . organized and operated exclusively for religious . . . purposes” are exempt only if they do “not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”). Any statement that amounts to direct support or opposition of a candidate can lead to the revocation of tax-exempt status. For instance, in *Branch Ministries v. Rossotti*, the D.C. Circuit upheld the IRS’s revocation of a church’s tax-exempt status after the church “placed full-page advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues.” *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000); *see also* Rev. Rul. 67-71, 1967-1 C.B. 125 (holding that a 501(c)(3) organization that endorsed candidates for a local school board election and distributed a biography of each approved candidate engaged in campaign intervention).

Although a church or religious charity cannot engage in direct, express advocacy, it can take a position on a controversial issue, even if it is one that has been prominent during the election cycle in question. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (“Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office.”). Such organizations can host speeches addressing the issue or run advertisements on television and in the newspapers on the issue so long as the issue advocacy does not explicitly endorse a political candidate. In determining whether the statement of issue advocacy has become campaign intervention, the IRS will consider whether: (1) candidates for public office have been directly identified; (2) the statement approves or

disapproves of a candidate or a candidate's position; (3) the proximity of time between the statement and the election; (3) the statement discusses voting or an election; (4) the issue "has been raised as an issue distinguishing candidates"; (5) the statement is part of an ongoing series of statements on the same issue made independent of the election's timing; and (6) the statement is timed with an event not connected to an election such as a vote on specific legislation. Rev. Rul. 2007-41, 2007-1 C.B. 1421.

A church or religious charity can easily cross the line between issue advocacy and campaign intervention. These two forms of advocacy are differentiated by the extent of their intended or potential effect on an election. A statement is more likely to be issue advocacy when it is part of a series of statements independent of the timing of an election or is timed to affect legislation, not an election. *Id.* If the issue discussed has become particularly relevant in an election, the statement is more likely to be considered campaign intervention, even if it does not mention a specific candidate. *Id.* The mention of a candidate is a strong indicator of campaign intervention. Although it may be permissible in some circumstances to mention an incumbent candidate in issue advocacy statements because of his role as a public official (e.g., urging of a state senator's constituents to contact the senator about their views regarding a specific issue), in the vast majority of cases, mentioning a current candidate for public office will constitute campaign intervention.

## **ii. Voter education materials**

As a general rule, a church or religious charity can send out material to educate voters on issues of importance to the general public if it is done on a wide range of issues in a nonpartisan manner. *See* Rev. Rul. 78-248, 1978-1 C.B. 125. For instance, the IRS held that a 501(c)(3) organization that publicized a "proposed code of fair campaign practices" could remain tax-exempt because it did not ask candidates to sign the code or endorse the pledge. *See* Rev. Rul. 76-456, 1976-2 C.B. 151. An organization can also make nonpartisan voter guides available to the general public based off of questionnaires sent to candidates if "[t]he issues are selected by the organization solely on the basis of their importance and interest to the electorate as a whole," and "neither the questionnaire nor the voters [sic] guide, in content or structure, evidences a bias or preference . . . ." Rev. Rul. 78-248, 1978-1 C.B. 154. If the issues listed in the questionnaire or voter guide are too narrowly focused or selected based on the organization's political preferences, the IRS will consider the guide and questionnaire to be campaign intervention. *See id.* It is also permissible to publish the voting record of all incumbent congressmen on a specific issue if the publication lists all incumbent congressmen, does not identify them as candidates for reelection, and the publication does not compare the congressmen and potential opponents. *See* Rev. Rul. 80-282, 1980-2 C.B. 178.

Likewise, materials sent to the general public that rate candidates will be considered campaign intervention material. In *Association of the Bar of New York City v. Commissioner of Internal Revenue*, the Second Circuit upheld the IRS's determination that the New York City Bar Association did not qualify for exemption under IRC § 501(c)(3). 858 F.2d 876 (2d Cir. 1988). In *Bar of New York City*, the court determined that the New York City Bar Association was ineligible for 501(c)(3) status because it rated candidates for elected judicial offices in New York as either "approved," "unapproved," or "approved as highly qualified." *Id.* at 877 (internal

quotation marks omitted). Despite finding that the New York City Bar Association's actions were "in the public interest," the Second Circuit held that the New York City Bar Association engaged in campaign intervention by "rating candidates and publicizing their rating." *Id.* at 878.

The key to preventing educational material from becoming campaign intervention is to make sure the material is nonpartisan, both as to candidates and issues. While some issue advocacy is permissible as discussed above, in the educational materials context, issue advocacy can quickly become campaign intervention. The general rule is that the less connected with an election the issue advocacy is, the more likely it is to not be considered campaign intervention.

### **iii. Candidate forums**

A church or religious charity may also be able to hold or host a forum in which candidates are invited. Common scenarios include: (1) the invitation of a single candidate in his or her capacity as a candidate; (2) the invitation of multiple candidates in their capacities as candidates; and (3) invitation of a candidate in a non-candidate capacity. Candidates may appear at any event open to the general public without invitation, such as a worship service. Rev. Rul. 2007-41, 2007-1 C.B. 1421.

#### **a. Invitation of a single candidate in his or her capacity as a candidate**

In determining whether the invitation of a candidate to speak at an event hosted by a church or religious charity is campaign intervention, the IRS will consider: (1) whether an equal opportunity was provided to the other candidate(s) to speak; (2) whether the church or religious charity indicated support for the speaking candidate, or his or her views; and (3) whether fundraising occurred. Rev. Rul. 2007-41, 2007-1 C.B. 1421. In determining whether an equal opportunity has been given to other candidates, the IRS will consider the quality of opportunities. For instance, if one candidate is invited to what a church knows will be a widely attended event and one candidate to another event that the church knows will not be well-attended, the church has engaged in campaign intervention. *See id.* A church cannot invite only one candidate to speak at an official church function in which the candidate or anyone in the church advocates for the candidate's election. *Id.*

#### **b. Invitation of multiple candidates for the same office in their capacity as candidates**

A church can hold a public forum with candidates in a race for a particular office if the church invites all of the candidates and the forum is conducted in a nonpartisan manner. Rev. Rul. 2007-41, 2007-1 C.B. 1421. In determining whether the invitation to candidates to speak at an event hosted by a church or religious charity amounts to campaign intervention, the IRS will consider: (1) whether the questions asked were "prepared and presented by an independent nonpartisan panel"; (2) whether a broad number of issues are discussed that were selected because of their interest to the general public; (3) whether each candidate is given equal time; (4) whether candidates are asked to agree or disagree with positions important to the organization; and (5) whether the moderator acts in a nonpartisan manner. *Id.* If a candidate declines the opportunity to attend, the forum likely remains permissible. *Id.*

### **c. Invitation of a candidate in a non-candidate capacity**

In determining whether the invitation of a candidate to speak at an event hosted by a church or religious charity in a non-candidate capacity amounts to campaign intervention, the IRS will consider whether: (1) the candidate was chosen to speak solely because he or she is a candidate for public office; (2) the candidate speaks only as a non-candidate; (3) the candidate's candidacy is mentioned; (4) a nonpartisan atmosphere is maintained; and (5) the upcoming election is mentioned in connection with the candidate's candidacy at the event. Rev. Rul. 2007-41, 2007-1 C.B. 1421. For example, it is not campaign intervention to mention the presence of a public official at a worship service so long as no mention is made of his or her candidacy for reelection. *Id.*

### **d. Rationale underlying candidate appearances**

The underlying rationale for the rules relating to a candidate's appearance is nonpartisanship. I.R.C. § 501(c)(3) seeks only to prohibit political intervention, not activities that benefit the general public.

#### **iv. Voting drives and voter registration drives**

Get-out-the-vote (GOTV) drives and voter registration drives are not considered campaign intervention if the organization hosting such drives carries them out in a nonpartisan manner. Rev. Rul. 2007-41, 2007-1 C.B. 1421. Things more likely to make a GOTV drive or voter registration drive campaign intervention include references to a particular candidate, political party, or prominent election issues. *See id.* The IRS will look at all the facts and circumstances surrounding GOTV and voter registration drives to determine if campaign intervention has occurred.

#### **v. Use of a church's or religious charity's resources**

Campaign intervention can occur simply by a candidate's use of a church's or religious charity's resources. For instance, if a church rents out the use of its fellowship hall at a discount to a particular candidate without offering the discount to the other candidates running for the same office, the organization has likely engaged in campaign intervention. *See Rev. Rul. 2007-41, 2007-1 C.B. 1421.* In determining whether a candidate's or a political party's use of a church's or religious charity's resources constitutes campaign intervention, the IRS will consider whether: (1) the resource has been offered to all candidates for the same office in the same election equally; (2) the resource is only available to candidates and not the general public; (3) the fees charged to candidates for use of the resources are the "customary and usual rates"; and (4) the candidate's use of the resource is part of an ongoing activity of the church or religious charity or whether the candidate was allowed to use the resource simply because of his or her candidacy. *Id.*

## **vi. Links on a webpage**

If a church or religious charity posts a link on its website that leads to another webpage that supports or opposes a candidate for public office, the organization may have engaged in campaign intervention. Rev. Rul. 2007-41, 2007-1 C.B. 1421. Although a link to a webpage that contains some campaign information does not constitute per se campaign intervention, a church or religious charity should be mindful of the links they post on their website. Webpages constantly change and a page that contains no express advocacy material one day may contain it the next. When determining if a link to a webpage constitutes campaign intervention, factors that the IRS will consider include: (1) whether all the candidates for a particular office are discussed on the linked page; (2) whether the religious purpose of the church or charity is furthered by the link; and (3) how easily and directly campaign intervention material can be accessed from the linked page. *Id.*

## **vii. Organization leaders making endorsements in their personal capacity**

A pastor or leader of a religious charity is free to engage in political activity as an individual. However, for the organization to remain tax-exempt, he or she “cannot make partisan comments in official organization publications or at official functions of the organization.” Rev. Rul. 2007-41, 2007-1 C.B. 1421. A pastor engages in campaign intervention if he or she endorses or opposes a candidate from the pulpit or in a church publication. This is true even if the pastor personally pays the cost of the column. *Id.* However, a pastor or religious charity leader can support or oppose a candidate in their personal capacity so long as he or she makes it clear that it is being done as an individual, and not on behalf of their church or charity. *Id.*

## **II. Lobbying**

IRC § 501(c)(3) allows a church or religious charity to remain tax exempt if “no substantial part of the activities” engaged in by the church or religious charity “is carrying on propaganda, or otherwise attempting, to influence legislation . . . .” I.R.C. § 501(c)(3). The term “propaganda” in the statute equates to what most people call “lobbying.” As stated by IRS regulations, a church or religious charity will lose its tax-exempt status “if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise.” Treas. Reg. § 1.501(c)(3)-1(c)(2). However, IRS regulations also state that an exempt organization will not lose its exempt status “because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation.” *Id.* Thus, to remain tax-exempt, a church’s or religious charity’s lobbying cannot be “more than insubstantial.” *See* I.R.C. §501(c)(3); Treas. Reg. §1.501(c)(3)-1(c)(2). To determine whether a church or religious charity has engaged in sufficient lobbying to compromise its tax-exempt status, the IRS will consider whether: (1) lobbying has occurred and (2) the amount was more than insubstantial. The Supreme Court of the United States has found IRC § 501(c)(3) and its accompanying lobbying rules constitutional. *See Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (holding that IRC §501(c)(3)’s prohibition on substantial lobbying did not violate the First Amendment because the Government is not required to subsidize speech and did not violate the Equal Protection Clause, in part, because the Federal Government has broad discretion in determining who and what to tax).

## **A. What is lobbying?**

The IRS' definition of lobbying is broad and includes both when an organization attempts to influence public officials about a particular issue and when an organization attempts to affect the general public's view on an issue. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (2012). IRS regulations state that a church or religious charity has engaged in lobbying if it “[c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation” or “[a]dvocates the adoption or rejection of legislation.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a)-(b) (2012). As used in the §501(c)(3) lobbying regulations, legislation “includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.” Treas. Reg. §1.501(c)(3)-1(c)(3)(ii)(b).

In addition to including direct appeals to public officials and the general public regarding specific legislation, the definition of lobbying includes appeals to affect the public's opinion on a general issue about which no specific legislation has been proposed. *See Cammarano v. United States*, 358 U.S. 498 (1959). In *Christian Echoes National Ministry, Inc. v. United States*, the Tenth Circuit held that a religious §501(c)(3) organization engaged in lobbying by publishing articles in its magazine discussing over twenty issues ranging from communism to immigration. 470 F.2d 849, 855 (10th Cir. 1972). All the articles urged readers to take political action regarding the issues discussed. *Id.* The court held that, although not all were attempts to influence specific legislation, the organization engaged in lobbying because the articles were “attempts to influence legislation through an indirect campaign to mold public opinion.” *Id.*

## **B. How much lobbying is more than insubstantial lobbying?**

Different tests apply for a church or religious organization when determining if its lobbying activity has become more than insubstantial. Although no bright-line rule exists to determine if a church's lobbying is substantial, a statutory formula does exist to determine if a religious charity's lobbying has become substantial.

### **i. Churches**

For a church, courts apply a facts-and-circumstances test in the lobbying context, which is similar to the test courts apply in the campaign-intervention context. *See id.* (citing *Krohn v. United States*, 246 F.Supp. 341 (D. Colo. 1965)). Courts have held that 501(c)(3) organizations that spend less than five percent of their time and resources lobbying are not engaging in more than insubstantial lobbying. *See Seasongood v. Comm'r of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955). Despite the holding in *Seasongood*, the IRS has specifically disclaimed any percentage test and states that it will apply the facts-and-circumstances approach. INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW, 6 (2009), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

## **ii. Religious charities**

Under IRC § 501(h), a religious charity will not be considered to have lobbied more than an insubstantial amount if they do not exceed what the statute calls the “lobbying ceiling amount.” *See* I.R.C. § 501(h)(2)(B). The lobbying ceiling amount is 150% of the organization’s “nontaxable lobbying amount” under IRC § 4911. The nontaxable lobbying amount is the amount of money an organization covered under IRC § 501(h) can spend on lobbying without being taxed. *See id.* The nontaxable lobbying amount is determined by a complex formula based on the organization’s size and expenditures. *See* I.R.C. § 4911(c)(2). A religious charity should consult a tax professional to determine how much time and money it can spend on lobbying under the formula.

## **II. Conclusion**

To remain tax-exempt under IRC § 501(c)(3), a church or religious charity cannot engage in campaign intervention or lobby more than an insubstantial amount. This does not mean, however, that a church or religious charity must be totally disengaged from politics. A church or religious charity can engage in truly nonpartisan political activity and lobby Congress and State legislatures if the amount is not substantial. If a church or religious charity desires to have a political presence in its local community, it may want to consider the possibility of creating a sister organization organized under IRC § 501(c)(4). Section 501(c)(4) organizations can engage in limited political activity and retain their tax-exempt status. For more information on the concept of creating a sister 501(c)(4) organization, see Douglas H. Cook, *The Politically Active Church*, 35 Loy. U. Chi. L.J. 457 (2004).