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THE CHURCH AND POLITICS: A REVIEW OF THE IRS GUIDELINES FOR CHURCHES

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Churches, like other organizations that are exempt from federal income tax under §501(c)(3), may 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."[1]

I. INTRODUCTION

A. History

Before 1954, the IRS and the courts generally recognized that participation in a political campaign is not a charitable activity, and an organization whose principal purpose was to do so could not be exempt under §501(c)(3). However, an organization whose principal purpose was religious or otherwise charitable could engage in incidental political activity without jeopardizing its exemption.

In the course of the overhaul of the Internal Revenue Code in 1954, then-Senate Minority Leader, Lyndon Johnson, persuaded his colleagues to approve a floor amendment, adding the prohibition quoted above to §501(c)(3). Although, for this reason, there is no legislative history, it has been reliably reported that Senator Johnson was angry at members of the Bass family who used several charities they controlled to oppose his election in 1948. The new prohibition would prevent a recurrence.

[1] I.R.C. §501(c)(3). IRS Publication 1828, *Tax Guide for Churches and Religious Organizations,* available at www.irs.gov, discusses these issues on pages 7-11.

B. Scope

The prohibition against participating or intervening in a political campaign applies only to elections for public office, and does not apply to attempts to influence legislation.[2] (Churches and other §501(c)(3) exempt organizations may engage in such attempts to influence legislation as an insubstantial part of their activities.)

In addition, unlike the restriction on lobbying, the prohibition on political activity is absolute. Exemption under §501(c)(3) may be revoked for even the smallest amount of prohibited political activity.[3] However the IRS rarely revokes exemption for political activity, despite frequent reports of church involvement in political campaigns by, *e.g.*, allowing candidates to speak from the pulpit, collecting campaign contributions during worship services, and ferrying voters to the pools in church vans festooned with signs promoting candidates of but one political party. Surprisingly, in the mid-1990s ministers from several churches in the Tidewater area around Norfolk, Virginia complained publicly after being visited by IRS agents whose purpose was merely to explain the rules prohibiting political activity, let alone open an audit or revoke the churches' exemptions.

C. Regulations

The regulations under §501(c)(3) elaborate on the prohibition only slightly, by defining the term "candidate for public office."

> The term *candidate for public office* means an individual who offers himself, or is proposed by others, as a contestant for an elected public office, whether such office be national, State, or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.[4]

Suffice it to say that the statute and regulations provide little *practical* guidance to the pastor or other church leader who is diligently attempting to ascertain which activities are permitted, and which are not. Although the IRS and the courts have issued a number of rulings and judicial opinions addressing these issues, to which we turn in a moment, except for three activities that are prohibited *per se*, the question turns on a review of all of the facts and circumstances, and slight variations in the fact patterns might easily produce a different result.

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[2] "Legislation" includes ballot initiatives or referenda, and the legislative confirmation of judicial nominations. 26 CFR §53.4911-2(b)(1)(iii); IRS Notice 88-76, 1988-2 C.B. 392; IRS Announcement 88-114, 1998-37 I.R.B. 26 (expenditures for influencing Senate confirmation of federal judges are subject to tax under §527(f)).

[3] Pursuant to I.R.C. §4955, the IRS can also assess excise taxes on the church and its leadership. *See* Field Service Advice 1998-209 (Sept. 21, 1993).

[4] Treas. Reg. §1.501(a)(3)-1(c)(3)(iii). A candidate for precinct committeeman may be a "candidate for public office." GCM 39811 (Feb. 9, 1990).

II. *PER SE* PROHIBITED ACTIVITIES

Three types of activities are prohibited *per se*: Candidate endorsements or denouncements; candidate ratings; and contributions of cash, goods, or services to a campaign.

A. Candidate endorsements and denouncements

A church may not, as a matter of its official position, endorse or oppose a candidate for public office. Thus, a pastor speaking from the pulpit or otherwise in his capacity as the pastor, may not urge his audience to vote for or against a particular candidate. Likewise, a church may not publish an article in its newsletter, or place an advertisement exhorting readers to vote for or against a particular candidate.[5] This is well-illustrated by the case of *Branch Ministries v. Rossotti*, involving the denouncement of Bill Clinton by a church. In 1992, only days before the election, The Church at Pierce Creek in Binghamton, New York, placed a full-page advertisement in *USA Today* and the *Washington Times*. The advertisement highlighted then-Gov. Bill Clinton's support for abortion on demand, civil rights for homosexuals, and the distribution of condoms to high school students, and then asked "How then can we [Christians] vote for Bill Clinton?" (The Church's advertisement did not tell Christians whether to vote for then-President Bush, running for re-election, or for Ross Perot, running as the candidate of the Reform Party.) Ironically, the advertisement also stated, "Tax-deductible contributions for this advertisement gladly accepted."

Despite its reticence to act against churches on account of their political activities, the IRS did not shrink from this "in your face" challenge and, in 1995, revoked the Church's exemption. The Church litigated the issue and the trial court summarily upheld the IRS' revocation. On appeal, the Court of Appeals gave equally short shrift to the Church's arguments.[6]

The Church first argued that the Internal Revenue Service did not have statutory authority to revoke a church's tax-exempt status, because the Church's exemption is derived not from §501(c)(3), but from the lack of any provisions in the Internal Revenue Code for the taxation of churches. The Court of Appeals concluded that the Church Audit Protection Act[7] expressly authorizes the IRS to revoke the tax-exempt status of a church in certain circumstances, including when a church is not exempt by reason of its failure to satisfy §501(c)(3).

The Church also challenged the IRS' authority, based the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act. The court found that under either rule the Church must first establish that its Free Exercise rights had been substantially burdened. The court denied the Church's predicate that "withdrawal of a conditional privilege for failure to meet the condition is in itself an unconstitutional burden on its Free Exercise Right." The Church's assumption is true only when "the receipt of the privilege (in this case the tax-exemption) is conditioned upon conduct prescribed by a religious faith, or…denied…because of conduct mandated by religious belief, thereby putting substantial

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[5] G.C.M. 39414 (Feb. 29, 1984).

[6] 211 F.3d 137 (D.C. Cir. 2000).

[7] I.R.C. §7611.

pressure on an adherent to modify his behavior and to violate his beliefs."[8] Because the Church did not also argue that withdrawing from electoral politics would violate its beliefs, and the sole effect of the loss of exemption might be some decrease in the amount of money available to the Church for its religious practices, that burden was not constitutionally significant. In fact, the court suggested that even that burden was overstated, because no tax is assessed on gifts, and if the Church does not intervene in future political campaigns, it may hold itself out as a §501(c)(3) organization without re-applying for exemption.

Finally, the court noted that the Church had alternate means by which to communicate its sentiments about candidates for public office. Following the Supreme Court's decision in *Regan v. Taxation With Representation*,[9] the court observed that the Church could form a related §501(c)(4) organization, which could then sponsor a political action committee in order to participate in political campaigns.

Because the church had failed to show that its religious activities were substantially burdened by revocation of its tax-exempt status, the court did not consider whether the prohibition serves a compelling government interest, or, if so, whether revocation of exemption was the least restrictive means of furthering that interest.[10]

In an earlier case, *Christian Echoes National Ministry, Inc. v. United States*[11] the court agreed with the IRS that a religious corporation whose publications attacked candidates and incumbents considered to be too liberal, and urged its followers to elect conservatives, including Strom Thurmond and Barry Goldwater, violated the prohibition on participation in political campaigns. The court in *Christian Echoes* overruled the trial court's Free Exercise analysis (prohibiting the IRS from evaluating the organization's activities as "religious" or "political" for purposes of denying tax-exempt status), and concluded that revocation of exemption was the least restrictive means of upholding the Government's "overwhelming and compelling…interest: That of guarantying [sic] that the wall separating church and state remain [sic] high and firm."[12]

B. **Candidate ratings**

Another form of endorsement is the rating of candidates, usually based on the extent to which the candidates' views or qualifications align with those of the organization on those issues that the organization views as important. These, too, are prohibited *per se*, because they both endorse those candidates who are rated favorably, and implicitly oppose those candidates who are rated unfavorably.

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[8] *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 391-92 (internal quotation marks and citations omitted).

[9] 461 U.S. 540 (1983) (upholding the constitutionality of §501(c)(3)'s restrictions on lobbying).

[10] In *Regan v. Taxation With Representation*, the court agreed that the government had a compelling interest in protecting the integrity of the tax code.

[11] 470 F.2d 849 (10th Cir. 1972).

[12] *Id*. 470 U.S. at 857. The problem with this analysis is that it makes protecting a particular interpretation of the First Amendment a "compelling state interest."

In *Association of the Bar of the City of New York v. Commissioner*,[13] the issue of whether the Association's activities in rating candidates for appointed and elected judgeships at the municipal, state, and federal level disqualified it from exemption under §501(c)(3). The Association's Committee on the Judiciary

> considers a candidate's professional ability, experience, character, temperament, and the possession of such special qualifications as the Committee deems desirable for judicial office. It then rates the candidate as either "approved", or "not approved" or "approved as highly qualified." The ratings are communicated to the public in the form of press releases and are published in *The Record of the Association of Bar of the City of New York*, a regular publication of the Association which is sent out to the Association members and approximately 120 other subscribers, including libraries and law schools. A "not approved" rating may be accompanied on occasion by a short statement explaining the reasons for the rating.[14]

The Association, which had been exempt under §501(c)(6), applied for exemption under §501(c)(3), and the IRS denied the application on the basis that the Association's ratings of judicial candidates constituted impermissible participation in or intervention in a political campaign.[15] Although the Tax Court held that the Association's ratings were not prohibited political activities, the Court of Appeals reversed, citing the Tax Court's conclusion that it is "obvious that the ratings were published with the hope that they will have an impact on the voters." That the Association's ratings were published without reference to any party affiliation did not avail the Association, because an individual may campaign for public office as an independent candidate, apart from any political party nomination or endorsement. The court also countered the Association's assertion that its rating activity involved merely the collection and limited dissemination of objective data, by pointing out that the Tax Court concluded "'that ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities,' and they are simply expressions of 'professional opinion' concerning the candidate's qualifications."[16]

More recently, the Assistant Chief Counsel (Employee Benefits and Exempt Organizations) concluded that a church may have engaged in prohibited political activities in connection with an insert in the church bulletin "recommending" certain candidates. The facts indicate that the church bulletin was routinely provided to those attending church services. On one particular Sunday, the bulletin included a one-page document insert indicating that certain candidates were "recommended" for office. The Office of the Chief Counsel concluded that revocation of exemption may be appropriate unless the church "provides evidence sufficient to

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[13] 858 F.2d 876 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).

[14] 858 F.2d at 877.

[15] *See* GCM 39441 (Sept. 27, 1985).

[16] 858 F.2d at 880. *See also* Rev. Rul. 67-71, 1967-1 C.B. 125 (nonprofit organization created to improve a public educational system may not qualify for §501(c)(3) status when it publicly announces a slate of favored candidates); TAM 9635003 (April 19, 1996).

show that the distribution of the insert was inadvertent, unauthorized, or otherwise not attributable to the church."[17]

C. Campaign contributions

Finally, although it may seem to be so obvious as to be unnecessary to address, churches and other charities may not contribute cash, goods, or services in support of a candidate for public office. Thus, for example, a church may not contribute money, nor permit a campaign committee to use its office equipment or supplies without charging an amount at least equal to the value provided. Likewise, the church may not permit its employees to provide services to a campaign during their work time, or to use church resources in the course of their work for the campaign. Of course, this would not preclude an employee from working for a campaign after hours, on weekends, or while taking normal vacation or other leave from his duties for the church.

III. OTHER ACTIVITIES

Aside from the three activities described above, whether an organization has engaged in prohibited participation of a political campaign depends on all of the facts and circumstances focusing specifically on whether an activity, or some significant aspect of it, is "biased" in favor of or against one or more candidates.

In addition, the IRS has declared that it will not follow the (former) "express advocacy" rule established by the Supreme Court in interpreting the Federal Election Campaign Act.

> M has argued that there must be more than evidence of bias in this fundraising letter for or against candidates running for public office in order for M to be found to have violated the section 501(c)(3) political intervention prohibition. However, in respect to this prohibition there is no "express advocacy" rule as was required by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), in regard to influencing federal elections under the jurisdiction of the Federal Election Commission. For purposes of section 501(c)(3), intervention in a political campaign may be subtle or blatant. It may seem to be justified by the press of events. It may even be inadvertent. The law prohibits all forms of participation or intervention in "any" political campaign.[18]

A. Voter guides

The most contentious area that arises when a church seeks to involve itself in the political process without violating the Internal Revenue Code is the extent to which voter guides may be considered to evidence bias in favor of or against a candidate.

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[17] Field Service Advice 1998-209 (Sept. 21, 1993).

[18] Technical Advice Memorandum 9609007 (Dec. 6, 1995). *See also* TAM 8936002 (May 24, 1989) ("We are not convinced that the Supreme Court's express advocacy standard is controlling in interpreting section 501(c)(3)…").

1. **Rev. Rul. 78-248**

The principal IRS ruling addressing this issue is Rev. Rul. 78-248.[19] In that ruling, the IRS considered four situations.

Situation 1

> Organization A has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. As one of its activities, the organization annually prepares and makes generally available to the public a compilation of voting records of all Members of Congress on major legislative issues involving a wide range of subjects. The publication contains no editorial opinion, and its contents and structure do not imply approval or disapproval of any Members or their voting records.
>
> The "voter education" activity of Organization A is not prohibited political activity within the meaning of section 501(c)(3) of the Code.

The IRS conclusion in Situation 1 is not controversial, but it addresses a relatively uncommon fact pattern. First, the publication is not, technically speaking, a "voter guide." Instead, it reports on the voting records only of incumbents. Second, few organizations have the resources to prepare and publish a compilation of the voting records of all incumbents on a significant number and wide range of legislative issues. An finally, in the context of an election campaign, some incumbents are not running for re-election, and this type of "voter guide" would provide little useful information with respect to those races.

Situation 2

> Organization B has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. As one of its activities in election years, it sends a questionnaire to all candidates for governor in State M. The questionnaire solicits a brief statement of each candidate's position on a wide variety of issues. All responses are published in a voters guide that it makes generally available to the public. The issues covered are selected by the organization solely on the basis of their importance and interest to the electorate as a whole. Neither the questionnaire nor the voters guide, in content or structure, evidences a bias or preference with respect to the views of any candidate or group of candidates.
>
> The "voter education" activity of Organization B is not prohibited political activity within the meaning of section 501(c)(3) of the Code.

Situation 2 is also relatively noncontroversial, but, again, it does not frequently occur in campaigns. In addition, the IRS generally takes the position that an organization may not report that a candidate failed to respond to its questionnaire. Unfortunately, the IRS has refused to explain why such a truthful response cannot be published or why the publication of that

[19] 1978-1 C.B. 154.

information is evidence of bias against a candidate who has chosen, usually after repeated attempts to contact the campaign, not to respond to the questionnaire.

Situation 3

> Organization C has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. Organization C undertakes a "voter education" activity patterned after that of Organization B in Situation 2. It sends a questionnaire to candidates for major public offices and uses the responses to prepare a voters guide which is distributed during an election campaign. Some questions evidence a bias on certain issues. By using a questionnaire structured in this way, Organization C is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified as exempt under that section.

Situation 3 is controversial, precisely because the IRS fails to address the question regarding how the questions evidence bias on certain issues. Of course, Situation 3 also shares the weakness of Situation 2 in that the IRS takes the position that an organization publishing a voter guide is not permitted to report that a candidate failed to respond to its questionnaire.

Situation 4

> Organization D has been recognized as exempt under section 501(c)(3) of the Code. It is primarily concerned with land conservation matters.
>
> The organization publishes a voters guide for its members and others concerned with land conservation issues. The guide is intended as a compilation of incumbents' voting records on selected land conservation issues of importance to the organization and is factual in nature. It contains no express statements in support of or in opposition to any candidate. The guide is widely distributed among the electorate during an election campaign. While the guide may provide the voting public with useful information, its emphasis on one area of concern indicates that its purpose is not nonpartisan voter education.
>
> By concentrating on a narrow range of issues in the voters guide and widely distributing it among the electorate during an election campaign, Organization D is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified as exempt under that section.

Situation 4, which arguably presents the most common fact pattern, is also quite controversial, because it prohibits an exempt §501(c)(3) organization that is concerned with a single issue or a set of related issues from educating the public about the candidates' positions with respect to that limited set of issues. That this conclusion is probably wrong is also indicated by the fact that a "widely distributed" voter guide is virtually certain to be distributed to a large number of people who may be opposed to the positions of the organization on those issues, and who will thereby be motivated to vote for a candidate who may in fact be opposed by the organization.

2. Rev. Rul. 80-282

Two years later, the IRS amplified Rev. Rul. 78-248 by publishing Rev. Rul. 80-282.[20] Rev. Rul. 80-282 considers the publication of summary of the voting records of all incumbent members of Congress on selected legislative issues important to the organization publishing the summary, together with an expression of the organization's position on those issues. Each member's votes were to be recorded in a way that illustrates whether he or she voted in accordance with the organization's position on the issue.

Again, this publication was not a voter guide at all, but simply a report of the legislative activity of incumbent members of Congress. The reason is that

> [t]he newsletter is to be politically non-partisan, and will not contain any reference to or mention of any political campaigns, elections, candidates, or any statements expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office. No mention will be made of an individual's overall qualifications for public office, nor will there be any comparison of candidates that might be competing with the incumbent in any political campaign. The voting records of all incumbents will be presented and candidates for re-election will not be identified. The newsletter will point out the limitations of judging the qualifications of an incumbent on the basis of a few selective votes and will note the need to consider such unrecorded matters as performance on subcommittees and constituent service.

The ruling also noted that "publication usually will occur after congressional adjournment and will not be geared to the timing of any federal election. The newsletter will be distributed to the usual subscribers, and will not be targeted towards particular areas in which elections are occurring."

After reviewing *Situations 3* and *4* of Rev. Rul. 78-248, the IRS concluded that although the format and content of the publications are not neutral, because the organization did not refer to election matters; pointed out that other factors should be considered in determining the qualifications of an incumbent; and distributed the publication only to the normal readership of the newsletter, a few thousand people nationwide, the publication did not constitute participation or intervention in a political campaign.

B. <u>Candidate forums and debates</u>

Another way in which churches may influence public opinion during election campaigns is to sponsor candidate forums and debates where candidates can address issues of interests to the electorate. By having one or more candidates present in the same event, those attending are better able to compare and contrast the candidates' views.

The IRS issued guidelines regarding the conduct of such forums and debates in Rev. Rul. 86-95.[21] In Rev. Rul. 86-95, the IRS concluded that the conduct of candidate forums that

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[20] 1980-2 C.B. 178. *considered in* GCM 3844 (July 15, 1980).

[21] 1986-2 C.B. 73.

provide fair and impartial treatment of candidates, and that do not promote or advance one candidate over another does not constitute participation or intervention in a political campaign on behalf of or in opposition to any candidate for public office. The facts indicate that the §501(c)(3) sponsor would invite all legally qualified candidates for the office in question to participate. The agenda would cover a broad range of issues, including, but not limited to those issues considered to be important to the sponsors and sponsor's members; questions to the candidate would be presented by a nonpartisan, independent panel of knowledgeable persons composed of representatives of the media, educational organizations, community leaders, and other interested persons; each candidate would be allowed an equal opportunity to state his or her views on each of the issues discussed, the moderator would ensure that the ground rules as followed by all participant; and at the beginning and end of each forum, the moderator would state that the views expressed are those of the candidates and not those of the organization, and that the organization's sponsorship of the forum is not intended as an endorsement of any candidate.[22]

The IRS has also concluded that in some cases, it is not necessary for an organization to invite *all* legally qualified candidates to participate in candidate forums and debates.[23]

> In circumstances where the number of legally qualified candidates for a particular office is large, a sponsoring organization exempt under section 501(c)(3) of the Code might determine that holding a debate to which all legally qualified candidates were invited would be impracticable and deter [sic] from the educational purposes of the organization. In determining whether a section 501(c)(3) organization participates or intervenes in a political campaign when it holds a candidate debate to which not all legally qualified candidates are invited, all the facts and circumstances must be considered including the following:
>
> (1) Whether inviting all legally qualified candidates is impracticable;
>
> (2) Whether the organization adopted reasonable, objective criteria for determining which candidates to invite;
>
> (3) Whether the criteria were applied consistently and non-arbitrarily to all candidates; and
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> (4) Whether other factors, such as those discussed in Rev. Rul. [86-95], … indicate that the debate was conducted in a neutral, non-partisan manner.

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[22] *See also* Rev. Rul. 74-574, 1974-2 C.B. 160 (a nonprofit educational broadcasting station is not participating in political campaigns by providing reasonable amounts of air time equally available to all legally qualified candidates for office, in compliance with the then-prevailing reasonable access provision of the Communications Act of 1934); *Fulani v. League of Women Voters Educational Fund*, 882 F.2d 621 (2nd Cir. 1989) (League's failure to permit independent party candidate for President to participate in separate primary-season debates for Democratic Party candidates and Republican Party candidates did not constitute impermissible political activity because plaintiff was not a candidate for the nomination of either party).

[23] Technical Advice Memorandum 9635003 (Apr. 19, 1996).

M's, decision to invite only the candidates from O and P parties and up to four candidates who agreed to a 15 percent share of popular support as reflected in at least one recognized credible and independent State-wide poll would appear to accentuate the educational nature of the forums and still ensure a meaningful field of candidates for worthwhile forums, while allocating for the organization's limited space and time.

C. Candidate appearances and speeches

Appearances by individual candidates at churches – apart from a multi-candidate forum or debate—can pose thorny issues for the church. Again, the "neutrality" principle must be used to determine whether the activity is prohibited.

- Do all candidates have an equal opportunity to speak in the same kind of event?
- If the candidate's presence is merely acknowledged, is equal treatment accorded to all candidates who may be present at other times?
- If the candidate is permitted to speak or is acknowledged because she is an incumbent, is there any mention of the individual's candidacy, the election, or voting?
- Do any campaign activities—*e.g.*, distributing promotional literature, buttons, bumper stickers, etc.—occur on the church's premises in connection with the candidate's attendance or speech?

D. Constituent activity

A church may encourage its members and other constituents to be active in the political process. To this end, it may generally teach about the importance of democracy, engagement in the electoral process, activity in political campaigns, and campaigning for public office.[24]

E. Voter registration drives and "get-out-the-vote" activities

The IRS has not issued any rulings regarding conduct of voter registration activities by churches or other public charities.[25] In any event, like most other activities voter registration drives must be conducted in a nonpartisan manner, without bias towards or against any candidate. The IRS has identified four factors that it would consider in making this determination:[26]

(1) Whether no candidate is named or depicted, or all candidates for a particular Federal office are named or depicted without favoring any

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[24] *See* Rev. Rul. 72-512, 1972-2 C.B. 246 (political science course may require students to participate in the political campaign of their choice without jeopardizing university's exemption under §501(c)(3)).

[25] Special rules govern private foundations, but not churches. I.R.C. §4945(d)(3), (f); 26 CFR §53.4945-3.

[26] Election Year Issues, FYE 2002 CPE Text, page 379.

candidate over any other in the voter registration or get-out-the-vote drive communication;

(2) Whether the communication names no political party except that [sic] for identifying the political party affiliation of all candidates named or depicted;

(3) Whether the communication is limited to urging acts such as voting and registering and to describing the hours and places of registration and voting; [and]

(4) Whether all voter registration and get-out-the-vote drive services are made available without regard to the voter's political preference.

The IRS also indicates that other facts and circumstances may be considered.

A church may use voter registration lists to identify unregistered voters, provided that it does not target voter registration efforts to those who are registered with a particular party.

F. Internet-related activities

The "neutrality principle" also applies to a church's communications on its website. For example, if the church includes statements by candidates regarding their position on abortion, it should include statements, insofar that they are available, from all candidates for the office in question.[27] Likewise, if a church provides a link to a candidate's website, a link should also be provided to the website of all other candidates for the office.

G. Business activities

As noted above, the church may not contribute money, or goods or services, such as the use of its mailing list, to a candidate. However, a church may sell or rent goods, or sell services, or the use of facilities, to candidates, provided it deals with all candidates on the same terms and, preferably, on the same terms that it deals with other non-political customers.

- Services or facilities offered to one candidate must be offered to all.
- Services provided to one candidate (upon request by the candidate) must be available to all (upon request). (IRS says notice of availability must be given to all.)
- Advertising may be sold on the same terms made available to other non-church advertisers.
- The mailing list may be rented on the same terms made available to other non-church users.

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[27] See text accompanying footnote 23.

- Is the product or service made available only to candidates? Has it previously been made available to candidates?

IV. POLITICAL vs. LEGISLATIVE ACTIVITIES

A. Background

Section 501(c)(3) permits religious, charitable, etc., organizations to engage in attempts to influence legislation (lobbying) as an insubstantial part of their activities, but absolutely prohibits them from intervening in political campaigns. Similarly, organizations that are exempt from federal income tax under §501(c)(4)("social welfare" or advocacy groups), §501(c)(5)(labor unions), or §501(c)(6)(trade associations) may not engage primarily in political activities, but may engage in lobbying as their primary or exclusive activity. In addition, when an exempt organization influences or attempts to influence "the selection, nomination, election or appointment of any individual to any Federal, State, or local public office," it becomes subject to tax under §527(f) of the Code.

When looked at in light of the rise of organizations whose activities are, on the surface, limited to lobbying or issue advertising, but which target their advertising in a manner designed to affect elections, these provisions of the Code raise the question of when ostensible attempts to influence legislation may be treated by the IRS as political activity that adversely affects exemption or becomes subject to tax under §527(f).

B. Rev. Rul. 2004-6, 2004-4 I.R.B. 328 (Jan. 26, 2004)

In Rev. Rul. 2004-6, the IRS published a non-exclusive list of the factors that it will consider in determining whether an ostensibly legislative activity should be treated as a political activity that is subject to tax under §527(f), and reviewed their use in evaluating six examples of advocacy communications. Although the ruling expressly addressed only non-§501(c)(3) organizations, it is also instructive for those religious organizations that engage in lobbying at or near the time of elections.

The IRS listed six factors as indicating that an advocacy communication about a public policy issue ***is*** intended to influence the selection of an individual for public office:

1. The communication identifies a candidate for public office;

2. The timing of the communication coincides with an electoral campaign;

3. The communication targets voters in a particular election;

4. The communication identifies that candidate's position on the public policy that is the subject of the communication;

5. The position of the candidate in the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and

6. The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

The IRS also listed five factors as indicating that an advocacy communication ***is not*** intended to influence the selection of an individual for public office:

1. The absence of any of the six factors listed above;

2. The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;

3. The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);

4. The communication identifies the candidate solely as a governmental official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and

5. The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

A review of the IRS' evaluations of the activities discussed in the six examples discussed in the ruling indicates that the IRS is significantly more likely to conclude that a communication is legislative advocacy, and not political advocacy, if the communication is part of an ongoing series of communications about the issue, if specific legislation is identified, or if the communication is timed to coincide with an impending event, such as a legislative hearing or vote on legislation related to the topic of the communication.[28]

V. WHO IS ACTING? PERSONAL vs. ORGANIZATIONAL ACTIVITIES

A. Agency

The IRS has addressed when the acts of a church official or member might be attributed to the church because the individual was acting as an agent of the church:

> A section 501(c)(3) organization acts or communicates with others through the authorized actions of its employees or members. There must be real or apparent authority by the organization of the actions of individuals other than officials [whose authority is presumed] before the actions of those individuals will be attributed to the organization. In general, the principles of agency will be applied to determine whether an individual engaging in political activity was acting with the authorization of the section 501(c)(3) organization. Actions of

[28] *Cf.* TAM 8936002 (May 24, 1989)(IRS "reluctantly" concluded that organization that ran ads promoting "the liberal posture on war and peace issues," mostly during the period surrounding an October 1984 debate between the presidential candidates about foreign and defense policy issues, "probably did not intervene in a political campaign").

employees within the context of their employment are considered to be authorized by the organization.

Acts of individuals that are not authorized by the section 501(c)(3) organization may be attributed to the organization if it explicitly or implicitly ratifies the actions. A failure to disavow the actions of the individual under apparent authorization from the section 501(c)(3) organization may be considered a ratification of the action. To be effective, the disavowal must be made in a timely manner equal to the original action. The organization must also take steps to ensure that such unauthorized actions do not recur.[29]

The IRS also noted that

revocation of exempt status is not automatically required, even if it is determines that the distribution of the bulletin insert constitutes a violation of the political intervention restriction attributable to the church. Although revocation is available, the Service may administratively determine that under the facts and circumstances revocation is not warranted. The Service could conclude that, rather than revocation, either assessment of section 4955 tax alone or some type of closing agreement setting forth standards the [organization] must follow or acts it must undertake in order to retain its exempt status, would be appropriate.[30]

B. Private actions

The prohibition on political activities by churches and other exempt organizations does not extend to the activities of individuals who are officials or volunteer leaders of the church. Individuals do not check their First Amendment and other personal rights at the door when they step into a leadership position in the church. Accordingly, pastors and other church leaders may fully exercise their individual rights to participate in the political process without jeopardizing the church's income tax exemption. However, it is important to ensure that the individual is not acting as an agent of the church, and is not using the church's resources while engaging in protected individual political activity. For example, suppose a candidate publishes a full-page ad in the local newspaper listing prominent ministers, including Father Ryan, who have personally endorsed the candidate. Father Ryan is identified in the ad as the pastor of St. Patrick's Church. The ad states: "Titles and affiliations are provided for identification purposes only."

Because the ad was not paid for by the church, the ad is not otherwise in an official publication of the church, and the endorsement is made by Father Ryan in his personal capacity, the ad does not constitute campaign intervention by St. Patrick's church. In contrast, if Father Ryan had endorsed the candidate in the church's newsletter or from the pulpit during the church worship service, those activities, because they were conducted in the context of Father Ryan's duties as pastor of the church, would be treated as prohibited political activity by the church.

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[29] Field Service Advice 1998-209 (Sept. 21, 1993).

[30] *Id*.

Likewise, a pastor or other church leader may contribute to a political candidate's campaign committee from personal funds, may attend party conventions and other political meetings at his personal expense and on his own time, and may otherwise engage in volunteer activities in support of a candidate's campaign, provided that church resources, such as its mailing list, facilities, and equipment, are not used in those efforts.

V. CONCLUSION

A church may be very active in informing and influencing its parishioners and the community about elections, candidates, and the electoral process. Aside from the prohibitions on contributions to candidates, and candidate endorsements and ratings, the church's involvement must be carefully neutral and unbiased in order to avoid jeopardizing its exemption under §501(c)(3). Unfortunately, the IRS has given no guidance on how to avoid bias in voter guides, which are the most common area in which controversy arises.

A church may also encourage its members to be active in political campaigns, provided it does not recommend any particular candidate or party. Finally, the pastor or other employees and volunteer leaders of a church have the right to participate in political activities, provided they do not use the church's resources, and they are not acting as the church's agents, when they do so.

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