

# Legal Counsel for Churches

Corporate Governance for Churches and Their Leaders



★★★ SPECIAL ELECTION EDITION ★★★

## Church Political Activity is Limited



In this season for political activity, some churches have asked what limitations or laws exist on their ability to participate in election campaigns. In this *Special Election Edition of Legal Counsel for Churches*, we will explore some of the rules the Internal Revenue Service follows for churches.

Churches and religious organizations enjoy special tax benefits. Favorable tax laws were enacted because of the unique role religion plays in society. Further, these laws originated from US Constitutional First Amendment protections. Generally, churches and religious organizations are exempt from income tax and receive other favorable treatments under the tax law.

The tax preferences churches receive come with conditions. In order that churches and religious organizations qualify for tax-exempt status, the organizations must meet some requirements. For the purposes of this article, we will focus on two of the requirements: a) no substantial part of its activity may be attempting to influence legislation; and b) may not intervene in political campaigns.

### Substantial Lobbying Activity

In general, no organization, including a church, may hold a 501(c)(3) tax-exempt status if a substantial part of its activities is attempting to influence legislation. This activity is commonly called lobbying.

The key element to this rule is the qualifier substantial. A church may engage in some lobbying, but too much lobbying activity risks loss of its tax-exempt status.

Lobbying activity is the attempt to influence legislation. The meaning of legislation here includes actions by Congress, any state legislature, any local council or similar governing body, with respect to acts, bills, resolutions or similar items. Legislation also includes public referendums, ballot initiatives and constitutional amendments.

A church or religious organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting or opposing legislation. A church also lobbies if the organization advocates the adoption or rejection of any legislation.

Churches and religious organizations may, however, involve themselves in issues of public policy without the activity being considered lobbying. For example, churches may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.

If a church find itself involved in lobbying, it should ensure its activities are not a substantial part of its activities. So, how does a church know when its lobbying is too much? The IRS uses a Substantial Part test.

### Substantial Part Test

Whether a church's or religious organization's attempts to influence legislation constitute a substantial part of its overall activities is determined on the basis of all the pertinent facts and circumstances in each case. The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.

Under the Substantial Part test, a church or religious organization that conducts excessive lobbying activity in any taxable year may lose its tax-exempt status. In addition, a religious organization is subject to an excise tax equal to five percent of its lobbying expenditures for the year in which it ceases to qualify for tax-exemption. Further, a tax equal to five percent of the lobbying expenditures for the year may be imposed against church officials, jointly and severally, who agree to making of such expenditures knowing that the expenditures would likely result in the loss of the church's tax-exempt status.

### Political Campaign Activity

Churches are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on

CONTINUED ON BACK PAGE



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CONTINUED FROM FRONT PAGE

behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made by or on behalf of the organization in favor of (or in opposition to) any candidate for public office clearly violate the prohibition against political campaign activity.

Certain activities or expenditures may not be prohibited depending on the facts and circumstances. For example, certain voter education activities (including the presentation of public forums and the publication of voter education guides) conducted in a non-partisan manner do not constitute prohibited political campaign activity. In addition, other activities intended to encourage people to participate in the electoral process, such as voter registration and get-out-the-vote drives, would not constitute prohibited political campaign activity if conducted in a non-partisan manner. On the other hand, voter education or registration activities with evidence of bias that: (a) would favor one candidate over another; (b) oppose a candidate in some manner; or (c) have the effect of favoring a candidate or group of candidates, will constitute prohibited participation or intervention.

## Individual Activity by Church Leaders

The political campaign activity prohibition isn't intended to restrict free expression on political matters by leaders of churches or religious organizations speaking for themselves, as individuals. Leaders are not prohibited from speaking about important issues of public policy. However, for their organizations to remain tax-exempt, religious leaders can't make partisan comments in official organization publications or at official church functions.

To avoid linking their comments to their churches, religious leaders who speak or write in their individual capacity are encouraged to clearly indicate that their comments are personal and not intended to represent the views of the church.

## Issue Advocacy vs. Political Campaign Intervention

Some churches and religious organizations take positions on public policy issues. Some of these issues divide candidates in an election for public office. However, churches must avoid any issue advocacy that interfere with a political campaign. Even if a statement does not expressly tell an audience to vote for or against a specific candidate,

a church delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate.

## Inviting a Candidate to Speak

Depending on the facts and circumstances, a church or religious organization may invite political candidates to speak at its events without jeopardizing its tax-exempt status. Political candidates may be invited in their capacity as candidates, or individually (not as candidates). Candidates may also appear without an invitation at organization events that are open to the public.

When a candidate is invited to speak at a church or religious organization event as a political candidate, a church should consider several factors including: a) whether the church provides an equal opportunity to all political candidates seeking the same office, b) whether the church indicates any support of or opposition to the candidate, and c) whether the church maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present.

## Voter Education, Registration and Get-Out-the-Vote Drives

Churches are permitted to conduct certain voter education activities (including the presentation of public forums and the publication of voter education guides) if they are carried out in a non-partisan manner. On the other hand, voter education or registration activities conducted in a biased manner that favors (or opposes) one or more candidates is prohibited.

*Final thoughts...* churches are a favorite venue for political candidates to campaign. Without meaning harm, a candidate may seek to reassure the church that it's okay for the church to do certain things in connection with the candidate's appearance. The IRS cautions church officials to keep in mind that the candidate may not be familiar with church tax-exemption laws. Also, the candidate may be focused on compliance with the election laws that apply to the candidate's campaign rather than the federal tax laws that apply to the church. The church should consult its own legal counsel and make its own independent judgment about its compliance with federal tax law. ■

*Legal Counsel for Churches* is a service provided by M Smith Law, PLLC for members of the religious community. This periodical is intended to help churches and their officials become better prepared to address important legal and governance issues. We hope you find *Legal Counsel for Churches* a valuable resource. For each issue, we try to raise relevant issues and offer some practical alternatives. We welcome your comments and input.

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