

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb is filled with a dark blue color, and the bottom bulb is filled with a light blue color. The globe is centered in the narrow neck of the hourglass.

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February 2, 2009

Congressional Research Service

Report RL34447

*Churches and Campaign Activity: Analysis Under Tax and
Campaign Finance Laws*

Erika Lunder and L. Paige Whitaker, American Law Division

April 14, 2008

Abstract. This report examines the restrictions imposed on campaign activity by churches under tax and campaign finance laws, discusses recent IRS inquiries into such activity, and analyzes H.R. 2275.

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Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Laws

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Congressional Research Service

7-5700

www.crs.gov

RL34447

CRS Report for Congress

Prepared for Members and Committees of Congress

Summary

Churches and other houses of worship qualify for tax-exempt status as Internal Revenue Code § 501(c)(3) organizations. One qualification for § 501(c)(3) status is that these organizations may not participate in political campaign activity. They are permitted under the tax laws to engage in other political activities (e.g., distribute voter guides and invite candidates to speak at church functions) so long as such activity does not support or oppose a candidate. Additionally, church leaders may engage in campaign activity in their capacity as private individuals without negative tax consequences to the church.

The tax code's political campaign prohibition is sometimes referred to as the "Johnson Amendment," after then-Senator Lyndon Johnson, who introduced the provision as an amendment to the Revenue Act of 1954. While some have argued the prohibition violates churches' free exercise and free speech rights under the First Amendment, the two federal courts of appeals to address the issue have reached the opposite conclusion.

Separate from the prohibition in the tax code, the Federal Election Campaign Act (FECA) may also restrict the ability of churches to engage in electioneering activities. Legislation introduced in the 110th Congress, H.R. 2275, would repeal the political campaign prohibition in the tax code. If this bill were enacted into law, churches could engage in campaign activities without jeopardizing their tax-exempt status, but they would still be subject to applicable campaign finance laws.

This report examines the restrictions imposed on campaign activity by churches under tax and campaign finance laws, discusses recent IRS inquiries into such activity, and analyzes H.R. 2275.

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Both tax and campaign finance laws are relevant in analyzing whether churches¹ may engage in campaign activity. Under the tax laws, churches that benefit from § 501(c)(3) tax-exempt status may not participate in such activity. Churches are also subject to applicable restrictions under campaign finance laws. This report discusses these laws, recent IRS inquiries into church political activity, and legislation to repeal the tax code's prohibition.

Current Law

Tax Law

Churches are among the organizations described in § 501(c)(3) of the Internal Revenue Code (IRC).² As such, they are exempt from federal income taxes and eligible to receive tax-deductible contributions.³ In return, they 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.”⁴ This is an absolute prohibition. A church that engages in any amount of campaign activity may have its § 501(c)(3) status revoked. It may also, either in addition to or in lieu of revocation, be taxed on its political expenditures.⁵

In 2002, the IRS indicated that only two churches have lost their § 501(c)(3) status due to campaign intervention.⁶ One of these is the Church at Pierce Creek in Binghamton, New York, which took out newspaper advertisements opposing a presidential candidate four days before the 1992 election. The identity of the second church is not clear. Several non-church religious organizations have had their § 501(c)(3) status revoked, including Christian Echoes National Ministry. Reportedly, The Way International, Christian Broadcasting Network, and Old Time Gospel Hour came to settlement agreements with the IRS under which their exempt status was revoked for certain years, and the Christian Coalition was denied § 501(c)(3) status due to its political activities.⁷

The prohibition was introduced by then-Senator Lyndon Johnson as a floor amendment to the Revenue Act of 1954. He analogized it to the lobbying limitation, enacted in 1934, under which “no substantial part” of a § 501(c)(3) organization's activities may be lobbying; however, he

¹ The term “church” includes houses of worship of all faiths.

² Other organizations described in § 501(c)(3) include charities, educational institutions, and non-church religious organizations.

³ See I.R.C. §§ 501(a), 170(c)(2).

⁴ I.R.C. § 501(c)(3).

⁵ See I.R.C. § 4955. Church managers may also be subject to tax. Other consequences for the flagrant violation of the prohibition include the IRS immediately determining and assessing all income and § 4955 taxes due and/or seeking injunctive and other relief to enjoin the church from making additional political expenditures and to preserve church assets. See I.R.C. §§ 6852, 7409.

⁶ See *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means*, Serial 107-69 (May 14, 2002) (statement of Steven Miller, Director, EO, IRS).

⁷ See *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 22 (D.D.C. 1999); Thomas B. Edsall, *Christian Network to Pay IRS Fine; Millions Were Spent to Promote Pat Robertson's '88 Campaign*, WASH. POST, March 21, 1998; Robert D. Hershey Jr., *Falwell's Gospel Hour Fined for Political Activity*, N.Y. TIMES, Apr. 7, 1993; Robert A. Rankin, *Christian Coalition Denied Tax-Exempt Status*, MIAMI HERALD, June 11, 1999.

mischaracterized the limitation by saying organizations that lobbied were denied tax-exempt status, as opposed to only those that substantially lobbied.⁸ The act's legislative history has no further discussion of the provision. It has been suggested he proposed it either as a way to get back at an organization that supported an opponent or as an alternative to a proposal denying tax-exempt status to organizations making grants to subversive entities and individuals.⁹

Prohibited Activities

IRC § 501(c)(3) only prohibits campaign intervention. Other types of political activities are permitted. The line between what is prohibited and what is permitted can be difficult to discern. Clearly, churches may not make statements that endorse or oppose a candidate, publish or distribute campaign literature,¹⁰ or make any type of monetary or other contribution to a campaign. On the other hand, they may conduct political activities not related to elections, such as issue advocacy and supporting or opposing appointments to nonelective offices.¹¹

In many situations, the activity is permissible unless it is structured or conducted in a way that shows bias towards or against a candidate. Some biases can be subtle and whether an activity is campaign intervention will depend on the facts and circumstances of each case.¹² For example, churches may create and distribute voter education materials that do not indicate a preference towards any candidate. There are, however, numerous ways in which the material could show bias, such as by not including all candidates on an equal basis, supporting a slate of candidates (even if the criteria are nonpartisan and objective), comparing the church's position on issues with those of the candidates, or covering only those issues important to the church.¹³ Other factors that may be important in a specific factual situation include the timing of the material's distribution and to whom it is distributed.¹⁴

Churches may invite candidates to appear at services and other functions so long as no bias for or against a candidate is exhibited.¹⁵ If an individual appears as a candidate, factors that may

⁸ See 100 Cong. Rec. 9,604 (1954) (statement of Sen. Johnson).

⁹ See Judith E. Kindell and John Francis Reilly, *Election Year Issues*, IRS 2002 EO CPE Text, 448-51 (2002).

¹⁰ See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

¹¹ See Rev. Rul. 2007-41, 2007-1 C.B. 1421; IRS Notice 88-76, 1988-2 C.B. 392. Although lobbying is allowed, "no substantial part" of a church's activities may be "carrying on propaganda, or otherwise attempting, to influence legislation." I.R.C. § 501(c)(3). Case law suggests that "no substantial part" is between 5% and 20% of an organization's expenditures, although courts generally examine the lobbying in the broad context of the organization's purpose and activities. See *Seasongood v. Comm'r*, 227 F.2d 907, 912 (6th Cir. 1955); *Haswell v. United States*, 500 F.2d 1133, 1142-47 (Ct. Cl. 1974); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855-56 (10th Cir. 1972); *Krohn v. United States*, 246 F. Supp. 341, 347-49 (D. Colo. 1965). Unlike many other § 501(c)(3) organizations, churches may not elect under § 501(h) to measure their lobbying expenditures against numerical standards and are not subject to the § 4912 excise tax for substantial lobbying. Other political activities, although permissible, may be taxable. See I.R.C. § 527(f).

¹² For information on the factors the IRS considers in determining whether various activities violate the political campaign prohibition, see Rev. Rul. 2007-41, 2007-1 C.B. 1421; CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by Erika Lunder.

¹³ See Rev. Rul. 67-71, 1967-1 C.B. 125; Rev. Rul. 78-248, 1978-1 C.B. 154; *Association of the Bar of the City of New York v. Comm'r*, 858 F.2d 876 (2nd Cir. 1988).

¹⁴ See Rev. Rul. 80-282, 1980-2 C.B. 178 (ruling it was permissible for an organization's monthly newsletter to include a compilation of legislators' voting records on selected issues along with the organization's position on those issues because it was sent to the usual small number of subscribers and not targeted to areas where elections were occurring).

¹⁵ See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

indicate the activity was permissible include the following: other candidates were provided an equal opportunity to speak; the church made clear it was not supporting or opposing any candidate; and no fundraising occurred. If the individual appears in a role other than as a candidate, relevant factors may include the following: he or she was chosen to speak for non-candidacy reasons and spoke solely in that capacity; no campaign activity occurred in connection with the event; the church maintained a nonpartisan atmosphere at the event; and the event's announcement indicated the non-candidate capacity in which the individual was appearing and did not mention the candidacy or election. It should be emphasized that even if these factors are met, the appearance could still be impermissible because bias was exhibited in some other way.

The tax laws do not prohibit religious leaders from participating in campaign activity as individuals.¹⁶ Religious leaders may endorse or oppose candidates in speeches, advertisements, etc., in their capacity as private citizens. A leader may be identified as being from a specific church, but there should be no intimation that he or she is speaking as a representative of the church. The church may not support the activity in any way. Thus, a leader may not make campaign-related statements in the church's publications, at its events, or in a manner that uses its assets. This is true even if the leader pays the costs of the publication or event.

Church Tax Inquiries and Examinations

IRS inquiry into a church's tax status and examination of its records and activities raise concerns under the First Amendment's Free Exercise Clause, which states that "Congress shall make no law prohibiting the free exercise [of religion]...." Due to this issue, IRC § 7611 provides special rules for church tax inquiries and examinations. These rules apply when the IRS looks into whether a church has engaged in campaign activity.

In order for the IRS to begin such an inquiry, an appropriate high-level Treasury official must reasonably believe, on the basis of written facts and circumstances, that the church may no longer qualify for § 501(c)(3) status.¹⁷ The IRS must then provide written notice to the church that includes an explanation of the inquiry's general subject matter and the concerns that gave rise to it, among other things. If the church's response does not sufficiently address the IRS's concerns and the agency decides to proceed to an examination of the church's records and religious activities, the IRS must provide a second written notice to the church. This notice must include a copy of the inquiry notice, a description of the records and activities the IRS seeks to examine, an offer for a conference to discuss and resolve concerns, and copies of IRS documents collected or prepared for the examination that are subject to disclosure under the Freedom of Information Act and tax laws.

In general, the inquiry and examination must be completed within two years after the examination notice was sent. The appropriate IRS counsel must approve any revocation of § 501(c)(3) status, notice of deficiency, or tax assessment and determine that the § 7611 requirements were met. The IRS is limited on further inquiries and examinations occurring within a five-year period.

¹⁶ *See id.*

¹⁷ While the statute and regulations define "appropriate high-level Treasury official" in terms of high-level IRS regional officers, those positions are obsolete after changes made to the agency's structure by the IRS Restructuring and Reform Act of 1998 (P.L. 105-206). Currently, the Director of Exempt Organizations, Examinations makes the "reasonable belief" determination. *See* IRS Internal Revenue Manual 4.76.7.4.1 (June 1, 2004).

Constitutionality of the Prohibition

Some have argued that the political campaign prohibition violates the free exercise and free speech rights of churches.¹⁸ The Supreme Court has not addressed this issue,¹⁹ but two U.S. Courts of Appeals have upheld the prohibition against First Amendment challenges.

In 1972, the Tenth Circuit Court of Appeals examined the issue in *Christian Echoes National Ministry, Inc. v. United States*.²⁰ The IRS had revoked a non-church religious organization's § 501(c)(3) status for violating the lobbying and campaign activity restrictions. One issue was whether the restrictions violated the organization's First Amendment rights. The district court held they were unconstitutional, reasoning that the First Amendment did not allow the government to examine the organization's activities, which were based on sincere religious belief, to determine whether they were religious or political.²¹ The Tenth Circuit flatly rejected that reasoning because it "is tantamount to the proposition that the First Amendment right of free exercise of religion, ipso facto, assures no restraints, no limitations and, in effect, protects those exercising the right to do so unfettered."²² The court said such analysis would "compell[] [it] to hold that Congress is constitutionally restrained from withholding the privilege of tax exemption whenever it enacts legislation relating to a nonprofit religious organization."²³

Instead, the Tenth Circuit held the lobbying and campaign activity limitations did not violate the First Amendment. The court stated that the Free Exercise Clause "is restrained [by the limitations] only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm."²⁴ Stating the maxim that a "tax exemption is a privilege, a matter of grace rather than right," the court also found that the limitations did not violate the organization's free speech rights, reasoning that the organization was free to choose whether it would limit its activities in exchange for the benefits of tax-exempt status.²⁵ The court ended by explaining that

The Congressional purposes evidenced by the 1934 and 1954 amendments are clearly constitutionally justified in keeping with the separation and neutrality principles particularly applicable in this case and, more succinctly, the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates.²⁶

¹⁸ U.S. CONST. amend. I ("Congress shall make no law prohibiting the free exercise [of religion], or abridging the freedom of speech ...").

¹⁹ The Court has held that the § 501(c)(3) lobbying limitation does not violate an organization's free speech rights. *See* *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545-46 (1983) (reasoning that "Congress has merely refused to pay for the lobbying out of public moneys" and "again reject[ing] the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State [internal citations omitted]").

²⁰ 470 F.2d 849 (10th Cir. 1972).

²¹ *See id.* at 856.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 857.

²⁵ *Id.*

²⁶ *Id.*

In 2000, the Court of Appeals for the D.C. Circuit held in *Branch Ministries v. Rossotti*²⁷ that the revocation of a church's tax-exempt status for campaign intervention did not violate its free exercise and free speech rights. In 1992, four days before the presidential election, the church placed advertisements in *USA Today* and the *Washington Times* advocating against then-candidate Bill Clinton and soliciting tax-deductible donations. The IRS revoked the church's § 501(c)(3) status. After the district court granted summary judgment in favor of the IRS,²⁸ the church appealed, alleging the revocation violated its rights under the First Amendment and the Religious Freedom Restoration Act (RFRA), among other things.²⁹

The D.C. Circuit Court of Appeals found that the church had failed to show, as required under law, that its right to freely exercise its religion had been substantially burdened.³⁰ According to the court, the revocation's only burden on the church was less money for its religious activities and such burden "[wa]s not constitutionally significant."³¹ Also rejecting the church's claim that it was substantially burdened because it had no other means to communicate its opinions about candidates, the court explained that it was constitutionally sufficient that the church could set up a related § 501(c)(4) social welfare organization that could then establish a political action committee (PAC).³² The court brushed aside the fact that the church could not give the tax-deductible contributions it received to the PAC, reasoning that the Supreme Court "has consistently held that, absent invidious discrimination, 'Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities.'"³³

The court also rejected the church's claim that the IRS had committed viewpoint discrimination, thus violating its free speech rights. The court reasoned that the campaign prohibition was viewpoint neutral because all § 501(c)(3) organizations were subject to it, "regardless of candidate, party, or viewpoint."³⁴

²⁷ 211 F.3d 137 (D.C. Cir. 2000).

²⁸ *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999).

²⁹ 42 U.S.C. § 2000bb, *et seq.* Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, . . . [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA was enacted in response to a Supreme Court case, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which had lowered the standard of review for free exercise challenges to neutral, generally applicable laws.

³⁰ *See* 211 F.3d at 142.

³¹ *Id.* (quoting *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990) and citing *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989) (the "contention that an incrementally larger tax burden interferes with [] religious activities ... knows no limitation")).

³² *See id.* at 143 (citing *Taxation With Representation*, 461 U.S. at 552-53 (Blackmun, J., concurring) and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)).

³³ *Id.* at 143-44 (quoting *Taxation With Representation*, 461 U.S. at 548 and citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959) ("Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do ...")).

³⁴ *Id.* at 144.

Campaign Finance Law

The Federal Election Campaign Act (FECA),³⁵ which regulates the raising and spending of campaign funds, is separate and distinct from the tax code. FECA prohibits corporations from using treasury funds to make contributions and expenditures in connection with federal elections,³⁶ but does not prohibit unincorporated organizations from making such contributions and expenditures. FECA also requires regular filing of disclosure reports by candidate and political committees of contributions³⁷ and expenditures, and by persons³⁸ making independent expenditures³⁹ that aggregate more than \$250 in a calendar year.⁴⁰ Under FECA, the term “political committee” is defined to include any committee, club, association, or other group of persons that receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year.⁴¹

As a result of a 2002 amendment to FECA,⁴² corporations, including tax-exempt corporations, are further prohibited from funding “electioneering communications.” These are defined as broadcast communications made within 60 days of a general election or 30 days of a primary that “refer” to a federal office candidate.⁴³ Federal Election Commission (FEC) regulations provide an exception to this prohibition for “qualified nonprofit corporations,”⁴⁴ but such term would not include churches.

³⁵ 2 U.S.C. § 431 *et seq.*

³⁶ 2 U.S.C. § 441b(a). FECA provides three exemptions to this prohibition: corporations may make expenditures (1) to communicate with stockholders and executive or administrative personnel and their families, (2) to engage in nonpartisan voter registration or get-out-the-vote campaigns aimed at stockholders and executive or administrative personnel and their families, and (3) to establish, administer, and solicit contributions to a separate segregated fund for political purposes (also known as a political action committee or PAC). 2 U.S.C. § 441b(b)(2).

³⁷ FECA defines “contribution” to include anything of value, but expressly exempts the use of real property, including a church room used by members of the community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided in the church room for candidate or political party related activities, to the extent that the cumulative value of such invitations, food, and beverages on behalf of any single candidate does not exceed \$1,000 with respect to any single election, and on behalf of all political party committees does not exceed \$2,000 in any calendar year. 2 U.S.C. § 431(8)(A),(B).

³⁸ FECA defines “person” to include an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the federal government. 2 U.S.C. § 431(11).

³⁹ FECA defines “independent expenditure” to mean an expenditure by a person that expressly advocates for the election or defeat of a clearly identified candidate and that is not made in cooperation with or at the suggestion of such candidate. 2 U.S.C. § 431(17).

⁴⁰ 2 U.S.C. § 434 (a), (c).

⁴¹ 2 U.S.C. § 431(4)(A).

⁴² P.L. 107-155, the “Bipartisan Campaign Reform Act of 2002” (BCRA).

⁴³ *See* 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A).

⁴⁴ 11 C.F.R. § 114.10(d)(2). A “qualified nonprofit corporation” is a corporation meeting the following criteria: (1) its only express purpose is the promotion of political ideas, (2) it cannot engage in business activities, (3) it has no shareholders or other persons with an ownership interest or claim on the organization’s assets or who receive any benefit from the corporation that is a disincentive for them to disassociate themselves from the corporation’s position on a political issue, (4) it was not established by nor accepts donations from business corporations, and (5) it is described in IRC § 501(c)(4). 11 C.F.R. § 114.10(c).

In *McConnell v. FEC*,⁴⁵ the Supreme Court upheld the constitutionality of FECA's prohibition on corporate treasury funds being spent for electioneering communications. More recently, however, the Court in *Wisconsin Right to Life, Inc. v. FEC (WRTL II)*⁴⁶ found that this prohibition was unconstitutional as applied to ads that Wisconsin Right to Life, Inc. sought to run. While not expressly overruling its decision in *McConnell v. FEC*, which upheld the provision against a First Amendment facial challenge, the Court limited the law's application. Specifically, it ruled that advertisements that may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate are not the functional equivalent of constitutionally protected express advocacy and therefore cannot be regulated.

IRS Political Activity Compliance Initiative

The IRS developed the political activity compliance initiative in 2004 due to concerns that § 501(c)(3) organizations were violating the campaign prohibition. It consists of two parts: (1) IRS public outreach to inform organizations about the prohibition and (2) a fast-track procedure to review allegations of campaign activity, with safeguards to ensure the § 7611 requirements are met.

The IRS first used the expedited review procedure in 2004, where 132 cases, 63 of which involved churches, were selected for review.⁴⁷ Twenty-two of the cases, including 16 church cases, were determined not to merit examination. Of the remaining 110 cases, 47 involved churches. As of March 30, 2007, the IRS has closed 46 of the church cases. In four of them, the IRS determined that the church did not violate the campaign prohibition. In the other 42 cases, the IRS issued a written advisory. This meant the IRS determined the church had engaged in campaign activity but did not impose a penalty because there were mitigating factors.⁴⁸ Impermissible activity included the distribution of church bulletins and inserts supporting or opposing candidates, church officials supporting or opposing candidates during services or church functions, candidates being allowed to use church facilities, and distribution of biased voter guides and candidate ratings.

While the 2004 initiative was proceeding, reports in various media outlets raised the question of whether the IRS had been politically motivated in looking at organizations so close to the 2004 election.⁴⁹ In response, the IRS Commissioner asked the Treasury Inspector General for Tax Administration (TIGTA) to investigate whether the IRS had engaged in any improper activities

⁴⁵ 540 U.S. 93, 191-94 (2003). For further discussion regarding this decision, see CRS Report RL32245, *Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in McConnell v. FEC*, by L. Paige Whitaker.

⁴⁶ 127 U.S. 2652 (2007). For further discussion regarding this decision, see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker.

⁴⁷ IRS, *Political Activity Compliance Initiative Final Report* (Feb. 24, 2006), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.

⁴⁸ Mitigating factors include (1) the activity being of a one-time nature or done in good faith reliance on the advice of counsel and (2) the organization correcting the conduct (e.g., recovering any funds that were spent) and establishing steps to prevent future violations. See 2004 PACI Report, *supra* note 47 at 18.

⁴⁹ See, e.g., Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST, Oct. 29, 2004; Vincent J. Schodolski, *Political sermons stir up the IRS: Effort to enforce tax-exempt rules or bid to bully pulpits?* CHIC. TRIB., Nov. 20, 2005.

while conducting the project. In 2005, TIGTA released a report concluding that the IRS had used appropriate, consistent procedures during the initiative.⁵⁰

In 2006, the IRS selected 100 cases for examination, 44 of which involved churches.⁵¹ As of March 30, 2007, the IRS has closed 14 of the church cases, issuing written advisories in four of them and not finding substantiated campaign activity in the other 10. The types of campaign activity were similar to those found in 2004. The IRS also looked at state campaign finance databases to determine whether § 501(c)(3) organizations had made campaign contributions from 2003 to 2005. The IRS found 269 apparent incidences of contributions, of which 87 involved church contributions totaling \$45,151. As of March 30, 2007, 86 of the church cases remain open; the IRS determined one case did not merit examination.

Examples of Church Inquiries

The IRS may not release the names of organizations it is investigating, but the organizations themselves sometimes make this information public. In recent years, two church inquiries have received public attention after the churches revealed the IRS was looking into whether they had violated the campaign prohibition.

All Saints Church

One of the churches is All Saints Church in Pasadena, California. The IRS notified the church in June 2005 that the agency was looking into whether a sermon delivered by a guest pastor on October 31, 2004, titled “If Jesus Debated Sen. Kerry and President Bush,” had violated the campaign prohibition.⁵² The IRS indicated its concerns were based on a newspaper article about political activity in several churches.⁵³ The church maintained the sermon was permissible issue advocacy against the war in Iraq and refused to answer the IRS’s questions.⁵⁴ It also challenged whether the § 7611 “reasonable belief” standard was met and provided examples of what it considered to be § 501(c)(3) organizations engaging in similar activities.⁵⁵ In September 2006, the

⁵⁰ TIGTA Report 2005-10-035, *Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations* (Feb. 2005), available at <http://www.tigta.gov>.

⁵¹ IRS, *2006 Political Activities Compliance Initiative* (2007), available at http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

⁵² See Letter from R.C. Johnson, Director, Exempt Organizations, Examinations, to All Saints Church, dated June 9, 2005, available on the church’s website at <http://aschu.convio.net/pdf/IRS%20Letter%20to%20All%20Saints.pdf>. A copy of the sermon at issue may be found on the church’s website at [http://aschu.convio.net/pdf/\(10-31-04\)%20If%20Jesus%20Debated.pdf](http://aschu.convio.net/pdf/(10-31-04)%20If%20Jesus%20Debated.pdf).

⁵³ The newspaper article discussed political activities at several churches representing different viewpoints on the 2004 Presidential election. Josh Getlin, “The Race for the White House; Pulpits Ring With Election Messages,” *L.A. TIMES*, Nov. 1 2004.

⁵⁴ See Letter from Marcus S. Owens, Counsel for All Saints Church, to Pat Schneiders, Exempt Organizations Specialist, dated Oct. 11, 2005, available at http://aschu.convio.net/pdf/DOCS-IRS_letter%20FINAL.pdf; Letter from Marcus S. Owens, Counsel for All Saints Church, to Pat Schneiders, Exempt Organizations Specialist, dated Dec. 13, 2005, available at <http://aschu.convio.net/pdf/051214%20All%20Saints%20Press%20Material.pdf> (“December 2005 letter”); Letter from Marcus S. Owens, Counsel for All Saints Church, to Pat Schneiders, Internal Revenue Agent, dated Aug. 17, 2006, available at http://aschu.convio.net/site/DocServer/ltr_to_Pat_Schneiders_August_17.pdf?docID=502.

⁵⁵ See December 2005 letter, *supra* note 54 at 3.

church decided not to comply with an IRS summons for church representatives to meet with the agency.⁵⁶

In September 2007, the IRS informed the church of its determination that the church had violated the political campaign prohibition but that it would not lose its tax-exempt status.⁵⁷ The IRS stated that the incident appeared to be a one-time occurrence and the church had policies to ensure it would comply with the prohibition in the future. The IRS advised the church to tell guest speakers about its policies and to be careful when posting information referring to candidates on its website. In response, the church sent letters to the IRS and the Treasury Inspector General for Tax Administration, raising concerns about how the inquiry was conducted.⁵⁸ These included whether the § 7611 “reasonable belief” standard was met; whether the IRS unlawfully shared the church’s tax return information with the Department of Justice (DOJ); whether DOJ political appointees played an improper role in the inquiry; and the sufficiency of the IRS letter closing the inquiry.

United Church of Christ

On February 20, 2008, the IRS informed the United Church of Christ (UCC) that it was beginning a church tax inquiry into whether the UCC had violated the campaign prohibition.⁵⁹ The agency indicated its

concerns are based on articles posted on several websites including the church’s which state that United States Presidential Candidate Senator Barack Obama addressed nearly 10,000 church members gathered at the United Church of Christ’s biennial General Synod at the Hartford Civic Center, on June 3, 2007. In addition, 40 Obama volunteers staffed campaign tables outside the center to promote his candidacy.

According to an article on the UCC’s website, Senator Obama, who is a UCC member, was “one of 60 diverse speakers representing the arts, media, academia, science, technology, business and government ... asked to reflect on the intersection of their faith and their respective vocations or fields of expertise.”⁶⁰ The article states the invitation was extended one year before Senator Obama became a presidential candidate, a church official told attendees that the appearance was not a campaign event and no electioneering was allowed, and no campaign paraphernalia was permitted in the venue.

⁵⁶ See http://aschu.convio.net/site/PageServer?pagename=IRS_Exam_splash.

⁵⁷ See Letter from Marsha A. Ramirez, Director, EO Examinations, to Marcus S. Owens, Counsel to All Saints Church, dated Sept. 10, 2007, available at http://aschu.convio.net/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541.

⁵⁸ See Letter from Marcus S. Owens, Counsel to All Saints Church, to Linda E. Stiff, Acting Commissioner, IRS, dated Sept. 21, 2007, available at http://aschu.convio.net/site/DocServer/Letter_to_IRS_Commissioner_092107.pdf?docID=2542; Letter from Marcus S. Owens, Counsel to All Saints Church, to J. Russell George, Treasury Inspector General for Tax Administration, dated Sept. 21, 2007, available at http://aschu.convio.net/site/DocServer/Letter_to_Treasury_Inspector_General_092107.pdf?docID=2543.

⁵⁹ See Letter from Marsha Ramirez, Director, EO Examinations, to United Church of Christ, dated Feb. 20, 2008, available at <http://www.ucc.org/news/pdf/lettrirs.pdf>.

⁶⁰ J. Bennett Guess, *Obama’s General Synod speech prompts IRS to investigate UCC’s tax-exempt status*, Feb. 26, 2008, available at <http://www.ucc.org/news/obama-speech-in-2007-prompts-1.html>.

Legislation in the 110th Congress

H.R. 2275

H.R. 2275 would repeal the political campaign prohibition in IRC § 501(c)(3), but “not invalidate or limit any provision” in FECA. Although the bill would affect all § 501(c)(3) organizations,⁶¹ the following discussion is limited to its impact on churches.

If H.R. 2275 were enacted into law, it appears churches would be able to engage in all types of campaign activity without jeopardizing their tax-exempt status. It appears the sole tax code restriction on the amount of such activity would be that it could not be a church’s primary activity.⁶² Churches would continue to be subject to campaign finance laws.

Churches and their managers would still be subject to tax on the church’s political expenditures under existing IRC § 4955. For the church, this tax is equal to 10% of the expenditures, which is increased to 100% if the church does not take timely actions to recover the expenditures and establish policies preventing future ones; managers are taxed at a reduced rate. Thus, while the bill would allow churches to engage in campaign activity without risking their tax-exempt status, so long as it was not their primary activity, the § 4955 tax could provide a disincentive to engage in activities involving taxable expenditures.

Another effect of the bill would be that churches could establish § 527 separate segregated funds to conduct election-related activities. For the § 501(c) organizations permitted to engage in electioneering (e.g., § 501(c)(4) social welfare organizations, § 501(c)(5) labor unions, and § 501(c)(6) trade associations), these funds are a lawful way to avoid the tax otherwise imposed by IRC § 527 for making certain political expenditures.⁶³ Churches may not establish such funds under current law because it would be an indirect way to get around the § 501(c)(3) campaign prohibition.⁶⁴ While it appears the bill would allow churches to set up these funds, they could still be subject to tax on amounts transferred to the funds.

The bill would not change existing reporting requirements. Churches, unlike most tax-exempt organizations, are not required to file an annual information return (Form 990) with the IRS. Other tax-exempt organizations, including those permitted to engage in campaign activity, must generally file the Form 990; however the information regarding political activity is cursory. These reporting requirements can be contrasted with those imposed on tax-exempt § 527 political

⁶¹ Legislation in prior Congresses would have permitted churches, but not other § 501(c)(3) organizations, to engage in some amount of campaign activity. For more information, see CRS Report RL32973, *Churches and Campaign Activity: Analysis of the Houses of Worship Free Speech Restoration Act and Similar Legislation*, by Erika Lunder and L. Paige Whitaker.

⁶² See Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that the lawful campaign intervention by a § 501(c)(4) organization whose primary activities were promoting social welfare would not affect its tax-exempt status); IRS Gen. Couns. Mem. 34233 (Dec. 30, 1969) (using similar analysis for § 501(c)(5) labor unions and § 501(c)(6) trade associations).

⁶³ I.R.C. § 527(f). The tax is imposed at the highest corporate rate on the lesser of the organization’s net investment income or its total amount of expenditures for “the influencing or attempting to influence the selection, nomination, election, or appointment of an individual to a federal, state, or local public office, to an office in a political organization, or as a Presidential or Vice-Presidential elector....” I.R.C. § 527(e)(2).

⁶⁴ See Treas. Reg. § 1.527-6(g).

organizations. They are generally subject to periodic, detailed reporting requirements regarding their contributors and expenditures.⁶⁵

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⁶⁵ For more information, see CRS Report RS21716, *Political Organizations Under Section 527 of the Internal Revenue Code*, by Erika Lunder; CRS Report RL33888, *Section 527 Political Organizations: Background and Issues for Federal Election and Tax Laws*, by R. Sam Garrett, Erika Lunder, and L. Paige Whitaker.