Order Code RL32973

CRS Report for Congress

Churches and Campaign Activity: Analysis of the Houses of Worship Free Speech Restoration Act and Similar Legislation

Updated August 22, 2008

Erika Lunder and L. Paige Whitaker
Legislative Attorneys
American Law Division

Prepared for Members and
Committees of Congress

Churches and Campaign Activity: Analysis of the Houses of Worship Free Speech Restoration Act and Similar Legislation

Summary

In recent years, there has been increased attention paid to the political activities of churches. Churches and other houses of worship qualify for tax-exempt status as Internal Revenue Code § 501(c)(3) organizations. Under the tax laws, these organizations may not participate in political campaign activity. 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 has been introduced in the past several Congresses that would allow churches to participate in at least some campaign activity without jeopardizing their § 501(c)(3) status. These bills are the Houses of Worship Free Speech Restoration Act, H.R. 235 (109th Congress) and H.R. 235 (108th Congress); a provision briefly included in the American Jobs Creation Act of 2004, H.R. 4520 (108th Congress); the Houses of Worship Political Speech Protection Act, H.R. 2357 and S. 2886 (107th Congress); and the Bright-Line Act of 2001, H.R. 2931 (107th Congress). In the 110th Congress, H.R. 2275 would repeal the prohibition against campaign intervention in IRC § 501(c)(3). Unlike the other bills, H.R. 2275 would apply to all § 501(c)(3) organizations and not just churches.

This report provides an overview of the tax and campaign finance laws relevant to these bills and a discussion of how each bill would amend current law. For further discussion of the laws restricting campaign activity by churches, see CRS Report RL34447, *Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika Lunder and L. Paige Whitaker.

Contents

Churches and Campaign Activity: Analysis of the Houses of Worship Free Speech Restoration Act and Similar Legislation

Churches[1] jeopardize their tax-exempt status under Internal Revenue Code (IRC) § 501(c)(3) if they participate in campaign activity. Legislation has been introduced in this and the past several Congresses that would allow churches to engage in at least some campaign activity without risking their § 501(c)(3) status. Churches would still be subject to applicable campaign finance laws. This report provides an overview of tax and campaign finance laws and discusses these bills. For further analysis of the legal restrictions on electioneering activities by churches, see CRS Report RL34447, *Churches and Campaign Activity: Analysis Under the Tax and Campaign Finance Laws*, by Erika Lunder and L. Paige Whitaker.

Current Law

Tax Law

Churches qualify for tax-exempt status as IRC § 501(c)(3) organizations.[2] These organizations 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."[3] This is an absolute prohibition. Thus, 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 under IRC § 4955.[4] The tax equals 10% of the expenditures, which is increased to 100% if the church does not take timely action to recover the expenditures and establish policies preventing future ones. The tax may also be imposed on church managers at lower rates.

---

[1] This report uses the term "church" broadly to refer to houses of worship of all faiths and generally includes integrated auxiliaries, conventions, and associations of churches.

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

[3] I.R.C. § 501(c)(3).

[4] 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 its assets. *See* I.R.C. §§ 6852, 7409.

IRC § 501(c)(3) only prohibits campaign intervention. Other types of political activities are permitted. The line between the two can be difficult to discern. Clearly, churches may not make statements that endorse or oppose a candidate, publish or distribute campaign literature, or contribute to a campaign.[5] On the other hand, they may conduct activities not related to elections, such as issue advocacy and supporting or opposing individuals for nonelective offices.[6] In other situations, an activity is generally permissible unless it is structured or conducted in a way that shows bias towards or against a candidate. Thus, churches may do such things as create and distribute voter education materials, host candidate forums, and invite candidates to appear at church functions so long as these activities do not show a preference for or against a candidate.[7] Biases can be subtle, and whether an activity is campaign intervention depends on the facts and circumstances of each case.[8]

The tax laws do not prohibit religious leaders from participating in campaign activity as individuals.[9] 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.

Campaign Finance Law

The Federal Election Campaign Act (FECA),[10] which regulates the raising and spending of campaign funds, is separate and distinct from the tax code. FECA

---

[5] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

[6] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421; IRS Notice 88-76, 1988-2 C.B. 392. While 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 tax on substantial lobbying. Other political activities, while permissible, may be taxable. *See* I.R.C. § 527(f).

[7] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[8] For information on the factors considered by the IRS in determining whether various activities violate the campaign prohibition, *see* Rev. Rul. 2007-41, 2007-1 C.B. 1421; IRS Publication 1828, *Tax Guide For Churches and Religious Organizations*, at 7-13; CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by Erika Lunder, at 8-13.

[9] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[10] 2 U.S.C. § 431 *et seq.*

prohibits corporations from using treasury funds to make contributions and expenditures in connection with federal elections,[11] but does not prohibit unincorporated organizations from making such contributions and expenditures. FECA also requires regular filing of disclosure reports by candidates and political committees of contributions[12] and expenditures, and by persons[13] making independent expenditures[14] that aggregate more than $250 in a calendar year.[15] 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.[16]

As a result of a 2002 amendment to FECA,[17] corporations — including tax-exempt corporations — are further prohibited from funding "electioneering communications," which 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.[18] Federal Election Commission (FEC) regulations provide an exception to this prohibition for "qualified nonprofit corporations," which do not include churches.[19]

---

[11] 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).

[12] 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).

[13] 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).

[14] 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).

[15] 2 U.S.C. § 434 (a), (c).

[16] 2 U.S.C. § 431(4)(A).

[17] P.L. 107-155, the "Bipartisan Campaign Reform Act of 2002" (BCRA).

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

[19] 11 C.F.R. § 114.10(d)(2). "Qualified nonprofit corporation" is defined as 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

(continued...)

In *McConnell v. FEC*,[20] 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)*[21] 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 had 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 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.

Analysis of Legislation

Bills introduced in the 110th, 109th, 108th, and 107th Congresses would allow churches to engage in some amount of political campaign activity without risking their tax-exempt status. Each bill addresses the issue in a different way. Thus, they provide examples of various approaches Congress could take, if it so chose, to amend the tax code's prohibition on campaign activity by churches.

None of the bills would change the reporting requirements under current law. Churches, unlike most tax-exempt organizations, are not required to file an annual information return (Form 990) with the IRS.[22] Historically, organizations filing the Form 990 have not been required to report meaningful information regarding their campaign activities.[23] However, beginning in tax year 2008 (returns filed in 2009), filing organizations will report information about their political activities on the form's new Schedule C.[24] Thus, while the bills would permit churches to engage in

---

[19] (...continued)
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).

[20] 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's Ruling in McConnell v. FEC*, by L. Paige Whitaker.

[21] 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.

[22] *See* IRC § 6033(a)(3)(A)(i).

[23] While churches and other § 501(c)(3) organizations are not permitted to engage in campaign activities, some § 501(c) organizations may, including § 501(c)(4) social welfare organizations, § 501(c)(5) labor unions, and § 501(c)(6) trade associations. For more information, *see* CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by Erika Lunder.

[24] The Schedule C is available at [http://www.irs.gov/pub/irs-dft/f990sc — dft.pdf].

campaign activities, they would not require churches to report to the IRS on those activities.

H.R. 2275 (110th Congress). H.R. 2275 would repeal the political campaign prohibition in IRC § 501(c)(3). Thus, it would allow churches and other § 501(c)(3) organizations to engage in all types of campaign activity without jeopardizing their tax-exempt status. If the bill were to become law, it appears the sole tax code restriction on the amount of such activity would be that it could not be the organization's primary activity.[25] Churches and other organizations would still be subject to tax on their political expenditures under IRC § 4955, thus possibly providing a disincentive to engage in activities with associated taxable expenditures. It appears the bill would allow churches and other § 501(c)(3) organizations to establish § 527(f)(3) separate segregated funds to conduct election-related activities.[26] Churches would, under the bill, still be subject to applicable campaign finance laws.

H.R. 235 (109th Congress). Under H.R. 235, the Houses of Worship Free Speech Restoration Act, churches would not have been treated as participating in campaign activity "because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings." This rule would have applied for purposes of § 501(c)(3) status, eligibility to receive tax-deductible contributions under § 170(c)(2), various estate and gift tax provisions (§§ 2055, 2106 and 2522), and the § 4955 excise tax on political expenditures.[27] The bill clarified that no church member or leader would be prohibited from expressing personal views on political matters or elections during regular religious services so long as those views were not disseminated beyond the service's attendees. Dissemination would have included a mailing with more than an incremental cost to the church and any electioneering communication. The bill expressly stated that it did not permit disbursements for electioneering communications or political expenditures prohibited by FECA.

---

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

[26] For the § 501(c) organizations permitted to engage in campaign activity, these funds are a lawful way to avoid the tax imposed for making certain political expenditures. *See* I.R.C. § 527(f). Churches and other § 501(c)(3) organizations may not establish these funds under current law because it would be an indirect way to get around the political campaign prohibition. *See* Treas. Reg. § 1.527-6(g).

[27] At least one commentator has raised the possibility that Congress could not constitutionally exempt churches, and no other organizations, from the § 4955 tax. *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 Bruce R. Hopkins, an expert on tax-exempt organizations, that "[i]f churches only were exempted from this tax, I believe that would amount to an unconstitutional sponsorship by the Federal Government of religion.").

It appears that H.R. 235 would have permitted activities such as the express endorsement of a candidate by church leaders and others during religious services, requests for contributions to candidate committees and other political committees during religious gatherings, and written endorsements in church bulletins and inserts. Any expenditures for these activities would not have been subject to the § 4955 tax. The bill would not have allowed churches to set up § 527(f)(3) separate segregated funds or change existing campaign finance laws.

H.R. 235 (108th Congress). H.R. 235, an earlier version of the Houses of Worship Free Speech Restoration Act, was identical to the version introduced in the 109th Congress except it did not reference IRC §§ 2055, 2106, 2522 and 4955 nor did it include the clarification concerning church leaders. While this version did not provide an exception from the § 4955 tax, it would seem from a practical standpoint that this difference between the two versions could be insignificant because many of the activities permitted under the bills would have little or no associated expenditures.

H.R. 4520 (108th Congress). The provision in H.R. 4520, former section 692 (Safe Harbor for Churches), was only briefly in the bill before the House Ways and Means Committee struck it by unanimous consent. It would have done several things. First, churches would not have been treated as participating in campaign activity solely because of their religious leaders' private statements. Second, churches that unintentionally intervened in a political campaign would not have lost their tax-exempt status or eligibility to receive deductible contributions unless the church or its religious leaders had done so on more than three occasions during the year. Third, unintentional violations of the § 501(c)(3) prohibition would have been subject to a new excise tax. If the church had at least three unintentional violations during the year, the tax would have equaled the highest corporate tax rate multiplied by the church's gross income, contributions, and gifts. If the church had two violations, then the tax would have equaled that amount divided by two. If the church had one violation, then the tax would have equaled the full amount divided by 52. The tax would have been reduced by any amount imposed under § 4955.

This bill was more restrictive than the others because it would have only permitted unintentional violations of the campaign prohibition and even those violations would have been fined. Thus, this bill was specifically targeted at removing the risk that churches that inadvertently engaged in campaign activity could lose their tax-exempt status, as opposed to permitting churches to engage in such activity. The impact of the provision addressing religious leaders' private statements could be unclear because it could be interpreted as simply codifying existing law.

H.R. 2357 and S. 2886 (107th Congress). H.R. 2357 and S. 2886, the Houses of Worship Political Speech Protection Act, would have allowed § 501(c)(3) churches to engage in campaign activity so long as it was "no substantial part" of a church's activities. S. 2886 — but not H.R. 2357 — clarified that the bill would not allow disbursements for electioneering communications not permitted under FECA. H.R. 2357 received a floor vote on October 2, 2002, and failed to pass by a vote of 178 to 239.

The "no substantial part" test, which is currently used to measure § 501(c)(3) organizations' lobbying activities, is a flexible standard.[28] Thus, the bills would have required each church to be judged on a case-by-case basis as to whether its campaign activities were a substantial part of its activities. Churches would have been allowed to engage in any type of campaign activity; however, the § 4955 tax could have discouraged churches from conducting activities with associated taxable expenditures. It could be unclear the extent to which the bills would have permitted churches to establish § 527(f)(3) separate segregated funds without overstepping the "no substantial part" rule. Churches would have still been subject to applicable campaign finance laws.

H.R. 2931 (107th Congress). Under, H.R. 2931, the Bright-Line Act of 2001, a church would only have violated the campaign prohibition if it normally made expenditures for campaign activity in excess of 5% of its gross revenues. Lobbying expenditures could not have normally exceeded 20% of its gross revenues, and the church could not have normally spent more than 20% of its gross revenues on campaign and lobbying activities combined. The bill did not define the term "normally."

The bill would have permitted churches to routinely engage in any type of campaign activity without risking their tax-exempt status so long as their expenditures for such activities did not "normally" exceed the limits. Thus, in practice, no or low-cost campaign activities could have been conducted almost without limit. Churches would have been allowed to occasionally engage in campaign activity in excess of the limits so long as this did not normally happen. It could be unclear the extent to which a church would have been able to establish a § 527(f)(3) separate segregated fund under the bill and still comply with the 5% limit. Any campaign activity would have been subject to the applicable campaign finance laws.

---

[28] *See* discussion *supra* note 6.