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FEDERAL TAX CODE RESTRICTIONS ON CHURCH POLITICAL ACTIVITY

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Since the birth of the federal income tax in 1913, churches

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have been exempt from taxation.¹ As tax-exempt organizations under section 501(c)(3) of the current Internal Revenue Code,² churches and religious organizations [hereinafter "Catholic organizations"] are subject to its restrictions, primary among them the prohibition against political campaign activity, which was enacted as part of the Revenue Act of 1954.³

This Article will begin with a discussion of section 501(c)(3) of the Internal Revenue Code (the "Code"), followed by its legislative history. The next section will discuss the recent developments in this area of the law. Lastly, Mr. Kearney will discuss his personal dealings with the Internal Revenue Service ("IRS") concerning a section 501(c)(3) organization. Mr. Kearney will describe his experiences with the hope that similar problems may be alleviated in the future.

I. THE STATUTE

To obtain tax-exempt status under section 501(c)(3), an organization must be organized and operated exclusively for exempt purposes.⁴ An organization does not operate for exempt purposes if it participates in substantial lobbying or in any political campaign activity.⁵ Section 501(c)(3) prohibits exempt organizations from "participat[ing] in or interven[ing] in ... any political campaign on behalf of, (or in opposition to) any candidate for public office."⁶ This provision has been interpreted by IRS as an absolute prohibition.⁷

II. LEGISLATIVE HISTORY

The political campaign activity prohibition was introduced, as an amendment to the Code, during a Senate floor debate in 1954 led by then Senator Lyndon B. Johnson. No legislative history is available to explain Johnson's purpose in introducing the

¹ See generally BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* (6th ed. 1992) (examining the history of federal tax exemptions for charitable organizations).

² I.R.C. § 501(c)(3) (West 1997); Gen. Couns. Mem. 39,811 (June 30, 1989).

³ See 100 CONG. REC. 9128 (1954). Tax-exempt organizations may also be subject to restrictions on campaign activity imposed under the Federal Elections Campaign Act, as well as any relevant state and local laws.

⁴ See I.R.C. § 501(c)(3).

⁵ See *id.*

⁶ *Id.*

⁷ See IRS Exempt Organizations Handbook (IRM 7751) § 3(10)1(1).

amendment. However, in the mid-eighties the United States Catholic Conference (“USCC”), performing research on Johnson’s motives, uncovered some interesting documentation which suggests that Johnson was concerned about an organization known as the Committee for Constitutional Government.⁸ Johnson’s opponent in the democratic primary in the summer of 1954 was Dudley Dougherty, a rich Catholic rancher from the area of Beeville, Texas. The amendment was offered on July 2, 1954, in the middle of the primary. A memorandum dated June 15, 1954 was uncovered, sent by Gerald Siegel, the then counsel to the Senate Democratic Policy Committee, in response to Johnson’s question whether the Committee for Constitutional Government had violated Texas election laws.⁹ Noting the limitations of the federal tax exemption statute which at that time restricted only lobbying activities, Siegel advised Johnson that the Committee had violated Texas law.¹⁰

Subsequently, George Reedy, Johnson’s chief aide, was contacted.¹¹ Reedy provided some colorful insight on the issue, stating:

Lyndon B. Johnson was very thin-skinned, however, and it is entirely possible that he was irritated by the activities of Dougherty’s followers—especially H.L. Hunt. The language used by the conservatives during that campaign was vicious—which in my judgment made it an asset for Johnson obviously wanted to lash back in some fashion as I had to restrain him (by persuasion, of course,) from making statements on more than one occasion.¹²

Reedy added graciously that he was “confident that Johnson would never have sought restrictions on religious organizations, but that is only an opinion and I have no evidence.”¹³

Other documents suggest that Johnson asked Representative John W. McCormack, the then Democratic Whip, to write

⁸ This research was performed by Br. Richard Daly, Executive Director of the Texas Catholic Conference, at the LBJ Library in Austin, Texas.

⁹ See Memorandum from Gerald W. Siegel to Sen. Lyndon B. Johnson, “Possible Violations of the Texas Election Laws by the Committee for Constitutional Government” (June 15, 1954) (on file with author).

¹⁰ See *id.*

¹¹ See Letter from Deirdre Dessingue to George Reedy (Oct. 9, 1985) (on file with author).

¹² Letter from George Reedy to Deirdre Dessingue (Oct. 11, 1985) (on file with author).

¹³ *Id.*

the IRS Commissioner about the tax-exempt status of the Committee for Constitutional Government. On June 28, 1954, the Commissioner responded to McCormack, stating that the IRS was "taking appropriate steps to see just what is the effect of these activities under the internal revenue laws and what, if anything, can be done about their present status in relation to exemption privileges."¹⁴ McCormack forwarded the Commissioner's reply to Johnson, which was date-stamped by Johnson's office on July 2, 1954, the same day that the political campaign activity prohibition was introduced.¹⁵

III. THE PROHIBITION

The first important distinction that must be made is the difference between lobbying and political campaign activity. Under section 501(c)(3) of the Code, lobbying is merely limited, while political campaign activity is strictly prohibited.¹⁶ Thus, Catholic organizations may lobby, but lobbying may comprise only an "insubstantial" part of their total activities.¹⁷ Conservatively, "insubstantial" is placed at five percent.¹⁸ Section 501(h) of the Code, an elective provision, permits organizations to elect to apply a sliding scale of permitted lobbying expenditures with a one million dollar cap.¹⁹ Unfortunately, churches, conventions or associations of churches, integrated auxiliaries, and members of affiliated groups that include churches, are, at their own request,

¹⁴ Letter from T. Coleman Andrews, IRS Commissioner, to Rep. John W. McCormack (June 28, 1954) (on file with author).

¹⁵ Letter from Rep. John W. McCormack to Sen. Lyndon B. Johnson (July 1, 1954) (on file with author).

¹⁶ Section 501(c)(3) of the Code distinguishes lobbying that is "substantial" from acts of "participat[ing] in, or interven[ing] in ... any political campaign on behalf of ... any candidate for public office," which are absolutely prohibited. I.R.C. § 501(c)(3).

¹⁷ See *id.*

¹⁸ A few cases suggest that the line between what is substantial and what is insubstantial lies somewhere between five and fifteen percent of an organization's total activities, as measured by time, effort, expenditure and other relevant factors. Compare *Haswell v. United States*, 500 F.2d 1133, 1146-47 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (finding 16-20% of budget was substantial), with *Murray Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955) (holding that less than five percent of total time and effort was not substantial). The IRS does not endorse any particular percentage as a safe harbor, but clearly it is safer to remain at the lower end of the spectrum.

¹⁹ See I.R.C. § 501(h); Treas. Reg. § 56.4911-1 (1997) (explaining computation of an electing organization's excess lobbying expenditures).

statutorily ineligible to make this election.²⁰ A key point involves ballot measures: activities related to ballot measures, e.g., referenda, initiatives, constitutional amendments, bond measures, and the like, are considered lobbying and not political activity.²¹ Therefore, Catholic organizations may become involved in ballot initiatives, which is a limited, rather than prohibited, activity.²²

A. *Deciphering the Code*

While the income tax regulations are not particularly helpful, they do provide a few definitions. For example, an “action” organization is defined as an organization participating or intervening, either directly or indirectly, in any political campaign.²³ The regulations state that an action organization is not exempt under section 501(c)(3) of the Code.²⁴ Furthermore, Catholic organizations should be cautioned against relying on the case law and regulations defining terms under the Federal Election Campaign Act (“FECA”). FECA is a different statute, containing different standards. The IRS does not consider definitions under FECA to be applicable to section 501(c)(3).²⁵

The first question that should be answered when determining the applicability of the statute is, who is a candidate? Any “individual who offers himself, or is proposed by others, as a contestant for an elective public office” is a candidate for purposes of the statute.²⁶ When a person becomes a candidate, by offering himself or being proposed by others, is determined on the basis of all the relevant facts and circumstances. Obviously, if one has announced his or her candidacy, one is a candidate.²⁷ Even without an announcement, however, one can be a candidate if nominated by others. Merely being a prominent figure is not suffi-

²⁰ See I.R.C. §§ 501(h)(5), 4911(f)(2) (defining associations and affiliations with exempt organizations).

²¹ See Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

²² See I.R.C. § 501(c)(3).

²³ See *id.*

²⁴ See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii); see also Gen. Couns. Mem. 39,811 (June 30, 1989).

²⁵ See Tech. Adv. Mem. 96-09-007 (Mar. 1, 1996) (stating that no “express advocacy” rule is required under section 501(c)(3) as compared to Federal Election Commission).

²⁶ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

²⁷ See STAFF OF JOINT COMM. ON TAXATION, 100TH CONG., LOBBYING AND POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS 14 (Comm. Print 1987).

cient to deem an individual a candidate.²⁸ Some action must be taken, though it need not be taken by the candidate or require his consent.

However, the prohibition does not apply to appointive positions.²⁹ Therefore, activity in support of an appointment that is confirmed by a legislative body, such as an appointment for a Supreme Court Justice, is considered a lobbying activity, rather than a political campaign activity.³⁰

In addition, elective political party positions can be considered public offices under state law. For instance, precinct committee positions which are created by statute can be public offices, if the positions are continuing and not occasional or contractual, possess fixed terms of office, and require oaths of office.³¹ Moreover, the Treasury regulations state that a "public office" can be one that is created by a state or federal legislative authority.³² Thus, city and county elected officials would also qualify under the term "public office."

B. Prohibited Activities

The next issue is what constitutes prohibited activities. The most obvious prohibited action is the making of statements, either written or oral, supporting or opposing candidates for elective office, or supporting or opposing slates of candidates, political parties, or political action committees.³³ Potentially, this

²⁸ See 1992 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 408 [hereinafter "1992 CPE TEXT"]; see also HOPKINS, *supra* note 1, at §15.3.

²⁹ See Gen. Couns. Mem. 39,694 (Jan. 21, 1988) (discussing Treasury regulation section 1.501-1(c)(3)(iii) and limiting meaning of term "candidate" for public office to individuals who offer themselves, or are proposed by others as contestants for elective public office); see also I.R.S. Notice 88-76, 1988-2 C.B. 392.

³⁰ The I.R.S. concluded in Gen. Couns. Mem. 39,694, dated Jan. 21, 1988, and I.R.S. Notice 88-76, that federal judges hold a public, and not an elective, office.

Although it is permissible for Catholic organizations to become involved in lobbying for Supreme Court Justice appointments, they may be subject to tax under section 527 of the Code unless a separate segregated fund is used. See Gen. Couns. Mem. 39,694 (Jan. 21, 1988) (stating that even if an organization is exempt from tax under section 501, it may be liable under section 527).

³¹ See Gen. Couns. Mem. 39,811 (June 30, 1989) (noting the characteristics of public office under state law).

³² See Treas. Reg. § 53.4946-1(g)(2)(i) (1972).

³³ See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990); see also Gen. Couns. Mem. 39,811 (June 30, 1989) (discussing particular activities constituting participation or intervention in a political campaign).

could include statements made in sermons, church bulletins, Catholic newspapers and other publications. Catholic organizations are also cautioned to avoid indirectly supporting or opposing candidates. Labeling candidates and thereby indicating approval or disapproval of the candidate should be avoided.³⁴ Use of plus or minus signs that indicate whether a candidate agrees or disagrees with an organization's position should also be discouraged.³⁵

1. Providing Financial Support

Catholic organizations may not provide financial or in-kind support to candidates, political action committees, or political parties. In-kind support includes the use of an organization's volunteers, paid staff, facilities, equipment, or mailing lists.³⁶ The IRS has offered additional guidance with regard to mailing lists, indicating that, generally, a Catholic organization may not give its mailing list to a political candidate or political party.³⁷ However, the IRS has indicated that if a Catholic organization regularly sells or rents its mailing list, it can do so to candidates or political parties on that same basis by which they are rented or sold to others.³⁸ These mailing lists must be equally available to other candidates;³⁹ IRS advises that other candidates be notified of the availability of the lists.⁴⁰ Prudence dictates that a list should not be rented or sold initially to a political candidate. For example, a parish which has neither rented nor sold its mailing list in the past should not begin doing so by renting of the list to a parishioner who is running for political office.

Catholic organizations may not sponsor political action committees.⁴¹ The Federal Election Commission ("FEC"), how-

³⁴ For example, labeling candidates as pro-life, anti-family, or anti-environment may indicate approval or disapproval of the candidates to members.

³⁵ See Gen. Couns. Mem. 39,811 (June 30, 1989) (finding that where an organization distributed a questionnaire asking candidates about their views on abortion, secular humanism, and other issues, and then published the responses while reminding members of their duty to vote righteously, this equated to implied electioneering).

³⁶ See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).

³⁷ See 1992 CPE TEXT, *supra* note 28, at 433.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See Treas. Reg. § 1.527-6(g) (1980); 1992 CPE TEXT, *supra* note 28, at 437 (concluding that Senate Finance Committee did not intend statute governing politi-

ever, has advised that the directors of a charitable organization may, in their individual capacities, form an independent political action committee ("PAC").⁴² Although FEC advisory opinion is not applicable to the Code, IRS has acknowledged the appropriateness of individual political action. Therefore, it is theoretically possible for individuals connected with Catholic organizations to establish independent PAC's. The determination of whether this qualifies as an individual activity depends on all of the facts and circumstances. Factors considered by the IRS in determining whether the establishment of a PAC is an independent activity include: (1) the similarity between the name of the PAC and that of the section 501(c)(3) organization; (2) the excessive overlap of the two organizations' directors without a convincing reason; and (3) the sharing of facilities and staff.⁴³

Similar issues arise with respect to related section 501(c)(4) organizations.⁴⁴ A section 501(c)(3) organization may not do indirectly what it is not permitted to do directly. In *Regan v. Taxation with Representation*,⁴⁵ the Supreme Court stated that a section 501(c)(3) organization may not subsidize a section 501(c)(4) lobbying affiliate,⁴⁶ in order to prevent contributions deductible under section 501(c)(3) from flowing to the section 501(c)(4) organization.⁴⁷ The IRS identified certain areas of particular concern, such as sharing facilities, staff, and expenses between the section 501(c)(3) and section 501(c)(4) organizations, conducting joint activities that require allocation of income and expenses between the section 501(c)(3) and section 501(c)(4) organizations,

cal organizations, section 527, to affect prohibition against tax exempt organizations).

⁴² FEC Adv. Op. 1984-12 (May 31, 1984) (advising that directors acting in an individual capacity on a committee which is neither supported nor governed by their organization may form a political action committee subject to certain restrictions).

⁴³ See 1992 CPE TEXT, *supra* note 28, at 438.

⁴⁴ Organizations exempt under section 501(c)(4) are:

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4)(A) (1986).

⁴⁵ 461 U.S. 540 (1983) (holding that section 501(c)(3) does not violate the First Amendment or Fifth Amendment).

⁴⁶ See *id.* at 544. The court required at a minimum that the two groups be separately incorporated and maintain separate books and records. See *id.* at 544 n.6.

⁴⁷ See *id.* at 544 n.6.

and joint fundraising that utilizes the section 501(c)(3) organization's goodwill.⁴⁸

2. Appearance of Bias

Catholic organizations may not distribute or authorize the distribution of partisan campaign materials, including campaign literature and biased voter education materials.⁴⁹ This prohibition applies to member mailings as well as materials distributed during worship services and published in bulletins or diocesan newspapers.⁵⁰ The current focus is on voter education materials prepared by outside organizations, with which extreme care must be used. Such materials may not cover the range of Catholic issues or cover them accurately. Further, although the prohibition against political campaign activity that applies to Catholic organizations may not apply to the organization preparing the materials,⁵¹ IRS may impute these activities to the Catholic organization.

Church property generally is considered private.⁵² In order to argue that church parking lots are public forums and to justify distribution of political literature, cases involving shopping malls and their parking areas, which were found to be public forums, have been cited.⁵³ However, a church parking lot is easily distinguishable in terms of both use and access from the local shopping mall.

An additional issue is that of paid political advertisements.

⁴⁸ See 1992 CPE TEXT, *supra* note 28, at 439-40; Milton Cerny, *Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions*, in 19 N.Y.U. CONFERENCE ON TAX PLANNING FOR 501(c)(3) ORGANIZATIONS, § 5.09[3], at 5-38 to 5-44 (1991).

⁴⁹ See I.R.C. § 501(c)(3).

⁵⁰ See *id.*

⁵¹ See generally I.R.C. § 501. While religious organizations are subject to campaign prohibitions under this statute, other tax-exempt organizations may not be subject to these restrictions. See *id.*

⁵² See, e.g., *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 316 F. Supp. 1116 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 934 (1971), and *vacated*, 404 U.S. 412 (1972) (vacated on procedural grounds) (holding that the use of church property for "commercial use ... with proceeds going to church projects" qualifies for exemption and does not violate the Establishment clause).

⁵³ See, e.g., *N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994) (holding that shopping centers must allow distribution of pamphlets concerning societal issues); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (holding that California Constitution protects speech and petitioning in privately owned shopping center).

Subject to certain criteria, paid political advertisements in diocesan newspapers are allowed. Paid political advertisements will not violate the political activity prohibition if they: (1) are accepted on the same criteria as other advertisements; (2) are identified as paid political advertising; (3) include an express statement disclaiming endorsement of any candidate; and (4) are equally available to all candidates.⁵⁴ The IRS will review an organization's solicitation procedures and will view unfavorably a situation in which a diocesan paper actively solicited advertisements from one candidate, while merely accepting them from others.⁵⁵ Prudence suggests that Catholic organizations document their political advertisement policies in a memorandum, resolution, or publication. Additionally, Catholic organizations should not offer free or reduced-rate advertisements, as these would constitute in-kind contributions.⁵⁶

Letters to the editor are an unknown quantity, since IRS has not issued any advice on the issue. By their very nature, they differ from editorial opinions. They do not represent the position of the paper, but rather that of the letter's author. However, since the editor of a diocesan newspaper is involved in selecting letters for publication, they are not immune from IRS scrutiny. The risks can be reduced by eliminating agreement with the organization's views as a basis for selection, by publishing letters addressing both sides of an issue, and by refusing to publish letters from organizations that endorse or oppose candidates. Additionally, publishing a disclaimer explaining that letters to the editor do not reflect the paper's editorial position is advisable.

C. Permitted Activities: Neutrality Is the Key

There are certain activities in which Catholic organizations can become involved. First, Catholic organizations can educate the candidates regarding the important issues and the Church's

⁵⁴ See 1992 CPE TEXT, *supra* note 28, at 434.

⁵⁵ See *id.*

One must also note the consequences of accepting paid political advertisements as they, along with other unrelated advertisements, are subject to the unrelated business income tax ("UBIT"). See generally Deirdre Dessingue Halloran, *UBIT Update*, 36 CATH. LAW. 39 (1995) (discussing tax-exempt organizations subject to the unrelated business income tax).

⁵⁶ Political advertisements, like other unrelated advertisements in Catholic organizations' periodicals, are subject to the unrelated business income tax under section 511 of the Code.

position on those issues.⁵⁷ Catholic organizations can also educate the voters regarding the candidate's position on the issues by sponsoring candidate forums and distributing appropriate voter education materials. It is essential that these activities remain unbiased. They must not indicate or imply that the Catholic organization agrees or disagrees with the candidates' positions. In determining the existence of bias, the IRS will review all of the facts and circumstances, including the format, content, and manner of the conduct or distribution.⁵⁸

1. Providing Information

All the facts and circumstances must be considered in determining whether an incumbent's voting record violates the political campaign activity prohibition, including: (1) the identification of incumbents as candidates; (2) the comparison of the incumbents' positions to that of the other candidates; (3) the comparison of the incumbents' positions to that of the organization; (4) the timing, extent, and manner of distribution; and (5) the range of issues covered.⁵⁹ The IRS clearly stated its expectations that voter education materials must cover a wide range of issues rather than one or two areas that are important to the organization.⁶⁰

The IRS has ruled that the distribution during an election campaign, in an unbiased manner, of the voting records of all congressional members on a wide variety of issues is permitted.⁶¹ Conversely, a biased voting record, one which indicates both the organization's position and the agreement of an incumbent with that position, is generally impermissible.⁶² However, the IRS has created limited exceptions, under which a biased voter guide may be distributed.⁶³ To qualify for the exception, candidates for re-election must not be identified. Distribution must not be timed to "coincide with an election campaign," but rather must

⁵⁷ See Cerny, *supra* note 48, § 5.04, at 5-10.

⁵⁸ See Rev. Rul. 78-248, 1978-1 C.B. 154 (explaining that the IRS will examine "facts and circumstances" with respect to voter education to decide whether the organization is acting on behalf of a candidate).

⁵⁹ See 1992 CPE TEXT, *supra* note 28, at 419-20.

⁶⁰ See *id.*

⁶¹ See Rev. Rul. 78-248, 1978-1 C.B. 164, Situation 1.

⁶² See *id.* Situation 3.

⁶³ See Rev. Rul. 80-282, 1980-2 C.B. 178.

be one of a series of regularly distributed voting records.⁶⁴ Distribution may not be targeted to areas where elections are occurring, and must not be broadly disseminated to voters.⁶⁵ Reliance on this ruling to justify wide distribution of biased voter guides is unfounded.

Another area requiring discussion is that of candidate questionnaires. In order to determine whether a particular questionnaire violates the political campaign activity prohibition, the facts and circumstances must, once again, be evaluated. The following criteria for identifying violations have been offered by the IRS: (1) whether the questionnaires are sent to all of the candidates; (2) whether all of the responses are published; (3) whether the questions indicate a bias towards the organization's preferred answer; (4) whether the responses are compared to the organization's positions on the issues; and (5) whether the publication of responses are received without editing by the organization.⁶⁶ Simply, an organization may distribute an unbiased voter guide addressing candidates' positions on a wide range of issues. However, the IRS has ruled that the distribution of a voter guide that focuses on a narrow range of issues, though otherwise unbiased, is a violation of the political campaign activity prohibition.⁶⁷ Questionnaires should be sent to all candidates, and all candidates should be encouraged to respond. The failure of all candidates to respond may, in certain circumstances, require a re-evaluation of the decision to distribute the questionnaire responses. In a situation where only one candidate responds, advice should be sought from the diocesan attorney.

Another valuable permitted activity for Catholic organizations is participation in nonpartisan voter registration and "get-out-the-vote" drives. These activities are permitted by both the IRS and the FEC, provided no bias is shown for or against any candidate or political party.⁶⁸ Therefore, an organization may not target voter registration to those areas in which the candidate's position is in agreement with the organization's position,

⁶⁴ See *id.*

⁶⁵ See *id.* (ruling that a distribution to normal readership did not constitute a violation of statutory provisions).

⁶⁶ See 1992 CPE TEXT, *supra* note 28, at 421.

⁶⁷ See Rev. Rul. 78-248, 1978-1 C.B. 154, Situation 4.

⁶⁸ See 11 C.F.R. § 114.4 (1997) (permitting voter registration information to be distributed by corporations and labor organizations); 1992 CPE TEXT, *supra* note 28, at 427-28.

according to the identity of the incumbent, or in cooperation with any political campaign.⁶⁹ Targeting historically disadvantaged groups, however, whether based on economic status, race, gender, or language, may be permitted.⁷⁰

2. Allowing Candidates to Speak

Catholic organizations are also permitted to provide non-partisan forums for the presentation of unbiased candidate debates and lectures.⁷¹ The following factors are necessary for a favorable determination with respect to candidate debates: (1) all legally qualified candidates should be invited to participate; (2) questions should be posed by a nonpartisan, independent panel; and (3) questions should allow each candidate to present his or her views.⁷² The moderator is not permitted to make comments about the candidates' answers.⁷³ All legally qualified candidates should be invited to participate because the exclusion of any candidate may evidence bias. There are, however, certain exceptions to this rule. First, in a primary election, the debate can be limited to qualified candidates of the particular party that is conducting the primary.⁷⁴ Second, if the field of candidates is exceptionally large, the FEC has indicated that an organization can use its discretion to limit the number of candidates. Such determinations must be based upon pre-established objective criteria.⁷⁵ However, there must be at least two candidates in the forum,⁷⁶ and one candidate may not be promoted over another.⁷⁷ The IRS has determined that the following criteria are necessary to excuse the failure to invite all legally qualified candidates: (1)

⁶⁹ See 11 C.F.R. § 114.4(c).

⁷⁰ See Cerny, *supra* note 48, § 5.04[2], at 5-13 to 5-17; Priv. Ltr. Rul. 92-23-050 (Mar. 10, 1992) (stating that grants for registering homeless people to vote did not constitute political activity for private foundation).

⁷¹ See Rev. Rul. 86-95, 1986-2 C.B. 73 (explaining that section 501(c)(3) organization which provided public forums for congressional candidates did not "participate" or "intervene" in political campaign under section 501(c)(3)).

⁷² See *id.*; see also 1992 CPE TEXT, *supra* note 28, at 423.

⁷³ See Rev. Rul. 86-95, 1986-2 C.B. 73.

⁷⁴ See *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 629-30 (2d Cir. 1989) (holding that exclusion of an independent party candidate from primary debate did not constitute "partisan activity" under section 501(c)(3) because the exclusion "was a logical consequence of the nature and role of primary contests in the electoral process").

⁷⁵ See 11 C.F.R. § 110.13(b) (1997).

⁷⁶ See *id.* § 110.13(b)(1).

⁷⁷ See *id.* § 110.13(b)(2).

inviting all the candidates must be impractical; (2) the organization must use reasonable, objective criteria to eliminate candidates; (3) the criteria must be applied consistently and not arbitrarily; and (4) other relevant factors must indicate that the debate was conducted in a neutral and unbiased manner.⁷⁸

A common issue is whether or not candidates may be invited to speak at events sponsored by Catholic organizations. The threshold question is whether the individual has been invited to speak as a candidate or in his or her capacity as an expert or public figure.⁷⁹ If the individual is invited as a candidate, the public forum rules apply and the organization must provide equal access to other candidates.⁸⁰ The IRS has cautioned exempt organizations to be wary of extending invitations to more than one candidate "with the knowledge and expectation that one will not accept the invitation because of well-known opposing viewpoints."⁸¹ If an individual is invited in his or her capacity as a public figure or an expert, equal access is not required. However, the IRS has suggested certain precautions: (1) the candidate must speak only in his or her capacity as a public figure; (2) no mention should be made of his or her candidacy; (3) no campaigning may take place; and (4) all advertising for the event should not mention the candidacy.⁸² The IRS, surprisingly, has indicated that it would be acceptable to pay a "customary and usual honoraria" to a candidate who spoke at a convention or other event, unless the payment was intended to support the campaign.⁸³

3. Individual Activity

Section 501(c)(3) prohibits political activity by Catholic organizations.⁸⁴ It does not apply to the acts of church members or leaders in their individual capacities. One must inquire whether church leaders are acting in their individual capacities or as representatives of their organizations. According to the IRS, if a leader of a religious organization endorses a candidate at an of-

⁷⁸ See 1992 CPE TEXT, *supra* note 28, at 424.

⁷⁹ See *supra* note 26 and accompanying text (defining "candidate").

⁸⁰ 1992 CPE TEXT, *supra* note 28, at 431.

⁸¹ See *id.*

⁸² See *id.* at 431-32.

⁸³ See *id.* at 432.

⁸⁴ See I.R.C. § 501(c)(3).

ficial function of the organization or in its official publication, that activity will be imputed to the organization.⁸⁵

Section 501(c)(3), however, does not prohibit priests or other religious leaders from being politically active, as long as they do not utilize their organization's financial resources, facilities, or personnel, and they clearly and unambiguously indicate that their actions are their own and not those of their respective organizations.⁸⁶

The actions of the employees and members of Catholic organizations can also be attributed to the organization if there is real or apparent authority for such actions.⁸⁷ The IRS has indicated that it will apply agency principles when making these determinations.⁸⁸ The actions of an employee within the scope of her employment generally will be considered authorized by the organization. Likewise, individual actions will be attributed to the organization if they are ratified by the organization, or if the organization fails to disavow actions that were performed under apparent authority.⁸⁹

IV. PENALTIES

A violation of the prohibition can result in the revocation of a Catholic organization's tax-exempt status.⁹⁰ In addition, under section 4955 of the Code, a two-tiered excise tax on political expenditures may be imposed.⁹¹ This excise tax is imposed upon both the exempt organization and the "organization manager" responsible for approving the political expenditure.⁹² The initial tax on the organization is ten percent of the expenditure,⁹³ and if there is no correction, the tax rises to one hundred percent.⁹⁴ The tax on the manager is two and one half percent in the first

⁸⁵ See *Public Statement of Jimmy Swaggart*, President, Jimmy Swaggart Ministries (Dec. 7, 1991) [hereinafter *Swaggart Statement*].

⁸⁶ See *id.*

⁸⁷ See 1992 CPE TEXT, *supra* note 28, at 436; Gen. Couns. Mem. 39,414 (Sept. 25, 1985).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *infra* notes 101-02 and accompanying text (describing the revocation of Jerry Falwell's tax exempt status for his Old Time Gospel Hour because of a violation of section 501(c)(3)).

⁹¹ See I.R.C. § 4955(a) (1997).

⁹² See *id.* § 4955(a).

⁹³ See *id.* § 4955(a)(1).

⁹⁴ See *id.* § 4955(b)(1).

instance,⁹⁵ increasing to fifty percent if no correction is made.⁹⁶ In the case of flagrant political expenditures, the IRS is also authorized to make an immediate assessment of the taxes due, both excise and income taxes,⁹⁷ and to seek an injunction against further political campaign activity violations.⁹⁸

V. ENFORCEMENT

Currently, at the national office, thirty cases are pending which involve violations or alleged violations of the political campaign activity prohibition. Religious organizations are not immune from IRS enforcement. In 1991, the IRS found that Jimmy Swaggart Ministries had committed two violations of the political activity prohibition for its endorsement of Pat Robertson's 1988 Presidential bid.⁹⁹ The IRS did not revoke Swaggart's tax-exempt status in that case. Jimmy Swaggart Ministries admitted that it had violated the prohibition and agreed to make changes to ensure that there would be no further violations. The organization also paid the IRS over \$170,000 in back taxes, supposedly unrelated to the political campaign activity.¹⁰⁰

In 1993, the IRS revoked the tax-exempt status of Jerry Falwell's organization, the Old Time Gospel Hour, for two years because it used its personnel and assets to raise money for a political action committee.¹⁰¹ In connection with that revocation, Falwell's organization paid \$50,000 in taxes, and agreed to changes in its organizational structure to ensure that there would not be any further violations.¹⁰²

The most interesting and current enforcement action is continuing in the Federal District Court for the District of Columbia, and involves the Church at Pierce Creek ("Pierce Church").¹⁰³

⁹⁵ See *id.* § 4955(a)(2).

⁹⁶ See *id.* § 4955(b)(2).

⁹⁷ See *id.* § 6852(a).

⁹⁸ See *id.* § 7409(a)(1); see also Political Expenditures by Section 501(c)(3) Organizations, 60 Fed. Reg. 62209 (Dec. 5, 1995) (to be codified at 26 C.F.R. pt. 1, 53, and 301).

⁹⁹ See *Jimmy Swaggart Ministry Admits Tax Law Violation*, L.A. TIMES, Feb. 1, 1992, at 17.

¹⁰⁰ See *Swaggart Statement*, *supra* note 85.

¹⁰¹ See *Statement of Jerry Falwell*, President, Old Time Gospel Hour (Feb. 17, 1993); see also News in Brief: *Falwell Responds to IRS Appeal for Money*, 59 TAX NOTES TODAY 327 (Apr. 19, 1993) [hereinafter *Falwell Responds*].

¹⁰² See *Falwell Responds*, *supra* note 101.

¹⁰³ See *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 12 (D.D.C. 1997).

Pierce Church, which filed the case in April 1995, is seeking a declaratory judgment against the IRS' revocation of its section 501(c)(3) status for the violation of the political campaign activity prohibition.¹⁰⁴ A week before the election in 1992, the Church purchased space in the *Washington Times* and *U.S.A. Today* for an open letter to the Christian community. This letter described Bill Clinton as a supporter of abortion, of the distribution of condoms in public schools, and of homosexuality. The letter included Biblical citations against such practices, and then asked "How then can we vote for Bill Clinton?"¹⁰⁵

The IRS began an examination under the church audit procedures of section 7611.¹⁰⁶ The IRS and Pierce Church met many times, and ultimately, on January 19, 1995, the IRS revoked Pierce Church's tax exempt status.¹⁰⁷ In its complaint, Pierce Church made an intriguing argument that it was not subject to the prohibition under section 501(c)(3) because Congress did not intend churches to come within the meaning of a "religious organization," as that term is defined in section 501(c)(3).¹⁰⁸ Section 501(c)(3) never mentions the term "church," referring instead to a "religious organization."¹⁰⁹ The complaint cited several other sections of the Code that make distinctions between churches and religious organizations.¹¹⁰

Pierce Church also argued that the prohibition was unconstitutionally vague, that it gave the IRS unfettered discretion over religious speech, that the revocation within days of the expiration of the two-year statutory period violated its due process rights, that the prohibition is a violation of the Free Exercise Clause and the Religious Freedom Restoration Act,¹¹¹ and that it causes excessive entanglement in church affairs in violation of the Establishment Clause.¹¹² Finally, Pierce Church argued that

(holding that discovery demands by the church and defendant were both granted and denied in part); see also Frank J. Murray, *Church Wins Round Against IRS After It Lost Tax Exemption*, WASH. TIMES, July 15, 1997, at A8.

¹⁰⁴ See *Branch Ministries*, 970 F. Supp. at 12-13.

¹⁰⁵ *Id.* at 13.

¹⁰⁶ I.R.C. § 7611(b) (1997).

¹⁰⁷ See *Branch Ministries*, 970 F. Supp. at 13.

¹⁰⁸ See *id.*

¹⁰⁹ I.R.C. § 501(c)(3).

¹¹⁰ See, e.g., I.R.C. §§ 508(a) & (c) and 170(b)(1)(A)(i) (1997). This argument does not appear in the opinion of the court. See *Branch Ministries*, 970 F. Supp. at 13.

¹¹¹ See *id.* The Religious Freedom Restoration Act has since been declared unconstitutional. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

¹¹² See *Branch Ministries*, 970 F. Supp. at 13.

the IRS violated its Fifth Amendment and equal protection clause rights by targeting churches with conservative political views.¹¹³ The attorney for Pierce Church, Colby May, Esq., has indicated that Judge Friedman, the presiding judge, believes that the case presents serious issues of selective prosecution and unbridled discretion. Judge Friedman instructed the parties to await the decision of the Supreme Court in a criminal case, *United States v. Armstrong*,¹¹⁴ involving the threshold showing for a selective prosecution claim. The parties were instructed that their briefs on the selective prosecution issue are due fourteen days after that Supreme Court decision.¹¹⁵

VI. NEW DEVELOPMENTS

The IRS has issued a technical advice memorandum relating to fundraising letters that violated the political activity prohibition, which will be reported in the April issue of *Law Briefs*.¹¹⁶ The facts are as follows: a section 501(c)(3) organization hired a direct mail company to develop a fundraising mailing to support its activities, including voter registration activities.¹¹⁷ The direct mail company developed the brochures, bore all mailing costs and sent the fundraising letters during a political campaign season. The letters were full of jargon that created the impression that the charity supported certain political views and that contributing to the organization would assist the candidates who shared those views. The IRS concluded that these letters violated the political campaign prohibition, even though the letters asserted that the organization was purely educational and non-partisan.¹¹⁸ A few key points in the ruling should be emphasized. First, the IRS again rejected the application of the "effective advocacy" rule,¹¹⁹ required by the United States Supreme Court in *Buckley v. Valeo*¹²⁰ and *Federal Election Commission v. Massa-*

¹¹³ *See id.*

¹¹⁴ 116 S. Ct. 1480 (1996).

¹¹⁵ The parties in the *Branch Ministries* case submitted supplemental briefs pertaining to the court's decision to grant discovery on the basis of selective prosecution.

¹¹⁶ Tech. Adv. Mem. 96-09-007, 1995 PRL LEXIS 2000.

¹¹⁷ *See id.* at *6-*7.

¹¹⁸ *See id.* at *35.

¹¹⁹ *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976).

¹²⁰ *Id.*

chusetts Citizens for Life.¹²¹ Second, the IRS clearly stated that motive is irrelevant to the determination of whether a political campaign activity violation has occurred.¹²² Third, the IRS reiterated that there is no substantiality test for political campaign activity.¹²³ Zero tolerance is the standard. The IRS concluded that the amounts that the organization paid or incurred for the fundraising letters were political expenditures, and subject to tax under section 4955.¹²⁴

Finally, in a press release issued by Americans United for the Separation of Church and State ("Americans United") in March 1996,¹²⁵ Americans United announced an activity entitled "Project Fair Play," described as an election year initiative designed to bring churches and religious groups into compliance with the IRS tax code.¹²⁶ Americans United has stated it will work with its members in all fifty states to report violations of the political activity prohibition to the IRS. Americans United reported the Pierce Church to the IRS back in 1992. The Americans United also sent a letter to the IRS national office alleging that the Second Baptist Church in Houston, Texas, had violated the political activity prohibition and asked the IRS to look into the matter.¹²⁷

KEVIN M. KEARNEY

VII. AN ATTEMPT AT DAMAGE CONTROL

Deirdre Halloran set forth the law pertaining to the Code and its accompanying regulations. Knowledge of the law is vital when a client requests your opinion and advice prior to taking action. On the other hand, I will describe what lies ahead when the client acts first and seeks help later.

The guiding principle in this article, is that all of the mat-

¹²¹ 479 U.S. 238 (1986).

¹²² See Tech. Adv. Mem. 96-09-007, 1995 PRL LEXIS 2000, at *29-*30.

¹²³ See *id.* at *33-*35.

¹²⁴ See *id.* at *36.

¹²⁵ See Barry Lynn, Group Mounts Campaign against Politics in Religion (Mar. 19, 1996) (transcript available in Nat'l Pub. Radio Transcript); Rebecca S. Weiner, *Religious Group Alleges Second Baptist Violated Tax Exempt Status*, STATES NEWS SERV., Mar. 19, 1996.

¹²⁶ See Lynn, *supra* note 125; Weiner, *supra* note 125.

¹²⁷ See *id.*; Linda Feldman, *Churches Risk Tax Standing by Becoming Too Political*, CHRISTIAN SCI. MONITOR, Apr. 1, 1996, at 1.

ters discussed within must be regarded with extreme caution. In law school, we were taught the principal of *de minimis non curat lex* - translated as "the law will not be concerned with things of minimal importance." Not only is this expression not the guiding principle for the IRS, but it is the exact opposite of the principles of the IRS. Quite clearly, the IRS will be most concerned with things of minimal importance. I hope that from my experiences you may be able to learn how to deal with issues similar to the ones presented here as they manifest themselves in your day-to-day lives.¹²⁸

Ms. Halloran, in her presentation, alluded to many of the Internal Revenue statutes that should be considered when dealing with a case involving alleged political activity by a section 501(c)(3) entity. I will address section 7611, which, in its own inimitable fashion is referred to in the Code as "Restrictions on church tax inquiries and examinations."¹²⁹ God knows what would happen if the IRS were not so "restricted." Section 7611 deals with inquiries and examinations. The difference between an inquiry and an examination could be described in this manner: an inquiry is when you go to the IRS' house, and an examination is when the IRS comes to your house.¹³⁰ It is important to consider these two possibilities as separate, and in my view, one should use every effort to avoid providing an "invitation" for the IRS to come visit. Section 7611 is clear as to what notice is appropriate prior to any action. The notice must specify the grounds for the inquiry, and the reasonable belief for the concerns which gave rise to the inquiry.¹³¹ The general subject matter, as well as a general explanation of the applicability of administrative and constitutional provisions, a general explanation of the applicable provisions of the Code which authorize the inquiry, and the opportunity to respond to the inquiry notice must be given.¹³²

¹²⁸ The names of the people and institution involved have been changed to protect the innocent.

¹²⁹ I.R.C. § 7611 (1997).

¹³⁰ See I.R.C. § 7611(a)-(b).

¹³¹ See I.R.C. § 7611(a)(3) (describing notice before an inquiry); § 7611(b)(2) (describing notice requirements of examination).

¹³² See I.R.C. § 7611(a)(3)(B).

A. *Church Involvement in School Board Elections*

Consider the following situation in which I was involved. In New York City there exists what are called "school board elections." New York City has a very large public education system which is run by a central board of education.¹³³ The system, however, is decentralized into local school boards, and once every three years, there is a local school board election in each district. Although the Diocese of Brooklyn ("Diocese") maintains its own parochial school education system, more Catholics in the Diocese attend public schools than parochial schools.¹³⁴ The Catholic Church, therefore, has a strong interest in public education. Additionally, these elections, as people from New York City know, are very localized, contentious, and deal with a myriad of issues. Numerous candidates seek election, running under a number of different slates.¹³⁵ While the elections are not partisan in the typical meaning of the term (i.e., Democrats and Republicans), various coalitions and alliances do exist.

One area of contention for the church, even outside New York City, is sex education.¹³⁶ The church is concerned with how both sex education is provided and the content of the curriculum. Currently, New York City's curriculum commences sex education in kindergarten.

Another area of concern deals with the programs regarding AIDS prevention, including the content of that curriculum. In the last election, one of the issues of contention was the program to distribute condoms in schools as part of an AIDS prevention curriculum.¹³⁷ Another issue was school based health clinics which would provide to youngsters a full panoply of morally questionable family planning services.

¹³³ See Sandra Lerner, *New York Forum About School Boards - A Vote of No Confidence*, NEWSDAY, July 12, 1994, at A26 (chronicling history of New York City's public schools).

¹³⁴ There are over 140 parochial schools and tens of thousands of students in those parochial schools.

¹³⁵ No information exists in either the New York City Chapter or New York Code of Rules and Regulations regarding the history of the election procedures.

¹³⁶ See Nick Chiles, *Heated School Races, Social Issues Stir Debate*, NEWSDAY, May 4, 1993, at 21.

¹³⁷ See *id.* at 21 (covering issues and debates of school board races); Alfred Lubrano, *2 Gays Win. Liberals Cite Election Gains in School Board "Holy War,"* NEWSDAY, May 17, 1993, at 3 (covering post election results and discussing issues involved in election).

B. The Detrimental Effects of One Parish Bulletin

The practice of distributing weekly parish bulletins exists in all of the 220 parishes in Brooklyn. In a typical four page parish bulletin, the front page includes a picture of the church, gives the times of the masses and baptisms, and the back page contains advertisements. The inside of the bulletin consists of two pages of news and information. The intent of one such church bulletin was a "get-out-the-vote" message, encouraging all parents to get out and vote in the school board elections. The church wanted parents to make the statement that whether or not your children attend public school, they have an interest in voting.

At one particular church ("Church"), one such notice appeared in the parish bulletin a few days before the election. The top piece stated: "School Board Elections Tuesday, May 4th." Another piece served as the "get-out-the-vote" message, containing a picture of a "palm card." A palm card is what is taken into a voting booth.¹³⁸ On the left hand side of the bulletin were the handwritten words: "Please read this note. C.U.E. needs you!" The words "Catholics United for Education," were printed underneath this statement. However, the name of the group in question was "Citizens United for Education," not "Catholics United for Education," thereby misstating the name of the organization. The bulletin was distributed, the elections proceeded, and the bulletin was forgotten until November 1993 (seven months after the election), when the parish received, by certified mail, a notice of a "church tax inquiry" dated November 23, 1993, from the IRS. The notice stated that it was a "limited inquiry to better understand your activities." The inquiry proceeded to ask thirty four questions over fifteen pages. It also indicated, pursuant to the statute,¹³⁹ that a response must be made within fifteen days from the date of the letter. The letter was dated November 23, 1993, but was received by the taxpayer on December 6, 1993, providing only two days to respond.

First, the local district office of the IRS was contacted, and informed that the notice had just been received, and therefore, a timely response was impossible. The individual with whom I spoke with on the telephone was helpful. I was told to file a power of attorney with the IRS and furthermore, was led to be-

¹³⁸ The palm card was reproduced and placed in the bulletin.

¹³⁹ See I.R.C. § 7611(b)(2)(A) (referring to an examination, not an inquiry).

lieve that the timing of the response was not critical. I indicated that I was getting the information necessary to make a response, which seemed acceptable. Since then, however, I learned not to take for granted anything that is said to me on the telephone when dealing with the IRS. While initially deadlines are not a problem, the IRS subsequently realizes that the deadline has expired and the required information has not been given.

After a review of the questionnaire, I found three problems. First, the questionnaire included four exhibits. The first exhibit was the page from the previously described bulletin. The next three exhibits had nothing to do with the case; these exhibits pertained to another investigation entirely.¹⁴⁰ Thus, a careful reading of any attachments to the questionnaire is required. I decided against calling some of the other targets to indicate that the IRS might be concerned with their organizational activities. Second, the notice clearly indicated that the IRS did not comprehend the structure of the church. For example, the material showed a lack of understanding as to the differences between the Catholic Dioceses, parishes and the NCCB/USCC.¹⁴¹ Finally, it seemed that this particular notice was also being used as an investigative tool. Some of the latter questions requested information concerning the questionable practices of other parishes. Furthermore, an inquiry was made into the Diocese's responsibility to police such actions.

After considering all of these issues, I sent a response to the IRS on January 13, 1994. In the response, I tried to identify and clarify the parties, indicating that I would refuse to give any information on any party or entity which was not indicated as a subject of the investigation. Additionally, I revealed that while I had some knowledge of the Diocese from my general understanding of its operation, I was not representing any other entity in this case as an attorney. I returned the irrelevant material that had been included, indicating that I would have no further comment on it. I then specifically answered some of the questions. I described the church bulletin and how it was created. In this case, it was created by the Church secretary, not a high level individual in our ecclesiastic and hierarchical Church. The pastor

¹⁴⁰ The IRS was undertaking inquiries concerning other different charitable organizations.

¹⁴¹ National Conference of Catholic Bishops and United States Catholic Conference.

told the Church secretary to put together the bulletin for the next week, instructing the secretary to include information about the school board elections in the bulletin. The secretary then called the principal of the school, and said "I have to do something for the school board elections, send over some material." The principal sent material which the secretary received in the mail. While some of the material was partisan, most of it was not. Clearly, it was not originated by anyone in the parish.

In addition, the questionnaire requested information as to how the bulletin was distributed. I responded that the bulletin was placed at the back of the Church, on the radiators (this particular church had no real church building, but was rather an auditorium-like structure in the basement of a school), and in some different areas outside the building. Additionally, a statement which described the Church's general interest in quality education was included. I attempted to describe the whole bulletin as an "issue oriented speech" and a "get-out-the-vote" solicitation. Lastly, I requested a conference with the IRS prior to any further activity. A conference is available prior to an examination of the church records,¹⁴² but there is no statutory right to a conference pursuant to an inquiry. If we did not respond to the inquiry, then the IRS might require an examination, which would include the opportunity to have a conference. In any event, my request for a conference was granted.

The conference took place in March 1994, and was truly something out of Alice in Wonderland. I expected that the agent with whom I had been speaking would be present at the meeting to discuss any open items. While I thought that my response was complete, I also thought that we needed a brief meeting to clarify some open questions that the IRS might still possess. However, this was not the case. The individual agent with whom I had spoken, the District Supervisor of that agent, a counsel to the District Supervisor, and I were present at the meeting. The situation appeared pessimistic when the counsel took out five handwritten pages and stated that he wished to speak first. He had taken the time to research the law, rewrite it, and spent approximately fifteen to twenty minutes reading it to me. He read verbatim from the pages entire sections of the law which he believed to be pertinent. We then reviewed the

¹⁴² See I.R.C. § 7611(b)(2).

questions in the inquiry as if the IRS had not received any information from me. The agent with whom I had dealt with throughout this process stood mute during the entire discussion; I assume due to the presence of the supervisor and counsel. The IRS appeared to accept my responses to the questionnaire, and all seemed well when I left. The IRS seemed satisfied with our level of cooperation and we spoke about a stipulation between the parties which would end the case. I indicated that I would be happy to draft such a stipulation in order to resolve the matter quickly. I was told that the drafting was entirely within the purview of the IRS, and furthermore, that the IRS was competent to draft a stipulation which would solidify our understanding.

I did not hear anything further from the IRS until late in the spring when I received the proposed closing agreement. The closing agreement shocked me because I did not understand where the document came from. The closing agreement stated that the Code's prohibition against political activity was absolute, and that the IRS found that the statute had been violated and proposed a revocation of the church's tax-exempt status. However, the IRS was willing to enter into an agreement which would eliminate the need to proceed further, which would benefit both the IRS and the church. The proposed agreement would include a full and complete confession that the parish did, in fact, violate the statute. Furthermore, pursuant to section 4955, a fine of one hundred dollars would be imposed.¹⁴³ The bulletin, which was the subject of the inquiry, was totally funded by advertising revenues of the church, and according to section 4599, fines are to be imposed as a percentage of the prohibited expenditure.¹⁴⁴ Nonetheless, the IRS concluded that a one hundred dollar fine, pursuant to section 4955, was to be imposed. The Church was also required to promise not to violate the statute again. In addition, the parish agreed that in the future, any literature, before going into the parish's bulletin, would be approved by the Diocese and the General Counsel of the USCC. The parish staff would also undergo a training program jointly administered by the Diocese and the USCC. Finally, the parish had to disavow any intent to support particular candidates in the

¹⁴³ See I.R.C. § 4955(a)-(b).

¹⁴⁴ See I.R.C. § 4955(a)-(b). Actually, they are referred to as "taxes," the \$100 is 10% of what the IRS determined they spent on the political expenditure.

election which had been concluded fourteen months earlier.

After receiving and reviewing the draft stipulation, I demanded, by telephone, a meeting with the IRS' counsel. That meeting was not as pleasant as the first. When I conveyed my confusion regarding the draft stipulation, the counsel stated that he did not understand why I was so upset. We then discussed my objections item by item. Finally, after a long discussion, the counsel indicated - "You know what? Why don't you write down specifically your objections to this agreement? And, if you have any specific language which you might want to give us as a model, why don't you write that down also." This is precisely what I had proposed months before. By a letter dated September 13, 1994, I stated my outrage at the entire process. I stated that I did not understand the process we were experiencing, which seemed just short of an examination. Specifically, I believed that we had an agreement on church cooperation and that we had freely given all the information requested. After I registered my outrage, I requested that the agreement contain a "whereas" statement which clearly indicated the cooperation of the Church throughout the inquiry process. We needed a "whereas" statement which indicated that the section 4955 excise tax should not be applied. I wanted the statement to be a finding of facts that might lead to finding a violation, rather than a finding of a violation. I also did not think that the agreement should represent an acknowledgment of a particular violation. I removed from the draft all references to the requirement that the Diocese and the USCC review materials in the future. I stated that if the IRS required training of the staff, it should be done by the counsel of the parish and myself. Finally, I designated specific language for inclusion in a future bulletin which would constitute the parish's exculpation if it confessed to any wrongdoing.

Finally, I did get a closing agreement, in which the IRS used the identical language that I had given to it, but the one hundred dollar fine remained. Approximately nineteen months had passed, and if the one hundred dollar fine would conclude the matter, the parish would agree to pay it without any acknowledgment of guilt. Everyone affiliated with the church received a presentation on the Code's prohibition against political activity for section 501(c)(3) organizations. This was three years ago. Currently, we are engaged in the next election of the school boards in the City of New York. I reviewed a questionnaire that

someone was going to send out to the candidates, and found it to be problematic and asked that it not be sent until there was a further examination of the questionnaire.

C. *In Retrospect*

In closing, I would like to leave you with a few thoughts. First, this process took nineteen months. It upset the pastor of the parish, a wonderfully gifted individual in matters of ministry and spirituality, but not an expert in the Code. He was not intending to create any “test case,” and this process was very painful. I would advise people to take these issues seriously, and always keep in mind that your exemption may be in jeopardy. Recall that the IRS did in fact send me a document which stated that the parish had lost its exemption. The consequences of such an action, considering that the parish was included in the Official Catholic Directory (“OCD”) and enjoyed a “group” ruling exemption, would have been severe. I did wonder, however, how the exemption might be restored. The parish might have been excluded from next year’s OCD.

Timing is also very important. We were given two days to prepare a response, and if the IRS chose, it could have enforced that, which would have resulted in an examination, and ultimately in litigation. Do not believe what you are told on the telephone. I also argued what I felt to be selective enforcement,¹⁴⁵ and I asked the IRS to explain how this complaint arose. The Americans United have complained in the past and I assume that they might have started this particular inquiry.¹⁴⁶ The IRS would not give me any of the information on this subject. Another possibility is that the inquiry came from a disgruntled losing candidate, but this has not been proven.

In the end, I think that we must be alert to issues regarding political activity and the prohibition in the Code and hopefully these problems will not continue to arise.

¹⁴⁵ See *United States v. Armstrong*, 116 S. Ct. 1480 (1996) (allowing claim of selective prosecution by criminal defendant); *Branch Ministries*, 970 F. Supp. at 16 (allowing church more discovery pursuant to their claim of selective prosecution).

¹⁴⁶ The Americans United have made it very clear that they will report possible violators. See Lynn, *supra* note 125 (warning potential violators someone is watching them).

