

CRS Report for Congress

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Campaign Activity by Churches: Legal Analysis of Houses of Worship Free Speech Restoration Act

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Summary

Churches and other Internal Revenue Code (IRC) Section 501(c)(3) tax-exempt organizations can lose their tax-exempt status if they participate in a political campaign. The Houses of Worship Free Speech Restoration Act, H.R. 235 (108th Congress) would permit churches to engage in unlimited amounts of certain types of political campaign activity without jeopardizing their tax-exempt status. It would amend the IRC so that churches could not lose their tax-exempt status “because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.” H.R. 235 is similar in purpose to the Houses of Worship Political Speech Protection Act, H.R. 2357 (107th Congress), although the 107th Congress bill took a different approach. H.R. 2357 received a floor vote on October 2, 2002, and failed to pass by a vote of 178 to 239.

H.R. 4520 (108th Congress), the American Jobs Creation Act of 2004, had included a provision addressing the participation of churches in political campaign activity, but the Committee on Ways and Means struck the provision by unanimous consent on June 14, 2004. The provision, former section 692 (Safe Harbor for Churches), would have codified existing law on the consequences to churches of statements made by religious leaders as private citizens, allowed churches to make a limited number of unintentional violations of the political campaign activity prohibition without jeopardizing their tax-exempt status, and imposed a sanction on unintentional violations of the prohibition.

These provisions appear to respond to *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), where the U.S. Court of Appeals for the D.C. Circuit upheld the authority of the Internal Revenue Service (IRS) to revoke the tax-exempt status of churches that engage in prohibited campaign activities. This report provides an overview of current tax and campaign finance law relevant to this legislation, a discussion of how H.R. 235 (108th Congress), H.R. 4520 (108th Congress), and H.R. 2357 (107th Congress) would amend current law, and a comparison of the three bills. This report will be updated as developments occur.

Current Law

Tax Law.

Churches and religious organizations are among several types of organizations exempted from federal income taxes by § 501(c)(3) of the Internal Revenue Code (IRC). Among the requirements for tax-exempt status is the requirement that the § 501(c)(3) organization must 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.

This is viewed as an absolute prohibition, violation of which can result in loss of tax-exempt status. For example, in *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), the U.S. Court of Appeals for the District of Columbia Circuit upheld the Internal Revenue Service (IRS) revocation of the exempt status of the Church at Pierce Creek in Binghamton, New York. The church and its pastor had placed a full-page political advertisement in two national newspapers four days before the 1992 presidential elections and had suggested that tax-deductible contributions would be accepted to pay for the advertisement.

While the *Branch Ministries* case underlined the point that a church can lose its exempt status for participating in a campaign, there is a distinction between political *campaign* activities and simple political activities. Under the tax laws, political campaign activities include those activities that are specifically linked to election periods and support or oppose particular candidates. Examples of prohibited political campaign activities include endorsing or opposing particular candidates; evaluating candidates and supporting a slate of the best-qualified candidates; preparing and distributing voters' guides during an election where the questions asked or the presentation of the information indicate a bias on certain issues; and making contributions to a political campaign.

It should be noted, however, that many types of political activities that are not "campaign activities" are permitted to some extent. The key distinction is that non-campaign political activities cannot support or oppose a particular candidate. Permissible political activities under the IRC, so long as no candidate is endorsed or opposed, include educational activities, such as conducting public forums at which social, political, and international questions are considered; compiling voting records of Members of Congress, so long as the record is not widely distributed to the general public during an election campaign; publishing candidate responses to a questionnaire on a variety of subjects; issuing report cards that indicate whether legislators support or oppose the organization's views; issue advertising (this is usually considered lobbying); nonpartisan public opinion polling; non-partisan voter registration drives meeting the requirements of IRC § 4945(f); and lobbying for or against the appointment of nonelective officers, such as judges. While these non-campaign political activities are not prohibited, some of these activities may cause the organization to be subject to one or more taxes. Under IRC § 527(f), a tax can be imposed on the lesser of (a) the amount spent on "exempt function" (i.e., political) activities as defined in IRC § 527 or (b) its net investment income. Under IRC § 4955, excise taxes measured by a percentage of the amounts spent on political expenditures (as

defined in that Code section) can be imposed on the managers of the organization and on the organization itself. IRC §§ 4911 and 4912 impose excise taxes measured by the amounts the organization spends on “excess” or “disqualifying” lobbying expenditures, respectively.¹

In sum, there are political activities that churches and other § 501(c)(3) organizations can engage in without jeopardizing their exempt status, such as taking a stand on particular issues or legislation and providing education on particular issues, but participating in an election campaign by endorsing or opposing or contributing to particular candidates is not permissible under current tax law.

Campaign Finance Law.

The current Federal Election Campaign Act (FECA),² which governs the raising and spending of campaign funds, does not perfectly parallel the tax law. FECA generally prohibits corporations from directly making contributions and expenditures in connection with federal elections.³ Unincorporated organizations, however, are not prohibited by FECA from making such contributions and expenditures. The recently enacted “Bipartisan Campaign Reform Act of 2002,” (BCRA), P.L. 107-155, which amends FECA, further bans corporations, including tax-exempt corporations, from funding “electioneering communications,” which it defines as broadcast communications that “refer” to a federal office candidate within 60 days of a general election and 30 days of a primary; the constitutionality of this provision of the new law, however, is under review by the U.S. Supreme Court.⁴ The new Federal Election Commission (FEC) regulations promulgated under BCRA carved out an exception to this prohibition for IRC § 501(c)(3) nonprofit corporations⁵ on the theory that the Internal Revenue Code already prohibits such organizations from funding such advertisements.⁶

¹ For a more complete discussion of this topic, see Kindell, Judith E. and Reilly, John Francis, *Election Year Issues*, Exempt Organization Continuing Professional Educational Technical Instruction Program for Fiscal Year 2002 at [<http://www.irs.gov/pub/irs-tege/topici02.pdf>].

² 2 U.S.C. § 431 *et seq.*

³ 2 U.S.C. § 441b(a)(2002). Corporations may make expenditures to communicate with stockholders and executive or administrative personnel and their families, to engage in nonpartisan voter registration or get-out-the-vote campaigns aimed at stockholders and executive or administrative personnel and their families, and 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).

⁴ 2 U.S.C. § 441b (2002). The constitutionality of this section of the newly amended FECA is under review by the U.S. Supreme Court, which will hear oral argument in the case on September 8, 2003, *McConnell v. FEC* (No. 02-1672). For information about the case, *see*, the CRS Campaign Finance Electronic Briefing Book, [<http://www.congress.gov/brbk/html/ebcam50.html>] and the Supreme Court BCRA case website, [<http://www.supremecourtus.gov/bcra/bcra.html>].

⁵ 11 C.F.R. § 114.10 (2003).

⁶ However, it is not clear that the Internal Revenue Code or current IRS regulations would necessarily treat all broadcasts that meet the definition of “electioneering communications” as campaign intervention. It may be that the future IRS regulations will be informed by the FECA

In addition, in the 1986 decision, *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*,⁷ the Supreme Court held that the prohibition on corporations using their corporate treasury funds to make contributions and expenditures in connection with federal elections could not constitutionally be applied to certain non-profit corporations. Under *MCFL*, certain nonprofit, nonstock corporations are permitted to spend treasury funds to make contributions and expenditures in connection with federal elections if: (1) the corporation is formed for the purpose of promoting political ideas and does not engage in business activities; (2) the corporation has no shareholders or other affiliates with an economic incentive to remain associated with the corporation when they disagree with its political activities; and (3) the corporation is not established by a business corporation and does not accept contributions from business corporations.⁸

How Legislation Would Change Current Law

H.R. 2357 (107th Congress). H.R. 2357 would have amended IRC § 501(c)(3) to except churches and church auxiliaries from the absolute prohibition on participation or intervention in a political campaign and added language which would have measured churches' political campaign activities by the same "no substantial part" test that is used for lobbying activities of all 501(c)(3) organizations; i.e., "no substantial part" of churches' activities could be "participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." The bill would have applied to expenditures made after the date of enactment. Since the bill did not include a numerical test, each church or related organization would have been judged on a case-by-case basis as to whether or not its campaign activities were a substantial part of its activities as a whole.

H.R. 235 (108th Congress). H.R. 235 takes a different approach from H.R. 2357 (107th Congress). Instead of amending IRC § 501(c)(3), section 2 of the bill would add a new subsection, IRC § 501(p), under which churches, their integrated auxiliaries, and conventions or associations of churches would

not fail to be treated as organized and operated exclusively for a religious purpose, or to have participated in, or intervened in any political campaign on behalf of (or in opposition to) any candidate for public office, for purposes of subsection (c)(3), or section 170(c)(2) (relating to charitable contributions), because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious service or gatherings.

Section 3 of the bill provides that nothing in section 2 of the bill would permit any disbursements for electioneering communications, or political expenditures, prohibited in the Federal Election Campaign Act of 1971, as amended and section 4 of the bill provides that the amendments made by the act would become effective as of the date of enactment.

⁶ (...continued)

regarding what activities constitute campaign intervention, but there is no requirement that they do so.

⁷ 479 U.S. 238 (1986).

⁸ *Id.* at 264.

H.R. 4520 (108th Congress). The provision in H.R. 4520 was markedly different from the other two bills. The Committee on Ways and Means struck the provision, former section 692 (Safe Harbor for Churches), by unanimous consent on June 14, 2004. The provision would have added a new subsection, IRC § 501(q), under which churches, their integrated auxiliaries, and conventions or association of churches would not have been treated as participating in a political campaign solely because of certain statements made by their religious leaders. The church would not have lost its tax-exempt status under IRC § 501 or its eligibility to receive deductible contributions under IRC § 170, and would not have been subject to the existing excise tax in IRC § 4955 or the proposed excise tax in IRC § 4956 (discussed below). The statement would have needed to be clearly identified as have been made by the religious leader in his or her capacity as a private citizen and not on the behalf of or in representation of the church. The statement could not have been made in an official publication of the church, made at “an official function” of the church, or paid for by the church.

Also under the new subsection, churches and related organizations that unintentionally participated in a political campaign would not have lost their tax-exempt status or eligibility to receive deductible contributions unless the organization or its religious leaders had done so on more than three separate occasions during the calendar year. This rule would not have applied to any activity that was an intentional disregard by the church or its religious leaders of the prohibition on political campaign activity. Regardless of the number of unintentional violations, the church would have been subject to the existing excise tax in IRC § 4955 and the proposed excise tax in IRC § 4956 (discussed below).

H.R. 4520 would also have added a new section, IRC § 4956, that would have imposed an excise tax on churches and related organizations that unintentionally violated the prohibition on political campaign activity. The amount of tax owed would have depended on the number of times the church had unintentionally violated the prohibition during the calendar year. If the church had at least three violations, then the sanction would have equaled the highest corporate tax rate multiplied by the church’s gross income. If the church had two violations, then the sanction would have equaled that amount divided by two. If the church had one violation, then the sanction would have equaled the full amount divided by 52. The amount of tax owed would have been reduced by any amount imposed for the existing excise tax in IRC § 4955.

Comparison Between H.R. 2357 (107th Congress), H.R. 235 (108th Congress), and H.R. 4520 (108th Congress)

Unlike H.R. 235 (108th Congress), H.R. 2357 (107th Congress) would not have limited the type of political campaign activities that a church could engage in while still maintaining its tax-exempt status, but would have required that political activities not be a substantial part of the activities of a church. Although “no substantial part” is a flexible standard, that test would prevent a church from being organized to conduct political campaign activities.

H.R. 235 (108th Congress) is narrower than H.R. 2357 (107th Congress) in that it limits the type of activities permitted, but it is broader in the sense that there is no cap on the number of activities that could be permitted. Under H.R. 235 (108th Congress), the

permitted campaign-related activities would have to occur in the “content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious service or gatherings,” but any number of these kinds of activities could be conducted provided they were part of the presentation at a religious gathering. This language would preclude a church from making campaign contributions or paying for full-page endorsement advertisements such as that sponsored by the Church at Pierce Creek. However, this language would permit any activity that could be deemed part of a sermon or other presentation during a religious service. As such the bill would appear to permit activities such as express endorsement or opposition to a candidate for public office during a sermon; requests that contributions be made directly to the candidate’s committee or other political organizations; directions for individual contributions of services to political campaigns; and exhortations to vote for particular candidates. Under the bill, a church could probably reprint the sermon or minutes of the gathering and mail them to church members as corporations are permitted to communicate with stockholders under 2 U.S.C. § 441b(b)(2).⁹ Broadcasting sermons by incorporated churches containing endorsements would appear to be prohibited under the language of BCRA as an “electioneering communication,” but the FEC regulations have interpreted broadcasts by § 501(c)(3) nonprofit corporations as exempt from the definition of “electioneering communication.” It is unclear how this might impact the interpretation of H.R. 235 (108th Congress).

Unlike H.R. 2357 (107th Congress) and H.R. 235 (108th Congress), H.R. 4520 (108th Congress) would not have allowed churches to intentionally participate in political campaign activity. Instead, under H.R. 4520, a church could have made a limited number of unintentional violations of the prohibition against political campaign activity without losing its tax-exempt status. The types of activity giving rise to the violations would not have been restricted as in H.R. 235, but the violations would have needed to be unintentional and limited to three per calendar year. Whether a violation was unintentional would have depended on the facts and circumstances of each case. H.R. 4520 would also have codified existing law that religious leaders may participate in an unlimited amount of political campaign activity in their capacity as private citizens. Neither H.R. 2357 nor H.R. 235 address this issue.

⁹ Unincorporated churches are not subject to the FECA restrictions on corporations.