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NAVIGATING CONFLICTING RULES FOR POLITICAL SPEECH IN AN ELECTION YEAR*

(AKA Federal Election Law and Ethics Rules: What Charities Need to Know)

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**** It's always an election year***

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IRS Rules

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I.R.C. § 501(c)(3) Prohibition on Political Intervention

- The Johnson Amendment: a section 501(c)(3) organization 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 [elected] public office

- Express advocacy is not required; explicit and implicit bias for or against candidates in their capacity as candidates are prohibited

- Even where political intervention is absent, the IRS may find excessive private benefit to political parties*

**American Campaign Academy v. Comm'r*, 92 T.C. 1053 (1989)

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Vague Facts-and-Circumstances Test

- The IRS may consider any and all facts it finds probative on whether intervention has occurred
- A few things clearly cross the line:
  - Express advocacy communications
  - Contributions
    - To candidate campaigns, political parties, 527 political organizations*
    - Cash or in-kind (use of facilities, staff time, lists)
- But what about activities like:
  - Supporting/improving the functioning of our democracy?
  - Education on issues important to voters?

**But see* TAM 8516001 (Oct. 22, 1984)

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Issue Advocacy

Educating voters on issues could be political intervention in disguise! The IRS will consider the following factors:*

- Whether a communication identifies specific candidates
- Whether it expresses approval or disapproval for one or more candidates' positions and/or actions
- Whether it's delivered close to the election
- Whether it makes reference to voting or an election
- Whether the issue differentiates between candidates in an election
- Whether it is part of a series of communications on the issue
- Whether timing of the communication is related to a non-electoral event

*Rev. Rul. 2007-41, 2007-25 I.R.B. 1421

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“Nonpartisan”?

- IRS guidance on specific activities, mostly predating the Internet:
  - Issues advocacy (see prior slide)
  - Voter guides
  - Candidate debates
  - Voter registration
  - GOTV efforts
- Nonpartisan if you can match the guidance point by point
- Outside of guidance, facts and circumstances and analogies

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Title search: Navigating Conflicting Rules for Political Speech in an Election Year (AKA Federal Election Law and Ethics Rules: What Charities Need to Know)

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