

## Nonprofit Institutions Advisory: Direct Challenge to Prohibition against Intervention in Political Campaigns

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Several weeks before the 2008 Presidential election, 33 pastors from across the United States participated in the “Pulpit Initiative” sponsored by Alliance Defense Fund, Inc. (ADF), a tax-exempt civil-liberties advocacy organization based in Scottsdale, Arizona. The pastors, on behalf of their churches, intentionally violated the federal prohibition imposed on religious organizations—as well as charitable, educational, scientific and certain other organizations that are exempt from federal income tax by virtue of Section 501(c)(3) of the Federal Income Tax Code of 1986, as amended (the “Code”)—from “intervening” in political campaigns on behalf of a candidate for public office, by endorsing political candidates from their pulpits during their sermons.

The provision forbidding political campaign activity by Section 501(c)(3) organizations was enacted as part of the Revenue Act of 1954. Congress adopted the prohibition principally due to concern that funds from charitable organizations could be used to finance political opponents. The ultimate consequence of violating the prohibition or otherwise intervening in a political campaign on behalf of a particular candidate for public office is revocation of tax-exempt status. This prohibition was revised in 1987 to clarify that activities in opposition to a particular candidate are also covered by the prohibition.

The ADF is a socially conservative legal consortium which describes itself as “a legal alliance defending the right to hear and speak the Truth through strategy, training, funding, and litigation.” The ADF promoted its Pulpit Initiative for several months prior to the Sunday on which the ADF-enlisted clergy unambiguously endorsed political candidates during their sermons, thereby violating the federal prohibition imposed on all Section 501(c)(3) organizations.

The ADF acknowledged throughout its promotion of the Pulpit Initiative that it intended to throw down the gauntlet to the Internal Revenue Service (IRS) with the hope that the IRS would attempt to enforce the law, which would then enable ADF members to challenge the political campaign prohibition through litigation. In fact, the individual clergy members who participated in the Pulpit Initiative planned to forward transcripts of their sermons to the IRS. In its position paper describing the initiative, the ADF states that:

The purpose of the Pulpit Initiative is to restore the right of pastors to speak freely from the pulpit without fear of punishment by the government for doing what churches do: speak on any number of cultural and societal issues from a biblical perspective. The purpose of the ADF Pulpit Initiative is not—as some have intentionally tried to confuse the issue—about whether pastors should or should not “endorse” candidates. The issue with which ADF is concerned is over who regulates what may be said from the pulpit.

The Pulpit Initiative has been criticized for being an attempt to dissolve the barrier between church and state enshrined in the First Amendment to the U.S. Constitution. Americans United for Separation of Church and State, Inc. (“Americans United”), also a Section 501(c)(3) organization, openly opposed the ADF’s Pulpit Initiative throughout the ADF’s campaign to raise support for the initiative. The day after the endorsement occurred, Americans United filed complaints with the IRS about six pastors whose sermons were detailed in media reports. Given that the IRS has reviewed the activities of ADF members in the past and has declined to take action, it is not surprising that the IRS has, for the moment, declined to comment on either the Pulpit Initiative or the complaints; however, it has responded that it is monitoring the situation and will take action as appropriate.<sup>1</sup>

During the 2008 primary season, the IRS announced that it will continue to actively educate the public and tax-exempt community about the political-campaign prohibition and maintain a “meaningful enforcement presence” in this area. The IRS may have more latitude to litigate these issues under the incoming Obama Administration, relative to the Bush Administration. If the IRS decides to take this opportunity to bring enforcement actions against ADF churches, the ADF itself, and/or their respective counsel, the litigation that is likely to arise could prove instructive for all Section 501(c)(3) organizations. It is possible that the outcome of any such litigation could be decided solely on First Amendment grounds, thereby creating principles applicable only to churches and other tax-exempt religious organizations. Alternatively, it is possible that resolution of these issues could be decided on broader grounds, and the outcome would provide more guidance concerning the contours of the prohibition against intervention in political campaigns. We understand that the IRS plans to issue a report about its activities during this past election cycle by April 2009.

### Elimination of the Advance Ruling Process

On September 9, 2008, the IRS issued temporary income tax regulations, effective immediately, which eliminate the advance ruling process for a Section 501(c)(3) organization that seeks to be treated as a publicly supported charity. The advance ruling process was the process whereby a new Section 501(c)(3) organization would request a determination from the IRS that it was a public charity, instead of a private foundation. The final rule is published in the Federal Register.

Under the old regulations, an organization that wanted to be recognized by the IRS as a publicly supported charity instead of a private foundation had to go through a two-step process. First, the organization had to declare that it expected to be publicly supported on an ongoing basis. Then, after a period running for four or, under certain circumstances, five years from the date of its inception as an organization, it had to file Form 8734, “Support Schedule for Advance Ruling Period,” showing the IRS that it actually met one of the public-support tests. If the organization didn’t meet one of the tests, it was designated a tax-exempt private foundation and would be subject to stricter rules.

Under the new regulations, a new Section 501(c)(3) organization will be classified as a publicly supported charity, and not a private foundation, if it can show that it reasonably can be expected to be publicly supported when it applies for tax-exempt status. The organization will no longer be required to file Form 8734 after completing its first five tax years and will retain its public charity status for its first five years, regardless of whether the public support it received during that period would otherwise qualify it as a public charity under the public-support test. Instead, beginning with the organization’s sixth taxable year, it must establish that it meets the public-support test by showing that it is publicly supported on its Schedule A to Form 990, “Return of Organization Exempt From Income Tax.” The organization at that point will be required to conduct the public-support test based on a five-year computation period that consists of the current year and the four years immediately preceding the current year. The five-year computation period also reflects a change from the prior regulations, which required an organization to apply the public-support test to a four-year period, consisting of the four years prior to the tested year.

In addition to new organizations, the transition rules apply to organizations that have previously received advance rulings. Specifically, the new rules apply to organizations whose advance ruling periods have not yet expired, or that expired on or after June 9, 2008. In other words, if an organization applied for an advance ruling, but had not yet received one as of June 9, 2008, that organization will be considered to be a publicly supported charity, subject to its meeting the requirements of the new rules going forward.

In addition to eliminating the advance ruling process, the temporary regulations make additional revisions necessary to implement the redesigned Form 990. They revise the regulations under Sections 6033 and 6043 of the Code to allow for increased threshold amounts for reporting compensation, to require that compensation be reported on a calendar-year basis, and to modify the scope of organizations subject to information reporting requirements upon a substantial contraction, such as a liquidation, termination, dissolution, or sale, exchange, disposition, or other transfer of more than 25% of an organization’s assets. The temporary regulations also clarify that support must be reported using the organization’s overall method of accounting. All tax-exempt organizations required under Section 6033 of the Code to file annual information returns are affected by the temporary regulations.

The IRS has prepared a list of frequently asked questions and responses regarding the temporary regulations.

Endnotes

<sup>1</sup> See “Partisan Sunday Sermons Test Federal Tax Laws,” Suzanne Sataline et al., *The Wall Street Journal* (Sept. 29, 2008); and “Pastors’ Political Endorsements Draw Complaints,” Associated Press (Sept. 30, 2008).

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*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

**Anthony E. Hubbard**  
**(617) 348-1706**  
AEHubbard@mintz.com

**Peter M. Miller**  
**(617) 348-1726**  
PMMiller@mintz.com

**Travis L. Blais**  
**(617) 348-1684**  
TLLBlais@mintz.com

**Marianne Staniunas**  
**(617) 348-1844**  
MStaniunas@mintz.com

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