

## Is the IRS Back in Church?

With fall approaching, the next election cycle is just around the corner – just in time for new IRS developments affecting churches and other religious institutions. As with all section 501(c)(3) organizations, religious institutions are prohibited from engaging in “political campaign activities.” That is, they may not advocate for or against a particular candidate for office, or otherwise seek to influence an election. For many, such restriction seems like a constitutional violation of First Amendment free speech and religious liberty protections. In recent years, IRS officials have refrained from auditing religious institutions and thereby have avoided this issue. But recent court and IRS activity this summer begs the question: Until now?

### A. IRS Background

Some legal and historical background is in order. Due to constitutional safeguards for religious institutions, the law imposes heightened restrictions and procedures as to when and how the IRS may audit them. In particular, Section 7611 of the Internal Revenue Code requires “an appropriate high-level Treasury official” to “reasonably believe” that a religious institution is engaged in improper activities before the IRS may commence an audit. The regulations accompanying section 7611 designate such official as a “Regional Commissioner” – that is, the head of an IRS region. As a result of the IRS’s 1998 internal reorganization, however, IRS “regions” no longer exist, making this regulatory definition obsolete.

In 2009, a Minnesota church challenged an IRS audit, arguing that the IRS’s reworked definition of “high-level Treasury official” was legally deficient. Therefore, as the church claimed, its alleged political campaign activity could not be investigated. The federal court agreed, finding that the subject IRS official in that audit was only a “mid-level” employee. In doing so, the court recognized that Section 7611’s intent is to protect religious institutions from overly aggressive IRS examinations and other government intrusions into religious liberty. Since then, the IRS has neither conducted any new audits of religious institutions nor corrected the Section 7611 regulatory language.

### B. Fallout from Freedom From Religion Foundation

This summer, however, new information surfaced as a result of the Freedom from Religion Foundation’s settled lawsuit against the IRS. The lawsuit challenged the IRS’s perceived policy of selective non-enforcement of the section 501(c)(3) political campaign prohibition. In connection with the settlement, and apparently in response to such challenge, an IRS letter penned by Mary Epps (acting director of IRS’s Exempt Organizations Examinations) was issued to the U.S. Department of Justice and then

became publicly available. In the letter, Ms. Epps states that the IRS has actually processed several alleged church violations of the political campaign prohibition. Specifically, the IRS's Political Activities Referral Committee ("PARC") now has a list of 99 churches that it believes merit a "high priority examination" for such violations, dating from 2010 to 2013.

### **C. What Lies Ahead?**

Some believe that by Ms. Epps's letter, a clear signal has been sent: the IRS is ready to resume scrutiny of churches and other religious institutions. This would mean not only enforcement of political campaign intervention prohibitions, but also other areas of potential trouble for churches such as unrelated business income tax ("UBIT"), which may affect certain fundraising activities, as well as employment tax liability (e.g., clergy tax, independent contractor versus employee distinctions, excessive compensation issues).

Others are concerned that such stepped-up scrutiny also may lead to governmental abuse and other inappropriate treatment of religious institutions, in violation of their First Amendment protections. The IRS's recent conservative-targeting scandal, as well as the fact that current IRS regulations allow for viewpoint discrimination in politically related areas, are certainly dangerous portents in that regard. (See also "*Speak Up: Issue Advocacy in Increasingly Politicized Times.*") In the meantime, as has also occurred in recent years, religious institutions may attempt to provoke a constitutional showdown on the political campaign ban itself. For example, the "Pulpit Freedom Sunday" annual campaign, sponsored by the Alliance Defending Freedom, advocates religious freedom for church pastors to speak out on abortion, marriage, and other topics in the crosshairs of politics. The next Pulpit Freedom Sunday is right around the corner – on October 5, 2014.

### **D. What should responsible religious institutions do now?**

First, make sure that your organization's operations and procedures are fully compliant with tax-related requirements. This review should include a wide range of income-generating activities and clergy employment tax practices. Second, the board and executive staff should have a thorough understanding on what the organization and its representatives may and may not do with respect to politically related activities. Click [here](#) for further legal guidance. Third, keep up with evolving legal developments, as applicable requirements and standards can change. Fourth, remember that our country's religious institutions serve critical roles for our society's well-being and betterment and therefore are to be honored and respected.

For more information regarding compliance with laws and regulations applicable to religious institutions or nonprofits generally, contact one of our attorneys at 312.626.1600 or [info@wagenmakerlaw.com](mailto:info@wagenmakerlaw.com), or visit us on the web at [www.wagenmakerlaw.com](http://www.wagenmakerlaw.com).