

SAFE HARBOR: NONPOLITICAL SPEECH BY EXEMPT ORGANIZATIONS

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The IRS and the nonprofit community are in a difficult position as we enter another election season, knowing how to handle sermons in churches, blogs on websites, speeches at conventions, and other tax-exempt messages that may be regarded as crossing the line into political intervention. Most of us believe that boundary is somewhere beyond "express advocacy," but there is no consensus as to where that line is.

It seems inevitable that the IRS must attempt to articulate some more specific standard sooner or later, otherwise regulation of this speech will be left to whatever bad law emerges from hard cases, "void-for-vagueness" constitutional challenges, or worst of all, widespread and escalating disregard for the charitable prohibition.

A first step could be a safe harbor with two symmetrical pieces, derived in part from discussion in the IRS 2002 CPE Text: Commentary on public officials who are also candidates is OK so long as no mention of elections or voting is made, and commentary on issues and elections is OK so long as there is no mention of candidates or parties.

Here goes:

Nonprofit speech within the safe harbor would not constitute participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office, for purposes of sections 501(c)(3), 501(c)(4) and other subsections of 501(c), 527, and 4955. Speech falling outside of the safe harbor may or may not constitute intervention depending on the facts and circumstances, and the existence of other published IRS standards for particular types of speech, such as voter guides, legislative scorecards, voter registration and GOTV.

This would be a new standard, operating prospectively only, from the date of announcement. Since the IRS political intervention standard to this point has been only the vague "facts and circumstances" test, giving organizations no adequate notice as to how they may conform their speech to the requirements of the intervention standard, the IRS should abate all pending enforcement actions that turn upon the question of the content of the organization's speech, if it does not meet the definition of express advocacy (e.g. NAACP, All Saints Church, Heritage Foundation).

The standard would apply to all speech attributable to the organization, including but not limited to oral or written communications of its officers, directors, employees, agents—acting within the scope of their organizational capacities—as well as guest speakers and writers, official publications including websites, and advertising messages. Separate

standards would apply to an appearance, forum, or debate involving one or more candidates for public office or their representatives.

1. The communication must further the exempt purpose of the organization.
2. The communication must not violate any non-tax law enacted for the purpose of regulating elections, campaigns, or campaign financing.
3. The communication must not be targeted to locations where the outcome of a candidate election is considered uncertain, i.e., there must be no evidence that the organization selected the locations that would and would not receive the communication based on the perception that they were or were not swing states, districts, etc.
4. The communication EITHER
 - a. May refer to a public official serving the jurisdiction in which the primary audience is located, who may also be a candidate for re-election or to another office, and may praise or criticize him or her, so long as the communication and any related communication to the same audience do not expressly advocate the election or defeat of the candidate and make no mention of his or her candidacy, the election, voting, or any opposing candidate, slate, or political party; OR
 - b. May refer to one or more public policy issues, or elections and voting, or both, so long as the communication and any related communication to the same audience make no mention of any candidate, slate, or political party, or any specific public office to which candidates are running for election, and refrain from any suggestion that candidates should be favored or disfavored based on their positions on the public policy issues discussed or any other criterion.
5. The term "election" shall refer to any general, primary, or special election, and to any nominating convention or caucus.
6. No communication pertaining to a candidate or to an election, or any related communication, to be within the safe harbor, may occur within 60 days prior to the election.
7. There is no evidence, expressed in the content of any fundraising solicitation or other statements made or agreed to by the organization, the speaker, or the author of the communication, that the communication was made for the purpose of influencing the outcome of any election of candidates for public office.

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