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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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