

House Tax Bill Opens Door to Expanded Political Activity by Charities

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Election and Political Law

There is one very important political law provision to watch as the tax bill moves to a final vote in the Senate, and potentially a conference committee reconciles the House and Senate versions. This amendment will remove the ban on partisan political activities by charitable entities, churches, educational institutions, and all other organizations exempt from tax under Section 501(c)(3) of the tax code. If adopted, this change could have a significant effect on the flow of money in future election campaigns. Here is a short description of the current state of the law, and why the language in the House bill could have a sweeping impact.

Currently, the IRS can revoke the tax-exempt status of a 501(c)(3) organization, such as a church, school, or foundation, if it participates or otherwise intervenes in a political campaign, which includes statements made by representatives of an organization on behalf of, or in opposition to, a political candidate. This bright line rule has been in place since 1954. While President Trump issued an [Executive Order](#) in May instructing the Treasury Department “to the greatest extent practicable” not to take adverse action against religious organizations for speech on “political issues,” that discretion must be exercised consistent with existing law.

The original House tax bill contained a modest exception to current law, ensuring that an entity would not lose its status as “exclusively operated for religious purposes” if the content of a “homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings” contained political content, so long as it occurred in the “ordinary course” of the organization’s regular activities, and resulted in no more than de minimis incremental expenses.

House Ways and Means Committee Chairman Kevin Brady proposed an amendment, which was adopted into the final House bill, that dramatically expanded that exception to include *all* organizations exempt under Section 501(c)(3), not just religious organizations, in any of their normal operations, again, so long as they did not incur more than de minimis incremental expenses. There was no similar language in the Senate Finance Committee’s bill released last week.

There are several reasons why the House language, if included in the final bill, would likely result in widespread involvement of 501(c)(3) organizations in political campaigns.

First, having the limits set at “not more than de minimis incremental expenses” will presumably allow these organizations to shift certain existing fixed costs, such as in-house staff, to partisan political activity, for this will not result in any “incremental expenses.” In addition, much internet advocacy involves only de minimis incremental expenses. Finally, ambiguities in interpreting what “de minimis” and “incremental” mean will presumably come within the Presidential Executive Order’s directive that “to the greatest extent practicable” the provisions shall be interpreted to favor more political speech.

Second, for donors interested in political spending, politically active 501(c)(3) organizations are vastly preferable to other types of nonprofits, for they contain a double tax advantage: not only is the entity exempt from tax on the income it receives, the donors also may deduct their contributions from their income taxes.

Third, 501(c)(3) organizations, like social welfare organizations operating under Section 501(c)(4), are not required to disclose the identity of their donors. This makes charities unlike more transparent political entities, such as candidate campaigns, party committees, PACs and Super PACs, which must disclose their donors.

If this provision makes it into law, we should expect to see the rapid growth of 501(c)(3) “educational” organizations with significant political operations, as well as existing churches and charities becoming more active politically. While the House bill provides for this provision to sunset in 2023, between now and then, if enacted, we would expect significant political activity to move into the charitable space.

Conclusion

Covington attorneys are closely tracking tax legislation as it moves through Congress. If you think you or your organization may be affected by the proposal discussed herein or any other part of tax reform, please let us know.

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