

Executive order does little to change nonprofits' lobbying situation

President Trump has vowed to “totally destroy” the restrictions on political activity applying to churches and charitable organizations.

Earlier this month, he signed an executive order touted as a first step toward fulfilling this promise.

The executive order actually does very little, but several bills are pending that would radically change the restrictions on politicking by charities. This article reviews current law about lobbying and political activity by charitable organizations in the context of these new developments.

The tax law divides the world of governmental affairs into two areas: lobbying and political activities.

Generally speaking, lobbying is an attempt to influence legislation, whereas political activity is an attempt to influence elections for public office.

Religious, charitable and educational organizations exempt from tax under section 501(c)(3) are completely barred from political activity under the so-called Johnson Amendment—the law that President Trump has vowed to “get rid of and totally destroy.” Lobbying, however, is permitted within certain bounds.

Let's start with lobbying. Attempting to influence legislation is permitted for charitable organizations as long as it is not a substantial part of their activities. Because the meaning of “substantial” is unclear, Congress has allowed organizations to elect into a safe harbor under which they can spend a certain portion of their budget on lobbying. For example, of the first \$500,000 of annual expenditures of a charitable organization, up to 20 percent can be spent on lobbying.



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Josh Gewolb

Foundations are effectively prohibited from lobbying. However, there are many advocacy activities that foundations can undertake or which don't count toward the lobbying limit for other charities. This is because lobbying is a term of art defined under the tax law that excludes certain advocacy activities.

Lobbying is defined as attempting to influence specific legislation. However, it does not include general efforts to influence policy where specific legislation is not involved. A charity is on solid ground, for example, if it speaks generally about the need for clean air and water. However, if the charity expressed support for specific environmental protection legislation, the lobbying rules are implicated.

Furthermore, charities are permitted to undertake an unlimited amount of advocacy before executive agencies. While the regulatory process can be as important as the legislative process in its practical impact on certain issues, under the law, attempts to influence administrative agencies don't count as lobbying.

Additionally, organizations are allowed to engage in an unlimited amount of “nonpartisan analysis, study or research.” This amorphous term refers to any activities that contain an independent and objective ex-

position of the issues, rather than unsupported opinion.

While charitable, educational and religious organizations are allowed to engage in some amount of lobbying as described above, under the Johnson amendment they are prohibited entirely from political activity. Political activity is generally defined as any attempt to participate in a campaign for public office. Unlike for lobbying, there are no easy exceptions.

Indeed, the IRS has interpreted the Johnson amendment expansively, stating that even if an organization doesn't expressly tell an audience to vote for a particular candidate, it can violate the Johnson amendment if its messages implicitly encourage the audience to do so. IRS guidance goes so far as to state that taking a position on issues that divide candidates for public office can constitute prohibited political activity.

While the Johnson amendment applies to all charitable, religious and educational organizations, elements of the faith community have been particularly vociferous in opposing it. Specifically, religious organizations have argued that the amendment restricts freedom of religion by unconstitutionally limiting the ability of ministers to preach from the pulpit on issues of the day.

As part of their opposition to the Johnson amendment, Christian groups have urged churches to deliberately violate it. On Pulpit Freedom Sunday, held annually, thousands of pastors deliberately violate the rule, with some sending transcripts or tapes of their verboten sermons to the IRS itself. So far, the IRS has not

responded to these provocations. Indeed, the IRS's compliance report for last year indicated that while there are almost 1.6 million tax-exempt organizations in the country, the IRS only conducted 87 audits that focused primarily on political, legislative or governance issues.

During the campaign, President Trump expressed his strong opposition to the Johnson amendment, and on May 4 he issued an executive order directing the IRS, to the extent permitted by law, not to enforce it against religious organizations. Given the extraordinarily low level of existing enforcement, as well as the president's caveat that the IRS still has to follow the law, it is hard to see much room for the IRS to change its practices based on this order.

A bill has been introduced in the House to repeal the Johnson amendment. However if the rule were completely repealed, charities could become a back door to making tax-deductible contributions to political campaigns. A separate pending bill would allow political statements only when made in the ordinary course of the organization's activities, and resulting in de minimis additional expenses. This would allow political preaching from the pulpit, but stop charities from being used as a conduit for political fundraising.

While the law may change in the future, today, even with President Trump's order, charitable organizations should steer clear of politicking and exercise caution when lobbying—or risk “totally destroying” their tax exempt status.

Josh Gewolb is a tax partner at Harter Secrest & Emery LLP.