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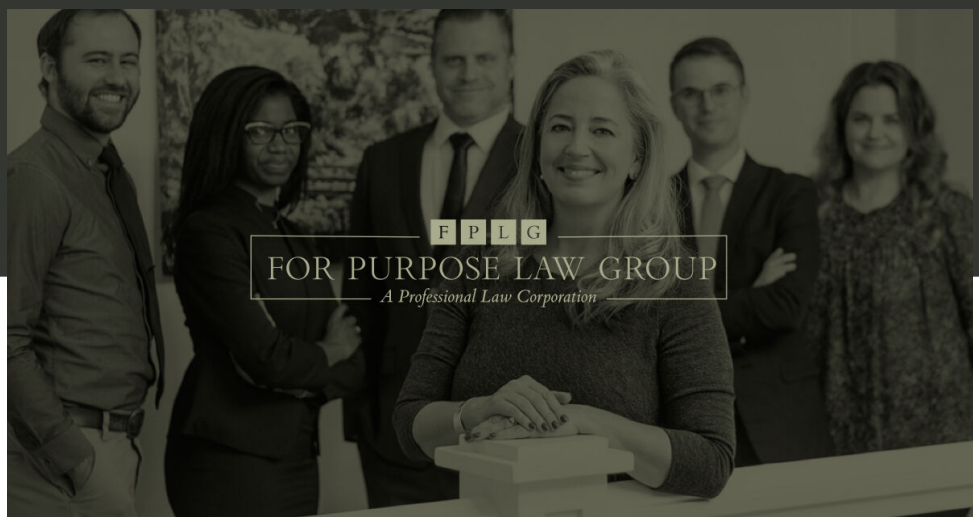
Johnson Amendment Stays … For Now

01.17.18 | Linda J. Rosenthal, JD



In mid-December 2017, when the GOP Congressional leadership was scrambling to get a tax-overhaul bill in final form – one that would meld the quite different House and Senate versions – an issue that could have gone either way, in or out, was the thorny matter of 501(c)(3)s dabbling or plunging headlong into the political arena.

History of Johnson Amendment

Under the 1954 Johnson Amendment to an earlier comprehensive rewrite of the federal tax code, charitable, tax-exempt organizations were prohibited entirely from participating in political campaign activity. Although for years, many people have thought that this politics ban was a carefully considered policy decision, it was not. In a 2016 post, *The 501(c)(3) Politics Ban: Its Odd History*, we described what actually happened at the eleventh hour of tax negotiations in a smoke-filled back room at the U.S. Capitol.

From time to time, there's discussion of changing it or getting rid of it entirely. That push has heated up recently, so it's not surprising that the topic popped up in the midst of the most comprehensive rewriting of the federal tax code in over 30 years.

Tax Overhaul Proceedings

The original version of H.R.1, the Tax Cuts and Job Acts of 2017, passed by the House of Representatives included a partial tweak of the Johnson Amendment. It would have allowed any and all 501(c)(3) organizations – not just churches or religious groups – to engage in partisan campaign activities in support of or opposition to a candidate, but only under two conditions. First, the electioneering activities must take place "in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose," and if the group incurs only "*de minimus*" incremental expenses.

The Senate's original legislation did not mention the Johnson Act at all. That may have been a policy consensus or – more likely – a realization by leadership that such a proposal would violate the 51-vote "Byrd Rule" that limits "budget reconciliation" proceeds to matters that are "germane."

When H.R.1 proceeded to conference reconciliation, the Senate side changed its position and was willing to accept the House version that proposed significant loosening of the Johnson Amendment in certain conditions. The Senate Parliamentarian, who has the final word on what meets the 51-vote, filibuster-free, non-regular-order procedure, ruled that the Johnson Amendment changes had to be tossed.

One lawmaker, Senator James Lankford (R-OK), disagreed and took his case directly to the Parliamentarian. "Lankford went to the mat, pushing to the very end." According to this strong proponent of repealing the Johnson Act entirely, "[t]he federal government and IRS should never have the ability, through our tax code, to limit free speech…." (In February 2017, Sen. Lankford had introduced legislation (S.264) that would have done just that.) Reportedly, Lankford may pursue a stand-alone bill again this session; he has an ally in the House in Rep. Walter Jones (R-N.C.) who had introduced a full-repeal bill there in early 2017.

This is a hot-button issue for many reasons including the possibility of significant diversion of charitable dollars. During the late 2017 tax-overhaul proceedings, the nonpartisan Joint Committee on Taxation, estimated that "some $1.2 billion in donations to campaign and candidate committees each year could shift to nonprofits. Donations to political committees are not tax-deductible but giving to charities is, which would mean less revenue for the Treasury."

Johnson: What's Next?

As a stand-alone legislative proposal, there are no "germaneness" issues like those that cropped up under the "Byrd Rule" in December. So, except for the tricky matters of deciding which version of full or partial repeal is desired, along with the big question of whether the repeal should apply to all 501(c)(3)s and not just "churches," and what in the world is the meaning of conditions like "in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose," or "only '*de minimus*' incremental expenses," change proponents may be good to go at any time now.

But we're forgetting one thing: A change of sorts was already made last year on May 4, by the strange and inscrutable "Executive Order Promoting Free Speech and Religious Liberty" from the White House. There are several sections; this link is to the full text which includes a Section 2 relating to 501(c)(3)s and the Johnson Amendment titled "Respecting Religious and Political Speech." Since it's been archived, and hard to find, here it is verbatim:

> *Respecting Religious and Political Speech. All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech. In particular, the Secretary of the Treasury shall ensure, to the extent permitted by law, that the Department of the Treasury does not take any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective, where speech of similar character has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office by the Department of the Treasury. As used in this section, the term "adverse action" means the imposition of any tax or tax penalty; the delay or denial of tax-exempt status; the disallowance of tax deductions for contributions made to entities exempted from taxation under section 501(c)(3) of title 26, United States Code; or any other action that makes unavailable or denies any tax deduction, exemption, credit, or benefit.*

In last year's post about this EO, we included commentary and reaction from various philanthropy and legal experts. The general reaction of these folks on Twitter was "meh"; it's a "nothing burger." Even the ACLU – which was ready to pounce on news this executive order was about to be issued – stood down.

In any event, there was some formal, written commentary; we listed about five of those scholarly articles. Here's one: What Happened to the Johnson Amendment? The Effect of Today's Executive Order on Nonprofit Organizations ["*The Executive Order … does not (and cannot) overturn the Johnson Amendment, … but it appears to direct the Department of Treasury to treat religious charities and religious issues differently when considering enforcement of the Johnson Amendment* "]

Conclusion

So here we are – in January 2018 – entirely uncertain about the status, application, or future of the Johnson Amendment.

Our conclusion from last year's post still applies, though: "Undoubtedly, this May 4th Executive Order

is not the last word on 501(c)(3)s and political campaign activity. It may be modified or Congress may decide to take additional action or – well – who knows these days?"

*[**Update 1/17/18**]: In an excellent law review article posted online yesterday, Prof. Ellen P. Aprill of Loyola Law School, L.A., examines the history of the Johnson Amendment up to the present, and includes predictions and analyses of what may – or should – happen in the next weeks or months. See "*Amending the Johnson Amendment in the Age of Cheap Speech*," (Jan. 16, 2018) 2018 U.Ill.L.Rev. Online 1.*