

## NONPROFIT GOVERNANCE & TAX-EXEMPT ORGANIZATIONS LAW ALERT

### Trump issues “Presidential Executive Order Promoting Free Speech and Religious Liberty”

On May 4, 2017, President Trump signed an [Executive Order](#) entitled “Presidential Executive Order Promoting Free Speech and Religious Liberty” that directs the Executive Branch to limit its enforcement of the “Johnson Amendment” against religious organizations. Codified in Section 501(c)(3) of the Internal Revenue Code – the same section that exempts charitable, educational and religious organizations from income tax – the Johnson Amendment prohibits all tax-exempt entities from participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office as a condition of their exemption.

The Executive Order directs the Executive Branch to limit enforcement of the Johnson Amendment against individuals, houses of worship and other religious organizations. Other organizations qualifying under 501(c)(3), which include all other charitable and educational organizations, must continue to avoid all political activity.

Importantly, the Executive Order also directs the Secretaries of Treasury, Labor, and Health and Human Services to write regulations to address objections to the requirement in the Affordable Care Act that employers fund contraceptive health services for their employees. These regulations would codify the U.S. Supreme Court ruling in *Burwell v. Hobby Lobby Stores, Inc.*, striking down a provision in the Affordable Care Act requiring employers to provide their female employees with no-cost access to contraception on the ground that it violated the Religious Freedom Restoration Act.<sup>1</sup>

#### The Johnson Amendment

There has been little enforcement of the Johnson Amendment, due in part to both regulatory ambiguity and administrative will. Technically, before the Internal Revenue Service (“IRS”) can initiate an inquiry that may lead to revocation of a church’s section 501(c)(3) status, applicable rules require an “appropriate high-level Treasury official” to first reasonably believe that the church may not be exempt from taxation under Section 501(c)(3).<sup>2</sup> In 2000, a federal district

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<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*,

<sup>2</sup> Internal Revenue Code § 7611; 26 CFR §§53.4958-8, 301.7611.1.

court held that the IRS's Director of Exempt Organizations Examination was insufficiently high ranking to qualify under this requirement.<sup>3</sup> The Obama administration never designated a higher-ranking official to perform that duty, and all tax inquiries for religious organizations have been suspended since 2009. [Proposed regulations](#) that would designate the Director, Exempt Organizations, as the appropriate high-level Treasury official were issued in 2009, but have not been finalized.

Because the Johnson Amendment is famously [unenforced](#), the issuance of the Executive Order seems unlikely to change any real taxpayer behavior. It is possible, however, that Trump is signaling that the IRS will begin materially enforcing the Johnson Amendment, at least against secular organizations, a stark departure from the conduct of the last administration.

### **The Executive Order**

The Executive Order provides that all executive departments and agencies must “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.” Specifically, the Department of Treasury should not take any “adverse action” against any individual, house of worship or other religious organization because the individual or organization speaks on moral or political issues from a religious perspective if similar speech has not generally been treated by the Department of Treasury as participating or intervening in a political campaign on behalf or against a politician. “Adverse action” includes imposition of tax or penalties, delay, or denial of tax-exempt status, and disallowance of tax deductions for contributions made to organizations that are exempt under Section 501(c)(3).

Soon after President Trump signed the Executive Order, the [Freedom from Religion Foundation, Inc.](#), a nonprofit focused on educating the public about the constitutional principle of separation of church and state, filed a lawsuit in the U.S. District Court for the Western District of Wisconsin seeking an order prohibiting the IRS from implementing the Executive Order and directing President Trump and the Commissioner of the IRS to enforce the Johnson Amendment equally as to all nonprofit organizations, whether religious or not. In its [complaint](#), the nonprofit argues that the Executive Order “requires the IRS to selectively and preferentially discontinue enforcement of the electioneering restrictions of the tax code against churches and religious organizations, while applying a more vigorous enforcement standard to secular nonprofits.”

Because only religious perspectives are exempted and all other secular, tax-exempt organizations remain subject to the prohibition, the Executive Order may indicate that the Trump administration intends to enforce secular violations of the Johnson Amendment in the future.

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<sup>3</sup> United States v. Living Word Christian Center, Civil No. 08-MC 37 ADM/JJK, 2009 WL 250049, at \*4 (D. Minn. 2009).

## Conclusion

The Executive Order instructs the Executive Branch to exercise its discretion and not enforce the Johnson Amendment, but it does not reflect a change in the law; the prohibition against political activity remains a condition of tax exemption. The open question is whether the Trump administration is providing merely a superficial win to its supporters, or is it suggesting that future enforcement of the Johnson Amendment will occur, but only against secular nonprofits?

Please visit our [Nonprofit Governance and Tax-Exempt Organizations Practice](#) webpage to learn more about the legal services we can provide this area. Contact one of our attorneys identified below if you would like more information on this issue.

Elena Salerno Flash	607.391.2862	<a href="mailto:eflash@hancocklaw.com">eflash@hancocklaw.com</a>
Marion Hancock Fish	315.565.4521	<a href="mailto:mfish@hancocklaw.com">mfish@hancocklaw.com</a>
Carrie J. Pollak	607.391.2860	<a href="mailto:cpollak@hancocklaw.com">cpollak@hancocklaw.com</a>
Richard E. Scrimale	315.565.4520	<a href="mailto:rscrimale@hancocklaw.com">rscrimale@hancocklaw.com</a>
Doreen A. Simmons	315.565.4552	<a href="mailto:dsimmons@hancocklaw.com">dsimmons@hancocklaw.com</a>
Robert C. Whitaker, Jr.	315.565.4557	<a href="mailto:rwhitaker@hancocklaw.com">rwhitaker@hancocklaw.com</a>
Warren D. Wolfson	315.425.7960	<a href="mailto:wwolfson@hancocklaw.com">wwolfson@hancocklaw.com</a>
Briana K. Wright	315.565.4562	<a href="mailto:bwright@hancocklaw.com">bwright@hancocklaw.com</a>

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