

Lobbying: Important Legal Considerations for Individuals and 501(c)(3) Organizations

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LOBBYING AS A 501(C)(3) ORGANIZATION

Contrary to what many nonprofits believe, 501(c)(3) organizations are legally allowed to lobby in support of their organization's charitable mission. The Internal Revenue Service (IRS) defines lobbying as activities to influence legislation. Electoral activities that support specific candidates or political parties are forbidden, and nonprofits can never endorse or assist any candidate for public office. If 501(c)(3) groups do lobby in support of their charitable mission, the amount of lobbying an organization can do depends on how the organization chooses to measure its lobbying activity. Two options determine lobbying limits for 501(c)(3) groups: the insubstantial part test and the 501(h) expenditure test.

Insubstantial Part Test

The insubstantial part test automatically applies unless the organization elects to come under the 501(h) expenditure test. The default insubstantial part test requires that a 501(c)(3)'s lobbying activity be an "insubstantial" part of its overall activities. The insubstantial part test has two elements. Unfortunately, the IRS and courts have been reluctant to define the line that divides substantial from insubstantial. A federal court case from 1952 establishes that if up to 5% of an organization's total activities are lobbying, then this does not constitute a "substantial part" of the organization's activities. The insubstantial part test is an activity-based test that tracks both the organization's spending, as well as activity that does not cost the organization anything. For example, when unpaid volunteers lobby on behalf of the organization, these activities would be counted under the insubstantial part test. No clear definitions exist to describe lobbying under

the insubstantial part test.

501(h) Expenditure Test

An alternative, the 501(h) expenditure test, provides much clearer guidance on how much lobbying a 501(c)(3) can do and what activities constitute lobbying. The 501(h) expenditure test was enacted in 1976 and implementing regulations were adopted in 1990. This choice offers a more precise way to measure an organization's lobbying limit because measurements are based on the organization's annual expenditures. The organization is only required to count lobbying activity that actually costs the organization money (i.e., expenditures); therefore, activities that do not incur an expense do not count as lobbying. A 501(c)(3) can elect to use these clearer rules by filing a simple, one-time form: IRS Form 5768 (available at www.irs.gov).

To determine its lobbying limit under the 501(h) expenditure test, an organization must first calculate its overall lobbying limit. This figure is based on an organization's "exempt purpose expenditures;" generally, this is the amount of money an organization spends per year. Once an organization has determined its exempt purpose expenditures, the following formula is applied to determine the organization's overall lobbying limit. Organizations are allowed to spend 20% on lobbying with overall annual expenditures of \$500,000. The allowable amount lowers to 15% for overall expenditures between \$500,000 and \$1 million, and further reduces to 10% for organizations with expenditures between \$1 million and \$1.5 million. A lowest 5% threshold applies to organizations with expenditures between \$1.5 and \$17 million.

An organization's overall yearly lobbying limit is capped at \$1 million. This means that if an organization chooses to measure its lobbying under the 501(h) expenditure test, it also agrees

not to spend more than \$1 million on lobbying activity each year.

Two types of lobbying under the 501(h) expenditure test are possible: direct lobbying and grassroots lobbying. Limitations dictate how much money can be used for each. An organization can use its entire lobbying limit on direct lobbying, but it can only use one-fourth of the overall limit to engage in grassroots lobbying.

Direct lobbying is communicating with a legislator or legislative staff member (federal, state, or local) about a position on specific legislation. Remember that legislators also include the President or governor when you are asking them to sign a bill into law or veto a bill, as well as Administration officials who have the ability to influence legislation.

Grassroots lobbying is communicating with the general public in a way that refers to specific legislation, takes a position on the legislation, and calls people to take action. A call to action contains one to four different ways the organization asks the public to respond to its message: (1) asking the public to contact their legislators; (2) providing the contact information, for example the phone number, for a legislator; (3) providing a mechanism for contacting legislators such as a tear-off postcard or an email link that can be used to send a message directly to legislators; or (4) listing those voting undecided or opposed to specific legislation. Identifying legislators as sponsors of legislation is not considered a call to action.

The regulations clarify how the following communications should be classified:

- **Ballot Measures:** communications with the general public that refer to and state a position on ballot measures (for example, referenda, ballot initiatives, bond measures, and constitutional amendments), count as direct, not grassroots lobbying, because the public are presumed to be acting as legislators when voting on ballot measures.
- **Organizational Members:** the 501(c)(3)'s members are treated as a part of the organization, so urging them to contact public

officials about legislation is considered direct, not grassroots, lobbying.

- **Mass Media:** any print, radio, or television ad about legislation widely known to the public must be counted as grassroots lobbying if the communication is paid for by the nonprofit and meets other, rather nuanced provisions. These provisions include: referring to and including the organization's position on the legislation; asking the public to contact legislators about the legislation; and appearing on the media source within two weeks of a vote by either legislative chamber, not including subcommittee votes.

Lobbying Exceptions

Specific exceptions for activities that otherwise might appear to be lobbying under the 501(h) expenditure test are listed below. It is not lobbying to:

- Examine and discuss broad social, economic, and similar problems. For example, materials and statements that do not refer to specific legislation are not lobbying even if they are used to communicate with a legislator. Additionally, materials and statements communicating with the general public and expressing a view on specific legislation but that do not have a call to action are also not considered lobbying.
- Prepare and distribute a substantive report that fully discusses the positives and negatives of a legislative proposal, even if the analysis comes to a conclusion about the merits of that proposal. The report cannot ask readers to contact their legislators or provide a mechanism to do so, and it must be widely distributed to those who would both agree and disagree with the position. This non-partisan distribution can be achieved through a posting on an organization's website or a mailing to all members of the legislative body considering the proposal.
- Respond to a request for testimony or assistance at the request of the head of a government body such as a legislative committee chair.

- Litigate and attempt to influence administrative (regulatory) decisions or the enforcement of existing laws and executive orders.
- Support or oppose legislation if that legislation impacts its tax-exempt status or existence. This lobbying exception is narrow and should be used with caution after consultation with an attorney.

RECORD KEEPING

Whether measuring lobbying under either the insubstantial part test or the 501(h) expenditure test, a 501(c)(3) organization is required to reasonably track its lobbying in a way sufficient to show that it has not exceeded its lobbying limits. Three costs that 501(h)-electing organizations must count toward their lobbying limits are:

- Staff Time: for example, paid staff time spent meeting legislators, preparing testimony, or encouraging others to testify.
- Direct Costs: for example, printing, copying, or mailing expenses to get the organization's message to legislators.
- Overhead: for example, the pro-rated share of rented space used in support of lobbying (a good way to handle this is to pro-rate the cost based on the percentage of staff time spent lobbying).

Although the 501(h) election is less ambiguous than the insubstantial part test, it is important to carefully consider which option is best for your organization.

LOBBYING AS AN INDIVIDUAL

The undeniable benefit of lobbying in an official capacity on behalf of an organization or coalition is that the broad reach of the group's membership, clients, and staff deepens the impact of your message. By contrast, a benefit of lobbying as an individual is that it can free you to discuss issues you care about in a more personal manner without concern for any potential limitations placed by a board of directors or organizational policy. Remember that even when you do not speak on behalf of your organization

or employer, it is always appropriate to mention what affiliations or work have informed your individual perspective.

Much like organizational lobbying, the key to lobbying as an individual is to ensure that your voice is heard and that congressional and Administration officials are responding to your particular concerns. In-person meetings, phone calls, and emails can all be effective and influential strategies.

FOR MORE INFORMATION

Bolder Advocacy, an Alliance for Justice (AFJ) campaign: Bolder Advocacy publishes a detailed, plain-language book on the 501(c)(3) lobbying rules called *Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities*. Another Bolder Advocacy publication, *The Rules of The Game: A Guide to Election-Related Activities for 501(c)(3) Organizations (Second Edition)*, reviews federal tax and election laws which govern nonprofit organizations with regard to election work and explains the right and wrong ways to organize specific voter education activities. Bolder Advocacy also publishes guides on related topics, such as influencing public policy through social media, praising or criticizing incumbent elected officials who are also candidates, and rules on coordinating with 501(c)(4) organizations. Bolder Advocacy maintains a free technical assistance hotline and offers workshops or webinars for nonprofit organizations.

Bolder Advocacy, 866-NP-LOBBY (866-675-6229), www.bolderadvocacy.org.