501(c)(3)
LOBBYING & ELECTORAL POLITICS GUIDELINES

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The following information is intended for general guidance and is not intended as legal advice or to replace legal counsel.

THE RULES OF 501(C)(3) LOBBYING:

WHAT IS LOBBYING?

It is a common misconception that there is no clear definition of lobbying, and the kinds of activities it does and does not include. Lobbying activity can take one of two forms: direct lobbying and grassroots lobbying. For legal purposes, when recording lobbying activity, a 501(c)(3) must specify which type of lobbying was practiced.

Direct lobbying consists of advocating for a specific piece of legislation. Legislation includes acts, bills, proposed legislation, resolutions, or similar items (such as legislative confirmation of appointive office) introduced by Congress, any state legislature or local council. Legislation also includes referenda, ballot initiatives, constitutional amendment, or similar procedure. Any time you refer to a specific piece of legislation and urge members of Congress, a state legislature, or a local council to support or oppose it, this is direct lobbying. Furthermore, anytime you urge your members to do the same, this is direct lobbying.

Grassroots lobbying consists of asking the general public to contact lawmakers and state your organization's position on a specific piece of legislation. You are not, however, conducting grassroots lobbying if you aren't specifically asking the public to take action. As Charity Lobbying in the Public Interest (CLPI) explains: "you can state your opinion on legislation to the general public as strongly as you want and it is not lobbying as long as you don't issue a call to action to the general public to contact legislators."[1]

One important distinction between grassroots and direct lobbying should be made with respect to a 501(c)(3)'s own members. As CLPI further explains: "Groups sometimes confuse urging their *members* to lobby, with urging the *grassroots* to lobby. They mistakenly think that contacting their members, who may number hundreds of thousands, to urge them in turn to contact members of the legislature, constitutes grassroots lobbying, simply because those members reside at the grassroots. A group contacting its members on behalf of legislation is conducting direct lobbying. It is only when an organization reaches beyond its members to get action from the general public, that grassroots lobbying occurs" (CLPI, Understanding the Differences between Direct Lobbying and Grassroots Lobbying). So if, for example, your organization sent alerts to your formal membership urging them to contact Congress to vote against the Healthy Forest Initiative last year, this would be direct, not grassroots lobbying and would be recorded as a direct lobbying expenditure. If the same appeal were made to the public directly or via the media, this would be considered grassroots lobbying and would be recorded accordingly.

Resources:

(1) Charity Lobbying in the Public Interest: Understanding the Differences between Direct Lobbying and Grassroots Lobbying

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WHAT ISN'T LOBBYING?

Educating and advocating on behalf of concepts, positions, or policies is not lobbying. It is not until these same concepts and policies are articulated in a piece of legislation, that is officially introduced, that such advocacy is considered lobbying. For example, *before* the Administration's Healthy Forests Initiative was introduced as a specific piece of legislation in the House (H.R. 1904), educating members of Congress about prioritizing fuels reduction work around communities, or discouraging the logging of large, old growth trees was not lobbying. Additionally, asking a member of Congress to oppose an egregious timber sale is not

considered lobbying since this is not advocating for a piece of legislation. There are many activities related to legislation that do not count toward lobbying expenditure limits. The following excerpt summarizes important categories of legislative-related activities that are not considered lobbying, such as:

- Contacts with executive branch employees or legislators in support of or opposition to proposed regulations.
- Response to written requests from a legislative body (not an individual legislator) for technical advice on pending legislation, even if the organization takes a position on the legislation (i.e. a request to provide testimony at a hearing).
- Lobbying by volunteers of a 501(c)(3) organization only to the extent that the organization incurs expenses associated with the volunteers' lobbying. For example, volunteers working for a charity could organize a huge rally of volunteers at the state capitol to lobby on an issue and only the expenses related to the rally paid by the charity would count as a lobbying expenditure.
- Communications to your membership base on legislation – even if it takes a position on the legislation –so long as you don't directly encourage your members or others to lobby.
- So-called self-defense activity – that is, lobbying legislators (but not the general public) on matters that may affect the organization's own existence, powers, tax-exempt status, and similar matters would not be lobbying.
- Making available the results of 'nonpartisan analysis, study or research on a legislative issue that presents a sufficiently full and fair exposition of the pertinent facts to enable the audience to form an independent opinion. The regulations make clear that such research and analysis need not be "neutral" or "objective" to fall within this "nonpartisan" exclusion. The exclusion is available to research and analysis that take direct positions on the merits of legislation, as long as the organization presents facts fully and fairly, makes the material generally available, and does not include a direct call to the reader to contact legislators.
- A charity's discussion of broad social, economic and similar policy issues whose resolution would require legislation – even if specific legislation on the matter is pending –so long as the discussion does not address the merits of specific legislation.

SOURCE: Charity Lobbying in the Public Interest. "Important Exclusions from Lobbying Under the 1976 Law." http://www.clpi.org/not_lobbying.html .

It should be noted that the above are exclusions from lobbying activity under the 1976 Lobbying Expenditure rules, which a 501(c)(3) must actively elect as the means of determining its lobbying limits. For further explanation, please see the next section: "How much Lobbying Can a 501(c)(3) Do?"

Resources:

(1) Charity Lobbying in the Public Interest: Important Exclusions from Lobbying Under the 1976 Law

(2) Charity Lobbying in the Public Interest: Frequently Asked Questions About Nonprofit Lobbying

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HOW MUCH LOBBYING CAN A 501(C)(3) DO?

501(c)(3) organizations have a choice between two sets of rules for determining how much lobbying they can legally do: the substantial part test, or the expenditure test. The Expenditure test was created as an alternative to the vague and confusing substantial part test. A 501 (c)(3) must chose one set of rules or the other.

The substantial part test holds that in order to maintain its tax-exempt status, lobbying activity can only constitute an "insubstantial" part of a 501(c)(3) organization's activity. The definition of an "insubstantial" part, however has never been clearly defined with the result that nonprofits that do lobby but have not chosen the expenditure test cannot be certain how much lobbying they may conduct without jeopardizing their tax exempt status. Under the substantial part test, if a 501(c)(3) exceeds this vague lobbying limit for a single year, it risks losing its tax-exempt status.

The expenditure test uses a formula to calculate an allowable lobbying budget for each 501(c)(3), based on the organization's total annual expenditures. Thus, the expenditure rule is much clearer in the limit it sets for lobbying activity since it specifies an expenditure cap for lobbying. The following rule determines how much an organization can spend on direct lobbying under the expenditures test:

20 percent of the first $500,000 of annual expenditures
15 percent of the next $500,000;
and so on, *up to* $1 million a year[2]

To take an example, a nonprofit organization with annual expenditures of $250,000 can spend 20% of that $250,000, or $50,000 on direct lobbying activity. The expenditure rule also specifies that a 501(c)(3) can spend one quarter or 25% of its total direct lobbying budget on grassroots lobbying. To continue with the example above, this nonprofit organization could spend up to $12,500 (25% of $50,000) on grassroots lobbying. So with a total lobbying budget of $50,000, this organization could spend the full $50,000 on direct lobbying, or it could spend $37,500 on direct lobbying and the remaining quarter of its budget ($12,500) on grassroots lobbying. It should be emphasized that the amount allowed for grassroots lobbying is equal to one quarter of the direct lobbying budget, and is not an additional 25% of the organization's annual expenditures.

Under the expenditure rules, there is also greater leniency with respect to violations of the allowable lobbying budget. As the Alliance for Justice explains, "Organizations that elect the 501(h) expenditure test, pay a tax on excess lobbying expenditures. Electing 501(c)(3) organizations do not risk their tax-exempt status unless they exceed their lobbying limits by 50% over a four-year period."[3]

A 501(c)(3) organization is subject to the terms of the substantial part test until such time as the organization *actively elects* to come under the expenditure test instead. Your organization can elect the expenditure rules by filling out the one-page IRS form 5768 (this must only be done once). Most nonprofit organizations favor the clarity of the expenditure test rules. Electing the expenditure rules in no way increases an organization's likelihood of being audited.

It is important to be clear about which test determines your organization's lobbying allowance and what your individual and organizational lobbying limits are.

Resources:

(1) Internal Revenue Service: Form 5768
(2) Alliance for Justice: Frequently Asked Questions: 501(h) Expenditure Test
(3) Charity Lobbying in the Public Interest: Online Tutorial on the Lobbying Law
(4) Alliance for Justice: Worry-Free Lobbying for Nonprofits: How to Use the 501(h) Election to maximize Effectiveness
(5) Charity Lobbying in the Public Interest: Questions and Answers Regarding the Law and Lobbying by Nonprofits

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WHAT TYPE OF FUNDS CAN A 501(C)(3) USE FOR LOBBYING?

A 501(c)(3) can receive funding from a variety of sources, including individual contributions, and grants from private or community foundations. A private foundation is defined as one that does not receive a major part of its support from the public. A community or public foundation, by contrast raises a significant portion of their resources from a broad cross-section of the public each year, usually within a given geographic region or on a particular issue area, and are focused primarily on "local needs". There are some important rules to know about using foundation or grant money for lobbying.

A 501(c)(3) may use any funds received from a community foundation to lobby. The only exception to this is if it has been specifically stipulated in the grant agreement between your organization and the community foundation that funds may not be used for lobbying. If this agreement is broken however, your organization is liable under the legal terms of the grant agreement with the foundation but not under IRS tax code.

A 501(c)(3) may use funds received from private foundations to lobby *as long as* the funds have been received as a general support grant. Unlike a community foundation, a private foundation *cannot* earmark grant funds to be used specifically for lobbying, even thought the IRS allows it for general support grants. The term earmarking refers to a written or oral agreement of what funds can be used for. Therefore, for general support grants, there can't be any understanding between the foundation and the grantee that these funds would be used for lobbying.

Even though the IRS allows general support grants to be used for lobbying, and under certain circumstances project specific grants as well, a private foundation may stipulate in a grant agreement that funds may not be used for lobbying, in which case a 501(c)(3) may not use funds for lobbying under the legal terms of the grant contract itself.

As this issue is complicated, it is good practice to always read foundation grant agreements carefully and consult with a legal expert before using private foundation funds to lobby. Alliance for Justice provides a free technical assistance hotline for questions relating to this issue at 866-675-6229.

A 501(c)(3) may not use federal grant money to lobby at the federal or state levels, nor may it use federal contract funds to lobby at the federal, state, or local levels.

Resources:

(1) Alliance for Justice: Myth v. Fact: Foundation Support of Advocacy

(2) Charity Lobbying in the Public Interest: The Nonprofit Lobbying Guide: Does Electing to Be Governed by the Regulations Complicate Receiving Grants from Foundations?

(3) University of Southern California: Private Foundations and Policy Making: Latitude Under the Law

RULES OF 501(C)(3) PARTICIPATION IN ELECTIONS:

IN WHAT WAYS CAN A 501(C)(3) PARTICIPATE IN ELECTION ACTIVITIES?

In a presidential election year, many tax-exempt organizations become more active in political activity. Questions frequently arise regarding the interplay of political campaign activities and exemption from federal income tax. While 501(c)(3)s are prohibited from participating in campaign activity on behalf of, or in opposition to a specific candidate, there are some campaign-related activities in which a 501(c)(3), acting as an organization, or its employees, acting as individuals, can engage. For example, according to the IRS:

- Employees of 501(c)(3) organizations may volunteer for or participate in any campaign, including endorsing or opposing a candidate, holding a fundraiser or hosting a campaign gathering, so long as these activities are conducted on personal time, away from the organization's facilities or without use of the organization's equipment, and that the views expressed are attributed to them as ***individuals*** and not to the organization.
- A 501(c)(3) can encourage the public to participate in the electoral process in activities such as voter registration and get-out-the-vote drives. This does not constitute prohibited political campaign activity as long as it is conducted in a non-partisan manner.
- A 501(c)(3) can undertake voter education activities by distributing voter guides. Voter guides, generally, are distributed during an election campaign and provide information on how *all* candidates stand on various issues. These guides may be distributed with the purpose of educating voters; however, they may not be used to attempt to favor or oppose a specific candidate.
- Depending on the facts and circumstances, a 501(c)(3) organization may invite political candidates to speak at an event without jeopardizing its tax-exempt status. For more detailed guidelines about hosting candidate speaking engagements or public forums, please see additional resources below.

SOURCE: Internal Revenue Service. "Political and Lobbying Activities." http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html.

Resources:

(1) Internal Revenue Service: Political and Lobbying Activities

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IN WHAT WAYS CAN'T A 501(C)(3) PARTICIPATE IN ELECTION ACTIVITIES?

As the Internal Revenue Service explains: "All 501(c)(3) organizations are prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of, or in opposition to, any candidate for elective public office."[4] Restricted activities include:

- Contributions to political campaign funds for any candidate running for public office[.]
- Public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office.
- Voter education or registration activities with evidence of bias that: (a) would favor one candidate over another; (b) oppose a candidate in some manner; or (c) have the effect of favoring a candidate or group of candidates.
- Making partisan comments in official organization publications or at official functions.

SOURCE: Internal Revenue Service. "Political and Lobbying Activities." http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html

Resources:

(1) Internal Revenue Service: Political and Lobbying Activities
(2) Maryland Nonprofits: Lobbying the Candidates: Issues for 501(c)(3) Organizations
(3) Maryland Nonprofits: Election Year Issues for Nonprofit Organizations

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[1] Charity Lobbying in the Public Interest . "Understanding the Differences between Direct Lobbying and Grassroots Lobbying." http://www.clpi.org/doc_pdf/direct_and_grassroots.pdf.

[2] Charity Lobbying in the Public Interest. Online tutorial: "Lobbying, Advocacy and the Law for Nonprofits Under Section 501(c)(3)." http://www.clpi.org/lobby_law.html.

[3] Alliance for Justice. "Frequently Asked Questions: Lobbying by Nonprofits." http://www.allianceforjustice.org/nonprofit/about/faq/Lobbying.html.

[4] Internal Revenue Service. "Political and Lobbying Activities." http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html.