

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

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LOBBYING AS A 501(C)(3) ORGANIZATION

Despite what many nonprofits believe, 501(c)(3) organizations are legally allowed to lobby in support of their organization’s mission as long as they adhere to certain limitations outlined in this article. The Internal Revenue Service (IRS) defines lobbying as activities to influence legislation or ballot measures, whereas advocacy is the act of generally educating and organizing around an issue (see the previous chapter *Advocacy and Lobbying Tips for Communities and Beyond* for more information about advocacy and lobbying best practices). 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 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 requires that a 501(c)(3)’s lobbying activities be an “insubstantial” part of its overall activities and automatically applies unless the organization elects to come under the 501(h) expenditure test. 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. The IRS and courts have been reluctant to define the

line that divides substantial from insubstantial, though 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.

501(h) Expenditure Test

The 501(h) expenditure test provides an alternative to the insubstantial part test and 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 option 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 costs the organization money (i.e., expenditures); 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).

CALCULATING OVERALL LIMITS

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,” or generally, 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 5% threshold applies to organizations with expenditures between \$1.5 and \$17 million.

An organization's overall annual 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.

LIMITS BY TYPE OF LOBBYING

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 can 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 up 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 postcard or a link to an email portal that can be used to send a message directly to legislators; or (4) listing those voting as undecided or opposed to specific legislation. Identifying legislators as sponsors of legislation is not considered a call to action.

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 more 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.

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 Exceptions

Some activities that might appear to be lobbying but are considered an exception 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 track its lobbying in a way sufficient to show that it has not exceeded its lobbying limits. This may include tracking time spent on lobbying activities and/or associated costs, depending on how the organization is measuring its lobbying activities.

Three costs that 501(h)-electing organizations must count toward their lobbying limits and track 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.

LOBBYING AS AN INDIVIDUAL

No limitations or record keeping requirements exist for individuals who want to lobby. While

lobbying in an official capacity on behalf of an organization or coalition can deepen the impact of your message through the broad reach of the group's membership, clients, and staff, lobbying as an individual allows you to freely discuss issues you care about in a more personal manner. 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 as long as you are clear about what capacity you are speaking (i.e., as an individual or on behalf of an organization).

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 (see *Advocacy and Lobbying Tips for Communities and Beyond* for more).

FOR MORE INFORMATION

Bolder Advocacy, an Alliance for Justice campaign, offers several resources for advocates navigating 501(c)(3) lobbying rules. One resource by Bolder Advocacy is a 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. Other Bolder Advocacy guide topics include 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.