

# PROTECTING YOUR 501(C)(3) STATUS WHILE ADVOCATING FOR YOUR ORGANIZATION

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# DISCLAIMERS

Please note this presentation focuses on public charities. Private foundations and churches have their own set of rules regarding lobbying activities.

Please also note that this presentation is for educational and informational purposes only. It is not legal advice. Please consult a qualified attorney should you have questions regarding the information contained in these slides.

# What is Lobbying?

- Attempting to influence legislation is commonly known as lobbying.
- **Legislation** includes action by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office), or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure.<sup>1</sup>
- An organization will be regarded as **attempting to influence** legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation.<sup>2</sup>

1, 2: *Lobbying* (last updated Feb. 4, 2017), <https://www.irs.gov/charities-non-profits/lobbying>.

# Direct Lobbying v. Grass Roots Lobbying

- **Direct lobbying** refers to attempts to influence a legislative body through communication with a member or employee of a legislative body, or with a government official who participates in formulating legislation.<sup>3</sup>
- **Grass roots lobbying** refers to attempts to influence legislation by attempting to affect the opinion of the public with respect to the legislation and encouraging the audience to take action with respect to the legislation. In either case, the communications must refer to and reflect a view on the legislation.<sup>4</sup>

3, 4: *"Direct" and "Grass Roots" Lobbying Defined* (last updated Mar. 8, 2017), <https://www.irs.gov/charities-non-profits/direct-and-grass-roots-lobbying-defined>

# Rules Prohibiting Political Activity

- All section 501(c)(3) organizations are absolutely 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.<sup>5</sup>
- Contributions to political campaign funds or public statements of position made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity.<sup>6</sup>
- Violating this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes.<sup>7</sup>

5, 6, 7: *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations* (last updated Sep. 13, 2016), <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations>

# Rules Limiting Legislative Activity

- In general, no organization may qualify for section 501(c)(3) status if a *substantial part* of its activities is attempting to influence legislation (commonly known as lobbying).<sup>8</sup>
- Two tests can be used to measure substantiality: the Substantial Part Test and the Expenditure Test.

8: *Lobbying* (last updated Feb. 4, 2017), <https://www.irs.gov/charities-non-profits/lobbying>.

# Test #1: Substantial Part Test

- Whether an organization's lobbying constitutes a substantial part of its overall activities is determined on the basis of all the pertinent facts and circumstances in each case. The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.<sup>9</sup>
- This test is subjective in nature.

<sup>9</sup>: *Measuring Lobbying: Substantial Part Test* (last updated Feb. 23, 2017), <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test>

# Repercussions under Substantial Part Test

- Under the substantial part test, an organization that conducts excessive lobbying in any taxable year may lose its tax-exempt status, resulting in all of its income being subject to tax.<sup>10</sup>
- In addition, section 501(c)(3) public charity organizations that lose their tax-exempt status due to excessive lobbying are subject to an excise tax equal to five percent of their lobbying expenditures for the year in which they cease to qualify for exemption.<sup>11</sup>
- Further, a tax equal to five percent of the lobbying expenditures for the year may be imposed against organization managers, jointly and severally, who agree to the making of such expenditures knowing that the expenditures would likely result in the loss of tax-exempt status.<sup>12</sup>

10, 11, 12: *Measuring Lobbying: Substantial Part Test* (last updated Feb. 23, 2017), <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test>

# Test #2: Expenditure Test: 501(h) election

- Public charity organizations may elect the expenditure test under section 501(h) as an alternative method for measuring lobbying activity.<sup>13</sup> IRS Form 5768 (Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation)
- Under the expenditure test, the extent of an organization's lobbying activity will not jeopardize its tax-exempt status, provided its expenditures, related to such activity, do not normally exceed an amount specified in section 4911. This limit is generally based upon the size of the organization and may not exceed \$1,000,000.<sup>14</sup>
  - I.e., how much an organization may spend on lobbying depends on its total expenditures.
- This test is objective in nature.

13, 14: *Measuring Lobbying Activity: Expenditure Test* (last updated Mar. 8, 2017), <https://www.irs.gov/charities-non-profits/measuring-lobbying-activity-expenditure-test>

# Repercussions under Expenditure Test

- Under the expenditure test, an organization that engages in excessive lobbying activity over a four-year period may lose its tax-exempt status, making all of its income for that period subject to tax.<sup>15</sup>
- Should the organization exceed its lobbying expenditure dollar limit in a particular year, it must pay an excise tax equal to 25 percent of the excess.<sup>16</sup>

15, 16: *Measuring Lobbying Activity: Expenditure Test* (last updated Mar. 8, 2017), <https://www.irs.gov/charities-non-profits/measuring-lobbying-activity-expenditure-test>

# Added Restriction for Private Foundations

- In addition to the restrictions on political and lobbying activities that apply to all section 501(c)(3) organizations, private foundations are subject to excise taxes on expenditures for political and lobbying activities.<sup>17</sup>
- For many private foundations, this added restriction functions as a prohibition against lobbying.

17: *Life Cycle of a Private Foundation - Political and Lobbying Activities* (last updated Feb. 23, 2017), <https://www.irs.gov/charities-non-profits/private-foundations/life-cycle-of-a-private-foundation-political-and-lobbying-activities>

# Safe Harbor Numbers

- Seasongood v. Commissioner held that attempts to influence legislation that constituted **5% of total activities were not substantial**.<sup>18</sup>
- In Haswell v. U.S., the Court of Claims cited percentage figures in support of its determination that an organization's lobbying activities were **substantial**. The amount of the organization's expenditures for lobbying activities ranged from **16.6% to 20.5% of total expenditures** during the four years at issue.<sup>19</sup>

18: *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955)

19: *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975)

# Advocacy Tool #1: Nonpartisan Analysis, Study, or Research

- Nonpartisan analysis, study, or research of matters pertaining to legislation *may* be educational and will not constitute attempts to influence legislation. This occurs where:
  - The material is available to the public, governmental bodies, officials, and employees, and;
  - Where the organization does not advocate the adoption or rejection of legislation.<sup>20</sup>

20: Judith E. Kindell and John Francis Reilly, *P. Lobbying Issues* (1997), <https://www.irs.gov/pub/irs-tege/eotopicp97.pdf>

# Successful Example of Nonpartisan Analysis, Study, or Research

A 501(c)(3) organization that conducted educational activities relating to the law, legal education, and lawyers became interested in the question of court reform in the particular state in which it was organized. A constitutional amendment requiring revision of the state's court system was agreed to by the state legislature and submitted to the public for approval. The organization embarked upon a program of study, research, and assembly of the materials necessary to make an evaluation of the legislation. Experts were assembled and employed to conduct an extensive analysis of all materials relating to court reform in the United States and a detailed study and analysis of the pertinent existing case and statutory law of the state. The organization did not expend any funds or otherwise participate in any campaign to present the bills or persuade the public to vote for the amendment.<sup>21</sup>

21: Rev. Rul. 64-195, 1964-2 C.B. 138

# Advocacy Tool #2: Individual Action

- Individuals within organizations (including the organization's leaders) may lobby on their own time. Only the following acts should be considered activities of the organization:
  - Acts by [the organization's] officials under actual or purported authority to act for the organization;
  - Acts by agents of the organization within their authority to act; or
  - Acts ratified by the organization.<sup>22</sup>

# Advocacy Tool #3: Grass Roots Lobbying

- There is a three-part test for determining whether communications with the general public will be treated as grass roots lobbying communications. The communication will be considered a grass roots lobbying communication only if it meets all three of the following requirements:
  - (1) The communication refers to specific legislation;
  - (2) The communication reflects a view on such legislation; and
  - (3) The communication encourages the recipient of the communication to take action with respect to such legislation (“Call to action” requirement).<sup>23</sup>
    - This “Call to action” requirement must meet several standards as well.
      - **Example:** An analysis of a pending bill study names certain undecided Senators on the Senate committee considering the bill. Although the study meets the three part test for determining whether a communication is a grass roots lobbying communication, the study is within the exception for nonpartisan analysis, study or research, because it does not *directly* encourage recipients of the communication to urge a legislator to oppose the bill.<sup>24</sup>

23: Reg. 56.4911-2(b)(2)(ii)

24: Reg. 56.4911-2(c)(1)(vii), Example (8)

# Advocacy Tool #4: Have a related 501(c)(4) Lobbying Organization

- Unlike 501(c)(3) organizations, other organizations described in 501(c) may engage in an unlimited amount of lobbying, provided that such lobbying is related to the organization's exempt purpose.<sup>25</sup>
- Therefore, a 501(c)(3) organization may have a related 501(c)(4) lobbying organization, so long as the organizations are kept separate (with appropriate record keeping and fair market reimbursement for facilities and services).<sup>26</sup>

25: Rev. Rul. 61-177, 1961-2 C.B. 117

26: Judith E. Kindell and John Francis Reilly, *P. Lobbying Issues* (1997), <https://www.irs.gov/pub/irs-tege/eotopicp97.pdf>

# Advocacy Tool #5: Make use of Volunteers

*If an organization makes a 501(h) election, then unpaid volunteers who are not reimbursed for any out-of-pocket expenses but do devote time to grassroots lobbying, for example, are not factored in as lobbying expenditures, because the 501(h) election only looks at the organization's expenditures.*

**Example:** An organization that trains volunteers to go door-to-door to seek signatures for petitions to be sent to legislators in favor of a specific bill. When the organization asks the volunteers to contact others and urge them to sign the petitions, it encourages those volunteers to take action in favor of the specific bill. The organization does not reimburse the volunteers for their time and expenses. Any costs incurred by the volunteers in carrying on this activity are not lobbying or exempt purpose expenditures made by the organization. Furthermore, the volunteers may not deduct their out-of-pocket expenditures.<sup>27</sup>

**However**, the organization's costs of soliciting the volunteers' help and its costs of training the volunteers are grass roots expenditures. In addition, the costs of preparing, copying, distributing, etc., the petitions (and any other materials on the same specific subject used in the door-to-door signature gathering effort) are grass roots expenditures.

27: Reg. 56.4911-2(b)(4)(ii)(C), Example (8)

# Advocacy Tool #6: Appearances before Legislative Bodies

- It is acceptable to appear before a legislative body and will not constitute lobbying if:
  - The appearance before the legislative committee is in response to official request for testimony; or
  - The appearance consists of providing technical advice/assistance to a government body, committee, or subdivision in response to a written request from that body, committee, or subdivision (the request cannot only come from an individual).<sup>28</sup>

# Advocacy Tool #7: Requests of Executive/Administrative Bodies

- Requesting **executive bodies** to take some action would generally not constitute attempting to influence legislation. However, requesting executive bodies to support or oppose legislation *is* included in the purview of “attempting to influence legislation.”<sup>29</sup>
- Requests of **administrative bodies** are also generally not considered lobbying.
  - The term “administrative bodies” includes school boards, housing authorities, sewer and water districts, zoning boards, and other similar Federal, State, or local special purpose bodies, whether elective or appointive.<sup>30</sup>
  - **Example:** An organization would not be influencing legislation if it proposed to a Park Authority that it purchase a particular tract of land for a new park, even though such an attempt would necessarily require the Park Authority eventually to seek appropriations to support a new park.<sup>31</sup>

29: Rev. Rul. 67-293, 1967-2 C.B. 185;

30: Reg. 56.4911-2(d)(4)

31: Reg. 56.4911-2(d)(4)

# What **NOT** to do: Research being considered as **Lobbying**

If a 501(c)(3) organization drafted legislation and presented petitions supporting such legislation, these activities would place the organization beyond the purview of engagement in nonpartisan analysis, study, or research of matters pertaining to legislation; it would have crossed over into attempting to influence legislation.<sup>32</sup>

32: Rev. Rul. 68-656, 1968-2 C.B. 216

# What **NOT** to do: Individual Action being Considered as **Lobbying** or **Political Activity**

A 501(c)(3) organization's publication stated that the organization would be sending members to work on political campaigns, members working on political campaigns identified themselves as representing the organization, the organization paid some of the costs incurred by members working on political campaigns, and officials of the organization knew about the members' political activities on behalf of the organization and made no effort to prevent the members' political activities. In this scenario, the political campaign activities of individual members would be attributed to the 501(c)(3) organization.<sup>33</sup>

# What **NOT** to do: Grass Roots Lobbying being Cited as Official Lobbying

An analysis of a pending bill study names certain undecided Senators on the Senate committee considering the bill. The study concludes: “You should write to the undecided committee members to support this crucial bill.” The study is not within the exception for nonpartisan analysis, study or research because it *directly encourages* the recipients to urge a legislator to support a specific piece of legislation.<sup>34</sup>

The study would therefore be classified as grass roots lobbying.

34: Reg. 56.4911-2(c)(1)(vii), Example (9)

# What **NOT** to do: Request of an Administrative Body becoming **Lobbying**

In the case that an organization proposed to a Park Authority that it purchase a particular tract of land for a new park, the proposal *may* be seen as lobbying by the IRS. For example, if the organization provided the Park Authority with a proposed budget to be submitted to a legislative body in addition to the proposal to buy the tract of land, the request would be characterized as lobbying.<sup>35</sup>

35: Reg. 56.4911-2(d)(4)

# What **NOT** to do: Voter Education being Classified as **Political Intervention\***

- C is a section 501(c)(3) organization that educates the public on environmental issues. Candidate G is running for the state legislature and an important element of her platform is challenging the environmental policies of the incumbent. Shortly before the election, C sets up a telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C's representative tells the voter about the importance of environmental issues and asks questions about the voter's views on these issues. If the voter appears to agree with the incumbent's position, C's representative thanks the voter and ends the call. If the voter appears to agree with Candidate G's position, C's representative reminds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls. C is engaged in **political campaign intervention** when it conducts this get-out-the-vote drive.<sup>36</sup>
- **\*Remember**, in addition to limits on legislative lobbying, 501(c)(3) organizations are prohibited from participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.

36: *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations* (last updated Jan. 22, 2013), <https://www.irs.gov/uac/election-year-activities-and-the-prohibition-on-political-campaign-intervention-for-section-501-c-3-organizations>

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