

Effective 501(c)(3) Lobbying:

*501(h) Election, No Substantial Part, and
Creating Related Lobbying Organizations*



501(c)(3) Lobbying Limits

- **Lobbying restriction:** Section 501(c)(3) of the Tax Code permits lobbying as long as lobbying is not a “substantial part” of organization’s total activities.
- **Political prohibition:** Section 501(c)(3) prohibits public charities from engaging in any political activities.



Lobbying Restriction

- The Tax Code provides organizations with two options for tracking and reporting lobbying activities:
 - “No substantial part” test, or
 - 501(h) election.



No Substantial Part Test

- Tax Code does not define substantiality.
- Courts general apply a “facts and circumstances” test that balances the organization’s activities in relation to its objectives and circumstances.
- The definition of lobbying is also vague. It includes “attempting to influence legislation by propaganda or otherwise” and advocating, “proposing, supporting, or opposing of legislation.”



501(h) Election

- Under this provision, a 501(c)(3) violates the lobbying limits if it:
 - makes lobbying expenditures in excess of the “lobbying ceiling” amount for such organization for each taxable year, or
 - makes grass roots expenditures in excess of the “grass roots ceiling” amount for such organization for each taxable year
- To use this alternative method, a 501(c)(3) must file Form 5768 notifying the IRS that the organization is electing to use the expenditure test under 501(h).



Expenditure Test

- An organization's lobbying and grass roots ceilings depend on the amount it spends on "exempt purposes" (i.e., the amounts paid or incurred by the entity to further the charitable, educational, scientific, or other exempt purpose for which it was organized).
- Under Section 4911(c)(2) of the Tax Code, the annual limit on lobbying expenditures is the sum of:
 - 20% of the first \$500,000 of an organization's exempt purpose expenditures; plus
 - 15% of the second \$500,000 of such expenditures; plus
 - 10% of the third \$500,000 of such expenditures; plus
 - 5% of the remainder of such expenditures.
- This limit is subject to an overall cap of \$1 million in annual lobbying expenditures.



Definition of “Lobbying” Under 501(h) Election

- “Influencing legislation” is defined as:
 - **Grass roots lobbying:** any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof; and
 - **Direct lobbying:** any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.
- For both direct and grassroots lobbying, the costs of **researching, planning, drafting, reviewing, publishing, and mailing**—including any amount paid as compensation for an employee’s work on any of these activities—are lobbying expenditures. The allocable portion of administrative, overhead, and other general expenses attributable to “lobbying” also count as lobbying expenditures.



Exceptions to Definition of “Lobbying”

- The following activities are **excluded** from the definition:
 - nonpartisan analysis, study, or research;
 - technical advice or assistance to a governmental body/committee in response to a written request by such body;
 - appearances before, or communications to, any legislative body with respect to a possible decision which might affect the organization’s existence, its powers and duties, tax-exempt status, or the deduction of contributions to the organization (“self-defense activities”);
 - communications between the organization and its bona fide members with respect to legislation of direct interest to the organization (unless the communication urges members to contact their legislator).



Basic Do's and Don'ts

- Therefore, a 501(c)(3) *may not*:
 - Support or oppose candidates for public office (absolute prohibition); or
 - Lobby on specific legislation in substantial part or, under Section 501(h), beyond a certain percentage of its expenditures.
- However, a 501(c)(3) *may*:
 - Lobby on specific legislation within the Code's lobbying limits;
 - Advocate for or against passage of ballot measures;
 - Set up related 501(c)(4) or (c)(6) entity to conduct lobbying and political activities;
 - Conduct nonpartisan get-out-the-vote and voter registration drives;
 - Provide its members with voting records of legislators as long as not limited to just campaign season.



Tracking Lobbying Expenses Under Tax Code and LDA

- Lobbying 501 (c)(3)'s are required to track and report their lobbying activities under
 - the Tax Code on their annual Form 990 informational returns, *and*
 - under the LDA if one or more of their employees spends more than 20% of his time on lobbying activities.



Lobbying Disclosure Act

- “Lobbying activities” include
 - “lobbying contacts,” *and*
 - efforts in support of such contacts, such as preparation, planning, and research.
- “Lobbying contacts” are the actual communications with “covered officials.”
- Covered *legislative* officials include all elected Members of the House and Senate, as well as all employees and officials of Congress.
- Covered *executive* branch officials include the President; Vice President; certain members of military; any employee in the Executive Office of the President; any employee listed in levels I through V of the Executive Schedule; and Schedule C political appointees.



“Lobbying Contacts”

- A contact is not a lobbying contact unless it involves:
 - The formulation, modification, or adoption of federal legislation;
 - The formulation, modification, or adoption of a federal rule, regulation, Executive Order, other policy of the U.S. government;
 - The administration or execution of a federal program or policy; or
 - The nomination or confirmation of a person subject to Senate confirmation.



Exceptions to Definition of “Lobbying Contacts”

- Administrative requests (e.g., requests for meeting);
- Testimony given before a congressional committee;
- Speeches or articles made available to the public;
- Information provided in writing in response to a request by a covered official;
- Information required by subpoena, CID, etc.
- Communications in response to a Federal Register notice (e.g., comments to proposed rulemaking);
- Written comments filed in the course of a public meeting;
- Any communication made on the record in a public proceeding; and
- Petitions for agency action made in writing and part of the record.



Reporting Expenses Under the LDA

- The LDA permits organizations to track and disclose lobbying expenses on their LDA reports using *either* the LDA's definition of lobbying *or* the Tax Code's.
- Reasons to use Tax Code definition:
 - avoids the need to keep two sets of records for tracking lobbying expenses.
- Reasons to use LDA definition:
 - LDA definition is narrower because it does not include state lobbying or grassroots activity;
 - LDA method allows organization to report lower, more accurate estimate of federal lobbying expenditures.



Related Organizations

- A 501(c)(3) organization may create a 501(c)(4) or (c)(6) entity.
- No limits on the amount of lobbying a 501(c)(4) or (c)(6) may conduct as long as the legislation pertains to purpose for which it was formed.
- A 501(c)(4) or (c)(6) organization may establish a PAC.
- The related entity must have independent funding sources; no charitable tax deduction will be available.

