



# Lobbying Considerations for Nonprofits: What Your Organization Needs to Know

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# Today's Discussion

- Tax Rules for Lobbying
  - 501(c)(3)s
  - 501(c)(4)s & 501(c)(6)s
- Lobbying Disclosure
  - Federal Lobbying Disclosure Act
    - Lobbyist registration requirements
    - Quarterly and semi-annual reporting
  - State and Local Lobbying Regulation
- Ethics and Gift Rules
- Restrictions for Recipients of Federal Funds
- Grassroots Advocacy
  - Telephone and text messaging
  - Email
  - Broadcast advertising
  - Digital advertising
  - Privacy and data collection

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# Tax Rules for Lobbying

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# Overview: 501(c)(3) Lobbying

## Public Charities

- Lobbying permitted, provided it is not a “substantial part” of the organization’s total activities
- NO political campaign activities permitted

## Private Foundations

- Lobbying not permitted
  - Subject to excise taxes
- May fund charities that lobby, but grants may not be earmarked for lobbying
  - General support grants
  - Specific project grants
- NO political campaign activities permitted

# Overview: 501(c)(4) and 501(c)(6) Lobbying

- Unlimited lobbying permitted
- Lobbying portion of dues not tax-deductible by members as a business expense
- Political campaign activities permitted, provided they are not the organization's primary activity
  - Be aware of federal and state campaign finance laws, particularly with regard to restrictions on political activities of corporations!

## Section 501(c)(3) Lobbying Rules

- What is lobbying?
  - Basic general concept—attempts to influence **legislation** at the federal, state, or local levels through direct or grassroots communications
- Two options for measuring compliance with (c)(3) limitation on lobbying activities:
  - No substantial part test
  - 501(h) expenditure test

# Section 501(c)(3) Lobbying Rules

## No substantial part test

- Vague, facts and circumstances test
- Strict sanctions
  - revocation of exempt status
  - excise tax on organization and its managers (5% of lobbying expenditures)

## 501(h) expenditure test

- Lobbying activity measured solely by the amount of money spent on lobbying
- Lobbying will not be considered “substantial” provided organization does not exceed expenditure cap
- Clear definitions of lobbying and exclusions for specific activities
- Must affirmatively elect to use by filing IRS Form 5768
- Flexible sanctions
  - 25% tax on amount spent over the cap
  - No tax penalties imposed on organization managers for exceeding the limits
  - Revocation of exempt status results only if the organization exceeds 150 percent of the cap over a 4-year consecutive averaging period

## Section 501(c)(3) Lobbying Rules—501(h) Caps

Exempt Purpose Expenditures	Percentage Allowed for Lobbying	Total Maximum Lobbying Amount
\$0 to \$500,000	20%	Up to \$100,000
\$500,001 to \$1,000,000	15%	\$100,000 plus 15% of excess over \$500,000
\$1,000,001 to \$1,500,000	10%	\$175,000 plus 10% of excess over \$1,000,000
Over \$1,500,000	5%	\$225,000 plus 5% over \$1,500,000, up to a maximum of \$1,000,000

**NOTE:** Grassroots lobbying expenditures are limited to no more than 25% of the total amount permitted for lobbying in a year.

# Definition of “Lobbying” under 501(h) Election

## Direct Lobbying

- Attempts to influence legislation through communications with **covered officials** that
  - refer to specific legislation and
  - reflect a point of view on the legislation
- Covered officials:
  - any member or employee of a legislative body
  - any government official or employee who may participate in the formulation of legislation
  - the public in a referendum, initiative, or constitutional amendment

## Grassroots Lobbying

- Attempts to influence the **general public** through communications that
  - refer to specific legislation,
  - reflect a point of view on the legislation, and
  - include a “call to action”

# Definition of “Lobbying” under 501(h) Election

- Specific exclusions from the definition of lobbying:
  - Communications with members regarding specific legislation
    - Point of view okay
    - No call to action
  - Nonpartisan analysis, study, or research
  - Discussions of broad social and economic problems
  - Efforts to change regulations
  - Requests for technical advice
  - Conducting self-defense activity
  - Volunteer time
- The excluded activities are not counted against a 501(h) electing organization’s annual lobbying expenditure cap
- Must take 501(h) election to use these definitions/exclusions

## 501(c)(3) Political Campaign Activity

- Activity to support or oppose the election of a candidate for public office could result in loss of tax-exempt status
- Nonpartisan electoral activities may be permissible for public charities if properly conducted within IRS restrictions:
  - Get-out-the vote and voter registration drives
  - Legislative voting records (but beware of issuing during campaign season)
  - Candidate debates and forums (inclusive, fair and impartial forum, broad range of issues covered)
  - Candidate questionnaires and voter guides (inclusive, fair and impartial forum, broad range of issues covered)

# Interacting with Candidates

May urge candidates to support policies (“lobbying” candidates)

May not ask candidates to take a pledge

May provide policy papers and other materials

Should provide material to all candidates

Should not create content at the request of candidates

# 501(c)(4)/(c)(6) Lobbying

- What is lobbying? (Code § 162(e))
  - Influencing legislation (federal, state, local)
  - Influencing the general public with respect to elections, legislative matters, or referendums
  - Influencing high-level federal executive branch officials with regard to executive and administrative actions
  - Participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office
- Definition is broader than the definitions for 501(h)-electing public charities (Code § 4911)
- Why we care: NO tax deductions are available for lobbying

# 501(c)(4)/(c)(6) Political Campaign Activity

- What are political activities?
  - Activities to influence or attempt to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization or the election of presidential or vice presidential electors
- Political activities cannot be “primary” activity
  - If primary, then organization would instead be exempt under Code Section 527 as a political organization, and would be required to disclose donors to the IRS on public filings
  - Also could trigger registration and regulation of entity as a political committee under applicable federal or state campaign finance laws

# “Lobby Tax” Rules for 501(c)(4)/(c)(6) Organizations

- Lobbying and political activity portion of member dues paid to a 501(c)(4)/(c)(6) is NOT tax-deductible by members as ordinary and necessary business expense (Code Section 162(e))
- 501(c)(4)/(c)(6) has two options:
  - Notify members annually of the amount of dues that are not deductible as a result of lobbying and political activity expenditures; OR
  - Pay a “proxy tax” on these amounts directly to the IRS (currently at 21% rate)

## Tax on Political Activities (527(f) Tax)

- Expenditures on political campaign activities are taxable under Code Section 527(f)
- Tax rate is 21% and is assessed on either the amount of the organization's political expenditures or the amount of the organization's net investment income, whichever is less
- Political expenditures are described and reported on Form 990, Schedule C, even if no tax is owed

# Using Related Tax-exempt Organizations

- A 501(c)(3) organization may create a related 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 the purpose for which the organization was formed
- A 501(c)(4) or (c)(6) organization may establish a political action committee for the purpose of supporting or opposing candidates for elective office
- The related entity must have independent funding sources, and no charitable tax deduction will be available to donors
- Related organizations may share staff and office space, subject to a cost-sharing agreement

# Form 990 Reporting—Schedule C

## 501(c)(3)s

- 501(h)-electing organizations need only report lobbying expenditures
- Non-electing organizations must report lobbying expenditures and describe their lobbying activities

## 501(c)(4)s & 501(c)(6)s

- Report lobbying expenditures
- Report political campaign activities, if any
- Calculate lobby tax liability, if any

# Tracking & Reporting Activities & Expenses

- Effective compliance requires careful tracking of time and money spent on lobbying
  - Include allocable staff time and compensation, overhead, and administrative costs
  - Time and money spent on research, planning, drafting, reviewing, publishing, and mailing in support of lobbying are included
- Provide training on what is and is not lobbying according to the applicable definitions (Tax Code, LDA, etc.)
- Use time sheets!

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# Lobbying Disclosure

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# Lobbying Disclosure Overview

- No uniformity between federal and state laws, or among states
- Lobbying disclosure laws cover a range of influencing activities
  - Legislation, regulations, executive orders, procurement
  - Grassroots activities
  - Cultivating goodwill
- Covered officials vary
  - Legislature vs. executive
- Public reporting on activity, expenses
- May limit gifts or political contributions

# What Is Federal Lobbying?

- Lobbying communication or contact
  - Actual, direct communication with a covered official
  - Oral, written, or electronic
  - About:
    - Federal legislation
    - Federal regulations
    - Federal program administration
    - Federal nominations
- Lobbying activity
  - All activities that support lobbying communications, like preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in lobbying contacts

# Who Is a Federal Covered Official?

- All members, officials, and employees of Congress
  - Everyone from the receptionist to the chief of staff to the member
- Specific categories for executive branch
  - The president
  - The vice president
  - Any member of the uniformed services whose pay or grade is at or above O-7
  - Any officer or employee in the Executive Office of the President
  - Any officer or employee in a position listed in levels I through V of the Executive Schedule
  - Schedule C political appointees

# Exemptions to Federal Lobbying

- Administrative: meeting requests | status | no intent to influence
- Legislative: testimony | for record | written response | subpoena
- Regulatory: Fed Reg | written response | FACA | Comments/Petitions | public record
- Law Enforcement: subpoena | confidential
- Public: articles | speeches | ads | mass communication

# Who Is a Federal Lobbyist?



# Reporting under the Federal LDA

- Quarterly reports of lobbying activity (Form LD-2)
  - Report contains:
    - Total amount spent on lobbying (rounded to nearest \$10,000)
      - Staff time – direct & preparation time
      - Outside lobbyists
      - Lobbying expenses
      - Overhead
    - Description of issues lobbied
    - Name of each lobbyist
  - Filed by the registrant organization

# Reporting under the Federal LDA

- Semiannual reports of political contributions (Form LD-203)
  - Report contains:
    - Federal political contributions
    - “Honoring & Recognizing” payments
    - Payments for certain meetings
    - Presidential Library contributions
    - Presidential Inaugural Committee contributions
  - Filed by the registrant organization
  - Filed by each of registrant’s individual lobbyists
  - Gift Rule Certification:
    - Familiar with House and Senate gift and travel rules
    - Confirmation that no improper gifts were knowingly given

# Federal LDA and Tax Code Lobbying Compared

Type of Lobbying	LDA	162(e)	4911
State	No	Yes	Yes
Grassroots	No	Yes	Yes
Legislative	Yes	Yes	Yes
Executive	Broad	Narrow	No
International	No	Yes	Yes

# State Lobbying Disclosure

- Laws vary widely
  - Activities covered
    - legislative, executive branch, grassroots, goodwill
  - Triggers for registration
    - monetary, hours, no threshold
  - Reporting frequency
    - annual, semiannual, monthly, biweekly
  - Report contents
    - issues lobbied, amount spent, staff time, compensation
  - Who is responsible for filing
    - individual lobbyist, lobbying firms, lobbyist employer/client

# State Lobbying Issues





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# Ethics and Gift Rules

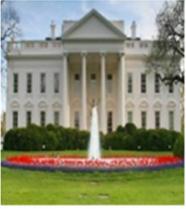
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# Federal Gift Rule Limits



## Legislative

- Organization:
  - No, unless exemption
- Lobbyist:
  - No, unless exemption
- Others:
  - <\$50 or exemption



## Administration

- Organization:
  - No, unless Exemption
- Lobbyist:
  - No, unless exemption
- Others:
  - <\$20 or exemption



## Career

- Organization:
  - <\$20 or exemption
- Lobbyist:
  - <\$20 or exemption
- Others:
  - <\$20 or exemption

# What Is a Gift (Federal Rules)?



Meals and beverages



Travel expenses



Invitations to charitable events



Tickets



Commemorative items



Books, periodicals and informational materials

# Exemptions to Federal Gift Rules

- Receptions
  - Modest or nominal food and refreshments (coffee & donuts), other than part of a meal, no alcohol
- Widely Attended Events
  - Seated meals; more than 25 invitees from throughout a profession; official is speaking in relation to official duties; entertainment at event ok
- Friendship
  - Mutual exchange of gifts; not expensed to employer, \$250 for legislative, unlimited for executive
- Informational Materials
  - Books, periodicals, not software
- Items of Nominal Value
  - Ball caps, t-shirts, greeting cards, items <\$10

# Federal Travel Rules

- Trip sponsor may pay for travel costs (flight, hotel, meals)
- Duration
  - If sponsor employs/retains lobbyist – 1 night only (2 for West Coast)
  - If sponsor does not employ/retain lobbyist
    - House: 4 days inclusive of travel; 7 days for foreign travel
    - Senate: 3 days inclusive of travel; 7 days for foreign travel, exclusive of travel
- Must be cleared by Ethics Committee in advance
- All costs disclosed
- Must provide full itinerary; no leisure/fun activities
- Lobbyists not permitted on any segment of transportation to/from event & may not have more than de minimis involvement in planning

## State Gift & Ethics Rules

- Know before you go!
  - Consult with Legal before paying for meals, events, or gifts
  - Lobbyists may not pay for or are subject to limits for meals even with their own money unless an exemption applies
- Look out for gifts when processing invoices
- Rules vary widely
- Giving gifts may trigger lobbying registration in some jurisdictions



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# **Restrictions for Recipients of Federal Funds**

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## Simpson Amendment—501(c)(4) Restrictions

- 501(c)(4) organizations are ineligible to receive any federal grant, loan, or award if the organization engages in lobbying activities
- LDA definition of “lobbying activities” applies
- May use separate affiliated organization to lobby

# Byrd Amendment

## Prohibitions

- Federal funds may not be used to lobby Congress or the executive branch for a specific federal award (a contract, grant, loan, or cooperative agreement) or the modification or extension of an award
  - Prohibits lobbying Congress to earmark funds for a particular program, project, or activity
  - Does not prohibit lobbying Congress with regard to general programs
- Non-federal funds may be used to lobby for an award—pursuant to OMB guidance, the government will presume that non-federal funds were used in a lobbying effort so long as the award recipient has sufficient non-federal funds to cover those lobbying activities

## Disclosure

- SF-LLL
- If non-federal funds are used to pay lobbyists for assistance in obtaining a federal award, award recipient must disclose the names of the LDA registrants who made lobbying contacts on the recipient's behalf with respect to that particular award

# OMB Guidance/FAR

- OMB Uniform Guidance—2 CFR part 200
  - Cost Principles for Nonprofit Organizations (fmr. Circular A-122)
    - Federal grant recipient may not be reimbursed out of federal grant money to influence federal, state or local elections or to influence federal or state legislation through direct or grassroots lobbying
    - Membership dues paid to organizations that lobby are also unallowable costs
- Federal Acquisition Regulations (FAR)
  - Apply to commercial and nonprofit federal contractors
  - Establish similar cost principles for contractors as set forth in OMB Uniform Guidance with regard to federal grantees: costs for lobbying and political activities are unallowable

## 18 U.S.C. § 1913

- Permanent statutory prohibition on lobbying at all levels of government with federally appropriated funds
- Federal criminal statute originally enacted in 1919:
  - Amended in 2002 to remove criminal penalties in favor of “Byrd Amendment” civil penalties
  - 2002 amendment made the provision broadly applicable (previously applied only to officers and employees of the federal government)
  - Appears to have never been enforced to date

# Annual Appropriations; Other Statutory Limitations; Contract/Award Provisions

- Usually there is a general rider included in annual appropriations laws prohibiting the use of the appropriated funds for lobbying or “propaganda or publicity” purposes (i.e., grassroots lobbying)
- May also be more specific statutory or appropriations limitations applicable to particular federal programs
- May also be specific provisions in contract

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# Grassroots Advocacy

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# Telephone & Texting Campaigns

- Key regulations:
  - TCPA (federal Telephone Consumer Protection Act of 1991)
  - State telemarketing/autodialer laws
    - Live operators
    - Specific disclaimer language
    - Time restrictions
    - Consent
    - Laws are continually changing (e.g., new VA law covers text messaging)

# Telephone & Texting Campaigns

- TCPA applied to nonprofit advocacy calls & texts:
  - **Prior express consent required to call or text a cell phone**
    - Consent need not be in writing (but recommended)
    - Ok to deliver prerecorded voice message calls (i.e., “robocalls”) to **landlines** without prior express consent
    - All prerecorded voice message calls must include certain identification information:
      - the identity of the entity initiating the call (must use official business name) must be stated clearly at the beginning of the message; and
      - the telephone number of the calling party must be provided either during or after the message
    - Exempt from Do-Not-Call restrictions
  - P2P texting (without consent) = no autodialer

# Telephone & Texting Campaigns

- TCPA Autodialer Developments: *Facebook, Inc. v. Duguid*
  - What constitutes a prohibited automatic telephone dialing system (autodialer/ATDS)
    - Device must have *capacity* to either store or produce a telephone number using a *random or sequential generator*
      - Telephone number must be “pulled out of thin air” and then called or texted
      - Open question of what “capacity” means in this context
    - Did not really address or support “human intervention”

# Telephone & Texting Campaigns

- SMS Campaign Best Practices
  - Require opt-ins before texting
  - Honor all opt-out requests
  - Follow calling hour restrictions (e.g., 8am to 9pm)
  - Follow industry best practices and wireless carrier requirements
    - Mobile Marketing Association
    - CTIA
  - Include recommended disclaimers for calls to action, confirmation messages, and program messages
    - E.g., *“Message and data rates may apply. Messaging frequency varies. Text STOP to opt out. Terms & conditions and privacy policy: <insert url>.”*

# Email

- CAN-SPAM
  - Applies to unsolicited email advertising or promoting commercial products or services
  - Advocacy emails unlikely to be commercial advertising, but be careful about mixed-purpose communications
- Best practices
  - Send all e-mails from a legitimate, active e-mail address
  - The “from” line should accurately identify the individual sender or the organization, or both
  - The body of the message should contain a valid postal address for the organization
  - Subject lines may not be misleading
  - Put the word “Advertisement” in the subject line or body of the e-mail if the message advertises or promotes commercial products or services
  - Offer a way to opt out (link to a webpage or an email address) and maintain a system to enable you to promptly honor those requests

# Broadcast Advertising (Television & Radio)

- FCC sponsorship identification requirements
  - “Paid for by [full legal name of sponsor].”
- FEC requirements for “electioneering communications” that refer to a federal candidate close in time to an election (30 or 60 days)
  - “Paid for by [sponsor] ([sponsor website url]) and not authorized by any candidate or candidate’s committee.”
  - Voiceover required: “[Sponsor] is responsible for the content of this advertising.”
  - Must follow specific requirements for disclaimer size and duration
- State political disclaimers
  - “Paid for by”; name of CEO; top donors
  - Voiceovers sometimes required
  - Must follow specific requirements for disclaimer size and duration

# Digital Advertising

- Sponsorship identification requirements vary depending on content and platform used to distribute
  - E.g., Facebook requires sponsorship disclosure for all ads relating to “any national legislative issue of public importance” in addition to ads relating to elections. Also covers ads on referenda, ballot initiatives, GOTV, or “election information campaigns”
  - Ad must be linked to a Facebook account verified as belonging to sponsor and labeled as paid for by the sponsor
  - Other digital ads (e.g., on non-social media websites) may require different kinds of disclaimers and formats
- Digital radio different rules than broadcast radio

# Privacy and Data Collection

- Basic principles when collecting data about donors or supporters:
  - Adhere to the promises made to donors regarding privacy and data protection (privacy policies/other statements)
  - Implement reasonable and appropriate measures to protect personal data against theft
  - Disclose whether the organization will sell or share data
- Privacy policy should address use of cookies and analytics tools



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