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Lobbying for 501(c)(3) Organizations: Tracking Political Activities under the Tax Code and the Lobbying Disclosure Act

501(c)(3) organizations that engage in federal lobbying are subject to at least two separate legal definitions of lobbying in order to comply with applicable federal tax and disclosure laws. The Internal Revenue Code (the “Code”) includes a definition of “lobbying” that applies specifically to “public charity” organizations recognized as exempt under Section 501(c)(3) of the Code. The federal Lobbying Disclosure Act (the “LDA”) provides a second—and very different—definition of the term “lobbying.”

Section 501(c)(3) Public Charities

Nonprofit organizations that qualify for federal income tax exemption as public charities¹ under [Section 501\(c\)\(3\)](#) of the Code have a favorable tax status, but are also subject to heightened restrictions on lobbying and political activities. Section 501(c)(3) provides that “no substantial part” of a public charity’s activities may be lobbying; exceeding the “substantial part” limit places such an organization at risk of losing its tax-exempt status. Further, 501(c)(3) organizations are prohibited by the Code from engaging in any political activities. The Code provides organizations with two options for tracking and reporting lobbying activities—the “no substantial part” test, and the 501(h) election.

The No Substantial Part Test

The “no substantial part” test is subjective. The IRS applies the standard on a case-by-case basis and has provided little guidance to organizations that seek to operate under this rule alone. Moreover, the definition of “lobbying” under the test is vague—it includes “attempting to influence legislation by propaganda or otherwise” and advocating “proposing, supporting, or opposing of legislation.”

¹ Note that this brief article does not discuss the application of 501(c)(3) lobbying restrictions to private foundations.

The 501(h) Election

Alternatively, 501(c)(3) entities that lobby may choose to make the so-called “lobbying election” under [Section 501\(h\)](#) of the Code. Electing organizations are governed by the “[expenditure test](#),” a mathematical formula that limits the amount a 501(c)(3) entity may spend on lobbying activities but provides specific definitions of “lobbying.” Under [Section 4911\(c\)\(2\)](#) of the Code, the annual limit on lobbying expenditures is the sum of:

- 1) Twenty percent of the first \$500,000 of an organization’s exempt purpose expenditures; plus
- 2) Fifteen percent of the second \$500,000 of such expenditures; plus
- 3) Ten percent of the third \$500,000 of such expenditures; plus
- 4) Five percent of the remainder of such expenditures.
- 5) This limit is subject to an overall cap of \$1 million in annual lobbying expenditures.

In addition, the amount of grassroots lobbying expenditures may not exceed 25 percent of the permitted overall lobbying expenditures. If an organization exceeds its lobbying expenditure limit in a given year, it must pay an excise tax equal to twenty-five percent of the excess. The 501(h) election may be made at any time by filing the one-page [Form 5768](#) with the IRS.

“Lobbying” Defined

For the purposes of calculating lobbying expenditures under the 501(h) election, there are two types of “lobbying”:

- 1) “[Direct lobbying](#)” is any attempt to influence legislation through communication with a member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation. “Direct lobbying” also includes communications by an organization to its members, directly encouraging those members to engage in direct lobbying.
- 2) “[Grassroots lobbying](#)” is any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof. An organization engages in “grassroots lobbying” when, directly or through its members, it urges the public to contact legislators, provides the public with contact information for a legislator, or identifies a legislator’s position on a pending legislative matter.

For both direct and grassroots lobbying, the costs of researching, preparing, planning, drafting, reviewing, copying, publishing, and mailing—including any amount paid as compensation for an employee’s work on any of these activities—must be treated as lobbying expenditures. The allocable portion of administrative, overhead, and other general expenses attributable to “lobbying” count as lobbying expenditures as well.

Several activities are expressly exempt from this definition of lobbying, even if they express a position on a pending legislative matter:

- 1) Lobbying does not include providing technical assistance or advice to a governmental body or committee in response its unsolicited, written request, provided that (a) the request comes from more than one member of the body or committee, and (b) the response is made available to every member of the body or committee.
- 2) Lobbying does not include so-called “self-defense activities”—i.e., communications concerning decisions that may affect an organization’s

existence, powers, duties, 501(c)(3) status, or deductibility of contributions.

3) Lobbying does not include nonpartisan analysis, study, or research that may advocate a particular view, provided that (a) presentation of the relevant facts is sufficient to enable readers to reach an independent conclusion, and (b) distribution of the results is not limited to or directed toward persons solely interested in one side of a particular issue.

Lobbying Disclosure Act

In addition to tracking lobbying activities under the Code, organizations that lobby are also [required to register](#) under the LDA if one or more of their employees spends more than twenty percent of his or her time on lobbying activities. Registered organizations must submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. The LDA definition of “lobbying” differs significantly from the definition used for the 501(h) election.

Under the LDA, [“lobbying activities”](#) include “lobbying contacts” as well as efforts in support of such contacts, including preparation and planning activities, research, and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

Under the LDA, [“lobbying contacts”](#) are the actual communications with “covered officials.” Lobbying contacts may be oral, written, or electronic. A contact is not a lobbying contact unless it involves:

- 1) The formulation, modification, or adoption of federal legislation;
- 2) The formulation, modification, or adoption of a federal rule, regulation, Executive Order, or other program, policy, or position of the United States government;
- 3) The administration or execution of a federal program or policy (including the negotiation, award, or administration of a federal contract, grant, loan, permit, or license); or
- 4) The nomination or confirmation of a person for a position subject to confirmation by the Senate.

There are a number of [exceptions](#) to these four categories. The following types of communication do not constitute “lobbying contacts” (and therefore preparation for such contacts does not constitute “lobbying activity”) and are particularly relevant to nonprofit organizations:

- 1) Administrative requests, such as requests for a meeting or about the status of a matter;
- 2) Testimony given before a committee or sub-committee of Congress;
- 3) Speeches, articles, or publications made available to the public or distributed through radio, television, or other methods of mass communication;
- 4) Information provided in writing in response to a request by a covered official;
- 5) Information required by subpoena, CID, or otherwise compelled by the federal government (including information compelled by a contract, grant, loan, permit, or license);
- 6) Communications in response to a notice in the Federal Register and directed toward the official listed in the notice;
- 7) Written comments filed in the course of a public meeting;

- 8) Any communication that is made on the record in a public proceeding; and
- 9) Petitions for agency action made in writing and made part of the public record.

The term “[covered legislative branch official](#)” includes all elected Members of Congress and the Senate, as well as all employees and officers of Congress. The definition of “[covered executive branch officials](#)” is more specific. It includes:

- 1) The President;
- 2) The Vice President;
- 3) Any member of the uniformed services whose pay or grade is at or above O-7;
- 4) Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
- 5) Any officer or employee in a position listed in levels I through V of the Executive Schedule; and
- 6) Schedule C political appointees.

The “[Executive Schedule](#)” delineates the most senior positions in the administration. [Schedule C](#) posts are typically non-career policymaking or “political” appointees, confidential secretaries, and administrative assistants of key appointees within an agency.

Even if a communication is directed to a covered official—e.g., a Schedule C appointee at a government agency—it is not a lobbying contact if the communication is otherwise made part of the public record before the agency (e.g., through a formal docketing process).

Reporting Expenses under the LDA

Although many 501(c)(3) organizations are subject to both Code and LDA reporting requirements for lobbying, a provision of the LDA permits organizations to track and disclose lobbying expenditures using the Section 4911 definition rather than the LDA definition. For many organizations, the LDA definition is far narrower than “lobbying” as it is described in the Code.

Nonprofit organizations that are sensitive to having high dollar amounts reported on their LDA reports may consider opting to track lobbying activities separately under both the Code and the LDA. Tracking lobbying expenses under two different methods will increase recordkeeping obligations. However, because state lobbying and grassroots lobbying expenses are not reported under the LDA, choosing the LDA method may allow an organization to report a lower, more accurate estimate of federal lobbying expenditures to the Clerk of the House and the Secretary of the Senate.

Additional Resources

Statutes, Regulations, and Other Government Resources

For 501(c)(3) Organizations

- [Section 501\(c\)\(3\)](#) of the Internal Revenue Code
- [Section 4911\(d\)](#) of the Internal Revenue Code, “Influencing legislation”
- IRS summary of “[501\(c\)\(3\) Lobbying](#)”
- IRS summary of “[Measuring Lobbying Activity: Substantial Part Test](#)”

- IRS summary of “[Measuring Lobbying Activity: Expenditure Test](#)”
- IRS [Form 5768](#), “Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation.”

For LDA Registrants

- [Office of Public Records](#), U.S. Senate
- [Office of the Clerk](#), U.S. House of Representatives
- [Lobbying Disclosure Act Guidance](#), Office of the Clerk, U.S. House of Representatives
- *United States Government Policy and Supporting Positions* (the “[Plum Book](#)”), listing all employees of the federal government (including Executive Schedule and Schedule C employees)
- [5 U.S.C. § 7511\(b\)\(2\)](#), defining Schedule C employees

Venable Resources

- [Legislative and Executive Branch Lobbying Changes and Increased Contribution Limits](#), D. E. Wilson, Jr., Ronald M. Jacobs, and Aaron H. Hiller, January 2009
- [FEC Enacts New Fundraising Regulations](#), Ronald M. Jacobs and Aaron H. Hiller, December 2009
- [The New Form 990: Defusing Governance, Political Activities, Compensation, and Other Issues](#), Jeffrey S. Tenenbaum, Ronald M. Jacobs, and Aaron H. Hiller, December 4, 2009
- [The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203](#), Jeffrey S. Tenenbaum and Ronald M. Jacobs, June 26, 2008
- [Playing Politics: A Menu of Options for Associations to Consider](#), Ronald M. Jacobs and Aaron H. Hiller, June 2008
- [Political Activity, Lobbying Law and Gift Rules Guide](#), George E. Constantine and Ronald M. Jacobs, February 15, 2008
- [Myths about Lobbying, Political Activity, and Tax-Exempt Status](#), Jeffrey S. Tenenbaum, June 5, 2007

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