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## Lobbying for Nonprofit Organizations: Tracking Political Activities under the Tax Code and the Lobbying Disclosure Act

Nonprofit organizations conducting federal lobbying are subject to two separate definitions of lobbying. Section 162(e) of the Internal Revenue Code (the “Code”) defines “lobbying” and requires most tax-exempt organizations either to pay a proxy tax on lobbying expenditures or inform their members that a portion of their dues are non-deductible. The federal Lobbying Disclosure Act (the “LDA”) provides a second—and very different—definition of “lobbying,” which requires organizations to track and disclose the amount spent on such activities.

Organizations that can show that ninety percent of their members do not deduct their dues are not required to provide notice to their members of the non-deductibility of lobbying expenses, or to report the amount spent on lobbying activities on their informational returns. Please note that 501(c)(3) organizations are subject to a different definition of “lobbying” under the Code. For more information on lobbying as it affects 501(c)(3) organizations, please see [Lobbying for 501\(c\)\(3\) Organizations](#).

### Section 162(e)

[Section 162\(e\)](#) of the Code denies a deduction for lobbying expenditures. Most trade and professional organizations exempt under 501(c)(6), labor unions and farm bureaus exempt under 501(c)(5), and most taxable business entities are subject to the requirements of Section 162(e).

Membership organizations that are subject to Section 162(e) and engage in lobbying activities may either: (1) disclose to their members what percentage of their dues are nondeductible because they are used for lobbying; or (2) pay a 35-percent proxy tax on lobbying expenditures. Regardless of the method chosen, they must disclose the amount spent lobbying on their Form 990 informational returns. Most membership organizations choose to report the nondeductible amount to their members.

“[Lobbying](#)” under Section 162(e) includes five broad categories of activity:

- 1) **Influencing legislation** includes any attempt to [influence legislation](#) through communication with (i) any member or employee of Congress; (ii) any member or employee of a state legislature; or (iii) any federal or state government official or employee who may participate in the formulation of legislation.
- 2) **Grassroots lobbying** includes any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referenda. The term also includes urging association members to engage in grassroots lobbying.
- 3) **Communications to covered federal executive branch officials** means any direct communication with a covered federal executive branch official in an attempt to influence the official actions or positions of such official. Covered federal executive branch officials include the President, the Vice President, employees of the Executive Office of the President, and any individual serving in Executive Schedule level I or designated by the President as having Cabinet level status, and any immediate deputy of any of the foregoing.
- 4) **Political activities** include any activity that constitutes participation or intervention in a political campaign at the federal, state, or local level, the expenditures for which are not already subject to tax under Code Section 527(f).
- 5) **Supporting activities** include all research, preparation, planning, and coordination (including deciding whether to make a lobbying communication) engaged in for a purpose of making or supporting a lobbying communication or political activity (as defined above). In other words, the time spent on any background activity engaged in for a purpose of supporting a future planned lobbying communication must also be counted as lobbying.

The [regulations implementing Section 162\(e\)](#) state that a covered organization may use any reasonable method to calculate the amount spent on lobbying. An accurate calculation typically includes employees’ time spent lobbying, an allocation of overhead costs to lobbying activity, and actual lobbying expenses (e.g., travel, payments to outside consultants, publications, etc.). The regulations also permit an organization to make reasonable allocations for activities that are conducted for both lobbying and non-lobbying purposes.

### **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 definitions found in the Code.

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 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 applicable Code 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 All Non-501(c)(3) Tax Exempt Entities*

- [Tax Information for Charities & Other Non-Profits](#), Internal Revenue Service
- [Section 162](#) of the Internal Revenue Code
- [26 C.F.R. § 1.162-28](#), “Allocation of costs to lobbying activities”
- [26 C.F.R. § 1.162-29](#), “Influencing legislation”
- IRS summary of “[Nondeductible Lobbying and Political Expenditures](#)”
- *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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