

# VENABLE<sup>®</sup><sub>LLP</sub>

## The Nuts and Bolts of Lobbying for 501(c)(3) and 501(c)(6) Exempt Organizations

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# Today's Discussion

- Tax Rules for Lobbying
  - Rules for 501(c)(3) and 501(c)(6)s
  - Lobbying v. political activities
  - “No substantial part” test
  - 501(h) election
  - Reporting
- Special Restrictions for Recipients of Federal Funds
- Lobbying Disclosure
  - Federal Lobbying Disclosure Act
    - Lobbyist registration requirements
    - Quarterly and semi-annual reporting
  - State Lobbying Regulation
- Ethics and Gift Rules
  - Federal legislative branch
  - Federal executive branch
  - States



# Wait a Minute, I Can Lobby?

“I thought 501(c)(3)s couldn’t do that.”



# Tax Rules for Lobbying

## 501(c)(3) and 501(c)(6) Rules

- 501(c)(3)
  - Lobbying permitted, provided it is not a “substantial part” of the organization’s total activities.
  - NO political campaign activities permitted.
  
- 501(c)(6)
  - 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.



# Tax Rules for Lobbying

## 501(c)(3) Basic Rule—“Insubstantial” Lobbying Allowed

- There is a common misperception about 501(c)(3) lobbying—501(c)(3) public charities are permitted to engage in lobbying, though there are limits.
- Internal Revenue Code and Regulations do not use the term “lobby”—rather, the act is generally referred to as “carrying on of propaganda” and “attempting to influence legislation.”
- Code Section 501(c)(3) says limit is “no substantial part” of the activities may be carrying on of propaganda or otherwise attempting to influence legislation.



# Tax Rules for Lobbying

## 501(c)(3) Basic Rule—Political Activity Prohibited

- Stark line drawn between lobbying activities and political campaign activities—501(c)(3) organizations are absolutely prohibited from engaging in political campaign activities.
- Political campaign activity is generally giving of support for the election or defeat of a candidate for office. In practice, IRS uses a very broad definition of “candidate.”
- Nonpartisan electoral activities may be permissible 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).



# Tax Rules for Lobbying

## 501(c)(3) Lobbying Compliance Options

- The Tax Code provides 501(c)(3) organizations with two options for measuring compliance with restrictions on lobbying activities:
  - “No substantial part” test
  - 501(h) expenditure test



# Tax Rules for Lobbying

## 501(c)(3) Lobbying Compliance Options

- **“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



# Tax Rules for Lobbying

## Definition of “Lobbying” for 501(c)(3)s

- Basic general concept—attempts to influence *legislation* at the federal, state, or local levels through direct or grassroots communications
  - 501(h) expenditure test—lobbying definition specifically tied to communications with certain covered officials that refer to specific legislation, with exclusions for a variety of activities
  - No 501(h) election—cannot rely on the specific definitions and exclusions



# Tax Rules for Lobbying

## 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
  - 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”



# Tax Rules for Lobbying

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

- Specific **exclusions** from the definition of lobbying:
  - communications with organization 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.



# Tax Rules for Lobbying

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

- 501(h) spending 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

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



# Tax Rules for Lobbying

## Special 501(c)(6) Lobbying Tax Rules

- Lobbying and political activity portion of member dues to a 501(c)(6) is NOT tax-deductible by members as ordinary and necessary business expense (Code Section 162(e)).
- 501(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 35% rate).



# Tax Rules for Lobbying

## Special 501(c)(6) Lobbying Tax Rules

- Definition of lobbying is different for lobby tax purposes than the definition of lobbying used by 501(h)-electing public charities (compare Code Sections 162(e) and 4911) and is also different than the definitions of lobbying under the LDA.
  
- Under Code Section 162(e), lobbying and political expenditures includes expenditures for:
  - Influencing federal or state legislation but *not* local legislation;
  - Influencing the general public with respect to elections, legislative matters, or referendums;
  - Influencing high-level federal executive branch officials with regard to administrative actions;
  - Participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office.



# Tax Rules for Lobbying

## Tracking and Reporting Activities and Expenses

- Tax-exempt organizations report lobbying activities on Form 990, Schedule C:
  - 501(c)(3)s
    - 501(h)-electing organizations need only report lobbying expenditures.
    - Non-electing organizations must report lobbying expenditures and also describe their lobbying activities.
  - 501(c)(6)s
    - Report expenditures; calculate lobby tax liability, if any.
- Be aware of non-tax reporting obligations (e.g., federal and state lobbying disclosure laws).



# Tax Rules for Lobbying

## Tracking and Reporting Activities and 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 is included.
  - Provide training on what is and is not lobbying according to the applicable definitions (Tax Code, LDA, etc.).
  - Use time sheets!



# Tax Rules for Lobbying

## 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.



# Tax Rules for Lobbying

## Basic Dos and Don'ts for 501(c)(3)s

- A 501(c)(3) **may not**
  - Support or oppose candidates for public office (absolute prohibition); or
  - Lobby on legislation in substantial part or, under Section 501(h), beyond a certain percentage of its expenditures.
  
- A 501(c)(3) **may**
  - Lobby on legislation within the Code's lobbying limits.
  - But be careful of special restrictions applicable to recipients of federal funds.



# Special Restrictions

## Receipt of Federal Funds



# Special Restrictions

## Receipt of Federal Funds

- OMB Circular A-122—Cost Principles for Nonprofit Organizations
  - 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 Circular A-122 with regard to federal grantees: costs for lobbying and political activities are unallowable.



# Special Restrictions

## Receipt of Federal Funds

- **“Byrd Amendment”**
  - **Prohibitions:**
    - Prohibits use of federal funds 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.
    - Does not prohibit lobbying for an award with an organization’s private funds—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:** 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 (SF-LLL).



# Special Restrictions

## Receipt of Federal Funds

- Appropriations Acts Limitations
  - 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.
- “Simpson Amendment”
  - 501(c)(4) organizations 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.



# Special Restrictions

## Receipt of Federal Funds

- 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 only applied to officers and employees of the federal government).
    - Appears to have never been enforced to date.



# Lobbying Disclosure

## Federal and State



# What is a Lobbyist?

## TWO PART TEST

- More than one lobbying contact  
*AND*
- More than 20% of time on lobbying activities



## Lobbying Contact

- Any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—
  - the formulation, modification, or adoption of Federal legislation (including legislative proposals);
  - the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
  - 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
  - the nomination or confirmation of a person for a position subject to confirmation by the Senate.



## Other Definitions

### COVERED LEGISLATIVE BRANCH OFFICIALS

- Anyone in Congress – from Members to the receptionist

### COVERED EXECUTIVE BRANCH OFFICIALS

- President, Vice President, & Executive Office of the President
- Levels 1 through 5 of the Executive schedule (cabinet & some below)
- Certain military officers
- Schedule C political appointments



## Other Definitions

### LOBBYING ACTIVITY

- Contacts and 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.



# Overview of Reporting

- Quarterly Reporting
- Semiannual Lobbyist Report



## Contents of Quarterly Reports

- Amount spent on lobbying
  - Minimum amount to report \$5,000 (instead of \$10,000)
  - Rounded to nearest \$10,000 (instead of \$20,000)
  - LDA or IRC
- Individuals who act as lobbyists
  - 20 year look back for covered officials
- Issue areas lobbied
- Agencies/houses of Congress lobbied



## LD-203

- Semiannual disclosure of “political” contributions
- Each organization with in-house lobbyist must complete form
- Each registered lobbyist must complete the form
- Includes certification of Gift Rule compliance
- Online system



## Don't Forget the States

- Virtually every state has some type of registration and reporting regime; know your state's requirements before lobbying
- See, for example, Florida Statutes 11.045
  - Lobbyist is a person who is employed and receives payment ...for the purpose of lobbying.



# Ethics & Gift Rules



# Congressional Gift Rule

## FOR NON-LOBBYISTS

- Basic Rule:
  - Gifts of up to \$49.99
  - Total for year of up to \$99.99
- Unless:
  - There is an applicable exemption
  - Then may give more



# Congressional Gift Rule

## FOR LOBBYISTS

- Basic Rule:
  - No gifts or travel from lobbyists or entities that retain or employ lobbyists
- Unless:
  - There is an applicable exemption
- Cannot expense “gifts”
  - No reimbursement
  - No deductions
  - May pay using own money if preexisting friendship (discussed below).
- Does not apply to executive branch gifts
  - \$20 limit



# Congressional Gift Rule Exceptions

- Personal Friendship
- Widely Attended Events
- Charity Events
- Receptions



## Executive Branch Ethics Rules

- The new rules apply to all political appointees:
  - Appointed by President and Vice President
  - Senior Executive Service appointments
  - Schedule C appointments
  - Will eventually include other career agency officials
- Requires appointees to sign pledge
- More strict than existing Executive Branch Rules



## Executive Branch Gift Ban—Gifts from Lobbyists

- Bans gifts from registered lobbyists and organizations registered under the LDA
- Exceptions:
  - Based on personal relationship
  - Discounts and similar benefits
  - Resulting from spouse's employment
  - Gifts to President or Vice President
  - Authorized by agency regulation or accepted under specific statutory authority



# Gift Rules

- Don't forget the states!



## Questions?

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