

Lobbying and Public Charities

Public charities are permitted to lobby within limits. Accordingly, where lobbying would be an effective and efficient strategy to further a charity's mission, the charity should strongly consider incorporating lobbying in its overall plan. Often, this never happens because leaders of the charity are concerned about violating the prohibition against substantial lobbying imposed by IRC §501(c)(3).

The Law

IRC §501(c)(3) provides that no substantial part of the activities of an otherwise qualified organization may be the carrying on of propaganda or otherwise attempting to influence legislation (i.e., lobbying). While violation of this prohibition may result in, among other consequences, loss of the organization's tax-exempt status, it is important not to rule out engaging in any or all advocacy activities. Instead, it is better to understand what is (and what is not) *lobbying* and what amount of lobbying is considered *substantial*. These terms may have different meanings depending on the charity's decision on the standard by which it chooses to measure its compliance:

Substantial Part Test. Under this test, little guidance is offered with respect to what activities are considered lobbying and how much lobbying is substantial. In one early case, devotion of less than 5% of an organization's time and effort was found to be insubstantial. However, the test appears to have evolved with later cases and it generally is thought to consider all the facts and circumstances of an organization's lobbying activities (including cash expenditures, volunteer efforts and donated resources). Accordingly, charities must document all of their lobbying activities and expenses. If a charity engages in substantial lobbying in any one year, it may have its tax-exempt status revoked. In addition to revocation, violation of the substantial part test may result in the imposition of (i) a 5% tax on the organization on all lobbying expenditures, and (ii) a 5% tax on organizational managers (e.g., directors and officers) who permitted such expenditures knowing that it would jeopardize the organization's tax-exempt status.

501(h) Expenditure Test. Under this test, which is available to most public charities (churches being a significant exception) that make the §501(h) election (*electing charities*) by filing Form 5768 (<http://www.irs.gov/pub/irs-pdf/f5768.pdf>), an otherwise qualified public charity will not be denied exempt status as a §501(c)(3) organization because of substantial lobbying so long as its total lobbying expenditures and grass roots expenditures do not normally exceed certain defined limits. Accordingly, an electing charity is not subject to limits on lobbying activities that do not require expenditures (e.g., unreimbursed lobbying by volunteers).

Expenditure Limits Under §501(h):

Total Lobbying Expenditures (direct and grassroots):

- 20% of the first \$500,000 of Exempt Purpose Expenditures (defined on the next page), plus
- 15% of the next \$500,000 of Exempt Purpose Expenditures, plus
- 10% of the next \$500,000 Exempt Purpose Expenditures, plus
- 5% of the remaining Exempt Purpose Expenditures up to a total cap of \$1 million.

Grass Roots Expenditures:

- 25% of the Total Lobbying Expenditures Limits.

If an electing charity exceeds either the total lobbying or grass roots expenditures limit in any one year, it must pay an excess lobbying expenditures tax equal to 25% of the excess. If an electing charity exceeds both limits in any one year, it must pay 25% of whichever excess is greater. An electing charity will be subject to revocation of its tax-exempt status if, over a four-year period, either its total lobbying or grassroots expenditures exceed the appropriate aggregated annual limit over the period by more than 50%.

This memorandum is intended to provide accurate information with respect to its subject matter. It does not constitute legal or professional advice, and it is not an invitation for an attorney-client relationship. If specific legal advice is sought, the reader is advised to retain the services of a competent professional. The author does not intend the resources referenced herein to be referrals or endorsements

For purposes of §501(h), the following definitions apply:

(1) A Direct Lobbying Communication is any attempt to influence legislation through communication with (A) any member or employee of a legislative body or (B) any other government official or employee who may participate in the formulation of legislation, but only if its principal purpose is to influence legislation, and it reflects a view on *specific legislation* (proposed or pending law or bill).

(2) A Grassroots Lobbying Communication is any attempt to influence legislation through an attempt to affect the opinion of the general public (or any segment), but only if it reflects a view on specific legislation and encourages the recipient to *take action* (contact legislators) with respect to such legislation.

(3) Legislation includes action by a legislative body (e.g., Congress, county board of supervisors) or by the public in a referendum, ballot initiative, constitutional amendment or similar procedure.

(4) Exempt Purpose Expenditures include all amounts a charity expends to accomplish its exempt purpose (e.g., program expenses, administrative overhead expenses, lobbying expenses, and straight-line depreciation of assets used for an exempt purpose). They do not include fundraising expenses of a charity's *separate fundraising unit* or an outside fundraiser, capital expenditures, unrelated business income expenses, nor investment management expenses.

For purposes of §501(h), the following activities are not considered lobbying:

(1) Nonpartisan analysis, study or research, which may advocate a particular position or viewpoint so long as: (a) there is a sufficiently full and fair exposition of the pertinent facts (and not just unsupported opinions) to enable the public or an individual to form an independent opinion or conclusion; (b) the distribution of the results is not limited to, or directed toward, persons who are interested solely in one side of a particular issue; and (c) subsequent use does not cause it to be treated as a grass roots lobbying communication (e.g., direct encouragement for recipients to take action within 6 months).

(2) Examinations and discussions of broad social, economic, and similar problems; provided that: (a) they do not address themselves to the merits of a specific legislative proposal, and (b) they do not directly encourage recipients to take action with respect to legislation.

(3) Technical advice or assistance provided to a governmental body or committee in response to a written request from such body or committee.

(4) Communications pertaining to self-defense by the organization, to a legislative body or its representatives, and with respect to a possible action by such legislative body that might affect the existence of the organization (or an affiliate), its powers and duties, its tax-exempt status, or the deductibility of contributions to the organization. Under this exception, a charity may similarly make expenditure in order to initiate legislation if such legislation concerns the matters listed above.

Other Activities Not Considered Lobbying

(1) A communication to an administrative agency advocating a view on an existing or proposed regulation or ruling.

(2) A petition to the President, a governor, or a mayor regarding an executive decision.

(3) A communication whose purpose is to influence legislators on nonlegislative matters (e.g., conducting an investigative hearing, intervening with a government agency).

Special Rules

Referendum, Ballot Initiative or Similar Procedure. In such procedures, the general public in the state or locality where the vote will take place constitutes the legislative body. Accordingly, a communication to one or more members of the general public in that state or locality referring to and reflecting a view on a measure that is the subject of such procedure is direct lobbying.

Communication with Members with Respect to Specific Legislation. Not lobbying if it does not encourage members to take action. Direct lobbying if it encourages members to engage in direct lobbying. Grassroots lobbying if it encourages members to engage in grassroots lobbying.

Paid Mass Media Advertisement about Highly Publicized Legislation. Presumed to be grass roots lobbying if it: (i) is made within 2 weeks before a vote by a legislative body/committee; (ii) reflects a view on the general subject of the legislation; and (iii) either refers to the legislation or encourages the public to communicate with legislators on the general subject of the legislation. Rebuttable by demonstrating that the timing of the advertisement was unrelated to the upcoming legislative action.