

COMPLYING WITH IRS REGULATIONS ON LOBBYING BY PUBLIC CHARITIES

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Is This Brochure For You?

This brochure explains the Internal Revenue Service regulations that restrict the lobbying activities of certain non-profit organizations. Nonprofit organizations can be structured in several ways. The information in this brochure applies only to nonprofit groups organized as public charities under Section 501(c)(3) of the federal tax code. People who donate to these groups receive the most generous tax deductions allowed by the IRS. Because of this benefit, significant restrictions are placed on the groups' expenditures for political purposes. This brochure explains those restrictions.

If your organization is set up differently -- for example, as a Section 501(c)(4) social welfare organization or as a Section 527 political organization -- you should seek legal advice on the restrictions that apply to you.

The regulations governing lobbying are complex, and although this brochure explains them in plain language, it is no substitute for competent legal advice. It should help you decide if you need to consult an attorney.

Introduction

Under the federal tax code -- Section 501(h) to be precise -- tax-exempt public charities are given a choice between two different methods of reporting their lobbying activities. One option is "to elect" to be governed by the rules contained in this section of the tax code. Charities choosing this option are often referred to as "501(h)" or "electing" charities. If a charity does not elect to be governed by the Section 501(h) rules, it is subject to another, vaguer set of rules. Such charities are often referred to as "nonelecting charities."

Why "elect" to be a "501(h)" charity?

You should "elect" because 501(h) charities' lobbying activities are determined strictly on the basis of expenditures. This allows you to determine your lobbying limits with precision. Clear guidelines state what counts, and what doesn't count, as lobbying. Additionally, any penalties you may face because of excess lobbying are generally limited to an excise tax (unless you repeatedly surpass your lobbying limits).

On the other hand, if you don't elect to be a 501(h) charity and you stray -- knowingly or not -- over the fine line of what's permissible and what isn't, you could lose your tax-exempt status. Additionally, if you don't elect, the rules governing what you can and can't do, and how much you can spend, are murky.

Regardless of whether or not you elect to be a 501(h) charity, you must keep track of your lobbying expenditures. So, if you think you might do any lobbying at all, there are significant advantages to electing to report as a 501(h) charity.

The IRS actually encourages groups to elect to report their activities under Section 501(h). It has found that groups that elect to report are more often in compliance with the law than those that have not.

My Group? Lobbying?

Public charities are given tax-exempt status by the Internal Revenue Service if they agree to do charitable deeds -- which, broadly speaking, means working for the "common good." If you think that means, by definition, charities can't engage in advocacy, you're wrong. Indeed, both the Congress and the IRS think it's perfectly proper for charities to work on legislative issues -- as long as they don't devote a "substantial part" of their activities to "carrying on propaganda" or "otherwise attempting to influence legislation."

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The thorny part for public charities is figuring out what these key terms and phrases mean.

- What is a “substantial part” of activities?
- What is “propaganda”?
- What does “otherwise attempting to influence legislation” refer to?

Nonprofit tax-exempt public charities struggled for answers to these questions until 1976, when Congress passed a law to clear up the “substantial part” test. Section 501(h) of the 1976 law provides public charities with an objective set of standards for determining whether their lobbying expenditures are “substantial.” These standards define terms such as “lobbying,” and give examples of what is and isn’t lobbying. The standards clear up a lot of confusion.

Additionally, an “electing” charity that exceeds the cap set on allowable lobbying expenses doesn’t automatically lose its tax-exempt status -- it simply pays a 25-percent surcharge on its excess expenses and, over an average of four years, must keep its lobbying expenses within acceptable levels. A “nonelecting” charity, however, that is found to devote a “substantial part” of its activities to lobbying is out of luck -- its tax-exempt status could be revoked.

The long and short of the situation is that if you think you’re going to be doing more lobbying than just making a few calls or sending out a few postcards, your organization should elect to report under the Section 501(h) rules. It’s safer, you’ll know exactly how much lobbying you are allowed to do, and it’s not that difficult to go through. You just have to know the rules.

Expenditure Limits

Section 501(h) public charities are subject to two lobbying expenditure limits. The first restricts the total amount of lobbying expenditures. The second limits expenditures in a specific area of lobbying known as “grassroots” lobbying.

Total Lobbying Expenditure Caps

- For public charities with total expenditures up to \$500,000, 20 percent of expenditures may be spent on lobbying (\$100,000).
- For public charities with expenditures from \$500,000 to \$1 million, \$100,000 plus 15 percent of expenditures over \$500,000 may be spent on lobbying.
- For public charities with expenditures from \$1 million to \$1.5 million, \$175,000 plus 10 percent of expenditures over \$1 million may be spent on lobbying.
- For public charities with expenditures over \$1.5 million, \$225,000 plus 5 percent of expenditures over \$1.5 million may be spent on lobbying. However, total lobbying expenditures may not exceed \$1 million.

Grassroots Lobbying Expenditure Cap

Only a portion of the money you are allowed to spend on lobbying can be spent on so-called “grassroots” lobbying.

- For all 501(h) public charities, up to 25 percent of the permitted amount spent on all lobbying may be spent on grassroots lobbying.

If you exceed your total lobbying expenditure cap or your grassroots lobbying expenditure cap, you are assessed a penalty of 25 percent of the amount of the excess (not of the total spent). If you exceed both caps, you are required to pay whichever penalty is greater. Only if you exceed either cap by 50 percent, averaged over a four-year period, can you lose your tax-exempt status.

What Is “Lobbying” Under The 1976 Federal Tax Law?

Direct Lobbying

Generally, you are lobbying when you state your position on specific legislation to legislators or other government employees who participate in the formulation of legislation. This type of lobbying is known as “direct lobbying.” If you are a membership organization and you ask your members to contact legislators in support of or in opposition to legislation, this is also considered direct lobbying.

Grassroots Lobbying

You are also lobbying when you state your position on legislation to the general public and ask the general public to express that same view to legislators or other government employees who participate in the formulation of legislation. This type of lobbying is known as “grassroots lobbying.”

To be considered “grassroots lobbying,” a statement must have some “call to action.” A call to action is a communication that:

- Asks the recipient to contact a legislator or other relevant government employee for purposes of influencing the legislation; or
- Gives the address, phone number, or similar information regarding a legislator or legislative body employee; or
- Provides a petition, post card, or similar means for the recipient to contact a legislator or legislative body employee; or
- Specifically identifies a legislator or legislators who will vote on the legislation as
 - opposed to or undecided about the organization’s view on the legislation, or
 - the recipient’s legislator(s), or
 - a member of a legislative (sub)committee that will vote on the legislation.

What Isn’t “Lobbying” Under The 1976 Federal Tax Law?

A number of activities that you might normally think would fall under lobbying are excluded from IRS’ definition of “lobbying”:

- Publishing the results of nonpartisan analysis, study, or research on a legislative issue.
- Communicating with your organization’s members, even on specific legislation -- as long as you do not directly encourage your members to lobby on the legislation.
- Discussing broad social, economic, and similar policy issues even if specific legislation is pending on the issues -- as long as the discussion doesn’t address the merits of specific legislation.
- Responding to a legislative body when requested in writing to provide technical advice on legislation.
- Lobbying on matters that affect your organization’s powers, duties, tax-exempt status, or deduction of contributions. (This is known as “self-defense lobbying.”)

Nonelecting Charities

If you lobby but choose not to report under the Section 501(h) rules, you’re thrown back on some of the same ropes the 1976 law was designed to keep you off -- the vagueness of what the Internal Revenue Service considers “substantial” lobbying.

Guidelines on what constitutes “substantial” remain murky. Some people believe the IRS considers lobbying expenditures over 5 percent of a group’s budget to be “substantial,” but the IRS has never admitted that is its benchmark. Moreover, the IRS has reserved the right to measure “substantial” lobbying by any of a number of ways -- not just by dollars, but by time, by public prominence, by success, or even by the importance of lobbying activities to your group. The upshot is that if you don’t elect to be governed by Section 501(h) rules, you can never be certain when you’re straying over the allowable lobbying line -- because you don’t know what the line is or where it lies.

Additionally, by not electing, there is no guarantee that certain activities won't be counted as lobbying -- even though they would not have been had you elected to report under Section 501(h) rules. For example, the 1976 law clearly states that, if you elect to report according to Section 501(h) rules, lobbying occurs only when money is spent. If no money is spent, there is no lobbying for electing charities. However, for nonelecting charities, the IRS could consider certain activities to be lobbying even if no money were spent. For example, volunteers' work may be considered a lobbying activity for a nonelecting charity -- even though no money was spent.

If the IRS determines that a nonelecting charity has spent a "substantial" amount of money on lobbying, it can lose its tax-exempt status -- as well as possibly have penalties assessed against the organization and its managers.

Are Elections Considered Lobbying?

Elections are treated different from lobbying. Elections concern political races, while lobbying concerns legislation. Generally, charities -- whether electing or nonelecting -- are prohibited from engaging in partisan political activity. Only a limited number of election-related activities are permitted. Expenditures made for permissible election activities need not be reported as lobbying expenses.

Permissible election activities include the following:

- nonpartisan voter registration and get-out-the-vote drives (efforts can be concentrated among historically under-represented groups).
- nonpartisan candidate forums.
- voting guides regularly distributed to the group's members describing how all legislators voted on an issue or issues important to the group; distribution during an election must be done in the same manner as at other times.

Not allowed is any intervention (including the publishing or distributing of statements) in any political campaign on behalf of (or in opposition to) any candidate for public office.

A quick rule of thumb for electioneering is that education efforts are OK, but endorsement of a particular candidate is not.

Important Changes

In 1995, Congress passed a new Lobbying Disclosure Act (LDA) that imposes new reporting requirements on charitable organizations. If you are lobbying federal officials, you must register and file reports every six months if your organization has at least one employee who devotes at least 20 percent of his or her time to lobbying activities and the organization incurs, or expects to incur, lobbying expenditures of \$20,000 or more in a six-month period.

Electing charities may follow the same Section 501(h) definitions of lobbying that are used for tax law purposes. However, these organizations, in filing under the LDA, also have the option of using the LDA definition of lobbying.

The major differences between the Section 501(h) and LDA definitions of lobbying are these:

- The LDA definition of lobbying *excludes* all efforts to influence state and local legislative bodies as well as grassroots lobbying activities at the federal level.
- The LDA definition of lobbying *includes* most forms of "self-defense lobbying" and lobbying on legislative proposals that are not yet "specific legislative proposals."

It is important to note that many forms of communication with executive branch officials are also considered lobbying under the LDA definition but not under the Section 501(h) definition. Such communications include lobbying executive branch officials on federal rules, regulations, and executive orders, or to influence a program, policy, or position of the U.S. government.

Frequently Asked Questions

Q. What exactly is “legislation”?

A. Legislation includes bills that have been introduced as well as specific legislative proposals. It doesn't include general concepts or principles. It also does not include administrative rules and regulations.

Q. How do I elect to report lobbying activities under Section 501(h)?

A. The IRS assumes you have chosen not to report under the Section 501(h) rules unless you file a form saying you have. Filing is easy. Simply complete the one-page IRS Form 5768 and send it to the Internal Revenue Service. On the form, you identify your organization and indicate that your governing body has elected to come under the provisions of Section 501(h). An election made anytime during the tax year applies throughout that tax year, and for succeeding years. If you ever decide to go back to nonelecting status, you file the same form (but check a different box on the form). Your new status becomes effective in the next tax year.

Q. Who must report lobbying activities?

A. All tax-exempt nonprofits must report their lobbying expenses to the IRS as part of their ordinary tax return -- whether they are electing or nonelecting charities. The format for reporting is different for each type, however.

Q. What activities must be reported?

A. This depends on whether you've elected to report under the Section 501(h) rules:

- Electing organizations need only report the lump sum amount spent on “direct” lobbying (generally, lobbying members or staff of a legislative body) and on “grassroots” lobbying (generally, urging the public to lobby). You should keep detailed records of how the money was used in case your organization is ever audited. Setting up a separate account each for direct and grassroots lobbying expenditures is the simplest way to do this.
- Nonelecting organizations must provide detailed narrative descriptions of their lobbying activities, and how much was spent on each activity.

The upshot is that it can be easier to report lobbying activities if you have elected to report under the Section 501(h) rules.

Q. Exactly what expenses must be reported?

A. Three main categories of expenses must be reported:

- You must report direct expenses -- including a pro rata share of compensation -- for researching, drafting, editing, copying, publishing, and mailing or otherwise disseminating lobbying communications.
- You must also count a share of the general overhead for the staff involved in these activities.
- Additionally, if any of your activities or publications has a dual purpose -- general information as well as lobbying -- you must allocate a portion of the expenses to lobbying.

Q. What kind of records must I keep?

A. Whether or not you elect to report under Section 501(h) rules, you must keep good records to substantiate your lobbying activities and expenses. It is a good idea -- again, whether you are an electing organization or not -- to put in place a system for tracking expenses. The IRS accepts any reasonable method for doing this, including a sample of activities over a period of time or complete time records.

Q. What if my organization chooses not to report under the Section 501(h) rules?

A. Nonelecting organizations are subject to the ambiguous interpretations of the “insubstantial” test. This essentially means you must convince the IRS that any lobbying activities you undertake are insubstantial to your overall work. Precisely which activities constitute lobbying is unclear, as is precisely how much lobbying is allowed. This can ultimately work to your group's disadvantage. Lobbying can be a powerful tool to push your policy agenda. Having your lobbying activities limited because of an unfavorable interpretation of a vague law prevents you from using that tool effectively.

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