LOBBYING AND POLITICAL ACTIVITY: A WEBINAR FOR 501(C)(3) ORGANIZATIONS

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Section 501(c)(3) of the Tax Code provides that a nonprofit cannot, as a substantial part of its activities, carry on propaganda, or otherwise attempting, to influence legislation.

Section 501(c)(3) also provides that a nonprofit cannot participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.
Participating directly or indirectly in political campaign.  

*In a word: Don’t!*

- Importance here is that any activities undertaken by the nonprofit are of a non-partisan nature
- Voter education activities (including presenting public forums and publishing voter education guides) are permitted provided they are conducted in a non-partisan manner
- In addition, other activities intended to encourage people to participate in the electoral process, such as voter registration and get-out-the-vote drives are also permitted.
Issue Advocacy v. Political Campaign Intervention

• Activities that are not permitted include:
  • Giving candidates grades or otherwise rating their positions on different issues.
  • Highlighting the candidates’ positions on only one or two issues, instead of a wide range of issues.
  • Hosting a candidate forum, unless all candidates are invited and questions are asked on a wide range of issues in a neutral fashion.
  • Issues statements with respect to an issue where it appears, based on the facts and circumstances, that the statement is intended to influence the election.
  • There are several factors the IRS uses to determine whether a statement is intended to influence an election.
Issue Advocacy v. Political Campaign Intervention

Key factors include whether the statement:

• Identifies one or more candidates for a given public office;
• Expresses approval or disapproval for one or more candidates’ positions and/or actions;
• Is delivered close in time to the election and/or makes reference to the election;
• Addresses an issue that has been raised in the campaign by the candidates;
• Is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
• Is related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

• For more information about political activities go to: http://www.irs.gov/pub/irs-drop/rr-07-41.pdf
What is Permitted Amount of Lobbying?

• The organization’s activities must constitute an insubstantial amount of its activities.

• In determining whether the activity is substantial, the IRS considers a variety of factors, including the time devoted (by employees, independent contractors, and volunteers) and the expenditures devoted by the organization to the activity.

• Major concern is uncertainty, including no bright line test as to what constitutes “substantial lobbying”.
  
  • Generally, the courts have ruled that the amount spent is not determinative. However, if less than 5% of an organization’s total activities is attributable to lobbying, there is a good chance that the activities should not constitute "substantial" lobbying.
How do you compute “lobbying expenditures”? The “expenditures test” and the 501(h) election.

- In order to assist nonprofits, Congress enacted what is known as the “expenditures test” as an alternative. Under Section 501(h) of the tax code, charitable organizations - other than churches and private foundations – may elect this test for computing lobbying expenditures, commonly known as the 501(h) election.

Advantages include:
- Greater Certainty
- Larger Lobbying Limits
Section 501(h) Limitations

• The total lobbying expenditure limits under the 501(h) election are:
  • 20 percent of the first $500,000 of exempt purpose expenditures, plus
  • 15 percent of the next $500,000 of exempt purpose expenditures, plus
  • 10 percent of the next $500,000 of exempt purpose expenditures, plus
  • Five percent of the remaining exempt purpose expenditures up to a total cap of $1 million.

• For purposes of the rule, “exempt purpose expenditures” are all payments an organization makes in a year except investment management, unrelated businesses and certain fundraising costs.

• No more than 25% of permitted lobbying expenditures may be for grass roots lobbying.
The IRS definition of lobbying expenditures under the 501(h) election includes both direct and grassroots lobbying.

Key Definitions:

• “Lobbying expenditures” are expenditures for the purposes of influencing legislation.

• Influencing legislation includes

• any attempt to influence any legislation through an attempt to affect the opinions of all or part of the general public (grassroots lobbying); and

• any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.
Direct Lobbying

Direct lobbying is any attempt to influence any legislation through communication with any member or employee of a legislative body. Legislation” includes

- Action with respect to acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by public referendum. It also includes the confirmation of someone for public office.

- “Action” includes the introduction, amendment, enactment, defeat, or repeal of acts, bills, resolutions, nominations or similar items.

- Direct lobbying includes any communication with:
  - Any member or employee of a legislative body; or
  - Any other government official or employee who may participate in the formulation of the legislation, but only if the principal purpose of the communication is to influence legislation.

- Communication must refer to specific legislation and reflect a view on such legislation.
Example of Non-Lobbying Expenditure

State X enacts a statute that requires the licensing of all day care providers. Agency B in State X is charged with preparing rules to implement the bill enacted by State X. One week after enactment of the bill, organization C sends a letter to Agency B providing detailed proposed rules that organization C suggests to Agency B as the appropriate standards to follow in implementing the statute on licensing of day care providers. Organization C's letter to Agency B is not a lobbying communication.
Grass Roots Lobbying

• Grassroots Lobbying is any attempt to influence any legislation through an attempt to affect the opinions of all or part of the general public.

• Grass roots lobbying communication has three elements:
  • Refers to specific legislation;
  • Reflects a view on such legislation; and
  • Encourages the recipient of the communication to take action with respect to such legislation. (Also referred to as a “call to action.”)
Definition of encouraging recipient to take action

• States that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation for principal purpose of influencing legislation;

• Includes information about how to contact legislator or an employee of a legislative body;

• Provides a petition, tear-off postcard or similar material for the recipient to communicate; or

• Specifically identifies one or more legislators who will vote on the legislation and who:
  • Have a different view about the legislation that the nonprofit;
  • Are undecided with respect to the legislation;
  • Is the recipient's representative in the legislature; or
  • Is a member of the legislative committee that will consider the legislation.
Examples of Grassroots Lobbying Expenditure

Example 1

- A pamphlet distributed by Y organization states that the “President's plan for a drug-free America,” should be passed. The pamphlet encourages readers to “write or call your senators and representatives and tell them to vote for the President's plan.” No legislative proposal formally bears the name “President's plan for a drug-free America,” but that and similar terms have been widely used in connection with specific legislation. Thus, the pamphlet refers to specific legislation, reflects a view on the legislation, and encourages readers to take action with respect to the legislation. The pamphlet is a grass roots lobbying communication.

Example 2

- “Assume the same facts as in Example 1, except that the pamphlet does not encourage the public to write or call representatives, but does list the members of the committee that will consider the bill. The pamphlet is a grass roots lobbying communication.

Example 3

- Assume the same facts as in Example 1, except that the pamphlet encourages readers to “write the President to urge him to make the bill a top legislative priority” rather than encouraging readers to communicate with members of Congress. The pamphlet is a grass roots lobbying communication.
Example of non-Grassroots Lobbying Expenditure

Organization B sends a letter to all persons on its mailing list. The letter includes an update on numerous environmental issues with a discussion of general concerns regarding pollution, proposed federal regulations affecting the area, and several pending legislative proposals. The letter endorses two pending bills and opposes another pending bill, but does not name any legislator involved, nor does it otherwise encourage the reader to take action with respect to the legislation. The letter is not a grass roots lobbying communication.
Exceptions to lobbying expenditures – none of these communications is lobbying:

- Nonpartisan analysis, study or research.
- Responding to a request from a government official for technical advice or assistance with respect to a piece of legislation.
- Communicating with a government official on legislation that might affect the organization’s existence, its powers and duties, tax-exempt status, or the deduction of contributions to the organization.
- Communications between the organization and its members with respect to legislation or proposed legislation of direct interest to the organization if those communications do not urge them to lobby or have others lobby on such legislation.
- Any communication with a government official or employee, except where:
  - the communication is with a member or employee of a legislative body, or
  - the principal purpose of the communication is to influence legislation.
Subsequent use of non-lobbying communications

• Where non-lobbying communications or research materials are subsequently accompanied by a direct encouragement for recipients to take action with respect to legislation, the communication or research materials themselves may be treated as grass roots lobbying communications. In such a case, all expenses of preparing and distributing the advocacy communications or research materials will be treated as grass roots expenditures.

• Safe Harbor Rule: This rule does not apply:
  
  • If a charitable organization paid the expenses for the communications or research materials 6 months or more before the time they were used for grass roots lobbying purposes, or
  
  • If the primary purpose of the original materials was for a non-lobbying purposes. (To determine primary purpose, look at the extent of the organization's non-lobbying distribution of the materials and whether the subsequent use of the materials is by the organization, a related organization, or an unrelated organization.) Clear and convincing evidence will be required to establish that the primary purpose for preparing the communication for use in lobbying when the material is being used by an unrelated organization.
Example of where non-lobbying communication becomes grassroots lobbying under the Subsequent Use Rule

- Assume a non-lobbying report is prepared by an organization and distributed to 50 people. The report refers to and reflects a view on specific legislation but does not contain a direct encouragement for the recipients to take action with respect to legislation.

- Two months later, the organization sends the report to 10,000 people along with a letter urging recipients to write their Senators about the legislation discussed in the report.

- Because the cost of the report was paid within the six months preceding the mailing of the letter, the organization's primary purpose in preparing the report must be determined by weighing all of the facts and circumstances.

- In light of the relatively minimal non-lobbying distribution and the fact that the lobbying distribution is by the preparing organization rather than by an unrelated organization, both the report and the letter are grassroots lobbying communications, unless there is other evidence to show differently.

- Accordingly, all of the organization's expenditures for preparing and mailing the two documents are grassroots lobbying expenditures.
Example of where non-lobbying communication would (mostly) not become grass roots lobbying under the Subsequent Use Rule

• Assume the same facts as in Example 1, except that the costs of the report are paid over the two month period of January and February. Between January 1 and 31, the organization pays $1,000 for the report. On February 10th, the organization pays $500 for the report. Further assume that the report is first used with a direct encouragement to action on August 1.

• Six months prior to August 1 is February 1. Accordingly, no costs paid for the report before February 1 are treated as grass roots lobbying expenditures under the subsequent use rule. Under these facts, only the $500 paid for the report on February 10th as grass roots lobbying expenditures.
Penalties for exceeding the substantial part and 501(h) expenditure tests

For those taking the 501(h) election

• **25% Excise Tax**  Should the organization exceed its lobbying expenditure dollar limit in a particular year, it must pay an excise tax equal to 25 percent of the excess.

• **Eventual Loss of Tax-Exempt Status**: Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period.

For those using the “substantial part” test

• **Potential of Immediate loss of tax exempt status**: A charitable organization that conducts excessive lobbying in any taxable year may lose its tax-exempt status.

• **5% Excise Tax**. In addition, those charitable organizations that lose their tax-exempt status due to excessive lobbying are subject to an excise tax equal to five percent of their lobbying expenditures for the year in which they cease to qualify for exemption.
Taxes on expenditures related to endorsing candidates – more reasons why you should never do it!!!

This includes

• A 10 percent tax on expenditure on the organization; and

• A 2.5 percent tax on the expenditure on the management.

Plus, if the expenditure is not corrected within the taxable period

• The organization must pay a tax equal to 100 percent of the amount of the expenditure, and

• The management must pay a tax equal to 50 percent of the amount of the political expenditure. The tax imposed by this paragraph shall be paid by any organization manager who refused to agree to part or all of the correction.

Simply put, don’t endorse or oppose a candidate for office.
Affiliated Organizations

• Under the tax code, the same lobbying limits that apply to one entity apply to all organizations that are affiliated with it, regardless of whether they choose the 501(h) election or not.
  • Look at total income to determine lobbying limits.
  • A violation by one is considered a violation by all. If one or more affiliated organizations exceed the combined limits on lobbying expenditures, then they all will be considered in violation.
  • Penalties shall be applied among the affiliated organizations. The allocation formula will vary depending on whether an organization filed a 501(h) election.

• Definition of affiliate:
  • the governing instrument of an organization requires it to be bound by decisions of another organization on legislative issues, or
  • the governing board of an organization includes persons who—
    • are specifically designated representatives of another organization or are members of the governing board, officers, or paid executive staff members of another organization, and
    • by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.
Affiliated and Non-Affiliated Organization

• Any amounts given by a 501(c)(3) organization to another organization for purposes of lobbying or political activity will be treated as an expenditure by the 501(c)(3) organization.

• This includes in-kind support, such as shared employees or office space.

• If making a grant to another organization, should include language that the funds cannot be used for lobbying or political activity. If want to fund lobbying, must count against 501(c)(3) organization’s limit.

• Hyperlinks to another website with political or lobbying activity will be attributable to the organization.
Forms to File

- **IRS Form 5768** – Election/Revocation of Election by an Eligible Section 501(c)(3) Organizations to Make Expenditures to Influence Legislation. This is a one page form that is filed at any time during the taxable year for election or revocation.

- **IRS Form 990 or 990-EZ Return of Organization Exempt From Income Tax**. This is the annual tax return for all 501 organizations.

- **Schedule C**

- **IRS Form 4720 Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code**. This is the form to report any excise taxes.

- Also, look at this booklet: **Worry Free Lobbying** by BolderAdvocacy.org
Reporting lobbying expenses under the *Lobbying Disclosure Act*

- **Calculating Lobbying Expenses, the easier way:** Section 15 of the LDA permits 501(c)(3) organizations to use the tax law definitions of lobbying in lieu of the LDA definitions for determining “contacts” and “lobbying activities” for Executive Branch lobbying.

- **Calculating Lobbying Expenses, the LDA way:** Focus on contacts on the federal level with Members of Congress and their staff and “Covered Executive Branch Officials” (normally those at the Secretary/Administrator level and their deputies along with anyone else who is a political appointee).
Lobbying registration and reporting is not required in the District of Columbia for corporations organized for 501(c)(3) organizations

- The term "lobbying" is defined as the means of communicating directly with any official in the legislative or executive branch of the District of Columbia government with the purpose of influencing any legislative action or an administrative decision.

- Lobbyists and the entities they represent must both register as a lobbyists with the District of Columbia, however there is an exception for 501(c)(3) organizations. If these entities do not engage in activities that include lobbying, the result of which would bring financial gain or benefit to the entity, they need not register. D.C. Code Ann. § 47–1802.01.
Conclusion/Questions