

## Non-Profit Legal Matters

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### Yes, Charities May Lobby! But They Need To Follow The Rules.

Today in the United States, non-profits are under siege as never before. Sadly, that attack is being led by an unlikely foe: legislatures and the White House. If passed, bills before Congress and state legislatures, as well as the recommendations of the President's Economic Recovery Advisory Board, would do everything from defunding some non-profits and eliminating property tax exemptions, to doing away with the charitable deduction itself. For example, six bills before Congress would [cut all federal funding for public broadcasting](#) even though it is used by half of all Americans each week.

Many non-profit leaders shake their heads and fret, worried there is nothing they can do. This resignation is informed by a misguided belief that it is illegal for non-profits to lobby. *They are utterly and sadly mistaken.* Except for private foundations, 501(c)(3) non-profits can lobby their legislators, and encourage their supporters and the general public to contact lawmakers, as well. More important, if they feel it's in their interests, they should lobby, especially when their very existence is threatened.

The remainder of this newsletter will briefly discuss the rules that govern lobbying by 501(c)(3) organizations other than private foundations. At the end we will provide you with [links](#) to resources on how to make your lobbying effective.

#### Yes, 501(c)(3)s May Lobby

As suggested above, it is a common misconception that 501(c)(3)s are not permitted to lobby. This leads organizations to fear that if they lobby at all, they could lose their exemption. This confusion may stem from section 501(c)(3) itself, which reads that "no substantial part of the activities" of the organization may consist of "attempting to influence legislation." Congress never intended that non-profits be prohibited from lobbying, but the term "substantial" is ambiguous. Congress actually rectified this oversight in 1990 when it passed section 501(h).

#### The Broad Ability to Lobby Under Section 501(h)

Section 501(h) clarified Section 501(c)(3) by setting specific expenditure limits and establishing clear guidelines for charities to follow *in lieu* of the ambiguity of "no substantial part," but only for charities that elect to be bound by the statute. Stated simply, section 501(h) defines lobbying as the expenditure of money by the organization for the purpose of attempting to influence legislation. As a result, many activities fall outside of the lobbying categorization and hence do not expose a 501(c)(3) to risk. These include:

- Lobbying by a volunteer (other than reimbursements to the volunteer for out-of-pocket expenditures related to the lobbying).
- Contacts with executive branch employees or legislators in support of, or opposition to, proposed regulations (as opposed to legislation).
- Communications to the organization's members on legislation, so long as the non-profit does not directly encourage its members or others to lobby.
- A non-profit's response to written requests from a legislative body such as a committee (but not just a single legislator) for technical advice on pending legislation.
- A non-profit's discussion of broad social, economic and similar policy issues whose resolution would require legislation, so long as the discussion does not address the merits of specific

- legislation.
- Lobbying on matters for which no legislation is pending.
- Lobbying that either challenges or supports legislation that would change the organization's right to exist or its rights under the law.

#### Self-Defense Lobbying

This last exception is particularly important in today's climate. One example of self-defense lobbying would be to lobby against a proposed change in the law that seeks to eliminate the charitable giving tax deduction. Under this exception, any lobbying done by an organization on legislation that affects its status is considered to be in the organization's self-defense and therefore not considered lobbying under the law. That is true whether or not the organization has made the election under 501(h) ([see below](#)). Note that lobbying for the sole purpose of preserving funding is NOT self-defense lobbying because losing funding does not affect the organization's rights under the law.

#### Direct vs. Grassroots

Broadly speaking, there are two types of lobbying defined in the statute: direct lobbying and grassroots lobbying. Direct lobbying is communication that a charitable organization makes about legislation (1) with lawmakers and (2) with its own members, when it asks them to lobby. Examples include visits to an elected official about a bill and e-mails by an organization to its members urging them to contact legislators about a particular bill.

Grassroots lobbying occurs when an organization reaches beyond its members to encourage action by the general public, or asks its members to ask others to lobby. Urging the public to vote for or against a ballot initiative or referendum, however, is direct lobbying, not grassroots lobbying. Why? Because in this instance, the public is acting as the legislature by voting to either accept or reject the proposed legislation. Likewise, lobbying by buying advertising is considered a direct lobbying expenditure.

#### Rules for Foundations

Private foundations are often hesitant to appear to fund lobbying activities. (Recall that they may not lobby at all.) However, it is important for private foundation managers and board members to note that they, indeed, may give support to 501(c)(3) organizations that lobby. Foundations just must be careful not to earmark any funds specifically for lobbying purposes. Even if the charity itself violates the rules under 501(h), the funding foundation will not be penalized.

#### Expenditure Limits

Section 501(h) sets spending limits based on percentages of a non-profit's expenditures for its fiscal year. As spending limits are based on total exempt-purpose expenditures, costs related to investment management, the production of unrelated business income and certain fundraising costs are not counted.

Use the table below to determine applicable lobbying (including grassroots lobbying) expenditures under section 501(h).

Exempt-purpose expenditures	Maximum permissible lobbying expenditures	Maximum permissible grassroots lobbying expenditures
\$0 - \$500,000	20%	5%
\$500,000 - \$1 million	\$100,000 + 15% of amount over \$500,000	\$25,000 + 3.75% of amount over \$500,000
\$1 million - \$1.5 million	\$175,000 + 10% of amount over \$1 million	\$43,750 + 2.5% of amount over \$1,000,000
\$1.5 million - \$17 million	\$225,000 + 5% of amount over \$1.5 million	\$56,250 + 1.25% of amount over \$1.5 million
Above \$17 million	\$1 million	\$250,000

### Sanctions

Prior to 501(h), the prescribed sanction for substantial political activity by a 501(c)(3) organization was loss of exemption. Under the new law, an organization that makes the 501(h) election faces an initial excise tax (i.e., penalty) of 25% of the lobbying expenditures in excess of the permissible limits. If both the overall lobbying and grassroots lobbying limits are exceeded, this excise tax is on the greater of the two excess amounts. The organization can still face loss of exemption if its lobbying expenditures normally (i.e., on a four-year aggregate basis) exceed 150% of either limit. However, overall these penalties are far less harsh and more nuanced than for non-profits that do not make the 501(h) election.

### Ready, Set, Advocate

Advocacy can be a powerful and important tool for many non-profits. The first step is to make the election to be bound by the provisions of section 501(h). This is quite simple to do, just fill out and file [IRS Form 5768](#). With a modicum of care and mindful planning that recognizes the limits on lobbying expenditures, an organization can be an effective advocate for positions important to it, both through lobbying and related non-lobbying expenditures.

Once your non-profit has made the decision to fight for itself, there are great resources for being an effective advocate. One of the best is [Alliance for Justice](#). You can visit their website for many useful tools, guides and other publications. [Independent Sector](#) also has great resources for non-profit lobbying and advocacy.

To learn more about permissible lobbying for non-profits, as well as special circumstances for election year issues, please contact [Julie Strom, Esq.](#), [The Law Firm for Non-Profits'](#) expert in non-profit lobbying. Julie is newly arrived at the firm after nearly seven years with national advocacy-oriented non-profits including the [U.S. Public Interest Research Group](#) and [ACLU](#).

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