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Lobbying: What Does It Mean for Nonprofits?

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SUMMARY

Nonprofit organizations that conduct federal lobbying must be cognizant of at least two different definitions of lobbying in order to comply with applicable federal tax law and federal lobbying disclosure laws.

The Internal Revenue Code (the "Code") sets forth different requirements and definitions for organizations recognized as exempt under Section 501(c)(3) than the requirements imposed on trade and professional organizations exempt under Section 501(c)(6) and labor unions and farm bureaus exempt under Section 501(c)(5). While the Code includes a definition of lobbying that applies specifically to public charities exempt under 501(c)(3); trade and professional associations and labor unions and farm bureaus are subject to the obligations set forth in Section 162(e) of the Code. The federal Lobbying Disclosure Act (the "LDA") applies to all nonprofit organizations and provides a different definition of "lobbying," which requires organizations to track and disclose the amount spent on such activities. Set forth below are the different definitions and reporting requirements for 501(c)(3) public charities and other non-501(c)(3) tax exempt organizations under the federal tax law and under the LDA.

FEDERAL TAX LAW

SECTION 501(c)(3) PUBLIC CHARITIES

Nonprofit organizations that qualify for federal income tax exemption as public charities under **Section 501(c)(3)** of the Code are subject to heightened restrictions on lobbying and political activities. Carrying on propaganda, or otherwise attempting to influence legislation may not constitute a "substantial part" of the activities of an organization exempt under Section 501(c)(3); exceeding the "substantial part" limit places an organization at risk of losing its exempt status. Further, such organizations are prohibited from engaging in any political activities. Whether an organization's attempts to influence legislation are substantial will be determined by a vague facts and circumstances "substantial part" test, unless an organization elects to have such determination made pursuant to an expenditure test, by filing a 501(h) election with the Internal Revenue Service ("IRS").

The No Substantial Part Test

Under the substantial part test, codified in part in Section 1.501(c)(3)-1(c)(3)(ii) of the Treasury Regulations, an organization's tax exempt status will not be at risk because of lobbying, provided such organization is not classified as an "action" organization, or an organization, "a substantial part of its activities is attempting to influence legislation by propaganda or otherwise." The definition of lobbying under the substantial part test includes the following:

- Attempts to influence legislation by propaganda or otherwise;
- Presentation of testimony at public hearings held by legislative committees;
- Correspondence and conferences with legislators and their staffs;
- Communications by electronic means; and
- Publication of documents advocating specific legislative action.

Legislation is defined to include action by Congress, a state legislature, a local council or similar governing body, and the general public in a referendum, initiative, constitutional amendment, or similar procedure.

The IRS has not defined "substantial" and a determination of whether an organization's lobbying activities are substantial is generally based on a facts and circumstances analysis. In some cases the IRS has taken into consideration the percentage of the organization's expenditures devoted to influencing legislation on an annual basis. In others, it has determined substantiality based on the percentage of the organization's activities that constitute influencing legislation. In a very early case, *Seasongood v. Commissioner of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955), it was found that use of approximately 5% of an organization's time and effort was "insubstantial." Later, the Tenth Circuit rejected the use of percentages to classify activity as substantial or insubstantial. *See Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1974). Two years after *Christian Echoes*, however, the Court of Claims continued to use the percentage test to find that an organization's lobbying activities were substantial when 16.6% to 20.5% of the organization's total expenditures over a four year period were for lobbying. *See Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). To date, the IRS has not offered further clarification on the point at which an organization's lobbying activities will be deemed substantial or set any type of threshold which an organization must not exceed, and therefore organizations following this rule alone operate with some level of uncertainty.

Further, if an exempt organization exceeds an "insubstantial" amount of lobbying activity, a tax in the amount of five percent of the lobbying expenditures may be imposed on the organization, for each year that lobbying expenditures were incurred. If the IRS finds that the organization's managers made decisions to undertake lobbying activity knowing that such activity was likely to result in a revocation of the organization's exempt status, an additional five percent tax may be levied on such managers.

The 501(h) Election

Limits on Lobbying

Alternatively, organizations exempt under Section 501(c)(3) that intend to engage in lobbying activity may choose to make the so-called "lobbying election" under **Section 501(h)** of the Code. Electing organizations are governed by the "**expenditure test**," a mathematical formula that limits the amount a 501(c)(3) entity may spend on lobbying activities to precise amounts and provides specific definitions of "lobbying." **Section 4911(c)(2)** of the Code sets forth the manner of calculating the lobbying ceiling, or nontaxable amount, which is the lesser of $1,000,000 or amounts determined on a sliding scale based on the organization's exempt purpose expenditures. This scale is as follows:

If the exempt purposes expenditures are:	The lobbying nontaxable amount is:
Not over $500,000	20 percent of the exempt purpose expenditures
Over $500,000 but not over $1,000,000	$100,000, plus 15 percent of the excess of the exempt expenditures over $500,000
Over $1,000,000 but not over $1,500,000	$175,000 plus 10 percent of the excess of the exempt purpose expenditures over $1,000,000
Over $1,500,000	$225,000 plus 5 percent of the excess of the exempt purpose expenditures over $1,500,000

In addition, the amount of grassroots lobbying expenditures may not exceed 25 percent of the permitted overall lobbying expenditures. If an organization exceeds its lobbying expenditure limit in a given year, it must pay an excise tax equal to twenty-five percent of the excess. The 501(h) election may be made at any time by filing the one-page **Form 5768** with the IRS.

Lobbying Defined

For the purposes of calculating lobbying expenditures under the 501(h) election, there are two types of "lobbying":

. "**Direct lobbying**" is any attempt to influence legislation through communication with a member or employee of a legislative body, or with any other government official or employee who may

participate in the formulation of legislation. “Direct lobbying” also includes communications by an organization to its members, directly encouraging those members to engage in direct lobbying.

- “**Grassroots lobbying**” is any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof. An organization engages in “grassroots lobbying” when, directly or through its members, it urges the public to contact legislators, provides the public with contact information for a legislator, or identifies a legislator’s position on a pending legislative matter.

For both direct and grassroots lobbying, the costs of researching, preparing, planning, drafting, reviewing, copying, publishing, and mailing—including any amount paid as compensation for an employee’s services attributable to these activities—must be treated as lobbying expenditures. The allocable portion of administrative, overhead, and other general expenses attributable to “lobbying” count as lobbying expenditures as well.

Several activities are expressly exempt from this definition of lobbying, even if they express a position on a pending legislative matter:

- Lobbying does not include providing technical assistance or advice to a governmental body or committee in response its unsolicited, written request, provided that (a) the request comes from more than one member of the body or committee, and (b) the response is made available to every member of the body or committee.
- Lobbying does not include so-called “self-defense activities”—i.e., communications concerning decisions that may affect an organization’s existence, powers, duties, 501(c)(3) status, or deductibility of contributions.
- Lobbying does not include nonpartisan analysis, study, or research that may advocate a particular view, provided that (a) presentation of the relevant facts is sufficient to enable readers to reach an independent conclusion, and (b) distribution of the results is not limited to or directed toward persons solely interested in one side of a particular issue.

NON-501(c)(3) ORGANIZATIONS

Section 162(e)

Section 162(e) of the Code denies a deduction for the amount an organization spends on lobbying. Most trade and professional organizations exempt under 501(c)(6) and labor unions and farm bureaus exempt under 501(c)(5) are subject to the requirements of Section 162(e) (as are most taxable business entities). Membership organizations that are subject to Section 162(e) and that conduct lobbying may either: (1) disclose to their members what percentage of their dues are nondeductible because they are used for lobbying; or (2) pay a 35-percent proxy tax on lobbying expenditures. Regardless of the method chosen, they must disclose the amount spent lobbying on their Form 990 informational returns. Most membership organizations choose to report the nondeductible amount to their members.

“**Lobbying**” under Section 162(e) includes five broad categories of activity:

- Influencing legislation. Any attempt to **influence legislation** through communication with (i) any member or employee of Congress; (ii) any member or employee of a state legislature; or (iii) any federal or state government official or employee who may participate in the formulation of legislation.
- Grassroots lobbying. Any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referenda. This includes urging association members to engage in grassroots lobbying.
- Communications to covered federal executive branch officials. Any direct communication with a covered federal executive branch official in an attempt to influence the official actions or positions of such official. Covered federal executive branch officials include the President, the Vice President, employees of the Executive Office of the President, and any individual serving in Executive Schedule level I or designated by the President as having Cabinet level status, and any immediate deputy of any of the foregoing.
- Political activities. Any activity which constitutes participation or intervention in any political campaign at the federal, state, or local level, the expenditures for which are not already subject to tax under Code Section 527(f).

- Supporting activities. All research, preparation, planning, and coordination (including deciding whether to make a lobbying communication) engaged in for a purpose of making or supporting a lobbying communication or political activity (as defined above) is treated as carried out in connection with such communication or activity. In other words, the time spent on any background activity engaged in for a purpose of supporting a future planned lobbying communication must also be counted as lobbying.

The **regulations implementing Section 162(e)** state that a covered organization may use any reasonable method to calculate the amount spent on lobbying. An accurate calculation typically includes tracking employees' time spent lobbying, allocating overhead costs to lobbying activity, and factoring actual lobbying expenses (e.g., travel, payments to outside consultants, publications, etc.) into the total. The regulations also permit an organization to make reasonable allocations for activities that are conducted for both lobbying and non-lobbying purposes.

LOBBYING DISCLOSURE ACT

In addition to complying with the tracking of lobbying activities under federal tax law, nonprofit organizations that lobby also may be **required to register** under the LDA if one or more of their employees spends more than twenty percent of his or her time on lobbying activities, and to submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. The LDA applies to taxable as well as tax-exempt entities and does not make a distinction between Section 501(c)(3) public charities and other nonprofit organizations. The LDA definition of "lobbying" differs significantly from the definition used under Section 162(e) or for the 501(h) election.

Under the LDA, "**lobbying activities**" include "lobbying contacts" as well as 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.

Under the LDA, "**lobbying contacts**" are the actual communications with "covered officials." Lobbying contacts may be oral, written, or electronic. A contact is not a lobbying contact unless it involves:

- The formulation, modification, or adoption of federal legislation;
- The formulation, modification, or adoption of a federal rule, regulation, Executive Order, or 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.

There are a number of **exceptions** to these four categories. The following exceptions do not constitute "lobbying contacts" (and therefore preparation for such contacts does not constitute "lobbying activity") and are particularly relevant to nonprofit organizations:

- Administrative requests, such as requests for a meeting or about the status of a matter;
- Testimony given before a committee or sub-committee of Congress;
- Speeches, articles, or publications made available to the public or distributed through radio, television, or other methods of mass communication;
- Information provided in writing in response to a request by a covered official;
- Information required by subpoena, a civil investigative demand, or otherwise compelled by the federal government (including information compelled by a contract, grant, loan, permit, or license);
- Communications in response to a notice in the Federal Register and directed toward the official listed in the notice;
- Written comments filed in the course of a public meeting;
- Any communication that is made on the record in a public proceeding; and
- Petitions for agency action made in writing and made part of the public record.

The term "**covered legislative branch official**" includes all elected Members of Congress and the Senate, as well as all employees and officers of Congress. The definition of "**covered executive branch officials**" is more specific. It includes:

. The President;
. The Vice President;
. Any member of the uniformed services whose pay or grade is at or above O-7;
. Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
. Any officer or employee in a position listed in levels I though V of the Executive Schedule; and,
. Schedule C political appointees.

The "**Executive Schedule**" delineates the most senior positions in the administration. **Schedule C** posts are typically non-career policymaking or "political" appointees, and confidential secretaries and administrative assistants of key appointees within an agency.
Even if a communication is directed to a covered official—e.g., a Schedule C appointee at a government agency—it is not a lobbying contact if the communication is otherwise made part of the public record before the agency (e.g., through a formal docketing process).

Reporting Expenses under the LDA

Although many organizations will be subject to both Code and LDA reporting requirements for lobbying, a provision of the LDA permits organizations to track and disclose lobbying expenditures using the Section 4911 definition rather than the LDA definition. For many organizations, the LDA definition is far narrower than "lobbying" as it is described in the Code.

Nonprofit organizations that are sensitive to having high dollar amounts reported on their LDA reports may consider opting to track lobbying activities separately under both the Code and the LDA. This approach will increase recordkeeping obligations, but will likely allow an organization to report a lower, more accurate estimate of federal lobbying expenditures to the Clerk of the House and the Secretary of the Senate, because state lobbying and grassroots lobbying expenses are not reported under the LDA.

ADDITIONAL RESOURCES

Statues, Regulations, and Other Government Resources

For Tax-Exempt Entities

- **Tax Information for Charities & Other Non-Profits**, Internal Revenue Service
- IRS Summary of "**501(c)(3) Lobbying**"
- IRS Summary of "**Measuring Lobbying - Substantial Part Test**"
- IRS Summary of "**Measuring Lobbying - Expenditure Test**"
- IRS Summary of "**Nondeductible Lobbying and Political Expenditures**"
- IRS Summary of "**Political Campaign and Lobbying Activities**"

For LDA Registrants

- **Office of Public Records**, U.S. Senate
- **Office of the Clerk**, U.S. House of Representatives
- ***Lobbying Disclosure Act Guidance***, Office of the Clerk, U.S. House of Representatives
- *United States Government Policy and Supporting Positions* (the "**Plum Book**"), listing all employees of the federal government (including Executive Schedule and Schedule C employees)
- **5 U.S.C. § 7511(b)(2)**, defining Schedule C employees

Venable Resources

- **Playing Politics: A Menu of Options for Associations to Consider** (September 2011)
- **Grassroots Lobbying: A Legal Primer** (Summer 2011)
- **Federal Ethics and Lobbying Rules** (May 2011)
- **Mythbusting the Top 10 Fallacies of 501(c)(3) Lobbying** (December 2010)
- **Effective 501(c)(3) Lobbying: 501(h) Election, No Substantial Part, Creating Related Lobbying Organizations** (August 2010)
- **Myths about Lobbying, Political Activity, and Tax Exempt Status** (June 2010)
- **Supreme Court Decision Opens New Doors for Associations** (February 2010)
- **The New Form 990: Defusing Governance, Political Activities, Compensation, and Other**

Issues (December 2009)

- **The Mechanics of Lobbying Disclosure Completing LD-1, 2, & 203** (June 2008)

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[1]Note that this brief article does not discuss the application of 501(c)(3) lobbying restrictions to private foundations.

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