

Advocacy for Public Charities

Advocacy is a powerful tool underutilized by nonprofits to advance their respective missions. While advocacy covers a broad array of activities, nonprofits that are subject to restrictions on lobbying or political campaign intervention activities often avoid other areas of advocacy because of fears they may be violating those restrictions. This is unfortunate and partly due to a lack of clear guidance and bright lines on what is and is not permitted. While different types of tax-exempt organizations are subject to different limitations, we'll focus this post on the advocacy of 501(c)(3) public charities.

Advocacy Activities Not Considered Lobbying

Here is a list of 10 advocacy activities that are generally not considered lobbying:

1. *Request for technical advice or assistance*: This communication must be made in response to a written request by a legislative body or a legislative committee or subcommittee and made available to all members of the requesting body.
2. *Making available nonpartisan analysis, study, or research*: This communication can refer to or reflect a particular view on specific legislation, but if it (a) provides a sufficiently full and fair exposition of the underlying facts, (b) is made available, and (3) doesn't directly encourage a recipient to take action, then it is not considered lobbying.
3. *Examinations and discussions of broad social, economic, and similar problems*: These communications can address the public, members of legislative bodies, or governmental employees on general topics which are the subject of specific legislation, but must not refer to specific legislation or directly encourage the recipients to take action.
4. *Self-defense communications*: These communications with a legislative body address matters that might affect the existence of the organization, its powers and duties, its tax-exempt status, or the deduction of contributions to the organization. Such communications, even if they constitute lobbying, are not counted against any lobbying limits.
5. *Certain communications with members*: A charity may inform its members of the issues and its stance on a specific piece of legislation, without encouraging them to contact their elected officials.
6. *Certain communications with the general public*: A charity may communicate with individuals or groups that do not refer to a specific legislations and/or issues.
7. *Certain direct communications with a legislative body*: A charity may inform a legislator how an agency grant received has helped its constituents or educate a legislator about the effects of a policy on her or his constituency.
8. *Communications with non-legislative bodies*: A charity generally may contact an executive or administrative body on issues regarding implementation of its regulations and/or policies.
9. *Fact sheets*: A charity may develop and distribute fact sheets that educate the general public on important issues that impact their community but that do not include a call to action encouraging the recipient to take action with respect to specific legislation.
10. *Litigation activity*: A charity may engage in litigation to obtain a favorable judicial interpretation of the law.

Lobbying

Lobbying is generally defined as activities that attempt to influence, whether in direct support of, or opposition to, specific legislation.

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). But the amount of lobbying that is permitted without crossing the substantiality threshold can be very generous for charities that make the 501(h) election, something we generally recommend for all but the largest charities.

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). Violation of this prohibition may result in, among other consequences, loss of the organization's tax-exempt status. It is therefore critical to avoid violating the substantial lobbying prohibition. But the key is not to rule out engaging in any or all advocacy activities, but to better understand what is (and 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 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 (reached when total Exempt Purpose Expenditures are at \$17 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%.

- Definitions Applicable Under §501(h)

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).

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.

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.

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.

- Activities That are Not Lobbying Under §501(h)

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).

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.

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

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.

For more information on the 501(h) election, see [Worry-Free Lobbying for Nonprofits: How to Use the 501\(h\) Election to Maximize Effectiveness](#) (Alliance for Justice).

Political Campaign Intervention Activities

Public charities are prohibited under 501(c)(3) from engaging in any political campaign intervention activities. In simple terms, a 501(c)(3) organization may not directly or indirectly engage in or sponsor any activity that supports or opposes any candidate for public office.

A “candidate” for purposes of this prohibition includes “an individual who offers himself [or herself], or is proposed by others, as a contestant for an elective public office...”. The prohibition applies not only to declared candidates, but also to third-party movements and efforts to encourage or discourage someone from running for office.

“Public office” for these purposes refers to any position that is filled by a vote of the people. This includes elected offices at the local, state, and federal level, as well as party nominations, and is not limited only to partisan positions. However, it does not extend to appointed public official positions, such as some judges and executive nominees (although note that activities related to such appointments may constitute lobbying if the appointments are subject to legislative confirmation).

The prohibition on election intervention includes publishing or distributing written statements or making oral statements on behalf of or in opposition to a candidate, including on social media. It also includes using any of the organization's resources to support or oppose a candidate, such as by making a contribution to a campaign, preparing a research report for the use of only one campaign or certain campaigns, or sharing the organization's mailing list with a specific campaign for free. However, it generally also includes less obvious activities, such as coordinating activities with a campaign, distributing campaign materials at an organizational event, or using code words in a communication to refer to a candidate other than by name.

In determining whether a particular action constitutes impermissible electioneering, the IRS will look at all of the relevant facts and circumstances. While there is no clearly established test that will be used, the IRS has indicated that the factors it may consider in determining whether a particular communication constitutes prohibited electioneering include:

- Whether it identifies a candidate for public office or a candidate's position on an issue that is the subject of the communication
- Whether it expresses approval or disapproval for a candidate's position or actions
- The timing of the message and its proximity to an election
- Whether it makes reference to an election or voting
- The targeted audience, including whether it targets voters in an election
- How the message relates to candidates' and political parties' communications, and whether it discusses an issue that has been raised as distinguishing candidates for a given office
- Whether it 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
- Whether the timing of the communication and identification of a candidate are related to a specified event other than an election (such as a scheduled vote on legislation)

If a 501(c)(3) organization engages in any amount of prohibited electioneering, it runs the risk of having its tax-exempt status revoked by the IRS, either permanently or for a specified period during which the activities occurred. The IRS also has the authority to impose a tax of 10 percent of the expenditure associated with the electioneering activities on the organization and a tax of 2.5 percent on organizational managers who knowingly and willfully approved a prohibited expenditure, up to a total of \$5,000. If the IRS does impose either tax and the expenditure is not corrected within the appropriate period, an additional tax of 100 percent of the prohibited expenditure may be imposed on the organization and an additional tax of 50 percent may be imposed on the individual managers, up to a total of \$10,000.

Although 501(c)(3) organizations must be careful to avoid engaging in prohibited campaign intervention, not all election-related activities are completely prohibited for such organizations. Note that the IRS uses a facts and circumstances test and looks to factors such as content, timing, and scope. Thus, organizations should proceed with caution when they engage in political or election-related activities.

501(c)(3) organizations are permitted to engage in **issue advocacy** which is advocacy related to the charitable mission and the charity's agenda (e.g., gun-safety, sustainable practices). However, issue advocacy may cross into prohibited political campaign activity

under certain circumstances, especially during election years. For example, an organization that engages in advocacy related to a particular issue only during election years and close to the election may be viewed by the IRS as engaging in political campaign activity even if the organization does not mention any candidate names or party affiliations. By contrast, it is a much more favorable set of facts and circumstances for the organization if the organization has a pattern of engaging in such advocacy during non-election years using the same means and scope.

Examples of permissible election-related activities include **voter education** such as voter guides and candidate debates; **voter registration** such as get-out-the-vote drives; and **candidate education** such as public policy reports created on behalf of the organization distributed to all candidates. The overarching theme of the electioneering prohibition that 501(c)(3) organizations be neutral and nonpartisan with respect to publicly elected offices must be a main consideration when undertaking any election-related activity. Thus, for example, voter education guides should not rank candidates; voter registrations should not be based on party affiliation; and candidate education should not be done in response to a candidate's request or show favoritism to certain candidates. Organizations should become knowledgeable about the 501(c)(3) prohibition on electioneering and when unsure, seek the assistance of nonprofit legal experts.

For more on certain permitted nonpartisan election-related activities that can be engaged in (if done carefully) without jeopardizing an organization's exempt-status see the following resources on the Nonprofit Law Blog:

[Employee Endorsements & Election Activities](#)
[Candidate Appearances & Debates](#)
[Voter Guides & Candidate Questionnaires](#)

Additional Thoughts

Who Should Engage in Advocacy?

All of us who work for nonprofits are advocates of our organizations and the communities they serve. Fundraisers know this. But the role of advocacy needs to be further embedded on all levels of a nonprofit starting with the board. We should also ensure we're communicating not only with prospective donors but also with the broader public. And we can't forget about policy makers who create the rules and the playing field we operate in. Let's remember that all of the most important public policies we hold dear to us – civil rights, women's rights, disability rights, education, health, religion, environmental protection, animal welfare, etc. – result from strong nonprofit advocacy and not just individual leaders.

Potential Areas of Advocacy

- Proposed cut in budget or public services to the people you serve
- Proposed change in a law that will affect your core mission and the people you serve
- Proposed change in law that will affect your organization's ability to operate or fundraise

Some Permissible Forms of Advocacy for Public Charities

- Stating the organization's position on a public policy issue
- Educational activities (including educating lawmakers and even candidates if done appropriately in a nonpartisan manner)
- Lobbying within certain limits which can be fairly generous, particularly for charities making the [501\(h\) election](#)
- Advocating a change in administrative regulations

Some Impermissible Forms of Advocacy for Public Charities

- Endorsing a candidate for public office (including by providing a link to a candidate's website)
- Contributing to a candidate
- Using organizational resources to support a candidate (including use of organizational emails)
- Getting a candidate to endorse the organization's agenda
- Evaluating or grading the candidates' positions

Some Tricky Areas to Approach Cautiously

- Issue advocacy (generally okay) that may appear to be timed with an election
- Legislative scorecards that may appear to be timed with an election
- Praising, honoring, criticizing an incumbent who is also a candidate
- Voter education (debates, forums, guides, candidate questionnaires) implemented in what may appear to be a partisan manner
- Social media likes, favorites, follows, and third party comments related to candidates

Courtesy of the Neo Law Group, <https://neolawgroup.com>