
Lobbying: What Does It Mean for 501(c)(3) Organizations?

501(c)(3) organizations that engage in federal lobbying are subject to at least two separate—and very different—definitions of lobbying in order to comply with applicable federal tax and lobbying disclosure laws. This article will review the definitions and reporting requirements for 501(c)(3) public charities under the Internal Revenue Code (the “Code”) and under the Lobbying Disclosure Act (“LDA”) and provide a guide for compliance efforts under each legal framework.

Federal Tax Law

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, the Code prohibits such organizations 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:

1. Attempts to influence legislation by propaganda or otherwise;
2. Presentation of testimony at public hearings held by legislative committees;
3. Correspondence and conferences with legislators and their staffs;
4. Communications by electronic means; and
5. 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 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. See [Haswell v. United States](#), 500 F.2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975).

In others, it has determined substantiality based on the percentage of the organization’s activities that constitute influencing legislation. See [Seasongood v. Commissioner of Internal Revenue](#), 227 F.2d 907 (6th Cir. 1955). To date, the IRS has not offered clear guidance on the point at which it will deem an organization’s lobbying activities substantial or set any type of threshold that an organization must not exceed. Consequentially, organizations following the “substantial part” test alone operate with some level of uncertainty.

Further, if an exempt organization exceeds an “insubstantial” amount of lobbying activity, a five percent excise tax may be imposed on the organization, for each year that lobbying expenditures were incurred. In some circumstances, an additional five percent tax may be levied on an organization’s managers.

The 501(h) Election

Limits on Lobbying

Instead of relying on the vague “substantial part” test, organizations exempt under Section 501(c)(3) 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 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 25 percent of the excess. An organization may make the 501(h) election 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”:

1. “[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, encouraging those members to engage in direct lobbying.
2. “[Grassroots lobbying](#)” is any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof.

For both direct and grassroots lobbying, the costs of researching and preparing materials, as well as 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, including:

1. Certain technical assistance or advice to a governmental body or committee in response to an unsolicited, written request;
2. 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; and
3. 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.

Lobbying Disclosure Act

In addition to complying with the tracking requirements and restrictions 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 20 percent of his or her time on lobbying activities. The LDA also requires

organizations to submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. The LDA definition of “lobbying” differs significantly from the definition used 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:

1. The formulation, modification, or adoption of federal legislation;
2. The formulation, modification, or adoption of a federal rule, regulation, Executive Order, or other program, policy, or position of the United States government;
3. 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
4. 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:

1. Administrative requests, such as requests for a meeting or about the status of a matter;
2. Testimony given before a committee or sub-committee of Congress;
3. Speeches, articles, or publications made available to the public or distributed through mass communication;
4. Information provided in writing in response to a request by a covered official;
5. Information required by subpoena, a civil investigative demand, or otherwise compelled by the federal government;
6. Communications in response to a notice in the Federal Register and directed toward the official listed in the notice;
7. Written comments filed in the course of a public meeting;
8. Any communication that is made on the record in a public proceeding; and
9. 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:

1. The President;
2. The Vice President;
3. Admirals and generals;
4. 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;
5. Any officer or employee in a position listed in levels I through V of the Executive Schedule; and,
6. 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.

Reporting Expenses under the LDA

Although many organizations will be subject to both the Code and LDA reporting requirements for lobbying, a provision of the LDA permits organizations to track and disclose lobbying expenditures using the Code's Section 4911 definition rather than the LDA definition. For many organizations, the LDA definition is far narrower than the Code's definition of "lobbying." If the organization elects to use the Internal Revenue Code definitions, they must, however, use the LDA's definition with respect to the legislative branch, and the Internal Revenue Code definition with respect to the executive branch, to determine which individuals are considered to be lobbyists and which agencies have been lobbied.

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 as the LDA does not require organizations to report state lobbying and grassroots lobbying expenses.

Conclusion

This article provided an overview of the federal tax law and LDA definitions and requirements applicable to 501(c)(3) organizations. In-house counsel with an understanding of these requirements will be able to effectively engage in lobbying while maintaining compliance with applicable federal law.

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

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