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Rules on Lobbying Activities for Non-Profit Entities

This brief summarizes certain legal restrictions on the lobbying activities of non-profit organizations (as described in section 501(c)(3) of the Internal Revenue Code (the “IRC”)) and their employees. Lobbying activity is regulated under a variety of laws (e.g., tax, lobbying disclosure, and federal contracting laws), which impose restrictions on different aspects of the same activity. As a general rule, non-profit organizations may lobby as long as the lobbying does not comprise a substantial part of the organization’s total activity.

A non-profit organization must ensure that it is in compliance with all of these federal laws, in addition to any relevant state and local laws. This brief only addresses certain aspects of federal restrictions and focuses on certain aspects of lobbying activities.¹

Note that this brief is intended as a reference guide and does not constitute legal advice or represent or otherwise address all applicable authority and guidance on lobbying activities for non-profit entities. You should consult the relevant laws, rules, and standards of conduct, or engage legal counsel and/or compliance personnel, should you have any questions about activities in connection with a specific situation.

Internal Revenue Code – Limits on Lobbying Expenditures

To maintain tax-exempt status under Section 501(c)(3) of the IRC, an organization must be organized and operated exclusively for certain exempt purposes set forth in Section 501(c)(3) of the IRC (e.g., charitable, religious, educational, etc.). Additionally, a 501(c)(3) organization may not attempt to influence legislation, or lobby, as a substantial part of its activities and may not participate in any campaign activity for or against political candidates.

As noted above, the tax code permits a 501(c)(3) organization to lobby so long as the lobbying does not comprise a “substantial part” of the organization’s activities. The IRC generally provides two methods of examining an organization’s lobbying activities. The general method for measuring the extent of an organization’s lobbying activities is the “substantial part test.” Alternatively, an organization may elect to use the “expenditure test” under IRC Section 501(h) to measure its lobbying activities. Each of these tests is discussed below.

Test No. 1: The Substantial Part Test

Under the “substantial part” test, the Internal Revenue Service (the “IRS”) examines all of “the pertinent facts and circumstances” to determine whether lobbying activity constitutes a substantial part of an organization’s overall activities. In applying this test, the IRS will consider a number of factors, including the time commitment to, and the expenditures for, lobbying activities, the visibility and frequency of such activity in the organization’s day-to-day agenda, and the contents of any publications or other organization communications.

¹ Federal lobbying registration and reporting requirements are addressed in a separate memorandum, “Disclosure of Federal Lobbying Activities.”

Under the substantial part test, an organization that conducts excessive lobbying in any taxable year may lose its tax-exempt status, resulting in all of its income being subject to tax. Such organizations are also subject to an excise tax equal to five percent of their lobbying expenditures for the year in which they cease to qualify for exempt treatment. Additionally, organization managers who agree to expenditures knowing that the expenditures would likely result in the loss of tax-exempt status may be subject to a further tax equal to five percent of the lobbying expenditures for the year.

The substantial part test is a subjective test, and the IRS has not issued regulations further defining the test or clarifying its application. For this reason, the test is not a particularly reliable means of determining an appropriate level of lobbying activity.

Test No. 2: The Expenditure Test

The expenditure test, on the other hand, provides an objective measure for lobbying activity. Organizations other than churches and private foundations may elect the expenditure test under IRC Section 501(h) as an alternative method for determining an appropriate amount of lobbying activity to maintain tax-exempt status.² Under the expenditure test, organizations agree to ensure that lobbying expenditures do not exceed specified permissible lobbying nontaxable amounts. The permissible amounts under this test are generally based on a percentage of the size of an organization's exempt purpose expenditures.

If the amount of exempt purpose expenditure is:	Lobbying nontaxable amount is:
Less than or equal to \$500,000	20 percent of the exempt purpose expenditure
Greater than \$500,000 but less than or equal to \$1,000,000	\$100,000 plus 15 percent of the excess of exempt purpose expenditures over \$500,000
Greater than \$1,000,000 but less than or equal to \$1,500,000	\$175,000 plus 10 percent of the excess of exempt purpose expenditures over \$1,000,000
Greater than \$1,500,000	\$225,000 plus 5 percent of the exempt purpose expenditures over \$1,500,000

Penalty for Excessive Lobbying. The IRS imposes an excise tax on any excessive lobbying expenditures. The penalty is 25 percent of the amount of the excess for the taxable year.³ For example, if an organization is allowed to spend \$100,000 on lobbying but exceeds that limit by \$12,000, the penalty should be \$3,000. A similar tax is imposed if the limit for grassroots lobbying is exceeded. An organization that engages in excessive lobbying activity over a four-year period may lose its tax-exempt status, making all of its income for that period subject to tax.

² Election is made by filing IRS Form 5768, "Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation." Election can be made at any time during the tax year in which the election is to be effective. An election remains in effect for subsequent years until it is revoked by the organization, using the same IRS Form 5768.

³ 26 U.S. Code § 4911(a)(1).

Determining Whether an Activity Is Lobbying

Lobbying is generally considered to be activity directed toward “influencing legislation.”⁴ Legislation includes action with respect to any Act, bill, resolution, or similar item (including a proposed treaty required to be submitted by the President to the Senate for its advice and consent) by the Congress, any state legislature, any local council, or similar governing body, or by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure.⁵

Activities to influence legislation are divided into two categories:

Direct Lobbying. An attempt to influence legislation by communicating with members or staff of a legislative body (Congress, a state legislature, or local council) or a government employee who participates in the formulation of legislation. The principal purpose of the communication must be to influence legislation. Generally, a communication with a legislator or government official will be deemed to be direct lobbying if the communication

- (1) refers to specific legislation;
- (2) reflects a view on the legislation, and
- (3) addresses a legislator, an employee of a legislative body, or any other government official participating in the formulation of legislation.

Grassroots Lobbying. Communicating with the general public, directly or through an organization’s members, to encourage public action or otherwise affect the opinions of the general public with respect to specific legislation is grassroots lobbying. Generally, a communication will be deemed to be grassroots lobbying if the communication:

- (1) refers to specific legislation;
- (2) reflects a view on the legislation; and
- (3) encourages the recipient of the communication to take action with respect to the legislation (e.g., a call to action encouraging recipients to contact legislators, or a message providing a legislator’s name, address, and phone number or providing a petition or post-card to send to legislators).⁶

Moreover, under IRS regulations, certain paid mass-media communications (including television, radio, newspaper, and magazine advertisements) may be deemed to be grassroots lobbying. Under these rules, even an advertisement that does not meet the definition of grassroots lobbying, the advertisement will be presumed to be grassroots lobbying if:

- (1) the communication appears within two weeks of a vote on legislation by a legislative body or committee (not a subcommittee);
- (2) the vote is on a highly publicized piece of legislation; and

⁴ 26 U.S. Code § 4911(c)(1), (d).

⁵ 26 U.S. Code § 4911(e)(2); 26 C.F.R § 56.4911-2(d)(1)(i).

⁶ 26 C.F.R § 56.4911-2(b)(2).

- (3) the advertisement reflects a view on the general subject of the legislation and either refers to the highly publicized legislation or encourages the public to communicate with legislators on the general subject of such legislation.⁷

What Counts: Preparation and Allocation Rules

All costs associated with putting out lobbying communications are considered lobbying expenditures. These include amounts paid or incurred as current or deferred compensation for an employee's services attributable to the lobbying communication as well as preparation costs, such as those for research, drafting, staff, and overhead, in addition to mailing, copying, and distribution.

If a communication is made purely for lobbying purposes, all costs of that communication are lobbying expenditures. If a communication has both a lobbying and non-lobbying purpose, however, certain costs may be allocated as non-lobbying expenditures.⁸ For example, lobbying expenditures for a communication that also has a bona fide non-lobbying purpose must include all costs attributable to those parts of the communication that are on the same specific subject as the lobbying message. However, any costs attributable to those parts of the communication that are not on the same specific subject as the lobbying message generally may not need to be included as lobbying expenditures.

Determining whether a portion of a communication is on the same subject as the lobbying message within that communication will require a review of the surrounding facts and circumstances. Generally speaking, a portion of a communication is on the same specific subject as the lobbying message within that communication if the portion discusses an activity or specific issue that would be directly affected by the specific legislation targeted by the lobbying message or if the portion discusses background or consequences of an activity or specific issue affected by the legislation. Communications made only or primarily to members require that an organization make "a reasonable allocation" between the amount expended for the lobbying purpose and the amount expended for the non-lobbying purpose. Costs may also have to be allocated between direct lobbying and grassroots lobbying expenses.

Under certain limited circumstances, the costs of "advocacy communications or research materials" used initially for non-lobbying purposes and subsequently (within six months) for grassroots lobbying may be required to be re-characterized as grassroots lobbying expenditures. Among other things, the primary purpose of the materials will be a key factor to consider in determining whether such communication or research materials should be treated as grassroots lobbying expenditures.

What Is Not Lobbying?

There are some activities that may be related to the legislative process but that are not considered lobbying. Consequently, expenditures for these activities generally may not need to be allocated as lobbying expenses, and a 501(c)(3) organization generally may engage in these activities.

⁷ 26 C.F.R § 56.4911-2(b)(5).

⁸ 26 C.F.R § 56.4911-3.

- ***Nonpartisan Analysis, Studies, or Research.*** Engaging in non-partisan analysis, study, or research and making available to the general public, or a segment or members of the general public, or to government officials or employees, the results of such work generally should not constitute either direct lobbying or grassroots lobbying under IRS rules. The following general guidelines apply to the preparation of these materials:
 - The materials must give a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion on the issue.
 - Under certain circumstances, the materials may refer to a specific piece of legislation and state the organization’s point of view on the legislation, as long as the materials do not merely advocate the organization’s position and provide sufficient information for the public or an individual for form an independent conclusion.
 - The materials may not directly encourage recipients to take action with respect to legislation.
- ***Technical Advice.*** A communication generally may not be considered a lobbying communication if the communication provides technical advice or assistance to a governmental body, a governmental committee, or a subdivision of either in response to a written request by the body, committee, or subdivision.⁹
- ***“Self-defense” Lobbying.*** The costs of communications with any legislative body respect to legislation that has a potential effect on the existence of the organization, its powers and duties, tax-exempt status, or deductibility of contributions to the organization generally will not constitute lobbying expenses. This is not a broad exception; for example, it would not include lobbying on future funding for one of the charity’s programs. Under this exception, an organization may communicate with an entire legislative body, with committees or subcommittees of a legislative body, with individual legislators, with legislative staff members, or with representatives of the executive branch who are involved with the legislative process, so long as the communication is limited to the appropriate subject.¹⁰
- ***Member Communications.*** Communications to bona fide members with respect to legislation or proposed legislation of direct interest to the organization and its members generally will not constitute lobbying so long as there is no request to take some action to influence the legislation. A member is an individual who pays dues or contributes more than nominal amounts of time or money, or is one of a limited number of “honorary” or “life” members.¹¹
- ***Examinations of broad social, economic, and other problems.*** Communications generally qualify under this exception so long as they do not address specific legislation or directly encourage recipients to take action with respect to legislation. Examinations of broad issues include discussions of general issues that may be the subject of legislation but do not mention specific legislation.¹²

⁹ 26 U.S. Code § 4911(d)(2)(B); 26 C.F.R § 56.4911-2(c)(3).

¹⁰ 26 U.S. Code § 4911(d)(2)(C); 26 C.F.R § 56.4911-2(c)(4).

¹¹ 26 U.S. Code § 4911(d)(2)(D); 26 C.F.R § 56.4911-5.

¹² 26 C.F.R § 56.4911-2(c)(2).

- **Communications with government officials about administrative procedures, regulations, and enforcement.** Once a bill is passed, an organization may want to ensure that adequate regulations are drafted to implement and enforce the legislation. Generally speaking, working with executive branch staff during the regulatory process and later to monitor enforcement of the legislation may not constitute lobbying activity.¹³
- **Volunteer Lobbying.** As long as they are not reimbursed, officers, members and other volunteers of an organization generally may lobby at their own expense and their costs associated with these activities generally would not be considered lobbying to be expenditures of the organization. If the organization recruits the volunteers and urges them to take some action, such as circulating petitions to send to legislators in support of legislation, the related costs and any training expenses incurred by the organization generally would be considered to be grassroots lobbying expenses. A volunteer lobbyist's out-of-pocket are not tax-deductible as contributions to the organization or as out-of-pocket costs of volunteer activity.

The regulations provide the following example:

Organization V trains volunteers to go door-to-door to seek signatures for petitions to be sent to legislators in favor of a specific bill. The volunteers are wholly unreimbursed for their time and expenses. The volunteers' costs are not lobbying or exempt purpose expenditures made by V. When V asks the volunteers to contact others and urge them to sign the petitions, V encourages those volunteers to take action in favor of a specific bill. Accordingly, V's costs of soliciting the volunteers' help and its costs of training the volunteers are grass roots expenditures. In addition, the costs of preparing, copying, distributing, etc. the petitions (and any other materials on the same specific subject used in the door-to-door signature gathering effort) are grass roots expenditures.¹⁴

Affiliated Organizations: Determining Permissible Lobbying Expenditures

The IRS, in an effort to discourage use of multiple 501(c)(3) organizations to circumvent the lobbying limits, calculates expenditures of all affiliated 501(c)(3) organizations as a single unit. Organizations generally are considered affiliated if:

- they have interlocking directorates in which one governing board has sufficient control over one or more other organizations to dictate action on legislative issues, or
- the governing instrument, such as the bylaws, gives the organization power to bind one or more other organizations to a particular action on a legislative issue.¹⁵

Transfers to Non-Charities

The rules also attempt to prevent 501(c)(3) organizations from circumventing the expenditure limits by transferring funds to an organization that is not exempt under Section 501(c)(3). A transfer to a non-charity that lobbies generally will be considered a lobbying expenditure unless:

¹³ 26 C.F.R. § 56.4911-2(b)(4)(i), Example 4.

¹⁴ 26 C.F.R. § 56.4911-2(b)(4)(ii)(C), Example 8.

¹⁵ 26 U.S. Code § 4911(f); 26 C.F.R. § 56.4911-7 – 56.4911-9.

- the 501(c)(3) organization is paying fair market value for goods or services or selling goods or services for less than their fair market value;
- the 501(c)(3) organization is making a “controlled” grant by limiting the use of the transferred funds for a non-lobbying purpose (records must establish the non-lobbying purpose and, therefore, a grant agreement is advisable); or
- the 501(c)(3) organization generally makes goods or services widely available for less than fair market value to the general public and the goods and services are offered to lobbying organizations on the same terms.¹⁶

The Byrd Amendment and OMB Regulations

The Byrd Amendment prohibits the use of appropriated funds “by any recipient of a Federal contract, grant, loan, or cooperative agreement [including contractors, subcontractors, and subgrantees] to pay any person for influencing or attempting to influence” any officer or employee of any federal agency or a Member or employee of Congress in connection with:

- (A) the awarding of any federal contract;
- (B) the making of any federal grant;
- (C) the making of any federal loan;
- (D) the entering into of any cooperative agreement; or
- (E) the extension, continuation, renewal, amendment, or modification of any of the above.¹⁷

A recipient of a federal contract, grant, loan, or cooperative agreement must file a declaration stating the name of any registered lobbyist (under the Lobbying Disclosure Act) who has made lobbying contacts on behalf of the recipient with respect to that contract, grant, loan, or cooperative agreement as well as a certification that the recipient has not made, and will not make, any prohibited payment of appropriated funds for a lobbying purpose.¹⁸ This declaration must be updated on a quarterly basis, if there is any material change in the information previously submitted.¹⁹ Subcontractors and subgrantees must file similar declarations with the principal contractors and grantees, who must then forward those declarations with their own to the Government.²⁰ These reporting requirements generally only apply to contracts, grants, and cooperative agreements that exceed \$100,000.²¹

¹⁶ 26 C.F.R § 56.4911-3(c)(3).

¹⁷ 31 U.S.C. § 1352(a).

¹⁸ 31 U.S.C. § 1352(b).

¹⁹ 31 U.S.C. § 1352(b)(4).

²⁰ 31 U.S.C. § 1352(b)(1), (5).

²¹ 31 U.S.C. § 1352(d)(2)(B).

The Office of Management and Budget has promulgated extensive guidance on the ban on using federally appropriated funds for lobbying activities, and many agencies have issued their own implementing regulations as well.