

Identifying and Reporting Lobbying Costs in an Election Year

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Whether your organization has or has not been involved in political advocacy or similar activities in the past, it is becoming increasingly difficult to refrain from engaging in some way at the federal, state, and/or local level.

As the country enters the 2020 presidential election year, understanding the basic rules to identify and report on lobbying activities is an important part of nonprofit organizational compliance. As nonprofits position their operations to align budgets with strategic goals, management must ensure they are following both lobbying disclosure and IRS rules.

This article focuses on lobbying’s impact on 501(c)(6) trade and professional associations, 501(c)(4) social welfare organizations, 501(c)(5) labor unions and farm bureaus (hereafter jointly referred to as “associations”), and 501(c)(3) public charities (hereafter “charities”). Due to the intricacies of campaign finance law, you are encouraged to engage your accountant/auditor and general counsel in the discussion of lobbying and other political activities.

Lobbying Basics

The chart below illustrates three unique definitions of lobbying applicable to charities and associations and the specific activities that qualify as such. These definitions include Internal Revenue Service (IRS) rules for associations (Code Section 162(e)), IRS rules for charitable organizations (Internal Revenue Code [IRC or Code] Section 6033(b)(8)), and the Lobbying Disclosure Act (LDA).

Type of Lobbying	IRS Association Definition	IRS Charity Definition	Federal LDA Definition
State and Local	Yes	Yes	No
Grassroots	Yes	Yes	No
Legislative	Yes	Yes	Yes
Executive	Narrow	No	Broad
International	Yes	Yes	No
Political Expenditures	Yes	Yes	No



Political Campaign Intervention

Although all organizations are permitted to engage in lobbying, it is important to understand what your organization can and cannot do related to political campaigns. Political campaign intervention is broadly defined as participation or intervention in a political campaign on behalf of or in opposition to a candidate at the local, state, or federal level. This participation or intervention can be both direct and indirect.

Charities are prohibited from such activities and cannot endorse, make contributions to, or communicate support of or opposition to political candidates. The IRS uses a facts and circumstances test to evaluate whether intervention activities occur that include specific references to candidates, scope of content, format, audience, subtext, and other subjective factors. [IRS Revenue Ruling 2007-41](#) provides specific examples for charities to consider in determining whether an organization is engaging in campaign intervention or simply advocating on a particular issue.

Although political campaign intervention is allowable by associations, it may not be a primary activity of the organization. Associations may also make contributions to candidates (if allowable under state law), form a political action committee (PAC) or other 527 political organization, endorse candidates, and communicate support of or opposition to candidates.

Calculating Total Lobbying Expenses

Regardless of the definition of lobbying you are applying, it is important to consider all costs that can include, but are not limited to, the following:

- 1) Internal employee time/salaries spent on lobbying
 - a. Allocation of fringe benefits
 - b. Allocation of overhead costs
- 2) Direct expenses
 - a. Consultants
 - b. Publications
 - c. Research tools
 - d. Travel, meals, entertainment, and other reimbursable costs
- 3) Other membership dues and sponsorships that might be nondeductible, in part or in whole

Lobbying – Associations

Associations and other taxable business entities are subject to Code Section 162(e), which denies a deduction for, and defines, lobbying.

Code Section 6033(e) imposes reporting and notice requirements on associations incurring expenditures to which Code Section 162(e) applies. It requires associations that either pay or incur nondeductible lobbying and political expenditures to notify their members of a reasonable estimate of the portion of the dues allocable to those expenditures. The notification must be provided at the time dues or other similar amounts are assessed or paid. A deduction is then disallowed for the portion of each member's dues that corresponds to the organization's dues income that is spent on lobbying.

Associations must disclose the total amount of lobbying and political expenses on their IRS Form 990. The reporting requires expenses to be calculated as defined under Code Section 162(e). For this purpose, an association's lobbying and political expenses for the taxable year are allocated to the dues assessed or received during the year. Any excess amount of lobbying or political expenses is carried forward and allocated to the dues assessed or received in the following year. An association that does not provide this



information to its members must pay a proxy tax on the amount of nondeductible expenditures at the highest corporate rate, to be reported on IRS Form 990 and paid on IRS Form 990-T.

The notice requirement does not apply if the organization's lobbying and political expenditures are only in-house, and expenditures do not exceed \$2,000, or if the organization has records to substantiate that 90 percent or more of the annual dues paid to the organization are not deductible by its members as business expenses, regardless of whether the organization uses any part of the dues for lobbying and political expenditures.

Lobbying Defined

Lobbying under Code Section 162(e) includes five broad categories of activity:

- 1) **Influencing legislation** includes any attempt to influence legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation at the federal, state, or local level.
- 2) **Political activities** include any activity that constitutes participation in or intervention in any political campaign on behalf of (or in opposition to) any candidate for public office.
- 3) **Grassroots lobbying** includes any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referenda. This also includes indirectly influencing association members to engage in grassroots lobbying on their own.
- 4) **Communications to covered federal executive branch officials** means 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.
- 5) **Supporting activities** are expenses incurred in connection with lobbying and political activities. This includes 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). 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.

Lobbying – Charities

Charities are subject to heightened restrictions on lobbying and political activities and must provide that “no substantial part” of their activities can be lobbying. Exceeding this “substantial part” limit places such an organization at risk of losing its tax-exempt status. As previously mentioned, charities are prohibited by the Code from engaging in any political activities.

Charities have two options for tracking and reporting lobbying activities, which include the “substantial part” test and the 501(h) election.



Substantial Part Test

The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.

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. In addition, charities that lose their tax-exempt status due to excessive lobbying are subject to an excise tax equal to 5 percent of their lobbying expenditures for the year in which they cease to qualify for exemption.

Further, a tax equal to 5 percent of the lobbying expenditures for the year may be imposed against organization managers, jointly and individually, who agree to the making of such expenditures, knowing that the expenditures would likely result in the loss of the tax-exempt status.

Private foundations are subject to a different set of taxes on their lobbying expenditures; churches are not subject to excise taxes on excessive lobbying.

501(h) Election

An alternative to the substantial part test is the 501(h) election. Organizations that choose to file IRS Form 5768 and make the “lobbying election” under Code Section 501(h) are governed by an expenditure test, which includes a mathematical formula that limits the amount the organization can spend on lobbying activities and includes a specific definition for charities to reference.

Under Code Section 4911, the annual limit on lobbying expenditures is the sum of:

- 20 percent of the first \$500,000 of an organization’s exempt purpose expenditures; plus
- 15 percent of the second \$500,000 of such expenditures; plus
- 10 percent of the third \$500,000 of such expenditures; plus
- 5 percent of the remainder of such expenditures.

This limit is subject to an overall cap of \$1 million in annual lobbying expenditures. In addition, the amount of grassroots lobbying expenditures may not exceed 25 percent of the permitted overall lobbying expenditures.

Under the 501(h) expenditure test, an organization that engages in excessive lobbying activity over a four-year period may lose its tax-exempt status, making all its income for that period subject to tax. Should the organization exceed its lobbying expenditure dollar limit in a particular year, it must pay an excise tax equal to 25 percent of the excess.

Lobbying Defined

For the purposes of calculating lobbying expenditures for charities (Code Section 6033(b)(8)), 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, directly 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 part (segment) of the general public. 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, provides a petition/tear-off postcard/material for the recipient to send to 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 work on any of 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:

- 1) Lobbying does not include providing technical assistance or advice to a governmental body or committee in response to 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.
- 2) Lobbying does not include so-called self-defense activities, i.e., communications concerning decisions that may affect an organization's existence, its powers and duties, its tax-exempt status, or the deductibility of contributions to the organization, as opposed to affecting merely the scope of the organization's future activities.

Lobbying Disclosure Act – Associations and Charities

In addition to tracking lobbying activities under the Code, organizations that lobby are also required to register under the LDA if one or more of their employees will make more than one lobbying contact and spends more than 20 percent of his or her time on lobbying activities, as defined under the LDA. Registered organizations must submit quarterly reports to Congress regarding their lobbying activities, including the amount spent on lobbying. State registration requirements and definitions of lobbying differ by state and should be examined on a state-by-state level. A resource for such information is the National Conference of State Legislatures (www.ncsl.org).

The LDA definition of lobbying differs significantly from the IRS definitions. Lobbying activities under the LDA include lobbying contacts, as well as efforts in support of such contacts that are inclusive of preparation and planning activities, research, and other background work that is intended, at the time it is performed, for use in lobbying 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 several relevant exceptions that do not lead to 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 subcommittee of Congress;
- 3) Speeches, articles, or publications made available to the public or distributed through radio, television, or other methods of mass communication;
- 4) Information provided in writing in response to a request by a covered official;
- 5) Information required by subpoena, civil investigative demand, or otherwise compelled by the federal government (including information compelled by a contract, grant, loan, permit, or license);
- 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.

Covered legislative branch officials include all elected Members of Congress and the Senate, as well as all employees and officers of Congress. Covered executive branch officials are more specific and include (1) the president, (2) the vice president, (3) any member of the uniformed services whose pay or grade is at or above O-7, (4) any officer or employee in the Executive Office of the President, (4) any officer or employee in a position listed in levels I through V of the Executive Schedule, and (5) Schedule C political appointees.

Even if a communication is directed to a covered official, it is not a lobbying contact if the communication is otherwise made part of the public record before the agency.

Reporting Expenses Under the LDA

Although many organizations are 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 applicable Code definition rather than the LDA definition. For many organizations, the LDA definition of lobbying is far narrower than described in the Code.

Nonprofit organizations sensitive to reporting high-dollar amounts in their LDA reports may consider opting to track lobbying activities separately under both the Code and the LDA. Tracking lobbying expenses under two different methods increases recordkeeping obligations. However, because state lobbying and grassroots lobbying expenses are not reported under the LDA, choosing the LDA method may allow an organization to report a lower, more accurate estimate of federal lobbying expenditures to the Clerk of the House of Representatives and the Secretary of the Senate.

S.R. Snodgrass is here to help you simplify and make sense of these complex reporting requirements. To discuss any of these matters in more detail, please email Brian Bender at bbender@srsnodgrass.com or call 202-372-6305.