Advocacy and Lobbying Without Fear: What Is Allowed within a 501(c)(3) Charitable Organization

by Thomas Raffa

Those of us working within the nonprofit community, and particularly in or with 501(c)(3) public charities, recognize advocacy as a vital part of our mission. However, many of us get caught up in the delivery of services and may spend very little time advocating for the very systemic changes that could reduce the extensive need for the services we deliver. I am certain that we can agree that there may be no better spokespersons for the sick and elderly than those who commit themselves to nursing home service and hospice care. And who are more qualified to testify to successful rehabilitation methods than those who counsel in local drug clinics?

However, in my daily practice, I have come to recognize that time and money are not the only causes for a limited advocacy program. Often, it is a lack of understanding about what one can and cannot do when your public charity gets involved as an advocate in the public policy arena. There is confusion as to the distinctions between advocacy and lobbying, limited knowledge of the related lobbying regulations, and a resulting uninformed concern over losing one's tax-exempt status.

While it is true that a public charity under the Internal Revenue Code Section 501(c)(3) is not allowed to take part in a political campaign on behalf of any candidate for public office, there are no such restrictions on cause-related advocacy. In fact, even lobbying can be undertaken by a public charity without any risk to its tax-exemption so long as these efforts are not a substantial part of its activities.

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Lobbying Defined

Direct lobbying is attempting to persuade legislators to enact or not enact a bill. Grassroots lobbying involves encouraging the constituency of legislators to exercise their influence with such legislators on behalf of or against some legislation. Political campaigning consists of working for or against candidates' election to office. (See pages 9 and 10 for extended definitions.)

Is It Advocacy or Is It Lobbying?

Under these definitions, there are in fact a great number of activities an organization can engage in that are neither campaigning nor lobbying, thereby eliminating the concern for legal repercussions that lobbying might have on the tax exemption of a "public charity."

For example, the following activities are not lobbying:

• Efforts to make an administrative agency of the government change its policies, rules or regulations, or to adopt new ones, are not considered lobbying.

• An exempt organization can target a political executive (e.g.: a mayor or governor) so long as they are not being asked to promote, discourage or veto legislation.

• Your organization can develop a general policy position directed at issues as long as the issues have not been reduced to a specific legislative proposal.

• Testifying before a legislative committee on a matter for which the organization has received a written request from the committee to testify.[1]

• Non-partisan voter registration drives are also allowable,[2] as is voter educational material so long as such material: 1) States the position of all candidates without any evaluation of the candidates, 2) covers a broad range of issues without any particular bias toward such matters, and/or 3) describes the candidates' positions in ways that do not show bias on the issues or a preference.

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Applies to Organizations Not Individuals

Also, it may be important to your organization to note that these rules apply only to the organization and not to individuals acting in their individual capacity and not as a representative of the organization. Staff or board members can advocate individually or join volunteer advocacy groups formed to advance positions as long as the group has no connection to the exempt organization with which the individual is associated.

In acting on your own, you should not use the letterhead of your exempt organization; in addition, if your name is to appear on the letterhead of some unrelated group that may be lobbying, it is always better not to list your organization's name. Several of my clients have an individual that is so closely associated by the public with their organization that I encourage he or she not to participate "on their own" unless we can track such activity within the organization to ensure it is not substantial.

Options Available Under the Law for Lobbying

In understanding some of the aforementioned distinctions, you may determine that your organization does need to lobby or that some of its "advocacy" activities may begin to meet the lobbying definitions. While it is true that the actual boundaries can, at times, only be ascertained through an in-depth knowledge of the code sections, regulations, revenue rulings and case law, this should not discourage you from pursuing your efforts. You simply need to be aware of the options available under the current law and have available to the organization professional counsel to address any specific nuances that may arise.

First, there is the "traditional" test under which no "substantial part" of the organization's activities can consist of lobbying. Unfortunately, there is no specific definition by

the IRS of "what is substantial," therefore, the amount of lobbying activity allowed to a given organization may ultimately depend on the extent and nature of its other activities.

It was once suggested that less than five percent of an organization's time and effort involved in legislative activities is not "substantial."[3] However, this may be misleading in that several cases have established that the political activities of an organization must be assessed in the context of its objectives and circumstances to determine whether a substantial part of its activities was to influence or attempt to influence legislation.

An exempt organization that desires to steer clear of such murky waters can employ Section 501(h) of the Code.

The H Election

Under this Code section, a public charity can elect to track their lobbying activities using a predefined "expenditure test." An organization may make the election by filing Federal Form 5768 Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation. It is important to note that the election pertains only to lobbying and that any involvement by the exempt organization in political campaigns on behalf of or in opposition to any candidate for public office is still forbidden. However, by making this election, the "substantial" lobbying becomes a matter of definition for the public charity organization.

A public charity making the Section 501(h) election may spend up to a certain dollar amount of its "exempt purpose expenditures" to influence legislation without incurring tax or losing its exempt status. Under the expenditure test there are limits for direct and grassroots lobbying expenditures (see expenditure test box on page 10). If the organization does not meet the expenditure test (i.e., it spends in excess of the amounts allocated under Section 501(h)), it will owe a 25 percent excise tax on its excess lobbying expenses. In addition, if over a 4-year period the organization's average annual total lobbying or grassroots lobbying expenditures are more than 150 percent of the direct and grassroots dollar limits, respectively, the organization will lose its exempt status. This is a one-time election and, if the organization wishes to revoke the election, it may do so using the same form.

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No Election

When an H election is not made, it is up to the organization to ensure that "no substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation." While the rules under the H election are clear and objective, it should be obvious from our discussions above that the "no substantial part" tests rests upon subjective criteria that have been developed in an inconsistent and unclear manner.

It is interesting to note, however, that some activities, which would clearly not be lobbying under the rules that apply to organizations that have made the election, may in fact be lobbying under the "no substantial part" test. Most of this uncertainty involves grassroots lobbying and the communication rules listed above. For example, the nonpartisan analysis or research material which presents full and fair disclosure of the facts so that the reader can

form an independent opinion on the issues will not be considered grassroots lobbying under 501(h), but would most likely be considered lobbying without the H election.

As the test for those who have made the H election is based solely on expenditures, lobbying may be done by uncompensated board members without limit and may not have any effect on the organization's tax status. Under the "no substantial part" test, such efforts would be included.

On the other hand, by not making the election, an organization is not subject to the strict rules that require the detailed accounting for direct and grassroots lobbying as discussed above in the "expenditure test." As the regulations are vague and do not use dollar limits in defining what is substantial outside the election, they can provide an organization with much more flexibility and judgement in determining what is considered substantial and place the burden on the IRS to prove otherwise.

If your organization plans to do a substantial amount of lobbying, you may want to consider establishing a 501(c)(4) organization. No limits are imposed on the amount of lobbying by a (c)(4) organization—it can also do more campaigning as long as doing so is not its primary purpose.

Consider a 501(c)(4)

If your organization plans to do a substantial amount of lobbying, you may want to consider establishing a 501(c)(4) organization. No limits are imposed on the amount of lobbying by a (c)(4) organization—it can also do more campaigning as long as doing so is not its primary purpose. In some circumstances, the organization may have to pay a tax on expenditures incurred in connection with political activity. Such (c)(4) organizations are tax-exempt but contributors are not eligible for the charitable deduction afforded to the contributors to a 501(c)(3) organization. Many of my (c)(3) clients that want to develop a significant political agenda may set up a "sister" (c)(4) organization through which they can safely carry out lobbying activities. Many have the same or similar board members for both organizations. As long as the (c)(4) is supported solely by after-tax dollars and receives no support from its sister (c)(3) organization (including both direct and in-kind support), there should be no problem with the lobbying regulations.

Conclusion

Our firm is often asked to make a recommendation as to whether a client exempt as a public charity under 501(c)(3) should make the Section 501(h) election. To do so requires discussions as to the extent and type of the current and planned activities of the organization. Most organizations may be surprised that many of their own activities are not lobbying but advocacy. Moreover, that, when properly accounted for, lobbying efforts may not be as "substantial" as one might believe. Although few enjoy the exercise of properly accounting for "actual" direct and indirect lobbying expenditures or projecting future costs for these activities, it is certainly the best method by which to make an informed decision. In the cause of advocacy, such knowledge is power. With this knowledge, you may find that your organization can do quite a lot to fulfill its mission and advance its causes without crossing the line and risking its tax-exempt status.

Endnotes

1. See Rev. ruling 70-449.
2. See Rev. ruling 74-574.
3. *Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955)

About the Author. **Thomas Raffa** is the managing partner of Raffa and Associates, P.C., a certified public accounting and consulting firm based in Washington D.C. Contact: 202-822-5000, tom@raffa.com.

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IRS Definitions

Lobbying activities consist of "attempts to influence legislation by propaganda or otherwise." Such activities can be conducted directly or indirectly.

Direct Lobbying communication is any attempt to influence legislation through communication with any member of a legislative body (i.e. a congress person or senator) or any government official or employee who may participate in the formulation of legislation. For the communication to be considered direct lobbying communication, it must refer to specific legislation and reflect a view on such legislation.

Indirect Lobbying activities are those "grassroots lobbying communications that attempt to influence legislation through attempts to affect the opinions of the general public." Like direct lobbying communication, it must refer to specific legislation and reflect a view on such legislation. Furthermore, to be considered lobbying, it must also "encourage the recipients" of the communication to take action with respect to such legislation.

Encouraging a recipient to take action with respect to legislation means that the communication:

1. Directs the recipient to contact a legislator or employee of a legislative body;
2. Provides the address, telephone number or similar information of a legislator or an employee of a legislative body;
3. Provides the recipient with a tear-off postcard or similar material to communicate with a legislator or an employee of a legislative body or any other government official or employee who may participate in the formulation of legislation; and
4. Specifically identifies one or more legislators who will vote on legislation in support of or opposing the organization's view.

The Expenditure Test Under the H Election

Exempt Purpose Lobbying	Expenditures non-taxable amount
Not over $500,000 [As defined in Section 4911(e)(1)]	20% of exempt purpose expenditures
Over $500,000 but not over $1,000,000	$100,000 + 15% of the excess of exempt purpose expenditures over $500,000
Over $1,000,000 but not over $1,500,000	$175,000 + 10% of excess of exempt purpose expenditures over $1,000,000
Over $1,500,000 purpose expenditures over $1,500,000	$225,000 +5% of the excess of exempt
Over $17,000,000	$1,000,000

Grassroots = 25% of lobbying non-taxable amount.

An example of determining taxable excess expenditures

The tax is triggered when either lobbying expenses or grassroots expenditures exceed the nontaxable amounts. The greater of the two "excesses" becomes the amount of taxable excess.

Facts: Direct lobbying expenditures = $425,000
Grassroots expenditures = -0-
Total Exempt Purpose expenditures = $4,000,000

Tax: The non-taxable lobbying amount is $350,000 [$225,000 + (5% of ($4,000,000 less $1,500,000))]. Excess lobbying expenditures equal $75,000 ($425,000 lobbying expenditures less $350,000 nontaxable lobbying expenditures). The tax due is $18,750 (25% of $75,000).

Ceiling: The ceiling on lobbying expenditures is $525,000 (or 150% of $350,000). A 501(c)(3) that "normally" exceeds the ceiling will loose its exemption.