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Mythbusting the Top 10 Fallacies of 501(c)(3) Lobbying

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Many 501(c)(3) organizations shy away from lobbying and other politically-related activities out of concern for their tax status. But by failing to engage in such activities, nonprofit organizations may be neglecting tools at their disposal that can be enormously helpful in carrying out their mission.

Myths abound about the permissible—or, more often, impermissible—lobbying and political activities of nonprofit organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. But the fear factor often is unwarranted. 501(c)(3) organizations certainly are limited in the amount of lobbying in which they may engage and are prohibited from engaging in political campaign activity. However, knowing which actions are lobbying or political campaign activity and how to account for those activities are critical questions that need to be answered before leaders of 501(c)(3) organizations unnecessarily inhibit their organizations from most fully and effectively furthering their missions. This article explores and debunks some of the most common misconceptions in this area.

Myth 1. 501(c)(3)s cannot lobby and will lose their tax exemption if they engage in lobbying.

Absolutely not. 501(c)(3) organizations can—and often should in order to fully carry out their missions—lobby at all levels of government. Federal tax law always has permitted lobbying by 501(c)(3) organizations, as long as lobbying is not a "substantial part" of an organization's total activities. There are two ways to determine what is substantial: the facts and circumstances test articulated by the IRS and courts and the more definitive "501(h) election."

Facts and Circumstances: The facts and circumstances test is not clearly articulated and includes expenditures for lobbying, staff time, volunteer time, and other activities. It does not specify exactly how much of an organization's funds or time may be spent on lobbying, nor does it specify exactly what constitutes lobbying. The sole penalty for violating the "substantial part" test is revocation of tax-exempt status.

501(h) Election: The statute and regulations governing organizations that make the 501(h) election are clear on which activities constitute lobbying and which do not; there also are numerous exceptions from the definition of lobbying. For example, lobbying occurs only when there is an *expenditure of money* by the 501(c)(3) organization for the purpose of attempting to influence legislation. Where there is no expenditure by the organization for lobbying (such as lobbying by members or volunteers), there is no lobbying by the organization. Generally, organizations that make the 501(h) election are subject to a sliding scale limit on their lobbying expenditures:

Exempt Purpose Expenditures	Percentage Allowed for Lobbying	Total Maximum Lobbying Amount
$0 to $500,000	20%	Up to $100,000
$500,001 to $1,000,000	15%	$100,000 plus 15% of excess over $500,000
$1,000,001 to $1,500,000	10%	$175,000 plus 10% of excess over $1,000,000
Over $1,500,000	5%	$225,000 plus 5% of excess over $1,500,000, up to a maximum lobbying expenditure limit of $1,000,000

As shown in the chart, there is an overall cap of $1 million on lobbying expenditures (which is reached when an organization reaches $17 million in total exempt purpose expenditures). Thus, with this hard cap on the amount of money that may be spent on lobbying, large 501(c)(3) organizations may not be able to make use of the 501(h) election. In addition, no more than 25 percent of the amount allowed to

be spent on lobbying generally may be for grassroots lobbying. There are financial penalties for exceeding the lobbying limits; revocation of tax-exempt status is only possible where there are repeated, excessive violations of the limits.

Myth 2. Making the 501(h) election will increase the risk of our organization becoming the target of an IRS audit.

The opposite is actually more likely. If a 501(c)(3) organization does not make the 501(h) election, it is governed by the much more ambiguous "substantial part" test. Thus, if an organization lobbies but does not make the 501(h) election, the organization's lobbying must be "insubstantial." This is a vague term that has never been clearly defined. If you remain subject to this rule, you cannot be certain how much lobbying your organization can do—or even what is and is not "lobbying."

Further, the IRS has made clear that far from singling out for audit 501(c)(3) organizations that make the election, the reverse is true. The IRS has stated, " ..our intent has been, and continues to be, one of encouragement [of 501(c)(3) organizations] to make the election … Experience also suggests that organizations that have made the election are usually in compliance with the restrictions on lobbying activities."

Some 501(c)(3) organizations also have been reluctant to make the 501(h) election for fear that this action will change their 501(c)(3) status. This is not true. Electing organizations remain fully exempt under section 501(c)(3) of the Internal Revenue Code.

Myth 3. 501(c)(3) organizations are not covered by federal and state lobbying registration requirements.

Yes, they are. Under the federal Lobbying Disclosure Act of 1995 ("LDA"), a 501(c)(3) organization—like all other entities—is required to register and file quarterly reports concerning its lobbying activities if (1) the organization has at least one employee who is a "lobbyist" and (2) the organization incurs or expects to incur expenditures on "lobbying activities" of $11,500 or more in a calendar quarter. Note that a "lobbyist" is someone who makes at least one "lobbying contact" and devotes at least 20 percent of his or her time to "lobbying activities."

501(c)(3) organizations that have elected to report lobbying expenditures for tax purposes under section 501(h) of the Internal Revenue Code may use the tax law definition of "influencing legislation" and the tax rules for computing lobbying expenditures for purposes of making quarterly reports under the LDA.

In addition to the federal requirements, each state has its own lobbying registration and reporting requirements. These laws have a variety of different triggers, but generally do not exempt 501(c)(3) organizations from their registration and reporting requirements. In addition, many states require organizations to register and report even if they use only outside lobbyists (that is, no employees meet the registration thresholds). This is different from the federal system, where organizations do not have to report if all of their lobbying is done by outside firms.

Myth 4. Encouraging the members of a 501(c)(3) organization to contact their legislators with respect to pending legislation is grassroots lobbying and is more limited than direct lobbying.

Not true. Under Section 501(h), the definition of "grassroots lobbying" includes only attempts by a 501 (c)(3) organization to influence legislation through an attempt to change the opinion of the general public. This is not to be confused with trying to get the members of the 501(c)(3) organization mobilized to support or oppose legislation by contacting their elected officials; encouraging members to contact a legislator is direct lobbying if the organization has made the 501(h) election. *Only when a 501(c)(3) organization tries to reach beyond its membership to get action from the general public does grassroots lobbying occur.*

Note that the facts and circumstances test does not distinguish between grassroots and direct lobbying or explain the difference. However, organizations that do not make the election do need to be cognizant that advocating to the general public can trigger a separate prohibition on 501(c)(3)s becoming an "action" organization.

Myth 5. If an expenditure has any lobbying purpose, it must be allocated entirely to lobbying.

Again, not true. 501(c)(3) organizations are required to allocate costs between lobbying and non-lobbying. Costs of communications with members may be reasonably allocated between lobbying and any other *bona fide* purpose (*e.g.*, education, fundraising, etc.) on any reasonable basis. For

communications with nonmembers, all costs attributable to the lobbying portion and to those parts of the communication that are on the same specific subject as the lobbying message must be included as lobbying expenditures. Other cost allocation rules apply as well; for instance, allocation is not permitted for grassroots lobbying expenditures.

Myth 6. A 501(c)(3) cannot provide its members with the voting records of legislators on key issues.

Yes, it can. 501(c)(3) organizations can tell their members how each member of a legislature voted on key issues. While 501(c)(3)s are prohibited from engaging in any political campaign activities, they may disseminate voting records during political campaigns, though such communications should be crafted carefully. However, a problem may arise if an organization waits to disseminate voting records until a political campaign is underway. If your organization has not published records regularly throughout the year, it may be at risk of violating the prohibition on political campaign activity if it were to publish a recap of votes throughout a legislative session at the time that the campaign is underway.

Myth 7. 501(c)(3)s cannot inform candidates of their organizations' positions on key issues and ask for their support.

You can within limits. A 501(c)(3) organization may inform political candidates of its positions on particular issues and urge them to go on record, pledging their support of those positions. Candidates may distribute their responses (with respect to those positions) both to the members of the 501(c)(3) organization and to the general public. However, 501(c)(3) entities should avoid publishing or distributing *statements* by candidates except as nonpartisan "questionnaires" or as part of *bona fide* news reports.

501(c)(3) organizations with a broad range of concerns can more safely disseminate responses from questionnaires. However, the questions must cover a broad range of subjects, be framed without bias, and be given to all candidates for office. If a 501(c)(3) organization has a very narrow focus, this may pose a problem. The IRS takes the position that a 501(c)(3)'s narrowness of focus implies endorsement of candidates whose replies are favorable to the questions posed. *Unless you are certain that your organization clearly qualifies as covering a broad range of issues, your organization should avoid disseminating replies from questionnaires.*

Finally, it is important to remember that 501(c)(3) organizations may not ask candidates to sign "pledges" to support the organization's positions. Doing so may result in political intervention, which is strictly prohibited.

Myth 8. Employees of 501(c)(3) organizations cannot participate in a candidate's campaign for elective office.

Not true. It is true that a 501(c)(3) organization is prohibited from endorsing, contributing to, working for, or otherwise supporting or opposing a candidate for public office. However, this does not prohibit the officers, directors, members, or employees of a 501(c)(3) organization from participating in a political campaign, provided that they say or do everything as private citizens and not as spokespersons for or agents of the organization, and not while using the organization's resources or assets in any manner.

Myth 9. 501(c)(3) organizations *can* make independent expenditures in support of political candidates in light of the U.S. Supreme Court's decision that corporations may expressly advocate for or against candidates.

No. Although the *Citizens United v. FEC* decision allowed for corporations—both for- and nonprofit—to fund messages to the general public that expressly advocate the election or defeat of a clearly identified candidate for federal office, the decision does not apply to the tax law restrictions on 501(c)(3) organizations. The U.S. Supreme Court has long held that because of the tax benefits that come with being a 501(c)(3) organization, they may be precluded from engaging in political campaign activities.

Myth 10. 501(c)(3)s cannot set up affiliated organizations for use in engaging in unlimited lobbying and certain political activities.

Not true. The U.S. Supreme Court has said that 501(c)(3)s *can* establish affiliated 501(c)(4)s, 501(c)(6)s or other tax-exempt affiliates (except Section 527 organizations, which include political action committees ("PACs")) to carry on unlimited lobbying activities and otherwise permitted political campaign activities. In fact, an affiliated 501(c)(4) or (c)(6) entity could, itself, establish a connected

PAC. The affiliated entity generally must have independent funding sources for which no charitable tax deduction will be available.

There are certain ways for the 501(c)(3) to provide support to its affiliated organizations. In general, however, if a 501(c)(3) transfers money, assets or anything of value to a non-501(c)(3) organization that lobbies, then the transfer will be treated as a lobbying expenditure of the 501(c)(3) unless it fits within certain protected categories. Moreover, the related organization that receives general support from the 501(c)(3) entity may not engage in political campaign activities. There are two ways for the 501(c)(3) to provide support to the related organizations without the support being treated as lobbying or political activity.

First, if the 501(c)(3) receives compensation of fair market value in return from the related organization, then no lobbying expenditures will be attributed to the 501(c)(3). Examples include leased office space, office services, and staff services in return for full reimbursement of the costs of the goods or services provided.

Second, if the support is made using a "controlled grant," whereby the resources or assets transferred are limited to a specific non-lobbying (or non-political) project of the transferee with proper documentation of the control and segregation of funds, then the expenditure will not be treated as one made for lobbying.

Thus, *general purpose* support by a 501(c)(3) of an affiliated non-501(c)(3) is permitted (presuming it falls within the scope of the 501(c)(3)'s mission) but will be treated as a lobbying expense of the 501(c)(3) subject to the limitations on lobbying discussed above. Moreover, the affiliated entity may not engage in political campaign activities.

Finally, it should be noted that the IRS pays close attention to ensure that the operations of a 501(c)(3) organization and its affiliated entities are clearly separate. Absent such separateness, the IRS might hold that the activities of an affiliated organization are attributable to the 501(c)(3) organization, with potentially significant adverse consequences.

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501(c)(3) Lobbying and Political Activity
QUICK REFERENCE CHART

Lobbying	Yes, and can advocate for or against specific legislation
Expenditure limits	Yes, with a sliding scale if organization makes 501(h) election
Federal lobbying disclosure	Yes, if threshold met
Legislator scorecards / voting records	Yes, with limitations
Political Action Committees	Prohibited
Endorsing candidates	Prohibited
Contributions to candidates	None
Voter registration drives and education	Yes, but must be nonpartisan and focused on need to vote
Express advocacy	Prohibited

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