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Lobbying and Nonprofits: Rules for Sharing Your Expertise

By John Pomeranz
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This article is only a summary of the law and should not be used as a substitute for the advice of qualified counsel.

All tax-exempt organizations are allowed to participate in the legislative process — but they need to follow the rules.

Of all the sectors in our society, the nonprofit sector is the best suited to advise policymakers about the problems facing us and the innovative solutions to address those problems. Nonprofits are at the front lines in meeting our most pressing needs and have had to develop ways to address those problems in the most effective and least costly manner.

Legislators don't have the luxury of knowing every issue in depth. They rely on the expertise that nonprofits may bring to help craft good public policy. Indeed, the laws that allow nonprofit involvement in the legislative process were explicitly enacted out of recognition of the expertise that the sector brings.

So, familiarize yourself with the laws governing lobbying by nonprofit organizations and then encourage your organization's leaders to take advantage of the opportunity they have to help make better public policy through advocacy — while staying legal. You owe it to the rest of society to share your knowledge and solutions with policymakers at all levels of government — you're the experts.

Different limits for different organizations

Just as the rules for election-related activity vary with the type of tax-exempt organization, so too does tax status determine how much lobbying you can do.

Type of Organization	Lobbying
501(c)(3) (charity)	Limited
501(c)(3) (foundation)	None (but can support charities that lobby)
501(c)(4) (social welfare) 501(c)(5) (unions) 501(c)(6) (trade association)	Unlimited

501(c)(3) charities

501(c)(3) public charities, such as clinics, schools, and houses of worship, may lobby, but only to a limited degree. The exact amount of lobbying they may do depends on the size of the organization and which of two sets of rules governing lobbying the organization has chosen to adopt.

Public charities that choose to measure their lobbying under an expenditure-based test often referred to as the 501(h) test, may spend a certain percentage of their budget on lobbying — as much as 20 percent for small organizations, although the percentage diminishes for organizations with larger budgets and is subject to an absolute cap of $1 million, no matter how large the organization's budget may be. Charities using the 501(h) test may spend a lesser amount — 25 percent of their overall lobbying limit — on

grassroots lobbying (activities designed to encourage the general public to lobby elected officials, as opposed to direct lobbying by the organization itself and its members).

In addition to the limits that this expenditure-based test provides, a key advantage of the 501(h) test is the clear definition of lobbying and many explicit exceptions under the 501(h) test that exempt many advocacy activities from the restrictions on lobbying. This allows a careful charity to structure its activities to avoid using up its lobbying limit while still influencing the policy debate. For example, a charity may attempt to influence a rulemaking process at an administrative agency without limit, because the definition of lobbying under the 501(h) test only covers legislative, not administrative, advocacy. Likewise, charities may conduct research or produce nonpartisan analyses of public policy issues and distribute the results without having to treat any of the activities as lobbying. Assistance that a charity provides in response to a written request from a legislative committee or other government body is also typically exempted from the definition of lobbying.

Charities may lobby even if they don't elect to follow the 501(h) expenditure test. In fact, some charities, notably churches, are not allowed to make the 501(h) election. Charities that don't make the 501(h) election must simply make sure that lobbying doesn't become a "substantial" part of their activities. There is very little guidance about what constitutes a "substantial" amount of activities, but most experts believe that less than five percent of an organization's activities is insubstantial, and even more may be permissible. Note that some very large charities choose to operate under this so-called "no-substantial-part" text because they believe — probably correctly — that even an insubstantial amount of lobbying by a very large charity is still more lobbying than would be permitted under the 501(h) test's $1 million cap.

Special rule: ballot measures

These rules for lobbying also allow 501(c)(3) charities to play a role in initiatives, referenda, constitutional amendments, and similar measures that appear on the ballot in many state and local elections. Although 501(c)(3)s may not support or oppose a candidate for public office, advocacy for or against a ballot measure is allowed. The reasoning is that asking your fellow citizens to vote for or against a ballot measure is analogous to asking a legislator to vote for or against a bill.

Just like such legislative lobbying, however, charities must treat such activities as part of the limited amount of lobbying they may do under federal tax law. Furthermore, 501(c)(3)s engaged in ballot measure work may also be subject to registration and reporting requirements under state election laws — check the law in your state!

501(c)(3) foundations

501(c)(3) private foundations are not allowed to engage in lobbying themselves, but may fund charities that do lobby.

It is legal for foundations to make grants that their 501(c)(3) charitable grantees may use for lobbying — a fact that is frequently misunderstood by private foundations. Even though the law forbids foundations from designating particular grants for their grantees to use for lobbying ("earmarking" grants for lobbying), foundations may provide general support grants that their charitable grantees may choose to use for lobbying activities.

Instead of making a general support grant, a foundation could also make a grant to support a particular project of a charity that includes lobbying, provided that the amount the foundation gives is less than the total non-lobbying budget for the project. For example, a charity may propose a $1 million project to improve children's health that includes direct services to children, public education efforts, and some lobbying on the federal SCHIP reauthorization bill. If the budget for lobbying is estimated at $100,000 of that $1 million project, a foundation could make a grant to the charity of up to $900,000 toward the

project. Even if the charity were to subsequently use some of the foundation grant for the lobbying activities associated with the project, the foundation would not be found to have impermissibly "earmarked" the grant for lobbying.

Sometimes, however, foundations unnecessarily tie the hands of their grantees by forbidding any use of their grants for lobbying activities. Although such language is distressingly common, there is generally no need for a foundation to include such a "no lobbying" provision in grants to public charities.

Beyond their more traditional role as funders, foundations are increasingly engaging in efforts that have a direct impact on legislative policy but that don't run afoul of the ban on foundation lobbying. For example, foundations may convene experts to discuss alternative solutions to policy problems, prepare nonpartisan reports on policy issues, or provide technical assistance at the request of legislative committees or other government bodies.

Note that foundations may also play these roles — funder or direct actor — in the context of ballot measure lobbying as well.

501(c)(4)s, 501(c)(5)s, and 501(c)(6)s – unlimited lobbying

Unlike 501(c)(3)s, other types of 501(c) organizations — including 501(c)(4) "social welfare organizations," 501(c)(5) unions, and 501(c)(6) trade associations — may do an unlimited amount of lobbying, including working for the passage of legislation and ballot measures.

Because 501(c)(4)s may engage in unlimited lobbying, a 501(c)(3) public charity that is coming close to its lobbying limits will often create a sister 501(c)(4) organization to lobby in support of the shared values of the two organizations. Frequently the two organizations share staff, offices, and other resources, with each tracking and paying for its own share of the related costs. Sometimes a 501(c)(3) will simplify its own lobbying reporting by simply making an annual grant to a sister 501(c)(4) in the amount of the 501(c)(3)'s total lobbying limit. Provided the legal and financial lines between the two organizations are not blurred, creating a related lobbying organization may offer another effective tool for accomplishing the public mission of the organizations.

Lobbying disclosure laws

These tax-law rules governing lobbying are only part of the story: The U.S. Congress and most state legislatures also require lobbyists and the organizations that employ them to register and file regular reports of their lobbying activities. The most important thing to remember is that unlike the limits that apply to 501(c)(3) charities, none of these federal or state lobbying disclosure laws put a cap on how much lobbying the organization may do.

Typically an organization is exempt from the requirement to register and report if it falls below some statutory threshold. For example, an organization is not required to register under the federal Lobbying Disclosure Act unless it spends more than $10,000 on lobbying in any calendar quarter and employs at least one individual who engages in a defined amount of lobbying activity.

One complication is that the definitions under these federal and state lobbying disclosure laws are somewhat different from state to state and also different from the tax-law definitions discussed above. Therefore, if an organization is required to register and report under one of these disclosure laws, it will have to create a recordkeeping system that tracks its lobbying activity in ways that allow the organization to comply with any reporting obligations that apply. Luckily, it's not as hard as it sounds.