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Summary of IRS Lobbying Regulations for Charities

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Historical Role of Nonprofits in the US

Nonprofits have been and continue to be the primary vehicle of civic involvement in the United States. They play a crucial role in the democratic process and have the information, networks needed for policy debates. Charities provide a forum for people to voice their ideas and get involved. They have the public interest at heart.

Legal Protections

- The First Amendment protects the free speech and association rights of charities.
- The term "charitable" in Section 501(c)(3) of the tax code is broad and includes relief of the poor, advancement of religion, education or science. IT IS NOT LIMITED TO HANDOUT ASSISTANCE OR BRICKS AND MORTAR: ADVOCACY INCLUDED WITHIN SCOPE OF THE DEFINITION OF CHARITABLE. IRS Reg Sec. 1.501(c)(3)-1(d). says: "The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3)"

Many Different Types of Advocacy

- Advocacy includes legislative lobbying, litigation, regulatory proceedings, rulemaking, action before administrative agencies, public education, organizing and direct action.

Legal Definitions are Different from Everyday Definitions

- The IRS definition of lobbying ONLY includes legislative advocacy that meets certain criteria. It does not include advocacy in other contexts.
- The IRS definition of "political" ONLY includes partisan activity for or against candidates for office.

IRS Definition of Lobbying

Expenditure Test: Easier and More Generous

A 501(c)(3) can choose from two sets of rules: a measure based purely on expenditures or a general "insubstantial part" test. 501(c)(3)s that choose to use the expenditure test can spend up to 20% of their budget on legislative lobbying. For those who do not "elect," they fall under a "substantial part" test, in which lobbying may not constitute more than an insubstantial part of a charity's activities. However, the term "substantial part" has never been fully defined. The definition of lobbying under the substantial part test does not require an expenditure of money. For example, activities of volunteers to influence legislation must be counted as lobbying. To take advantage of the expenditure test a 501(c)(3) must file a one page notice with the IRS (Form 5768). A couple of court decisions indicated that "substantial part" would be determined as a percentage of an organization's budget spent on lobbying. But the exact percentage is not clear.

Basic Requirements

The communication must address "specific legislation, which includes bills, resolutions, repeal proposals, referendums or similar items at the federal, state and local level. It also includes specific proposals that have not yet been introduced in a legislative body.

Source: IRS Reg. IRS Regulations Sec. 56.4911-1 and Reg. 56.4911-2(d)(1)(ii).

Direct Lobbying v. Grass Roots Lobbying:

Direct Lobbying: 3 elements:

An organization is attempting to "influence legislation" when the communication is directed to a legislator or employee of a legislative body, refers to specific legislation and reflects a view on that legislation.

Source: IRS Reg. 56.4911-2(b)(1)(ii).

Grassroots Lobbying: 4 elements:

Grassroots lobbying occurs when the communication is directed to the general public, refers to specific legislation, reflects a view on the legislation AND "encourages the recipient ...to take action with respect to the legislation."

Source: IRS Reg. 56.4911-2(b)(2)(ii).

Membership Communications

Communications made primarily to members as internal to the organization, and therefore communications that express a view on specific legislation but contain no direct "call to action" do not constitute direct or grassroots lobbying. A member is defined as someone who contributes more than a nominal amount of time or money to the organization. A communication that asks members to contact legislators constitutes direct lobbying, but if it urges members to ask the general public to contact legislators it constitutes grassroots lobbying. If there is a call to action and the audience is primarily but not 100% members, the cost is divided between direct and grassroots lobbying.

Source: IRS Reg. 56.4911-5

Call to Action

State that the recipient should contact a legislator or other relevant government employee for the purposes of influencing legislation;

OR

State the address, telephone number or similar information regarding a legislator or legislative body employee;

OR

Provide a petition, post card or similar means for the recipient to contact a legislator or legislative body employee;

OR

Specifically identify a legislator or legislators who will note on the legislation as being opposed to undecided about the organization's view on the legislation

OR

a member of a legislative (sub)committee which will vote on the legislation.

But note that identifying the of sponsor a bill is NOT a call to action.

Source: IRS Reg. 56.4911-2(b)(2)(iii)

3 EASY STEPS TO CALCULATE YOUR LOBBYING BUDGET:

Step 1: Determine Your "Exempt Purpose Expenditures"

Annual budget amount _____
Costs of outside fundraiser - _____
Subtotal _____
Capital costs - _____
Total = Exempt Purpose Expenditures _____

Step 2: Apply IRS Percentage Formula

Exempt Purpose Expenditure Amount _____
20% of first 0,000 _____
15% of the next 0,000 _____
10% of the third 0,000 _____
5% of the remaining + _____
Total = Annual Lobbying Budget _____

May not exceed million Step 3: Determine Grassroots Lobbying Budget Annual Lobbying Budget _____ Divide by 4 = Grassroots lobbying budget _____ Source: IRS Reg. .4911-1(c)(1).

Exceptions to the IRS Definition of Lobbying

1. WRITTEN REQUESTS FOR TECHNICAL ASSISTANCE FROM LEGISLATIVE BODIES

Basic Requirements Written request from a legislative "body". This includes committees, subcommittees, official task forces or leadership such as Speaker or Whip. A request from individual legislator will not meet this requirement. But you can ask a friendly legislator to ask a committee chair or floor leader to sign a letter. Made your response available to every member of the legislative body that requests it. To avoid making lots of copies, you can submit your response to the person who made the request with a statement that the response is for the use of all members of the legislative body that made the request. Scope of the Request Written requests from legislative bodies can be narrow or broad, but your response must be within the scope of the request. For that reason, you can seek the broadest possible scope of activities in the request. The request can ask for: Information and/or data requests. Your opinion or recommendations on a specific bill. Your opinion or recommendations on a topic or policy proposal. In analysis of the impact of legislative proposals on a constituency Draft language for bills or amendment Testimony before a legislative body. Source: IRS Reg. 56.4911-2(c)(3) and Reg. 53.4945-2(d)(2).

2. NONPARTISAN ANALYSIS, STUDY OR RESEARCH Basic Requirements

To be nonpartisan your study must be a full and fair examination of facts and issues so that a reader can form their own opinion. The arguments of opponents should be cited and can be refuted. Explain the pros and cons of your position and show how the pros outweigh the cons. You CAN come to a conclusion AND refer to specific legislation. Note: You do not have to be impartial about the issues

Fact sheets generally too cursory to meet requirements of this exception.

The study must be distributed broadly, not just to friendly legislators or a select list of allies. Distribution may not be limited to or directed solely to persons only interested in one side of an issue. It can be oral or written, with or without charge. You can use reprints of speeches, articles and reports, presentations at conferences, meetings or news releases. Costs Excluded From Lobbying Budget Most of producing study Printing Distribution. Subsequent Use in Lobbying If used for direct lobbying the original costs of the study do not count toward the lobbying budget, but the costs of use in direct lobbying do count (attachment of study to direct lobbying material does not bring it within the exception). If used for grassroots lobbying purposes all original costs of the study count as a grassroots lobbying expense ONLY IF it refers to specific legislation AND the expenses are paid within 6 months of the grassroots lobbying use or the primary purpose of the study was for grassroots lobbying use. Note: A primary non-lobbying purpose presumed by the IRS if a substantial non-lobbying distribution is made prior to or at same time as the grassroots lobbying use. Subsequent use by another organization: if subsequent distribution made by unrelated org clear and convincing evidence required to establish lobbying purpose (i.e. collusion, cooperation). Source: IRS Reg. 56.4911-2(c)(1)

3. SELF DEFENSE COMMUNICATIONS Basic Requirements If the communications with legislators are about possible action that could affect the organization's existence, powers or duties the expenses do not count as lobbying. This exception does not apply to grassroots lobbying. The issue can be defensive or proactive. Source: IRS Reg. 56.4911-2(c)(4).

4. BROAD DISCUSSION OF ISSUES THAT DO NOT ADDRESS SPECIFIC LEGISLATION Basic Requirements Discussion of broad social, economic and similar problems that are general and do not refer directly to legislation. Source: IRS Reg.. 56.4911-2(c)(2) Special Rules for Lobbying Activities

1. LEGISLATIVE SCORECARDS AND VOTING RECORDS Basic Requirements Include voting records of all legislators, or those within a region. Legislators who are up for re-election cannot be identified. The records cannot include stated positions of candidates who have not held elected office (and therefore haven't cast any votes). Include a disclaimer that makes it clear your organization does not support or oppose candidates for office. Uses of legislative scorecards Inform membership or the public on how legislators voted on certain issues. Evaluate the effectiveness of your lobbying efforts. Provide information for strategic planning. Rating Voting Records Take special care when a voting record is published during or close to election season so that it does not appear to support or oppose election of any legislator. You may rate or otherwise evaluate voting records ONLY if the evaluation is part of a continuing program to report results of your lobbying efforts and circulation is limited to regular outlets for reports. Source: IRS Rev. Rul. 78-248, Rev. Rul. 80-282.

2. REFERENDUMS AND BALLOT MEASURES Basic Requirements Communications that urge voters to support or oppose a measure on the ballot is considered direct lobbying, as the general public is acting as a legislative body. Referendums become specific legislation as soon as the first petition is circulated among voters. Source: IRS Reg. 56.4911-2(b)(1)(iii)

3. PAID MASS MEDIA ADVERTISEMENTS Basic Requirements General educational messages that do not contain a "call to action" but do reflect a view on the same specific subject

as highly publicized legislation are presumed to be grassroots lobbying communications (and therefore expenses) only when they appear within two weeks of a vote by a legislative body, including committees and subcommittees. But the presumption can be rebutted if the organization can show that the timing of ad was unrelated to the upcoming legislative vote (i.e. part of a regular series). The rule also applies to ads that encourage the public to contact legislators about the general subject of legislation (but not specific legislation) and appear within two weeks of a vote. Definition of "highly publicized" Frequent media coverage within two weeks of the vote AND the general purposes, terms and pending action of the legislative body must be known to a significant portion of the public in the area where the ad appears.

Funding Source Restrictions on Lobbying

1. Private Foundations

Basic Requirements

- Private foundations CAN fund lobbying activities by 501(c)(3) organizations if funds are not earmarked for lobbying. Grant applications can mention lobbying activities. (*Source: IRS Reg. 53.4945-2*)

2. Federal Funding

Basic Requirements

- OMB Circular A-122 prohibits use of federal funds for lobbying or political (electioneering) activities. It also prohibits inclusion of overhead costs associated with these activities.
- The "Byrd amendment," (31 U.S.C. 1352) prohibits recipients of federal grants, contracts, loans or awards from using any federal funds to lobby for a grant or renewal of a grant. Recipients of federal funds are required to file reports with the grantor agency certifying compliance with these provisions and disclosing the name of persons registered as lobbyists under the federal Lobbying Disclosure Act.
- OMB Circular 1-133 governs auditing and reporting procedures for federal grantees. Audits must take place at least every two years, and if the grant is for more than 0,000 an independent CPA must conduct an audit for compliance with the provisions of A-122.
- Impact on lobbying activities of 501(c)(4)s: The Lobbying Disclosure Act singles out 501(c)(4) organizations by barring them from receiving federal grants if they lobby. 2 U.S.C.1611. However, a 501(c)(4) can establish a separate bank account with private funds to pay for lobbying activities. H. Rept. 104-339, Pt. 1 at 24.
- The Hatch Act: Some non-profits that administer federal grants and/or assistance programs are subject to the provisions of the Hatch Act. Check your grant agreement for specifics.