

**LEGISLATIVE AND POLITICAL CAMPAIGN ACTIVITY  
LIMITATIONS UNDER INTERNAL REVENUE CODE  
SECTION 501(C)(3)**

JOANNA PRESSMAN  
SIMPSON THACHER & BARTLETT LLP

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NEW YORK COUNTY LAWYERS' ASSOCIATION  
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JOANNA PRESSMAN  
SIMPSON THACHER & BARTLETT LLP  
212-455-2494  
jpressman@stblaw.com

**LEGISLATIVE ACTIVITIES (PUBLIC CHARITIES)**

Section 501(c)(3) statutory limitation: “no substantial part” of an organization’s activities can be “carrying on propaganda, or otherwise attempting, to influence legislation.”

Two ways to measure lobbying activities:

- **Substantial part test under Section 501(c)(3)** – a facts and circumstances analysis;
- **Expenditure test under Sections 501(h) and 4911** – a mechanical test. A charity must elect to have the expenditure test apply.

**SUBSTANTIAL PART TEST UNDER SECTION 501(C)(3)**

An organization that devotes a “substantial part” of its activities to “influencing legislation” will be found to be an “action organization” and is therefore disqualified from tax exempt status. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

How much lobbying is “substantial?”

There is no statutory or regulatory definition of the amount of legislative activity that would constitute a “substantial part” of an organization’s activities.

Caselaw provides limited guidance:

Devoting less than 5% of activities to lobbying is not substantial. *Seasongood v. Commissioner*, 227 F.2d 907 (1955).

Spending between 16.6% and 20.5% of an organization's time on lobbying is substantial. *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974).

The IRS has used other factors to determine substantiality:

Time spent by employees and volunteers;

Money spent in relation to the organization's entire budget;

The amount of publicity the organization assigns to the activity;

Continuous or intermittent nature of the activity. G.C.M. 36148 (Jan. 28, 1975).

When is an organization "attempting to influence legislation" (i.e., lobbying)?

An organization attempts to influence legislation if it:

Contacts or urges the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation, or

Advocates adoption or rejection of legislation. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

"Legislation" under the substantial part test includes action by the Congress, state legislature, local council, or by the public in a referendum or other such procedure. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

The definition of "legislation" encompasses the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items. Section 4911(e); *see also* G.C.M. 39694 (Jan. 21, 1988) (concluding that the application of a single definition of "action by the Congress" would simplify the administration of the various statutes relating to lobbying by charities).

When is an organization *not* "attempting to influence legislation" (i.e., not lobbying)?

Under the Section 501(c)(3) substantial part test, there are no statutory exceptions for specified types of activities (unlike the expenditure test).

An organization may engage in "nonpartisan analysis, study or reasearch" and make the results of the research available to the public without being considered an "action" organization. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv).

The IRS has also said that providing technical advice on legislation at the invitation of a Congressional committee (but not initiating contact with the committee) would not be an attempt to influence legislation. Rev. Rul. 70-449, 1970-2 C.B. 111.

The private foundation rules under Section 4945 also contain four exceptions to the definition of “attempting to influence legislation,” which, it could be argued, also apply to non-electing public charities:

Nonpartisan analysis, study or research. May advocate a particular viewpoint, but must have a sufficiently full and fair exposition of facts to enable the public or an individual to form an independent opinion or conclusion. Treas. Reg. § 53.4945-2(d)(1);

Providing technical advice or assistance at the request of a governmental body. In so doing, the organization may offer opinions or recommendations, so long as they are specifically requested by the governmental body. Treas. Reg. § 53.4945-2(d)(2);

“Self-defense” communications. The organization may lobby with respect to legislation that might affect the organization’s existence, its powers and duties, its tax-exempt status, or the deductibility of contributions. Treas. Reg. § 53.4945-2(d)(3);

Examinations and discussions of broad social, economic and similar problems. The discussion may not address the merits of a specific legislative proposal or directly encourage recipients to take action with respect to legislation. Treas. Reg. § 53.4945-2(d)(4)

Penalties for violating substantial part test

Theoretically, loss of tax exempt status (even for first time offense)

Section 4912 excise tax:

5% tax on organization

5% tax on manager who agreed to expenditures, knowing that the expenditure was likely to result in the loss of exempt status, unless the agreement was not willful and was due to reasonable cause

“Manager”: Officer, director or trustee or any other individual with similar responsibilities; employee who has authority or responsibility with regard to the expenditure

**Expenditure Test (501(h) and 4911)**

Election available to any public charity except a church

Looks only to actual expenditures

Two main limitations:

Overall lobbying expenditures cannot exceed lobbying nontaxable amount

Grassroots lobbying expenditures cannot exceed 25% of LNTA

Direct Lobbying Expenditure: Directly attempts to influence legislation. (See Treas. Reg. § 56.4911-2(b)(1).) Communication with member of legislature, government official (if principal purpose of

communication is to influence legislation), members of organization (encouraging them to engage in direct lobbying), the public (if legislation at issue is a ballot initiative, referendum, etc.).

Elements: (1) refers directly to specific legislation; (2) reflects a view on legislation

Grassroots Lobbying Expenditure: Attempts to influence legislation by attempting to affect the opinions of the general public. (See Treas. Reg. § 56.4911-2(b)(2).)

Elements: (1) refers to specific legislation; (2) reflects a view on such legislation; (3) “call to action”

Call to action (element of grassroots lobbying) – Treas. Reg. § 56.4911-2(b)(iii):

State that recipient should contact a legislator who may participate in the formulation of the legislation

Give the contact information of a legislator

Provide a petition, tear-off card, etc. to facilitate communication

Specifically identify one or more legislators who will vote on the legislation and their view, or identify legislators as being on the committee that will consider the legislation

Special rule for mass media communication – Treas. Reg. § 56.4911-2(b)(5):

Communication in the mass media within two weeks of a vote on a piece of highly publicized legislation.

Reflects a view on the general subject of the legislation and either refers to the legislation or encourages members of the public to contact their legislators on the general subject of the legislation

Presumed to be grassroots lobbying unless the organization can demonstrate that it was the type of communication regularly made by the organization, made without regard to timing.

The regulations under Section 4911 contain clear exceptions to the definition of influencing legislation. The exceptions under Section 4945 discussed above are explicitly incorporated.

Treas. Reg. § 56.4911-2(b)(3), -2(c), -5.

Nonpartisan analysis, study and research, Treas. Reg. § 56.4911-2(c)(1). The regulations provide additional examples to illustrate this exception.

Examinations and discussions of broad social, economic or similar problems, Treas. Reg. § 56.4911-2(c)(2).

Response to a written request from a government body (bipartisan committee or subcommittee) to provide technical advice, Treas. Reg. § 56.4911-2(c)(3).

“Self-defense” communications, Treas. Reg. § 56.4911-2(c)(4).

Communications with members, Treas. Reg. § 56.4911-5: The regulations provide that (1) expenditures for some communications with members are not lobbying expenditures even though those expenditures

would be lobbying expenditures if the communications were to nonmembers, and (2) expenditures for some communications with members are direct lobbying expenditures even though those expenditures would be grass roots lobbying expenditures if directed to nonmembers.

A “member” is someone who pays dues, contributes more than a nominal amount of money or time, or is one of a limited number of “honorary” or “life” members.

Example – a communication that refers to, and reflects a view on, specific legislation is not lobbying if:

The communication is directed only to members;

The specific legislation is of direct interest to the organization and its members;

The communication does not directly encourage the member to engage in direct lobbying;

The communication does not directly encourage the member to engage in grass roots lobbying.

The regulations also provide rules for allocating expenditures when a communication is directed to both members and nonmembers (and therefore may be considered partly direct lobbying and partly grassroots lobbying).

Should a public charity elect the expenditure test?

Probably yes if: Small budget and/or not planning a lot of grass roots lobbying activities

Possibly no if: Budget over \$17 million and/or a lot of grass roots

Note: Non-electing charities still have to report lobbying on Form 990

**POLITICAL CAMPAIGN ACTIVITIES (PUBLIC CHARITIES)**

Section 501(c)(3) statutory limitation: organization “does not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.” An absolute bar on campaign activities.

**I. Penalties for violating bar on campaign activities**

Loss of federal tax exemption (IRS has the authority to seek revocation for even a small violation)

Section 4955 excise tax:

First-level tax on organization of 10% of expenditure

First-level tax on organization manager who agreed to expenditure, knowing it was a political expenditure – 2½ % of expenditure (capped at \$5,000)

Second-level tax if expenditure is not “corrected” (recovery of expenditure and establishing safeguards to ensure it does not happen again) within a specified period:

100% on organization

50% on manager who refused to agree to correction (capped at \$10,000)

**Key terms:**

“Candidate for public office”: individual who offers himself or is proposed by others as a contestant for public office. Treas. Reg. §1.501(c)(3)-1(c)(3)(iii)

Danger – you don’t know for sure when a “candidacy” begins, and it could be much earlier than when an official announcement of candidacy is made

“Public office”: generally refers to elective office, not appointed (but attempts to influence confirmation of appointee may constitute lobbying)

In G.C.M. 39811 (June 30, 1989) the IRS concluded that an office (in this case, position of precinct committeeman in a political party) was a “public office” because it:

was created by statute;

was continuing;

was not occasional or contractual;

had a fixed term of office;

required an oath of office

The IRS has also indicated that Treas. Reg. § 53.4946-1(g)(2)(i) (defining “public office” for purposes of determining who is a “disqualified person” for the Section 4941 self-dealing tax) can be looked to for guidance. The regulation stresses the importance of the independent performance of policy-making functions. However, the IRS cautions that this regulation should not be relied on too heavily. Judith E. Kindell and John Francis Reilly, “Election Year Issues,” IRS EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002.

## Carrying on a substantive agenda during a campaign period is still possible

Focus on organization’s viewpoint rather than any candidate’s specific stand on an issue  
Avoid defining issues so narrowly as to link organization’s position directly with that of a particular candidate

## Certain activities have been identified as “**voter education**”(not campaigning)

Voter guides: publishing the results of questionnaires sent to all candidates (Rev. Rul. 78-248, 1978-1 C.B. 154)

The questions should be broad based (cover a “wide variety of issues”)

The organization should publish all available responses

Don’t show bias

Publishing reports of incumbents’ voting records (Rev. Rul. 80-282, 1980-2 C.B. 178)  
To the general public without editorial comment

Or, if sent only to members, can express approval or disapproval

Not timed to coincide with election (e.g., after close of every legislative term)

Sponsoring a candidate forum (debate) (Rev. Rul. 86-95, 1986-2 C.B. 73)  
Invite all legally qualified candidates for the office

Cover a broad range of issues

Conducting voter registration drives or get out the vote campaigns  
Do not ask people how they intend to vote before registering them

Sale or rental of mailing lists (at FMV, make lists equally available to all viable candidates)  
**A NOTE ON PRIVATE FOUNDATIONS**

II. Section 4945 imposes an additional excise tax on “taxable expenditures,” which is defined to include lobbying, campaign activities, and voter registration drives

10 % tax on foundation of amount paid

2½ % on foundation manager who agreed to expenditure

**Effectively an absolute restriction on both lobbying and campaign activities by private foundations**

Certain activities are excepted from the definition of taxable expenditures (see discussion above)

Nonpartisan analysis, study, research

Projects funded jointly by the government

Certain kinds of nonpartisan voter registration activities

Making grants to charities that engage in lobbying, Treas. Reg. § 53.4945-2(a)(6)

General support grants – will not be considered a taxable expenditure if grant is not earmarked for influencing legislation.

Special project grants – will not be considered a taxable expenditure if grant is not earmarked and the amount of the grant, together with other grants by the foundation for the same project for the same year, does not exceed the amount budgeted by the recipient for activities of the projected that are not attempts to influence legislation.

**CALCULATIONS UNDER THE SECTION 501(h) EXPENDITURE TEST**

Exempt Purposes Expenditures (EPE): The expenditures made by an organization to accomplish its charitable purposes. Includes:

Expenditures for charitable purposes (including grants)

Compensation

Portion of administrative expenditures allocable to charitable purpose

Lobbying expenditures

Non-partisan analysis, study, research

Examinations of broad technical and social issues

Responses to requests for technical advice

Communications to members

Depreciation or amortization of charitable assets

Fundraising expenses

Lobbying Nontaxable Amount (LNTA): The amount an organization can spend on lobbying without being penalized. Based on a sliding scale of percentages of the organization’s exempt purposes expenditures:

20% of first \$500,000



15% of next \$500,000  
10% of next \$500,000  
5% of any remaining EPE

But not to exceed \$1,000,000 (LNTA caps out at \$17,000,000 of EPE)  
And grassroots lobbying expenditures can't exceed 25% of LNTA

Example: EPE \$1 million

(20% of first \$500,000 = \$100,000) + (15% of next \$500,000 = \$75,000)

Total lobbying expenditures can't exceed \$175,000; grassroots lobbying expenditures can't exceed 25% of \$175,000 or \$43,750.