



This article presents general guidelines for Georgia nonprofit organizations as of 6/26/2012 and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Lobbying vs. Advocacy

In exchange for such benefits as the tax-deductibility of donations, an organization that is recognized as exempt from taxation under Section 501(c)(3) of the Internal Revenue Code (“tax-exempt”) is subject to many restrictions. For example, tax-exempt organizations are completely prohibited from engaging in political activity.¹ There are also restrictions on the amount of lobbying that a tax-exempt organization can do. There are no restrictions, however, on advocacy efforts by tax-exempt organizations. As a result, it is important for tax-exempt organizations to understand the difference between advocacy and lobbying as well as the restrictions on lobbying activities.

What is the Difference between Advocacy and Lobbying?

Advocacy is a broad term covering a range of activities that seek to influence policies or bring about systemic social change. Advocacy often “seeks to address the root causes, as well as the symptoms, of social and economic problems”.² Advocacy can include voter registration drives, filing amicus briefs and public education about social issues. While the two activities are similar, the Internal Revenue Service (“IRS”) distinguishes between advocacy and lobbying. Lobbying is any activity that seeks to impact policies *by influencing specific legislation*. The IRS restricts lobbying by tax-exempt organizations but permits them to engage in advocacy efforts without limitation.

Some examples of common types of advocacy that are not restricted by the IRS are:

- Educating the public (without encouraging them to contact their legislators) on current issues by:
 1. Publicizing results of nonpartisan analysis and studies,
 2. Discussing broad social issues (without mentioning or referring to specific legislation), and
 3. Providing a point of view on an issue (without mentioning or referring to specific legislation);
- Encouraging the public to vote (voter registration drives or voter education in a nonpartisan way);

¹Political activity includes any intervention in a political campaign of any candidate for public office and any involvement in partisan activity of any kind. For example, a tax-exempt organization cannot endorse or oppose a candidate or mobilize its supporters to elect or defeat a candidate. For more information, see **Political Activity Guidelines** <http://www.pbpatl.org/wp-content/uploads/2011/12/PoliticalActivityGuidelinesDCBar1.pdf>

² Center for Lobbying in the Public Interest www.clpi.org.

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- Communicating with the judiciary about a pending case, such as in amicus briefs; and
- Communicating with a government official or employee other than for the purpose of influencing legislation.

What is Lobbying?

The IRS defines lobbying as “an attempt to influence specific legislation.” Legislation includes action by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office), or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. It does not include actions by executive, judicial, or administrative bodies.

Lobbying activities include contacting, or urging the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or advocating the adoption or rejection of legislation.

There are two different types of lobbying: direct and grassroots. The IRS treats each one quite differently.

Direct Lobbying

Any attempt to *influence legislation by communicating with* a legislator, an employee of a legislative body or other government officials is considered direct lobbying. The communication must:

1. Refer to specific legislation AND
2. Reflect a view on such legislation.

The communication can be made directly by the tax-exempt organization or through its members. A member is an individual that contributes more than a nominal amount of time or money to the tax-exempt organization. To be considered direct lobbying, the tax-exempt organization must have encouraged its members to lobby for the specific legislation. A general statement about specific legislation and the organization’s position on it is not enough to constitute lobbying, even if the organization’s members contact legislators directly.

Grassroots Lobbying

Any attempt to *influence legislation by attempting to affect the opinion of the general public* through a specific communication is considered grassroots lobbying. To constitute a grassroots lobbying communication, the communication must:

1. Refer to specific legislation AND
2. Reflect a view on such legislation AND
3. Encourage the recipient to take action by:

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- a. Directly urging the recipient to contact legislators or government officials in order to influence legislation;
- b. Including the name, address, phone number, or similar information about a legislator or government official in the communication;
- c. Providing a petition, postcard, or other prepared message for the recipient to send to the legislator in order to influence legislation;
- d. Identifying any legislators who will vote on the legislation and are either voting on the opposing side of the organization's viewpoint or are undecided; OR
- e. Identifying any legislators who are the representative of the recipient or are on the committee that will consider the specific legislation addressed by the communication. This is also known as "indirect encouragement." [Note that identifying the main sponsor for the bill will not be considered encouragement to take action.]

Mass media advertisements that meet the description above usually fall within grassroots lobbying and are subject to special and complex rules. If you are considering placing an ad that falls within the description above, please consult a legal expert.

How Much Lobbying May a Tax-Exempt Organization Do?

If a substantial part of a tax-exempt organization's activities involves lobbying, the tax-exempt organization can lose its tax-exempt status. Activities, in this case, can include both time and expenses, depending upon the test used. There are two tests the IRS relies on to determine whether a tax-exempt organization's lobbying activities are a substantial part of its activities: (1) the "substantial part" test, and (2) the Internal Revenue Code Section 501(h) Election ("the 501(h) Election").³ The IRS will analyze an organization's lobbying activities under the substantial part test unless the organization has made the 501(h) election.

Substantial Part Test

The substantial part test states that an organization that devotes a substantial part of its activities to influencing legislation will be disqualified from tax-exempt status. The "substantial part" test is not a bright-line test, and what constitutes a "substantial part" of a tax-exempt organization's activity to merit loss of exemption has never been defined. Each situation is considered on a "case-by-case" basis and no clear definition exists. Court cases simply address the specific facts and situation before it. In one case, the court found that devoting less than 5% of activities to lobbying is not substantial and in another case the court found that spending between 16.6% and 20.5% of an organization's time on lobbying is substantial.

³ This article discusses restrictions on lobbying activities imposed by the IRS. There may be other limitations on the ability of organizations to lobby. Tax-exempt organizations are not allowed to use government funds, including grants and contracts, to lobby. This includes the use of federal funds to lobby for more federal grants and contracts. Other funders, including private foundations, may place additional limitations on lobbying activities. It is also important to note any state regulations of lobbying activity.

The IRS has used several factors to determine substantiality under the substantial part test including:

- 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, and
- The continuous or intermittent nature of the activity.

Section 501(h) Election

A tax-exempt organization may choose to have its lobbying activity analyzed under a test with more clear and definite rules by making the 501(h) election. To make this election, the organization must file a simple, one-page form (IRS Form 5768). Filing of the form does not increase the risk of being audited, and the election stays in effect until it is revoked by the tax-exempt organization.

Under the 501(h) Election, the IRS provides for a sliding scale of amounts that can be spent on lobbying. The scale is based on a percentage of the organization's exempt purpose expenditures. Unlike the substantial part test, there is no limit on time spent on lobbying under the 501(h) election; the only limit is on monetary expenditures. For a large tax-exempt organization, for example, the limit on lobbying expenses would be \$1 million for direct lobbying and \$250,000 for grassroots lobbying (this is the maximum amount of lobbying expenditures allowed).

The 501(h) Election also provides that the following four types of communications are excluded by the IRS from the definition of lobbying for organizations that make the election:

1. Self-defense

Communicating with legislators about possible legislative action that could affect the organization's existence, powers, duties, tax-exempt status, or right to receive tax-deductible donations.

2. Technical assistance

Assisting in response to a written request by a legislative body for technical assistance, including requests to testify in front of a committee, provide information or data, or render an opinion or recommendation on a specific bill or policy proposal.

3. Non-partisan study, analysis, or research

Communicating the results of a non-partisan study, analysis or research provided that the communication is a full and fair examination of facts and issues and that the organization does not encourage the recipient to take action.

4. Broad discussion of issues that do not address specific legislation.

Communicating on broad social, economic, or similar issues that are general and without referring to specific legislation or encouraging the recipient to take action.

Conclusion

Tax-exempt organizations are not limited in the amount of advocacy that they can engage in, but are limited by the IRS with respect to their lobbying activities.

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Organizations that are engaged in some lobbying activity should consider whether to make the 501(h) election in order to gain a clearer understanding of the limitations on their lobbying activity. For more information on the differences between the substantial part test and the 501(h) election, see the chart on the next page.

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How does the Substantial Part Test compare to the 501(h) Election?

	“Substantial Part” Test	501(h) Election
What types of activities are included?	Lobbying is not clearly defined. No activities are specifically excluded.	Direct and grassroots lobbying activities, excluding four types of activities.
What expenses are included?	Money and volunteer time spent.	Money spent; volunteer time and other cost-free activities are excluded.
What are the limits?	Amount of lobbying activities cannot be substantial. The test is subjective and not clear. There are no established limits.	For direct lobbying: 20% of first \$500,000 of “exempt-purpose expenditures.” Specific dollar amount plus decreasing percentages for remainder, up to \$1 million. For grassroots lobbying: up to \$250,000. No limits on activities that require no expenditures, like volunteer time.
What are the reporting requirements?	Detailed description of a wide range of activities related to lobbying.	Report on Form 990 of amount spent on each, direct lobbying and grassroots lobbying.
What are the penalties for faulty compliance?	Excise tax of 5% on money spent on all lobbying activities, if tax-exempt status is revoked. Directors and officer fined 5% if substantial lobbying was done willfully or unreasonably authorized.	Excise tax of 25% on amount spent in excess of the given limit. No specific liability for directors and officers.
When would the organization risk losing its 501(c)(3) status?	When the IRS determines that a substantial part of the tax-exempt organization’s activities were lobbying efforts.	When lobbying exceeds 150% of limits over a period of 4 years.

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