

“Election Year DOs and DON’Ts”

Lobbying and Political Activity for Tax-Exempt Organizations

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Mission of Pro Bono Partnership of Atlanta

To maximize the impact of pro bono engagement by connecting a network of attorneys with nonprofits in need of free business legal services.

Pro Bono Partnership of Atlanta Eligibility & Other Information

In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit organization.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

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Applicable Exempt Organizations

§ 501(c)(3): charities, schools, churches, foundations

§ 501(c)(4): social welfare organizations

§ 527: political committees

Many organizations groups have a (c)(3), a (c)(4) and a 527 to serve different functions, i.e., education, lobbying and political campaign activity.

Applicable Exempt Organizations

§501(c)(3) Charities/Foundations: an organization must be organized and operated exclusively for an exempt purpose: charitable, religious, educational, scientific, etc.

§ 501(c)(4) Social Welfare Organizations: an organization must be operated exclusively for the promotion of social welfare--promoting the common good and general welfare of the people in the community.

§ 527 Political Organization: an organization that is organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for the function of attempting to influence the selection, nomination, election or appointment of any individual to federal, state, or local public office.

Categories of Activity

IRS typically views these activities through one of three prisms:

- (1) Political Campaign Activity
- (2) Lobbying
- (3) General / Issue Advocacy

The tax rules vary depending on

- (a) the tax exempt status of the entity, and
- (b) the type of activity.

**TODAY'S PRESENTATION IS FOCUSED ON
§501(c)(3) ORGANIZATIONS ONLY**

Rules Applicable to §501(c)(3)s

Political Campaign Activity: prohibited

Lobbying: cannot be a substantial activity of the organization

General Advocacy: permitted

Political Campaign Activity

Absolute Prohibition for §501(c)(3)s

All §501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office

Political Campaign Activity Includes:

Attempting to influence political campaigns through direct and indirect candidate support

Activities include contributions to candidates or PACs; participation in campaigns; making public statements for or against candidates; etc.

On public statements (verbal or written), the IRS looks to a number of factors on whether this is political campaign activity or issue advocacy:

- (1) Whether it identifies a candidate;
- (2) Whether the timing coincides with an election;
- (3) Whether it targets voters in a particular election;
- (4) Whether it identifies a candidate's position; etc.

Political Campaign Activity (cont.)

If conducted in a *nonpartisan* manner, and depending on facts and circumstances, some political activities are permissible

- Voter Education (presenting public forums, publishing voter education guides)
- Encouraging Voter Involvement (voter registration, get-out-the-vote drives)

If the IRS finds evidence of bias that would either favor or oppose on candidate (or group of candidates) over another, such activities will constitute prohibited participation or intervention

Political Activities Compliance Initiative “PACI”

In 2006, IRS commenced PACI after noting:

- (i) a growth in the number and variety of allegations of impermissible political interventions; and
- (ii) a dramatic increase in money spent during political campaigns

Initiative involved examinations of organizations (other than churches, which have their own inquiry procedures) were conducted by correspondence and/or field examinations

The vast majority of reviews were the result of **referrals**

Political Activities Compliance Initiative

Violations

Under PACI, the IRS examined a number of allegations and found 501(c)(3)s engaged in the following violations:

- Distributing printed materials
- Using pulpit to endorse or oppose a candidate
- Criticizing or supporting a candidate on their website or through links to another website
- Disseminating improper voter guides or candidate ranks

Definition of Lobbying

Attempting to influence “legislation” –

- ✓ Action by Congress, any state legislature, local council, etc. with respect to acts, bills, resolutions, etc., OR
 - ✓ By the public in a referendum, ballot initiative, etc.
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- Limited to specific legislation – does not include general advocacy on public issues
 - Does not include actions by executive, judicial, or administrative bodies

Political Activities Compliance Initiative (cont.)

Violations (cont.)

- Improperly preferential treatment of a candidate at speaking functions
- Placing signs on property
- Allow candidate to use organization's facilities (when not part of a candidate forum or established policy)
- Cash contributions to campaign

Lobbying Activities

Such activities typically include:

- Directly contacting members of legislative body;
- Encouraging the public to contact members of a legislative body; or
- Advocating a position on a public referendum.

Two Types of Lobbying

Grassroots vs. Direct

Grassroots: attempt to influence legislation by attempting to affect the opinions of the general public or segment thereof

Direct: attempt to influence legislation through communication with any member or employee of a legislative body or participant in the formulation of legislation

Exclusions to Lobbying

The following activities are excluded from the definition of lobbying:

- Nonpartisan analysis, study, or research
- Technical advice to a governmental unit or committee in response to a written request
- “Self-defense activities” – appearances relating to possible decisions affecting existence, powers, tax-exempt status, etc.

IRS Has Two Tests for Lobbying

1. The Substantial Part Test
2. The §501(h) Election

Lobbying - “No Substantial Part” Test

Code Provisions

An organization is eligible for tax-exemption so long as “no substantial part of [its] activities... is carrying on propaganda or otherwise attempting to influence legislation...”

- Facts and circumstances analysis, rather than a particular percentage or hard measurement
- Factors include time devoted to activity (by both compensated and volunteer workers) and total expenditures involved
- Although the IRS has declined to adopt an “insubstantial” percentage, generally advise that 5 to 10% of activities will be okay

Lobbying - “No Substantial Part” Test

Penalties

- Jeopardizes tax-exempt status – all income then subject to taxation, plus lose eligibility to receive deductible charitable contributions
- Excise tax equal to five percent of lobbying expenditures for year (except private foundations and churches)
- Organization managers may be subject to five percent excise tax if knowing violation

501(h) Election (Expenditure Test)

Eligibility

- Organizations other than churches and private foundations can elect the expenditure test as an alternative method for measuring lobbying activity
- Must file a Form 5768 at any time during the tax year; will remain in effect for succeeding years unless revoked by the entity

§501(h) Election (Expenditure Test)

Expenditure Limitations

Under the expenditure test, the extent of an organization's lobbying activity will not jeopardize its tax-exempt status, *provided* that its expenditures do not normally exceed a specified amount (based on the size of the organization)

§501(h) Election (Expenditure Test)

If the amount of exempt purpose expenditures is:	Lobbying nontaxable amount is:
≤ \$500,000	20% of the exempt purpose expenditures
>\$500,00 but ≤ \$1,000,000	\$100,000 plus 15% of the excess of exempt purpose expenditures over \$500,000
> \$1,000,000 but ≤ \$1,500,000	\$175,000 plus 10% of the excess of exempt purpose expenditures over \$1,000,000
>\$1,500,000	\$225,000 plus 5% of the exempt purpose expenditures over \$1,500,000

§501(h) Election (Expenditure Test) (cont.)

- Up to 20% of the first \$500,000 of budget on lobbying
- Reduced percentages of budget amounts above \$500,000
- Overall cap of \$1 million
- No more than 25% of permissible amounts may be spent on grassroots lobbying

Lobbying Expenditures

For both types of lobbying activity (grassroots & direct, expenditures include:

- The costs of research, planning, drafting, reviewing, publishing, and mailing (including amounts paid as compensation for an employee's work on such activities
- The allocable portion of administrative, overhead, and other general expenses

The more detailed calculation for determining grassroots v total lobbying expenditures can be found in Instructions to Schedule C of Form 990.

§501(h) Election (Expenditure Test) (cont.)

Penalties

- Excessive lobbying activity over a four-year period
 - May lose tax-exempt status
- All income for that period then subject to tax
- Exceed dollar limit for a particular year, pay excise tax equal to 25% of the excess

Registering as a Lobbyist in Georgia

Who is required to register as a lobbyist?

- Any person who spends **10 percent** or more of her paid working hours to:
 1. promote or oppose passage of legislation or regulations, or
 2. influence the selection of a vendor to supply goods or services
- With respect to any governmental body of the State or political subdivision thereof
- “10 percent rule” includes time spent planning, researching, or preparing for such activities
- Any person who spends \$1,000 or more per calendar year to promote or oppose state or local governmental legislation or regulation is also required to register

Registering as a Lobbyist in Georgia

Who is NOT required to register?

State law provides for certain exemptions:

1. Expressing personal views on one's own behalf;
2. Providing testimony or other info at a hearing or committee meeting
3. Licensed attorneys on behalf of a client in adversarial proceedings
4. Public employees serving at direction of a member of the General Assembly

Registering as a Lobbyist in Georgia

Four Categories of Lobbyists

May register for any or all, depending on intended activities under 10 percent/\$1,000 test:

1. State (General Assembly, Governor)
2. State Agency (agencies, authorities, commissions)
3. Local (cities or counties)
4. Vendor

Registering as a Lobbyist in Georgia

Reporting Requirements

All lobbyists must file reports disclosing expenditures:

- Name and title of public officer (or group)
- Amount, date, and description of expenditure
- Summary of spending classified by category
- If applicable, number of the bill, resolution etc. pending before the governmental entity
- Aggregate of all expenses incurred during reporting period for food, beverage, etc.
- Reports may be submitted electronically
- Submission constitutes an affirmation that the report is true, complete, and correct

Registering as a Lobbyist in Georgia

Reporting Requirements

Local level lobbyist must file reports with the Commission, PLUS

- A copy with the election superintendent of each county (if expenditures for county/county school district affairs); PLUS
- A copy with the municipal clerk (if expenditures for city/independent school district affairs)

Registering as a Lobbyist in Georgia

Filing Schedule

- Reports due promptly at end of each filing period
- Tough schedule of late fees apply:
 - Late – \$275 penalty per report
 - 7+ Days Late – \$1,000 penalty
 - 21+ Days Late – \$10,000 penalty

Registering as a Lobbyist in Georgia

Registration Process

- \$300 annual registration or renewal fee
- \$20 lobbyist ID badge charge (worn in a readily visible manner whenever lobbying in a governmental facility)
- Forms available at <http://ethics.ga.gov>

General Issue Advocacy

Attempting to influence public opinion on issues;

Attempting to influence non-legislative government bodies, i.e., executive branch, regulatory;

Encouraging voter participation through non-partisan activities such as voter registration; get-out-the-vote drives; voter guides; and candidate debates

General Notes

IRS Rev. Rule 2007-41

Important ruling – good practical advice

Outlines 21 fact patterns and consequences

Beware of, and Monitor, In-Kind Contributions

Not a cash contribution

Involves use of resources, facilities, paid staff time

Standard is generally fair market value

Do Not Offer Rewards for Voting

Even minimal things - like a free sandwich to those who can prove they have voted - is likely illegal

Both federal and state law make a criminal offense

Exercise caution in voter education and registration

Questions?

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