LOBBYING BY PUBLIC CHARITIES:
An Introduction

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I. The “No Substantial Part” Test.

A. Historical Background.

1. **Pre-1930:** No statutory restriction on legislative or lobbying activities by charities; a few scattered judicial interpretations.

2. **1930:** *Slee v. Commissioner of Internal Revenue.* 1 Denial of charitable tax-exempt status to the American Birth Control League because it disseminated materials to legislators and to the public, advocating repeal of laws preventing birth control, thus precluding it from being exclusively charitable, educational or scientific.

3. **1934:** Congress enacts change in definition of an organization qualifying under Section 501(c)(3), requiring that “no substantial part of [its] activities [ ] is carrying on propaganda, or otherwise attempting, to influence legislation.”

4. **Legislative lobbying vs. candidate electioneering:** The legislative activities restriction should not be confused with the absolute statutory prohibition on participation or intervention in candidate campaigns for public office, enacted by Congress in 1954.

B. Activities clearly **not** restricted under the “no substantial part” test.

1. Attempts to influence an administrative agency regarding its regulations and rulings.

2. Petitioning the President, or a governor or mayor, on executive decisions.

3. Attempting to influence legislators on nonlegislative matters, such as conducting investigative hearings or intervening with a government agency.

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1 42 F.2d 184 (2nd Cir. 1930).
4. Engaging in litigation to obtain favorable rulings from the judicial branch of government.

C. Definitional problems: How much is “substantial”?

1. In an early court case, spending less than five percent of the organization’s volunteers’ time and effort (but no money) on lobbying was considered to be insubstantial.²

2. Later decisions³ cast doubt on the usefulness of a percentage test, stating that all the facts and circumstances of an organization’s legislative and other activities would have to be examined.

3. One court found that, even though lobbying contacts were “insignificant,” the time spent formulating positions and deciding whether to lobby was substantial and must be considered.⁴

D. Penalty for engaging in “substantial” lobbying activities: revocation of 501(c)(3) tax exemption, retroactive to the date lobbying activities became substantial. Difficult for the IRS to justify imposing this sanction where the charity has substantial nonlobbying charitable activities, but nevertheless threatens charity’s continued existence.

E. The result of this uncertainty was a severe chilling effect on advocacy activities by charities.

F. The “no substantial part” test is still the law for a charity that does not (or cannot) elect to be governed by Section 501(h) with respect to its lobbying activities. See Section II.B. below.

II. The Section 501(h) Expenditure Test.

A. Enacted as part of the Tax Reform Act of 1976 to clarify the “no substantial part” test, constituting Congressional acknowledgement that some limited lobbying is a charitable activity beneficial to society for which use of deductible gifts is appropriate. Regulations finalized in 1990.

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² Seasongood v. Commissioner of Internal Revenue, 227 F.2d 907 (6th Cir. 1955).


1. Section 501(h) states that an organization with lobbying activities does not fail to qualify as tax-exempt under Section 501(c)(3) because of those activities, so long as they are kept below certain dollar expenditure limits. Section 501(h) also imposes a tax on lobbying expenditures above another lower set of limits.

2. Section 4911 provides details on how the lobbying limits are calculated, defines terms (like direct and grass roots lobbying), describes exceptions to definitions, and addresses what expenses count as lobbying expenses.

B. Charities must elect to be governed by Section 501(h). Otherwise, the “no substantial part” test is still the law.

1. Certain charities are not eligible to make the election, based on their foundation status classification: they must remain under the “no substantial part” test.
   a. Churches and related entities.
   b. Governmental units.
   c. Testing for public safety.
   d. Private foundations.\(^5\)

2. So-called “public charities” may generally make the election.
   a. Educational institutions.
   b. Hospitals.
   c. Organizations supporting government schools.
   d. Organizations publicly supported by grants and donations.
   e. Organizations publicly supported by grants, donations, and exempt function income.
   f. Supporting organizations to public charities.

C. Procedural matters in making the election.

1. One-time filing of IRS Form 5768 at any time during the first tax year in which election will be effective (but lobbying expenditure tracking systems should be in place from the beginning of the year).

2. Election continues in effect until revoked, also by filing IRS Form 5768. The revocation will not be effective until the tax year after the year in which it is filed.

3. Keep a copy of the Form 5768 as filed, because the IRS ordinarily will not acknowledge receipt.

\(^5\) Although private foundations are governed by the “no substantial part” test with respect to continued eligibility for exemption, private foundations and their foundation managers are subject to taxes under IRC Section 4945 on “taxable expenditures,” which include amounts paid or incurred “to carry on propaganda, or otherwise attempt, to influence legislation” as defined in that section. Effectively, private foundations are banned from legislative lobbying entirely.
4. For each tax year in which the election is effective, the charity must complete Part VI-A, Schedule A, of IRS Form 990, to report its lobbying expenditures.

5. A charity can switch the Section 501(h) election on and off as often as it pleases.

6. Making the 501(h) election has no impact on an organization’s Section 501(c)(3) status or foundation classification.

D. Section 501(h) focuses on lobbying expenditures, rather than lobbying activities, capping lobbying expenditures as a percentage of exempt purpose expenditures.


   a. Everything spent by the charity to accomplish its exempt purposes is included.
      - Program service expenses.
      - Administrative and overhead expenses.
      - Lobbying expenses.
      - Straight-line depreciation.

   b. The following are not included.
      - Capital expenditures.
      - Expenses related to managing investments.
      - Unrelated business income expenses.
      - Fundraising expenses, but only if paid to an outside vendor primarily for fundraising, or incurred by a separate fundraising unit within the charity.

2. The percentage limits on lobbying expenditures.

   a. The total lobbying limit.
      - 20% of the first $500,000 of exempt purpose expenditures.
      - 15% of the second $500,000 of exempt purpose expenditures.
      - 10% of the third $500,000 of exempt purpose expenditures.
      - 5% of exempt purpose expenditures over $1,500,000, up to a total cap of $1,000,000, regardless of the level of exempt purpose expenditures.

   b. The grass roots lobbying limit: one-quarter of the total lobbying limit.

   c. To prevent abuse, the Regulations provide that certain closely affiliated charities will be treated as one unit in calculating the lobbying limits.\(^6\)

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\(^6\) IRC Section 4911(f).
E. Basic definitions.

1. **Legislation: Action** with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. Legislative bodies in foreign countries are included.

2. **Action:** With respect to legislation, includes introduction, amendment, enactment, defeat, or repeal.

3. **Specific legislation:** Includes both legislation that has already been introduced in a legislative body, and a specific legislative proposal (though it may not have been introduced) that the organization either supports or opposes. Votes to confirm or reject executive branch nominees (e.g., judges) are considered legislation. Legislation includes a proposed treaty required to be submitted to the Senate for advice and consent, from the time the President’s representative begins to negotiate with the prospective parties to the treaty.

4. **Direct lobbying:** A (i) communication with (ii) any member or employee of a legislative body, or (if the principal purpose of the communication is lobbying) with any government official or employee who may participate in the formulation of the legislation, that (iii) refers to **specific legislation**, and (iv) reflects a view on that legislation.

5. **Grass roots lobbying:** A (i) communication with (ii) the general public or any segment thereof, that (iii) refers to **specific legislation**, (iv) reflects a view on that legislation, and (v) encourages the recipient to take action with respect to the legislation (a “**call to action**”).

6. **Call to action:** Any of the following. The first three are considered **direct** calls to action; the last is considered **nondirect**.
   
a. A statement that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation.

   b. A statement of the address, telephone number, or similar information of a legislator or an employee of a legislative body.

   c. Inclusion of a petition, tear-off postcard or similar material for the recipient to communicate with a legislator or an employee of a legislative body (or other government official involved in the legislation).

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7 Charities lobbying on these confirmation votes may be subject to the tax on political organizations under IRC Section 527.
d. Specifically identifying one or more legislators who will vote on the legislation as: opposing the charity’s view on the legislation, being undecided, being the recipient’s representative in the legislature, or being on the committee or subcommittee that will consider the legislation.

F. Selected special rules.

1. **Ballot measures**: Where a communication refers to and reflects a view on a measure that is the subject of a referendum, ballot initiative or similar procedure, the general public in the state or locality where the vote will take place constitutes the legislative body. Accordingly, if such a communication is made to one or more members of the general public in that state or locality, it is direct lobbying. In the case of a measure that is placed on the ballot by voter petitions, an item becomes “specific legislation” when the petition is first circulated among voters for signature.

2. **Communications with members**: A person is a member of a charity if the person pays dues, or makes a contribution of more than a nominal amount of time or money, or is one of a limited number of honorary or life members; members need not have voting rights in the organization. Communications to members on legislation, directly encouraging them to contact legislators, are treated as direct lobbying. If members are asked to go outside the organization and urge nonmembers to lobby their legislators, it is grass roots lobbying.

3. **Mass media advertisements**: A paid mass media ad is grass roots lobbying if it: (i) is made within two weeks before a vote by a legislative body or committee, on (ii) highly publicized legislation, (iii) reflects a view on the general subject of that legislation, and (iv) either refers to the legislation or encourages the public to contact legislators on the general subject of the legislation, even though it does not include any call to action. The presumption may be overcome by showing that the timing of the ad was unrelated to the upcoming vote.

G. Exceptions to the basic definitions, from the statute and the Regulations.

1. **Nonpartisan analysis, study, or research**: An independent and objective exposition of a particular subject matter that includes a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion, is not lobbying, even if a particular position or viewpoint is advocated. The mere presentation of unsupported opinion will not qualify. Further, distribution of the communication may not be limited to, or be directed toward, persons who are interested solely in one side of a particular issue. A communication which includes any direct call to action (see Section II.E.6.) cannot qualify under this exception.
2. **Requests for technical advice:** Providing technical advice to a governmental body or committee in response to a written request by such body is not lobbying. The request must be made in the name of the committee or agency, rather than an individual member of the body.

3. **Self-defense lobbying:** Appearances before, or communications to, any legislative body with respect to a possible decision by that body which might affect the existence of the charity, its powers and duties, tax-exempt status, or deductibility of contributions to it, are not reportable lobbying activities. This exception does not cover legislation, such as an appropriations bill, which (in the eyes of the IRS) merely affects the scope of the charity’s future activities.

4. **Certain member communications:** Communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, are not lobbying, so long as members are not directly encouraged to lobby.

5. **Other government communications:** Communications with government officials or employees where the charity is not mainly attempting to influence legislation, are not lobbying.

6. **Examinations and discussions of broad social, economic, and similar problems:** This exception covers public discussions, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation, so long as such discussion does not address itself to the merits of a specific legislative proposal and so long as no direct call to action is made.

H. **Recordkeeping, allocations, and reporting highlights.**

1. No guidance in the statute; only general guidance (with some exceptions) in the Regulations: rely on common sense and a good accountant. Use reasonable approaches, applied in good faith and consistently.

2. Out-of-pocket expenses of lobbying (payments to lobbyists, travel to meet with legislators, costs of producing and sending materials, telephone calls, etc.) must be included.

3. Mixed purpose communications (lobbying mixed with fundraising, educational, or other messages) must be reasonably allocated.

   a. If communications sent only or primarily (at least 50% of distribution) to members contain both lobbying and nonlobbying messages, the charity may make a reasonable allocation of costs between the messages.
b. If a grass roots lobbying message is combined with nonlobbying material in a communication sent to the public, such as a newsletter or a direct mail fundraising solicitation, then, in addition to the cost of the lobbying message itself, any parts of the communication on the same specific subject must be treated as lobbying expenditures as well.

4. Internal overhead expenses (staff salaries, benefits, rent, etc.) must be allocated between lobbying and nonlobbying. A common approach is for paid professional staff to keep time records, showing the hours devoted to direct lobbying, grass roots lobbying, and other activities. This information can be used to allocate payroll and benefits for individual staff; the aggregate percentage of total staff time devoted to the two forms of lobbying can be used to allocate other overhead costs, including costs of non-timekeeping support staff.

5. Expenses to research and prepare lobbying materials are lobbying expenditures. However, expenses to research and prepare nonlobbying materials are also presumed to be grass roots lobbying expenses if the nonlobbying materials are used in a grass roots lobbying communication within six months after they were paid for, and if the primary purpose of the charity in preparing them was for eventual use in lobbying. The presumption is rebutted if, prior to or contemporaneously with the lobbying distribution, the charity makes a substantial nonlobbying distribution of the materials.

I. Penalties for exceeding the limits.

1. If in any year the charity exceeds the total lobbying limit or the grass roots lobbying limit, it must pay a tax equal to 25% of the excess. If the charity exceeds both limits, the 25% tax is imposed only on whichever excess is larger. This tax is automatically due to the IRS with the filing of the Form 990 reporting the excess lobbying expenditures made that year. Use IRS Form 4720 to report and pay the tax.

2. If, over any four year period, the charity’s lobbying expenditures exceed either limit by more than 50%, the charity will automatically lose its Section 501(c)(3) tax-exempt status. Furthermore, the charity is prohibited from converting to a Section 501(c)(4) organization.

III. Deciding whether to make the Section 501(h) election.

Generally, for charities that are eligible and have total exempt purpose expenditures of less than $35 to $40 million, the benefits of electing Section 501(h) substantially outweigh any disadvantages. Some of the facts and factors to consider in deciding whether your organization should make the 501(h) election are:
A. Detailed Regulations under Section 501(h) provide clarity and certainty on a number of common questions. Such clarity and certainty are not available where, as under the “no substantial part” test, the primary source of guidance is a few very dated court cases.

B. The definitions available to an electing charity, which exclude many activities commonly thought of as lobbying, are not available to nonelecting charities. In other words, fewer activities will constitute lobbying under the 501(h) election than under the “no substantial part” test. Some of the more important examples:

1. Using volunteers to lobby.
2. Endorsing legislation without spending money to promote the endorsement.
3. Public commentary on legislation without a call to action.

C. The level of lobbying permitted to smaller organizations (up to 20% of program expenditures) would clearly be considered a substantial activity, in excess of the level permitted under the “no substantial part” test. However, for a charity with a very large budget, lobbying expenditures exceeding $1 million annually (the 501(h) cap) could still represent an insubstantial part of its activities overall. Since the limits are not indexed for inflation, their real dollar value has eroded substantially. Also, because the grass roots ceiling is so low, it is possible that a large charity that only engages in grass roots lobbying could spend more than the annual limit of $250,000 that Section 501(h) permits, and still be able to claim its lobbying was insubstantial relative to the rest of its activities. On the other hand, a small to medium-sized charity (under $20 million/year) that engages in more direct lobbying activity, such as ballot measure campaigns, will find that the 501(h) limit is more generous.

D. A nonelecting charity that fails the “no substantial part” test for even one tax year risks losing its Section 501(c)(3) status. In addition, for each year of excessive lobbying activities, the charity is subject to a 5% tax on the entire amount that it spent for lobbying that year. A 5% tax can also be imposed on organization managers who knowingly, willfully and without reasonable cause agreed to the expenditures. For an electing charity, the only penalty for excessive lobbying in a single year is the 25% excise tax.

E. A charity that currently does no lobbying may still make the Section 501(h) election, reporting zero lobbying expenditures on its Form 990, to take advantage of the clearer definitions, and to establish a base of nonlobbying expenditures for future years when it may decide to lobby.

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8 IRC Section 4912. This penalty tax scheme does not apply to churches and church-related organizations.
F. For charities that have a companion Section 501(c)(4) lobbying affiliate, electing Section 501(h) permits the charity annually to transfer (by grant or contract) the maximum amounts permitted for direct and grass roots lobbying on issues of concern to the charity.

G. The IRS has assured the charitable sector that electing to be governed by Section 501(h) will not increase a charity’s chances of an IRS audit.

H. Any charity that lobbies must put in place an appropriate accounting system to track lobbying expenditures, whether it elects Section 501(h) treatment or not. All lobbying charities must report their lobbying expenditures on Part VI of Form 990, Schedule A; nonelecting charities that lobby must also report on volunteer activities, and provide additional detailed narrative information to the IRS on their lobbying activities. While noncompliance with these reporting requirements for non-electing charities that lobby has been widespread in the past, is it likely that pressure from the press and the public to report lobbying accurately will increase as Form 990s become more easily available and searchable on-line as a result of new charity disclosure obligations imposed by tax law.

I. Under the Lobbying Disclosure Act of 1995, which concerns a range of activities directed towards influencing officials in the legislative and executive branches of the Federal government, electing charities may choose between the tax law’s definitions and the definitions under the Act – whichever is more favorable – in reporting their lobbying activities.

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