

Electing the 501(h) Expenditure Test

Most 501(c)(3) public charities will benefit from “electing” the 501(h) lobbying expenditure test. The rules that govern lobbying under 501(h) are clearer than those that apply under the “insubstantial” standard.

Step 1 – Complete Form 5768

[IRS Form 5768](#), *Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation*, is the first step in electing to be governed by the 501(h) expenditure test. An organization simply supplies its name, address, and the first tax year to which it wants the election to apply. The form needs to be signed by an authorized officer, usually the president or treasurer. The election applies retroactively to the first day of the fiscal year in which the form is filed and, generally, to all subsequent years. For example, a form filed in December 2006 will bring an organization under section 501(h) from January 1, 2006 forward (assuming the organization operates under the calendar year).

Step 2 – Make a Copy

Make a copy of Form 5768 before mailing it to the IRS because the agency will NOT send a confirmation letter.

Step 3 – Track Lobbying Expenditures

Under 501(h), your organization can spend up to 20% of its first \$500,000 exempt purpose budget on direct lobbying. Direct lobbying is defined as any communication, with a legislator, expressing a view about specific legislation. Organizations with budget expenditures over \$500,000 should apply the following formula:

$$\begin{aligned} & 20\% \text{ of the first } \$500,000 \\ & + 15\% \text{ of the next } \$500,000 \\ & + 10\% \text{ of the next } \$500,000 \\ & \quad + 5\% \text{ of the remaining} \\ & = \text{the overall lobbying limit} \end{aligned}$$

Grassroots lobbying is defined as any communication with the general public, expressing a view about specific legislation, with a call to action. A call to action refers to four different ways the organization asks the public to respond to its message: (1) asking the public to contact their legislators or staffers; (2) providing the address, phone number, website, or other contact information for the legislators; (3) providing a mechanism to contact legislators such as a tear off postcard, petition, letter, or email link to send a message directly to the legislators; or (4) listing the recipient’s legislator, the names of legislators voting on a bill, or those undecided or opposed to organization’s view on the legislation. An organization that has made the 501(h) election can never spend more than 25% of their overall lobbying limit on grassroots lobbying.

Therefore, a 501(c)(3), that has made the 501(h) election, with an annual budget of \$500,000, would have an overall lobbying limit of \$100,000 and a grassroots lobbying limit of \$25,000.

All public charities, including 501(h) electing charities need to keep track of their lobbying expenditures for their 990 Form and in the event of an IRS audit.

Note: To revoke your organization’s 501(h) election, follow steps 1 and 2, filling out the revocation portion of Form 5768 (question 2).

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nonprofits, and provides technical assistance for nonprofits engaging in advocacy. For additional information, please feel free to contact the Alliance for Justice.

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Form **5768**

(Rev. December 2004)

Department of the Treasury
Internal Revenue Service

**Election/Revocation of Election by an Eligible
Section 501(c)(3) Organization To Make
Expenditures To Influence Legislation**

(Under Section 501(h) of the Internal Revenue Code)

For IRS
Use Only ▶

Name of organization

Employer identification number

Number and street (or P.O. box no., if mail is not delivered to street address)

Room/suite

City, town or post office, and state

ZIP + 4

1 Election—As an eligible organization, we hereby elect to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending.....and all subsequent tax years until revoked.
(Month, day, and year)

Note: This election must be signed and postmarked within the first taxable year to which it applies.

2 Revocation—As an eligible organization, we hereby revoke our election to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending.....
(Month, day, and year)

Note: This revocation must be signed and postmarked before the first day of the tax year to which it applies.

Under penalties of perjury, I declare that I am authorized to make this (check applicable box) election revocation on behalf of the above named organization.

(Signature of officer or trustee)

(Type or print name and title)

(Date)

General Instructions

Section references are to the Internal Revenue Code.

Section 501(c)(3) states that an organization exempt under that section will lose its tax-exempt status and its qualification to receive deductible charitable contributions if a substantial part of its activities are carried on to influence legislation. Section 501(h), however, permits certain eligible 501(c)(3) organizations to elect to make limited expenditures to influence legislation. An organization making the election will, however, be subject to an excise tax under section 4911 if it spends more than the amounts permitted by that section. Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period. For any tax year in which an election under section 501(h) is in effect, an electing organization must report the actual and permitted amounts of its lobbying expenditures and grass roots expenditures (as defined in section 4911(c)) on its annual return required under section 6033. See Schedule A (Form 990 or Form 990-EZ). Each electing member of an affiliated group must report these amounts for both itself and the affiliated group as a whole.

To make or revoke the election, enter the ending date of the tax year to which the election or revocation applies in item 1 or 2, as applicable, and sign and date the form in the spaces provided.

Eligible Organizations.—A section 501(c)(3) organization is permitted to make the election if it is not a disqualified organization (see below) and is described in:

1. Section 170(b)(1)(A)(ii) (relating to educational institutions),
2. Section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),
3. Section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),
4. Section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),
5. Section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or
6. Section 509(a)(3) (relating to organizations supporting certain types of public charities other than those section 509(a)(3) organizations that support section 501(c)(4), (5), or (6) organizations).

Disqualified Organizations.—The following types of organizations are not permitted to make the election:

- a. Section 170(b)(1)(A)(i) organizations (relating to churches),

- b. An integrated auxiliary of a church or of a convention or association of churches, or

- c. A member of an affiliated group of organizations if one or more members of such group is described in a or b of this paragraph.

Affiliated Organizations.—Organizations are members of an affiliated group of organizations only if (1) the governing instrument of one such organization requires it to be bound by the decisions of the other organization on legislative issues, or (2) the governing board of one such organization includes persons (i) who are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and (ii) who, by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.

For more details, see section 4911 and section 501(h).

Note: A private foundation (including a private operating foundation) is not an eligible organization.

Where To File.—Mail Form 5768 to the Internal Revenue Service Center, Ogden, UT 84201-0027.

Lobbying Rules for Public Foundations

Federal tax law controls *how much* lobbying 501(c)(3) organizations may engage in. Under the tax code, a 501(c)(3) public charity, including public foundations, may measure its lobbying under one of two methods.

The “Insubstantial Part” Test

The first—and default—method is the rather vague insubstantial part test. This test requires that lobbying be limited to an insubstantial part of an organization’s overall activity. Under this test, there are no clear definitions regarding what constitutes lobbying, what an “insubstantial part” is, or how to measure activities. If a public foundation measures its lobbying limit by the insubstantial part test, it should work with an attorney and accountant to create parameters and definitions for the organization. An organization is subject to this test unless until it elects otherwise.

The “501(h) Expenditure” Test

The second method to measure lobbying activity is the 501(h) expenditure test. While the name reflects a section of the tax code, public foundations do not change their 501(c)(3) status by choosing this method to measure their lobbying. This test provides clearer guidance, as it defines lobbying, provides an exact dollar-based lobbying limit, and measures lobbying based upon an organization’s expenditures. Therefore, if an activity creates no cost for the organization then it does not count against its lobbying limit. An organization must affirmatively elect—through a one-time filing of Form 5768—to be covered by this test.

Since no guidance is provided under the insubstantial part test, the following rules apply to the 501(h) expenditure test only.

Overall lobbying limit

To determine a public foundation’s lobbying limits under the 501(h) expenditure test, first calculate its overall lobbying limit. It is based on the organization’s “exempt purpose expenditures” which, for most organizations, is the amount of money they will spend in the current fiscal year. Once you have determined the exempt purpose expenditure amount, apply the following mathematical percentages:

20% of the first \$500,000 + 15% of the next \$500,000 + 10% of the next \$500,000 + 5% of the remaining = the overall lobbying limit

There is a \$1 million cap on the overall lobbying limit. There are two types of lobbying, and public foundations may use the entire lobbying limit on *direct lobbying*, but can only use ¼ of it on *grassroots lobbying*.

Direct Lobbying

Direct lobbying is a communication with a legislator (federal, state, local) or legislative staff member that both:

- Refers to specific legislation, and
- Takes a position on that legislation

Special Rule for Ballot Measures (referenda, ballot initiatives, bond measures, constitutional amendments): Communications with the general public that refer to and state a position on ballot measures count as direct lobbying. Public foundations may fund ballot measure drives and tell voters whether to support or oppose ballot measures because the activity is considered direct lobbying.

Grassroots Lobbying

Grassroots lobbying is a communication with the public that:

- Refers to specific legislation
- Reflects a view of the legislation, and
- Contains a call to action

A call to action refers to four different ways the public foundation asks the public to respond to its message:

- Asking the public to contact their legislators or staffers
- Providing the address, phone number, website, or other contact information for the legislators
- Providing a mechanism to contact legislators such as a tear off postcard, petition, letter, or email link to send a message directly to the legislators, or
- Listing the recipient’s legislator, the names of legislators voting on a bill, or those undecided or opposed to the organization’s view on the legislation (Identifying legislators as sponsors of the legislation is *not* a call to action.)

Note: This handout provides general guidelines only. Organizations should consult with their attorney to receive guidance on special rules governing their conduct.

Lobbying Resources

NC & IRS Lobbying Laws Are Very Different

Complying with IRS lobbying rules for 501 c3s does not mean you are in compliance with NC lobbying rules. Be sure to understand the difference and track your time & expenses accordingly.

- ❑ **Develop expertise:** Have at least one person in your office develop expertise on NC and federal lobbying rules
- ❑ **Develop reporting system:** Set up a clear system for tracking lobbying time and expenses under both NC and IRS rules. Don't over-report.
- ❑ **Train your staff:** Hold regular training for all your staff.

Alliance for Justice

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Washington, DC 20036
202-822-6070

Publish up to date, plain language guides to explain the laws governing non-profit advocacy, and provide technical assistance and training for non-profits and foundations engaged in advocacy. For additional information, including their training schedule, go to:

advocacy@afj.org

866-NPLOBBY

www.allianceforjustice.org

For immediate help, contact an AJF staff attorney "on call" during regular business hours at 866-NPLOBBY (866-675-6229), or fill out their on-line request for assistance at <http://www.afj.org/nonprofits-foundations/advocacy-assistance/technical-assistance.html>.

NC State Ethics Commission

424 N. Blount Street
Raleigh, NC 27601-1010
919-715-2071
<http://www.ethicscommission.nc.gov/index.htm>

This commission is an excellent resource for guidance and training on NC lobbying law. If you have questions about the interpretation of the law, you can ask for an Advisory Opinion, which can be confidential if you request. For their training schedule (5 trainings in next 2 months), go to http://www.ethicscommission.nc.gov/EDU_schedule.html.

NC Secretary of State

Lobbying Compliance Division
Department of the Secretary of State
PO Box 29622
Raleigh, North Carolina 27626-0626
(919) 807-2170

For information about NC lobbying compliance in NC, including registration and reporting, go to <http://www.secretary.state.nc.us/lobbyists/>.

Lobbying – A Review of 501(c)(3) Definitions

1. Lobbying (General Definition):

Direct Lobbying:

A communication with a legislator counts “if, but only if” it:

Refers to specific legislation
and Reflects a view thereof.

26 CFR § 56.4911-2(b)(1)(ii).

Grassroots Lobbying:

A communication with the general public counts “if, but only if” it:

Refers to specific legislation,
and Reflects a view thereof,
and Contains a call to action.

26 CFR § 56.4911-2(b)(2)(ii).

2.A. Not Lobbying

(Because No View of Specific Legislation Expressed):

**Expressing a view
of administrative
rules or regulations**

**Discussing broad social or
economic problems (*even if
addressed in pending legislation*),
provided you do not express a
view of any specific legislative
proposal and do not encourage
recipients to take action w/r/t
legislation**

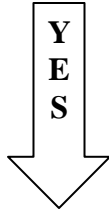
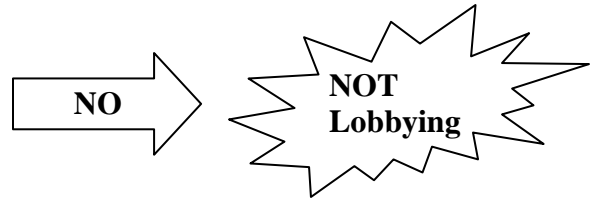
2.B. Not Lobbying, Even With a View of Specific Legislation, **(Because These Are Exceptions To The General Definition):**

**Response to
written request
from
governmental
body**

**Nonpartisan
Research or
Analysis**

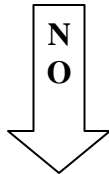
Attendance at Multi-Purpose Staff Meetings

Could any part of the meeting potentially be characterized as preparation/strategizing for lobbying? (i.e., for communications to influence specific legislation either directly or through a grassroots call to action)?

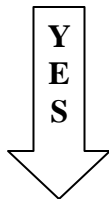
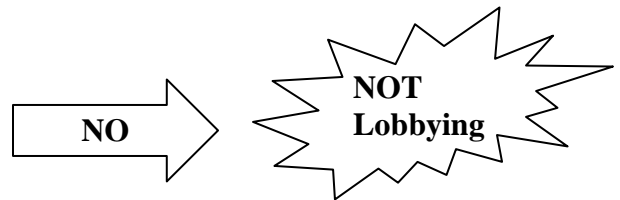


Does any exception/exclusion apply?

- Non-partisan research & analysis.
- Response to written request from a legislative or other governmental body.
- Remember: Administrative Rules and Regulations are not legislation.
- Remember: Examinations/Discussions of broad social or economic problems are not lobbying.



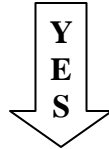
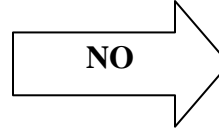
Did my purpose in attending the meeting relate to lobbying work that I'm doing? (*as opposed to, e.g., attending just FYI, or for purposes of a non-partisan research report I am drafting, or regulatory action I am considering*)



Attribute to lobbying the time spent at the lobbying-related portion of the meeting.

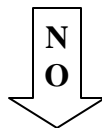
Working with Coalitions and Allied Organizations

Could any part of the interaction (meeting, phone call, email, letter) potentially be characterized as preparation or strategizing for, or assistance with, lobbying?

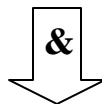


Does any exception/exclusion apply?

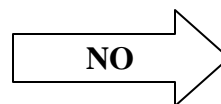
- Non-partisan research & analysis.
- Response to written request from a legislative or other governmental body.
- Remember: Administrative Rules and Regulations are not legislation.
- Remember: Examinations/Discussions of broad social or economic problems are not lobbying.



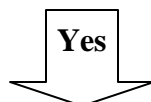
Attribute to lobbying the time spent in the lobbying-related portions of the interaction.



Did I include a call to action?



**NO
Grassroots
Lobbying**



Treat as grassroots lobbying time spent on communication containing call to action.

Communications with Legislators or their Staff

Could any part of the communication potentially be characterized as expressing an opinion on specific legislation?

NO

**NOT
Lobbying**

YES

Does any exception/exclusion apply?

- Non-partisan research & analysis.
- Response to written request from a legislative or other governmental body.
- Remember: Administrative Rules and Regulations are not legislation.
- Remember: Examinations/Discussions of broad social or economic problems are not lobbying.

YES

**NOT
Lobbying**

NO

Attribute to lobbying the time spent on the communication and in preparation for it.