501(c)(3)s and the Art of Advocacy

Political advocacy is a term that can refer to a number of different activities, and only some of them create a risk to 501(c)(3) organizations. As articulated by Alliance for Justice: "Advocacy is any action that speaks in favor of, recommends, argues for, supports, or defends, or pleas on behalf of others."[1] Many types of advocacy are perfectly consistent with 501(c)(3) status and do not raise any legal issue whatsoever. In fact, 501(c)(3) organizations often underestimate the amount of political advocacy that they are allowed to perform, leaving potential mission impact on the table.

Depending on the type of advocacy, however, 501(c)(3) organizations do need to be aware of certain rules for how such advocacy must be conducted and certain key boundaries that they must not cross. Failure to comply with such rules puts 501(c)(3) organizations at risk of losing their tax-exempt status.

Let's begin with the two types of political advocacy that are regulated for 501(c)(3) organizations: electioneering (*supporting or opposing* ***candidates in an election***) and lobbying (*certain attempts to influence* ***legislation***).

Electioneering

Electioneering is a "red line" for 501(c)(3) organizations – it is strictly prohibited and any electioneering puts at risk the organization's tax-exempt status. This is reflected in Section 501(c)(3) itself, which describes an exempt organization as one that "does not participate in, 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."

A 501(c)(3) organization will violate this prohibition if it tries to persuade people to vote for a particular person or political party, either directly or indirectly. This includes:

- Donating money to a campaign
- Distributing campaign materials
- Endorsing or opposing a candidate
- Suggesting that others support or oppose candidates.

The prohibitions apply not only to declared candidates, but also to movements to advance third-party candidates and to efforts to encourage or discourage someone from running for office.

A 501(c)(3) organization may contact candidates and parties, both to seek their views on issues and to communicate the organization's views. However, the organization may not represent the organization as supporting or opposing the candidate. Even when a 501(c)(3) organization is

[1] "Bolder Advocacy," Alliance for Justice's resources for nonprofits engaged in political advocacy, is a critical tool for 501c3 organizations and other tax-exempt organizations considering how to maximize their political impact. https://bolderadvocacy.org/

engaging with one or more political candidates in a manner that is not directly prohibited (e.g. releasing a voter guide educating the public on candidates' stances on key issues, hosting a debate, receiving support from a candidate at an event), it is critical that the 501(c)(3) organization conduct that activity in a nonpartisan manner. When evaluating whether a 501(c)(3) organization is behaving in a partisan or nonpartisan manner, ***all of the facts and circumstances matter.*** Therefore, if a 501(c)(3) organization is interacting with one or more candidates in an election (or with potential candidates), the 501(c)(3) organization must tread carefully.

Lobbying

The other key term 501(c)(3) organizations need to understand is "lobbying," which refers to certain attempts to "influence legislation." Unlike electioneering, lobbying is not strictly prohibited for public charities[2], but it is regulated and subject to limits. Critical to understanding those limits are the definitions of the two types of lobbying: direct lobbying and grassroots lobbying.

D**irect Lobbying** is the attempt to influence specific legislation through direct communication with the person in legislative power: e.g., a member of Congress, a state legislator, a city council member, or a staff member of one of these officials[3]; BUT only if that communication meets the technical definition. For federal tax law purposes, a communication is lobbying only if (1) it is with a legislator, (2) it is about specific legislation, (3) it reflects a view on that legislation, and (4) an exception does not apply.

Note that each of these elements must be present. So, a 501(c)(3) organization that advocates to a legislator about a particular policy *position* is not lobbying if there is no specific *legislation* on the table for that policy. Likewise, a 501(c)(3) organization is not lobbying if it is advocating a position on specific legislation to a member of the *executive* branch about the *implementation* of the proposed legislation if passed.

Direct Lobbying	**Not Direct Lobbying**
Meeting with legislators or their staff to discuss specific legislation.	Responding to inquiries from Congress or other government officials regarding matters of public policy (but not specific legislation).
Writing a letter to legislators to share your views on specific legislation.	Discussing the needs or interests of your organization in a general way, with no urging for changes in law or legislation.
Paying a third party to communicate with public officials about your views on specific legislation.	Sending your organization's newsletter to a member of Congress, provided it does not include your views on legislation.

[2] Under Internal Revenue Code Section 4945, private foundations are subject to excise taxes on taxable expenditures, which include direct or indirect expenditures on lobbying.
[3] While communications with the general public are usually lobbying only if they meet the grassroots lobbying definition, the public IS considered a legislator for ballot measures (e.g. referenda), so these activities must be reviewed more carefully under the rules applicable to direct lobbying.

Grassroots Lobbying is an attempt to influence specific legislation through a communication with the general public *for the purpose* of getting the public to communicate with the persons in legislative power. The definition of grassroots lobbying is similar to that of direct lobbying, but it is about communicating *with the general public* (instead of a legislator) and applies only if there is a call to action. A "call to action" refers to certain methods of urging members of the public to contact their legislators, whether explicitly or implicitly (e.g., including legislator contact information in the communication).

Grassroots Lobbying	**Not Grassroots Lobbying**
Your director of development sends a mass advocacy message to your donors by email urging them to contact *their* member of Congress about legislation.	Your director of development sends a mass advocacy message to your donors by email regarding your charity's position on legislation.
A staff member posts on your organization's Facebook Congress' decision to reject a bill, and includes in the posting the contact information for a member of Congress.	A staff member posts on their personal blog, in their private capacity about legislation and urges members of the public to act.
Paying an influencer to ask their followers to tag a legislator in a post regarding specific legislation.	Posts on social media aimed at educating the public on specific legislation that includes names of legislators involved in the bill's passage.

Exceptions to lobbying[4]

- **Nonpartisan Analysis, Study or Research**
  A study or research that provides information on all sides of the issue and is made available to at least a segment of the public or to governmental bodies and employees. It may also be distributed, in part, to members of Congress as long as it is widely distributed.
- **Requests for Technical Advice or Assistance**
  Refers to requests made by a legislative body or committee in writing that you respond or provide information about a certain piece of legislation (e.g., a written invitation to come testify about proposed legislation's impact on your charitable constituency).
- **"Self-defense" Communications**
  Communications to a legislative body concerning specific legislation that could affect your organization's existence, powers, duties, tax-exempt status, or the deductibility of contributions to the organization.

So…Can Public Charities Lobby?

Yes. The key is: how much?

According to the IRS, a 501(c)(3) public charity can engage in lobbying, so long as the organization's lobbying does not constitute a "substantial part" of what the organization does.

"Substantial" is measured by the IRS using one of two standards:

[4] In addition to these exceptions, there is a "jointly funded project" exception for public-private partnerships, but it applies only to private foundations.

1. By meeting the "insubstantial part test" (this is the default standard, if the organization fails to file a 501(h) election, though this standard is vaguer and looks at the facts and circumstances of each case); or
2. By electing to use the 501(h) "expenditure test," which sets out dollar limits based on the overall budget of the organization.

For most public charities, the 501(h) expenditure test provides a higher lobbying limit, a greater sense of clarity, and the ability to measure lobbying only in terms of expenditures (as opposed to time or effort).

How much can your nonprofit spend on lobbying based on the 501(h)-expenditure test?
Under 501(h) rules, you can calculate the overall lobbying limit of your organization as follows: You can spend 20% of the first $500,000 of your budget on lobbying. You can spend 15% of the next $500,000, 10% of the next $500,000 and 5% of the remaining. You are capped at $1,000,000, regardless of your overall budget.

Total Exempt Purpose Expenditures	Total Nontaxable Lobbying Amount
Less than or equal to $500K	20% of the exempt purpose expenditures
More than $500K but less than or equal to $1M	$100K plus 15% of the exempt purpose expenditures over $500K
More than $1M but less than or equal to $1.5M	$175K plus 10% of the exempt purpose expenditures over $1M
More than $1.5M but less than or equal to $17M	$225K plus 5% of the exempt purpose expenditures over $1.5M
More than $17M	$1M

Of the total amount that you spend on lobbying, only 25% can go towards grassroots lobbying.

Are there any required filings?
Lobbying expenditures must be reported on Schedule C of the annual Form 990 tax return. At the state level, reporting rules differ from state to state. In addition to the tax law limitations on lobbying activities, disclosure laws require certain organizations and individuals to register when they begin to engage in lobbying and to file periodic reports on their lobbying activities. 501(c)(3) organizations that pay anyone—be it a staff member, outside lobbying firm or a volunteer who is reimbursed for expenses—to influence legislation or administrative rules, may have to comply with these disclosure laws.

How should we keep track of our spending?
Keep a record of how much was spent, for what legislative purpose, which officials were lobbied, and when. Expenses incurred may include costs for printed materials, direct costs associated with meeting with a legislator, and staff time used for lobbying. (This assumes that your organization has filed a 501(h) election. If your organization hasn't, you may also need to track your organization's lobbying *activities*.)

Because different expenditure limits apply to direct lobbying and grassroots lobbying these expenses should be tracked separately.

Other options for organizations that wish to make lobbying their primary activity.

An option for a nonprofit organization that wants to be tax-exempt and to make lobbying its primary function is to seek exempt status from the IRS as a 501(c)(4) social welfare organization. Unlike 501(c)(3) organizations, 501(c)(4) organizations have little limitation on lobbying on behalf of their exempt purpose, but contributions to them are not tax-deductible charitable contributions.

Not electioneering, not lobbying, other options for advocacy

1. Nonpartisan voter registration and get-out-the-vote activities
2. Invite all candidates to speak at a public event
3. Educate the public about participating in the political process, including registration or election deadlines and dates
4. Sponsor a debate/candidate forum with community members, extending invitations to all candidates
5. Submit questions to all the candidates on issues of interest to your nonprofit, and publishing the answers on a website or nonpartisan voter guide
6. Distribute a nonpartisan voter guide created by trusted community partners
7. Encourage all public whether in opposition or in support to communicate with officials.