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Lobbying by Non-Profit Clients: Navigating Federal and State Regulations

Complying With Lobbying Activity Tests, Limits, Registration and Reporting

WEDNESDAY, OCTOBER 19, 2011

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Lobbying by Non-Profit Clients: Navigating Federal and State Regulations Seminar

Oct. 19, 2011

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Today's Program

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Charles Spies, Clark Hill

LOBBYING VS. PERMISSIBLE, UNREGULATED ACTIVITIES

Lobbying Activities By Non-Profits – In General

Non-profit organizations often limit their advocacy activities because of the complex rules and fear of losing their tax-exempt status. However:

- Non-profits may engage in a fair amount of lobbying under current IRS regulations without jeopardizing their tax exempt status; and
- Most policy advocacy is not lobbying, so it does not pose a threat to the organization's tax exemption.
- 501(c)(3) non-profits must limit lobbying activity to an "insubstantial amount."

What Is Lobbying?

Lobbying is any attempt to influence legislation by:

- Stating a position on specific legislation to legislators or other government employees who participate in the formulation of legislation, which is known as direct lobbying; or
- Urging the general public or your members to contact their legislators regarding a position on specific legislation, often referred to as a “call to action.” This is known as grassroots lobbying.

IRS Definition Of “Lobbying”

Under IRS regulations, “lobbying” is defined as:

- A communication
- To legislators
- Intended to influence specific legislation (pending or proposed)

“Direct Lobbying”

“Direct lobbying” is:

- **A communication with a legislator or an employee of a legislative body**
- **Refers to specific legislation**
- **Expresses a view about that legislation**

“Grassroots Lobbying”

“Grassroots lobbying” is:

- A communication to members of the general public
- That refers to specific legislation, expresses a view about that legislation, and
- “Encourages the recipient ... to take action with respect to the legislation”

“Legislation”

Under IRS regulations, “legislation” includes:

- Action by Congress, any state legislature, any local or city 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

General Advocacy

- **Influence public opinion on issues**
- **Influence non-legislative governing bodies (the executive branch, regulators)**
- **Encourage voter participation: Voter registration**
 - GOTV drives
 - Voter guides
 - Candidate debates

Public Education And Issue Advocacy – In General

Public education or issue advocacy, or generally promoting a point of view on an issue, typically is not lobbying for one of two reasons:

- 1) With regard to targeting legislators, an advocacy campaign is not lobbying unless it urges legislators to adopt specific provisions of law; or
- 2) When directed to the general public, even though the advocacy campaign endorses a specific response in law to a problem (such as increasing funding for infrastructure or healthcare), it is not lobbying unless it encourages citizens to urge their legislators to pass an increase in funding for those causes.

Most Advocacy Is Not Lobbying

- **Executive, judicial and administrative agencies (including school boards, zoning boards and other administrative bodies) are not legislative bodies and do not create legislation when they act. Therefore, urging such agencies to act a certain way would not constitute lobbying.**
- **For example, urging an agency such as a state's Motor Vehicle Administration to comply with existing laws aimed at curbing discrimination of driver's license applicants, based on ability to prove residency, would not be considered lobbying.**

Advocacy Is Not Lobbying Unless Discussing Specific Legislation

- **To constitute lobbying, a communication must address “specific legislation,” which means either a proposed or pending law or bill. Specific legislation is not addressing a broad policy issue.**
- **NOTE: With regard to ballot initiatives, a proposal is specific legislation once it is presented in a petition for signatures to qualify the proposal for the ballot.**

Non-Lobbying Advocacy

The following forms of advocacy are not lobbying:

- Making available the results of non-partisan analysis, study or research;
- Volunteer lobbying
- Discussing broad social issues, without mentioning specific legislation; and
- Communicating with members

Non-Lobbying Advocacy: Non-Partisan Analysis

- A communication that refers to and states a view about specific legislation is not lobbying if it qualifies as non-partisan analysis, study or research.
 - Content test: The analysis, study or research may have a definite point of view, but it must present a full and fair explanation of facts that would allow readers to form an independent opinion.
 - Distribution test: Must be made available to the general public or governmental bodies

Non-Lobbying Advocacy: Volunteer Lobbying

- **Lobbying by volunteers is considered a lobbying expenditure only to the extent that the non-profit incurs expenses associated with the volunteers.**
- **For example, volunteers working for a non-profit could organize a huge rally of volunteers at the state Capitol to lobby on an issue, and only the expenses related to the rally paid by the non-profit would count as a lobbying expenditure.**

Non-Lobbying Advocacy: Discussing Broad Social Issues

- **Communications addressed to public, legislative members or government employees on general topics, which are also the subject of specific legislation, are not lobbying if they do not refer to the specific legislation or urge the audience to take action.**

Non-Lobbying Advocacy: Communicating With Members

- **Communicating with members of your organization with respect to legislation, and expressing a view about the legislation, are not lobbying if the communication does not encourage members to take action regarding the legislation.**
- **A member is defined as someone who contributes more than a nominal amount of time or money to the organization.**
- **At least 50% of the recipients of the communication must be members.**

Exception To Lobbying: Testimony

- **Providing technical advice or assistance to a government body, or to its committee or other subdivision, is exempt from the lobbying limits.**
- **To qualify for this exception, your testimony must be in response to a written request from the chairperson of the legislative body or committee.**
- **This is a free pass to express a view about legislation directly to the relevant legislators with the intent of influencing the legislation.**

Exception To Lobbying: Self-Defense

- **Self-defense communications with a governmental body regarding legislation that would affect your existence, your powers or duties, your tax-exempt status or the deductibility of contributions to your group are excepted from the lobbying limits.**
- **E.g., community clinics could oppose a bill limiting deductibility of contributions to health organizations that provide birth control counseling and services.**

Charles Spies, Clark Hill

LOBBYING-RELATED REGS FOR DIFFERENT KINDS OF NPOS

Advocacy And § 501(c)(3) Status

- ***Political campaign activity***: Absolutely prohibited
- ***Lobbying***: Cannot be a substantial activity of the organization
- ***General advocacy***: Permitted as an educational activity

501(c)(3) Public Charity “Lobbying”

501(c)(3) non-profit organizations are prohibited from lobbying except to an “insubstantial degree.” The IRS evaluates 501(c)(3) lobbying activities under two rules:

- **General rule:** Looks at totality of organization’s lobbying activities and considers whether they are “insubstantial”
 - Gives IRS broad discretion
 - Courts have previously considered expenditures of more than 5% of a non-profit’s budget to be substantial.
- **501(h) expenditure test:** Sets specific dollar limits on a non-profit’s lobbying activities
 - An organization must file a form electing to be evaluated under the 501(h) test.

* These tests will be explained in much greater depth by Tammera later in the presentation

Impermissible 501(c)(3) Lobbying Activities

A 501(c)(3) may not:

- Support or oppose candidates for public office (absolute prohibition), or
- Lobby on specific legislation in substantial part or, under Sect. 501(h), beyond a certain percentage of its expenditures

Permissible 501(c)(3) Lobbying Activities

A 501(c)(3) may:

- Lobby on specific legislation within the IRS's lobbying limits
- Advocate for or against passage of ballot measures
- Set up a related 501(c)(4) or (c)(6) entity to conduct lobbying and political activities
- Conduct non-partisan get-out-the-vote and voter registration drives
- Provide its members with voting records of legislators, as long as not limited to just campaign season

Advocacy And § 501(c)(4), (c)(5) Or (c)(6) Status

- ***Political campaign activity***: Permitted so long as it does not constitute the organization's primary activity
- ***Lobbying***: Unlimited amount of lobbying in furtherance of its exempt purpose permitted
- ***General advocacy***: Unlimited amount in furtherance of exempt purpose

501(c)(4) Affiliates

- **501(c)(3) organizations that find themselves hampered by lobbying limits may want to consider forming a related 501(c)(4) social welfare organization.**
- **501(c)(4) organizations are not subject to the lobbying limits.**
- **501(c)(4) organizations may even engage in political activity, so long as that is secondary to their other program activities.**

501(c)(4) Affiliate Relationship With 501(c)(3)

- **501(c)(4) organization must be separately incorporated.**
- **Records must be adequate to show that tax deductible contributions are not being used to support political or other non-charitable activities.**
- **501(c)(3) non-profits must be able to demonstrate the affiliated (c)(4) is not an “arm, agent or integral part” of the (c)(3).**
- **Contributions to a (c)(4) are not tax deductible.**

501(c)(4) Affiliate Relationship With 501(c)(3) (Cont.)

- **The 501(c)(3) and (c)(4) may have overlapping boards and staff, but they should have separate meetings, keep separate minutes, and preferably have either separate executives or differing boards.**
- **They MUST keep money separate. The (c)(4) must pay for its own share of expenses.**
- **A 501(c)(3) can make grants to (c)(4) for uses that do not include lobbying, fundraising or general support.**

Advocacy And § 527 Status

- ***Political campaign activity*** : Permitted as exempt activity
- ***Lobbying***: A limited amount is permitted, provided it is not substantial.
- ***General advocacy***: A limited amount is permitted, provided it is not substantial

Matthew Sanderson, Caplin & Drysdale

DIRECT LOBBYING AND IMPACT OF FLDA

Lobbying Disclosure Rules: Basic Principles

- A non-profit organization, subject to potential tax restrictions, may engage in lobbying. That means its employees may communicate with federal, state and local government employees about matters that interest or affect the organization.
- Federal, state and local laws may regulate lobbying communications, as well as work done in preparation for the communications.
 - Special restrictions on contingent fees, gifts and political contributions by lobbyists/employers may also apply.
- An employee lobbying on an organization's behalf may trigger registration and/or reporting requirements for both the company and the employee.
- All lobbying communications and related preparation must be tracked and recorded to enable the organization, as well as the employee, to satisfy reporting requirements.
 - Government Accountability Office (GAO) regularly performs federal lobbying audits of organizations.

Federal Lobbying: Registration

- Entities that employ federal lobbyists and spend over \$11,500/quarter on lobbying activities must register with Congress; individual employees need not register separately.
- An employee qualifies as a federal lobbyist if he/she:
 - Makes two or more lobbying contacts with a covered official, and
 - Spends 20% or more of his/her working time during a calendar quarter engaged in lobbying activities.

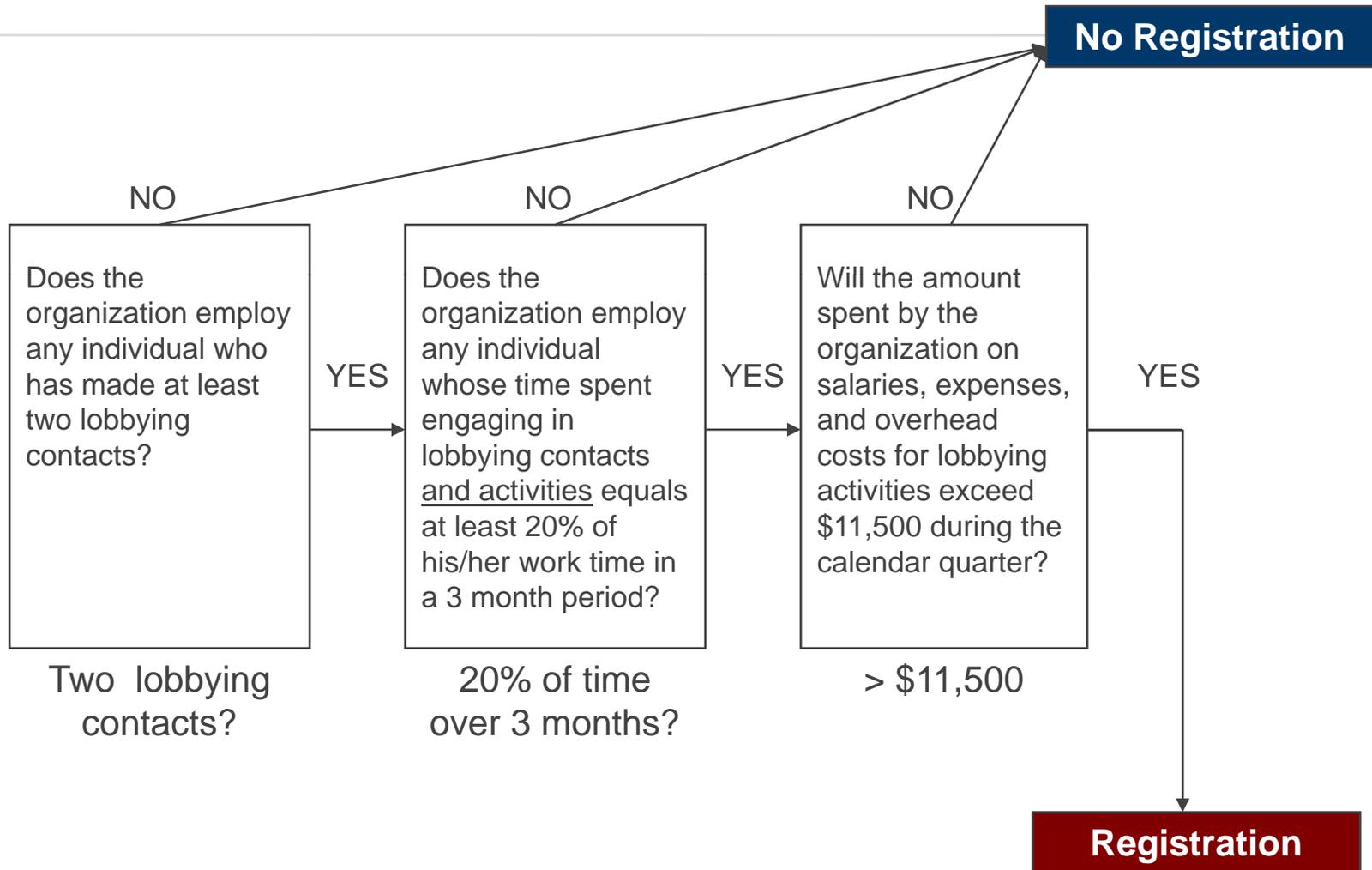
Covered officials are legislative branch employees (i.e. senators, House members, congressional staffers) and certain high-level executive branch employees (e.g., cabinet, cabinet deputies, Schedule C employees, executive office of president uniformed officers O-7 or above).

Lobbying contacts are communications with covered officials regarding federal legislation, regulations, rules, policies, programs, permits, licenses, positions or appointments subject to Senate confirmation.

- Exemptions: Public testimony, written comment on pending rules, communications compelled by agency action/contract, public speeches/articles, administrative requests (e.g. status updates, request for mtg.)

Lobbying activities include all lobbying contacts and all work done in support of lobbying contacts, such as background and preparation work, performed by any employee.

Federal Lobbying: Registration (Cont.)



Federal Lobbying: Registration (Cont.)

- Registration termination: A lobbyist may be “de-listed” if he/she reasonably expects that he/she will not: (1) make any further lobbying contacts, or (2) spend less than 20% of working time on lobbying activities in the current and next calendar quarter.
- Special restrictions on registered federal lobbyists that cause individuals/entities to avoid registration:
 - Congressional ban on lobbyist gifts and lobbyist accompaniment during travel
 - FEC special disclosure rules on lobbyist “bundling”
 - Obama administration
 - Stricter rules for lobbyist gifts
 - Ban on lobbyist appointments without waiver
 - Post-service lobbying (entire administration)
 - Ban on lobbyists serving on federal advisory boards

Federal Lobbying: Reporting Rules

- Quarterly lobbying report (LD-2)
 - Who files? The registered entity
 - Who is responsible for compiling report?
 - What is disclosed?
 - Aggregate total spent on federal lobbying activities during quarter
 - Disclose “grassroots” and state lobbying costs only if “Method B” filer
 - Overhead (utilities, rent, office supplies)
 - Employee compensation, benefits and cost reimbursements
 - Fees paid to outside lobbying firms
 - Fees paid to law firms for lobbying activities
 - Dues paid to trade associations for lobbying activities
 - Information about in-house lobbyists’ interactions with federal government bodies
 - Keep timely record of contacts (office, bill number, subject)

Federal Lobbying: Reporting Rules (Cont.)

- Semi-annual contributions reports (LD-203)
 - Who files? The registered entity and in-house lobbyists each file a separate report.
 - What is disclosed?
 - Certify familiarity and compliance with congressional gift rules
 - Single individual certifies that all company employees comply.
 - Listed lobbyists certify individual compliance.
 - Political contributions to a federal candidate, PAC or party committee
 - Donations to presidential libraries/inaugurals
 - Payments: (1) for events to honor or recognize a covered official; (2) to entities established by, controlled by, named for, or designated by a covered official; (3) for covered officials' meetings, retreats or conferences; and (4) in the name of a covered official
 - Compile a quarterly list of all events that may fit this description; organization's compliance personnel determine which are reportable.

Tammera Diehm, Winthrop & Weinstine

RECENT STATE GUIDANCE OF NOTE

State Lobbying Regulation

- Who is a lobbyist?
 - It depends.



- The definition of lobbyist varies significantly from state to state.

State Lobbying Regulation (Cont.)



- In reviewing state regulations, pay attention to the following:
- Scope of applicable laws
- Types of covered activity
- Prohibitions and limitations
- Public disclosure

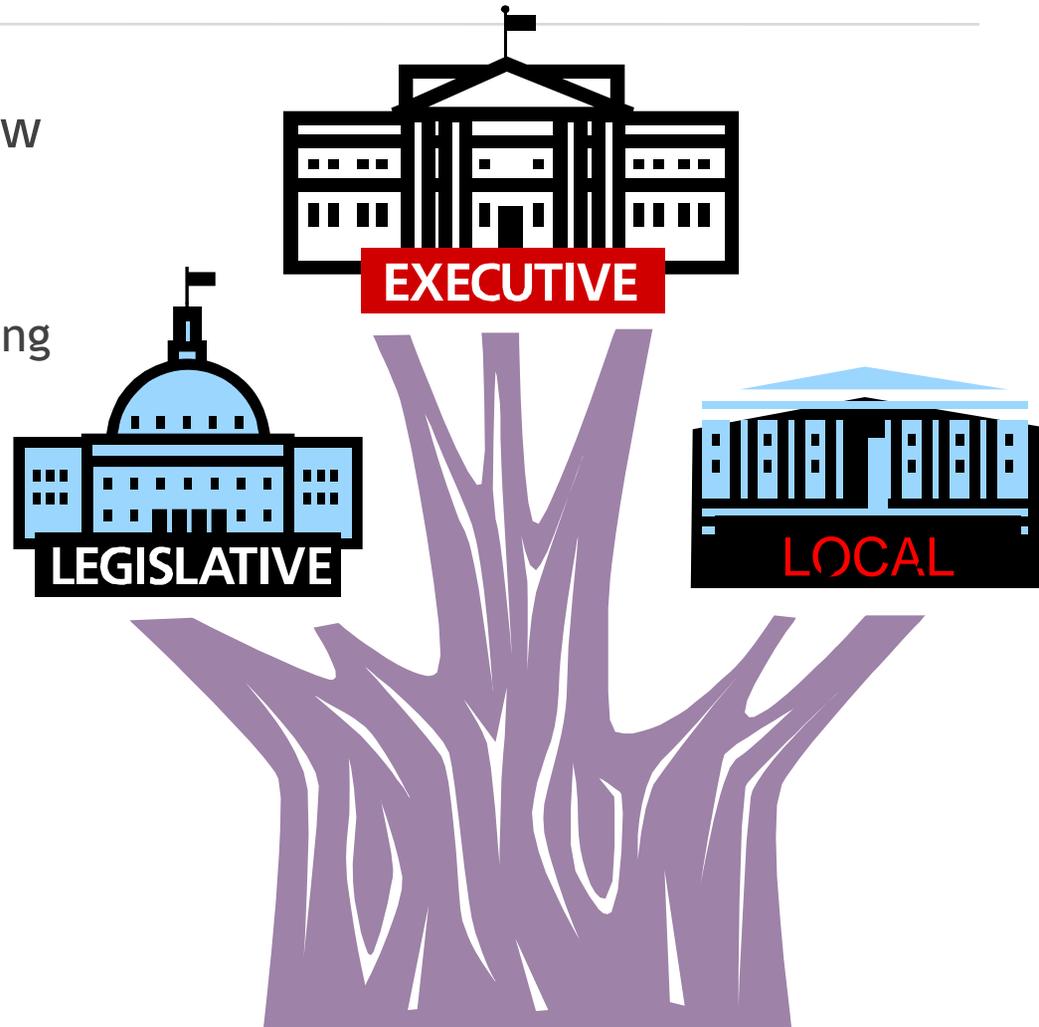
State Lobbying Regulation (Cont.)

- Scope of applicable law

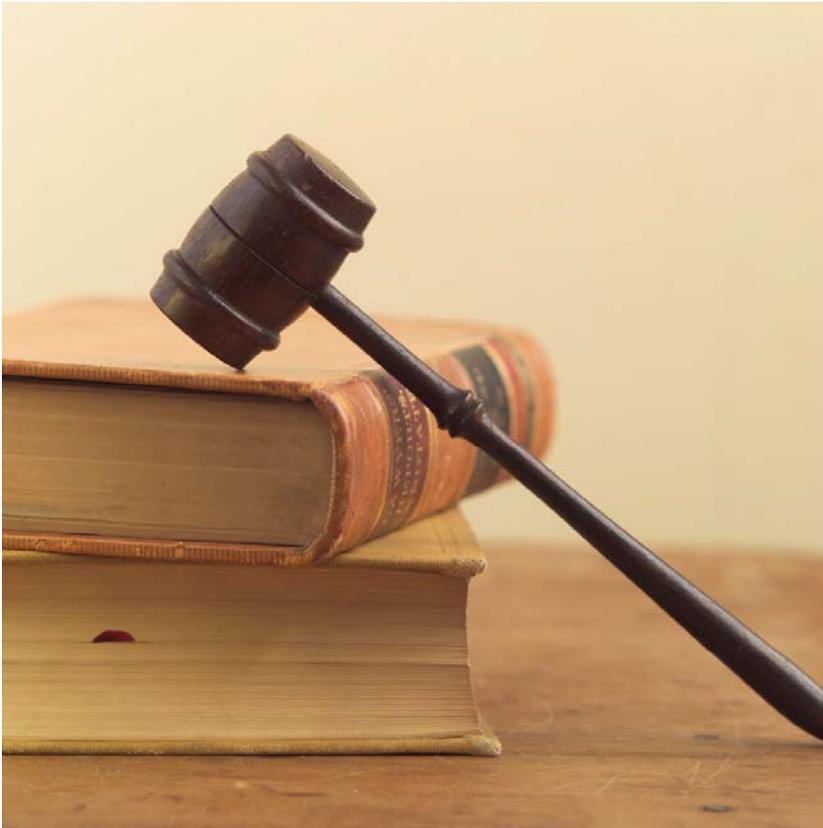
- Legislative lobbying

- Executive Branch lobbying

- Local lobbying



State Lobbying Regulation (Cont.)



- Types of covered activity
 - What constitutes lobbying?
 - Direct communication
 - Procurement lobbying
 - Grassroots lobbying
 - Are there any exceptions?

State Lobbying Regulation (Cont.)

- Prohibitions and limitations
 - Campaign contributions and gifts
 - Contingency fees
 - Other restrictions



State Lobbying Regulation (Cont.)

- Public disclosure



State Lobbying Regulation (Cont.)



- Example: Minnesota
- Lobbying: administrative action or communicating with, or officials or local officials Attempting to influence legislative action, metropolitan governmental unit action by urging others to communicate with public
- Lobbyist: year (from (b) spends membership An individual who (a) receives more than \$3,000 in any all sources) for purposes of “lobbying” or a person who more than \$250 (not including travel expenses or dues) for lobbying

State Lobbying Regulation (Cont.)



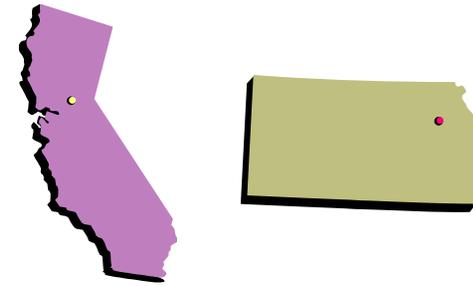
- Example: Minnesota (Cont.)
- Exceptions: Paid expert witnesses whose testimony is requested by a public body
- Who regulates: Minnesota Campaign Finance and Public Disclosure Board
- www.cfboard.state.mn.us
-

State Lobbying Regulation (Cont.)



- Example: Minnesota (Cont.)
- Registration and reporting (lobbyist):
 - All lobbyists must register with the Board within five (5) days of becoming a lobbyist.
 - Registration includes a description of subjects to be lobbied.
 - Periodic reports are due on Jan. 15 and June 15 of each year.
 - Reports include a detailed summary of all disbursements spent on lobbying.
- Registration and reporting (principal):
 - Principal is defined as any individual or association that (a) spends more than \$500 in a year to employ a lobbyist; or (b) spends more than \$50,000 in a year to influence legislative, administrative or MGU actions.
 - Principal must file a report each year by March 15.
 - Report discloses amount spent on lobbying - rounded to nearest \$20,000.

State Lobbying Regulation (Cont.)



- Comparison

- California: Lobbyist is defined as someone who earns \$2,500 or more per month or spends more than 1/3 of his/her time lobbying.
- Kansas: Lobbyist is defined as (1) any person “employed” in considerable degree for lobbying, (2) any person “formally appointed” as the primary representative to lobby in person on state-owned property in excess of \$100 or more in any calendar year (excluding travel expenses) or (3) any person who makes “expenditures” more in any calendar year (excluding travel expenses).
- For a 50-state guide to the definitions of lobbying and lobbyist, see publication by National Conference of State Legislatures, online at:

State Lobbying Regulation (Cont.)

- Practical tips
 - Review the requirements for the state you are active in
 - Analyze whether your activities qualify as lobbying
 - Seek guidance from local experts

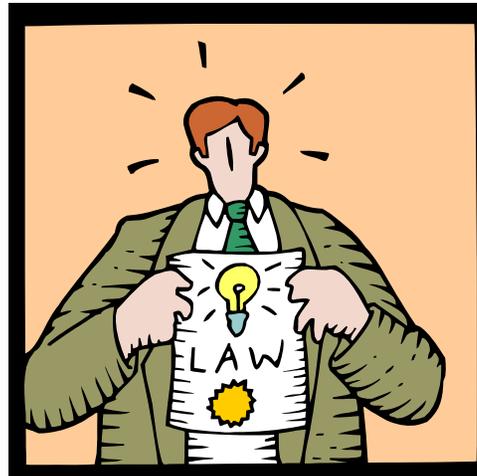


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TAX IMPLICATIONS FOR 501(C)3S AND 501(C)6S

Tax Implications Of Lobbying For Non-Profit Organizations

- What is “lobbying,” for purposes of IRS regulations?
 - Any (a) *communication* that is (b) intended to *influence* (c) *specific legislation*



Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)



- What is legislation?
- Any action by any legislative body including:
 - (a) Congress
 - (b) State legislatures
 - (c) Local legislative bodies
 - (d) The general public, in referendum or by constitutional amendment

Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Types of lobbying
- Direct lobbying: Any attempt to influence any legislation through communication with (a) any member or employee of a legislative body; or (b) any governmental official or employee (other than a member or employee of a legislative body) who may participate in the formulation of the legislation, but only if the principal purpose of the communication is to influence legislation
- Grassroots lobbying: Any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof
- *See 26 C.F.R. §56.4911-2(b)*



Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Exceptions to lobbying
- Self-defense: Communication on any legislation that would affect an organization's existence, powers and duties, tax-exempt status, or deductibility of contributions. 26 C.F.R. §56.4911-2(c)(4)
- Technical advice: Providing technical advice to a governmental body in response to a written communication. 26 C.F.R. §56.4911-2(c)(3)
- Non-partisan
- analysis or research: Considering community problems is considered non-partisan if it is "an independent and objective exposition of a particular subject matter ...(which) may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of pertinent facts to enable the public or an individual to form an independent opinion or conclusion." 26 C.F.R. §56.4911-2(c)(1)

Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Examinations and discussions
- of broad social, economic
- and similar problems: Examinations and discussions of broad social, economic, and similar problems are neither direct lobbying communications nor grass roots lobbying communications even if the problems are of the type with which government would be expected to ultimately deal with so long as it does not address the merits of specific legislation.
26 C.F.R. §56.4911-2(c)(2)
- Regulatory and
- administrative issues: Communication with governmental officials or employees on non-legislative (i.e. administrative) matters such as rulemaking. 26 C.F.R. §56.4911-2(d)(2)(E)
-

Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Why is this important?
- Sect. 501(c)3 organizations will lose their exempt status if lobbying activities become a substantial part of their overall activities.



Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Substantial part test
 - The IRS has not defined “substantial part,” but all of the facts and circumstances will be analyzed including the importance of the lobbying effort to the organization, the time and effort of the organization in lobbying activities, the frequency of the activities and the degree of attention of the leadership of the organization to these activities.

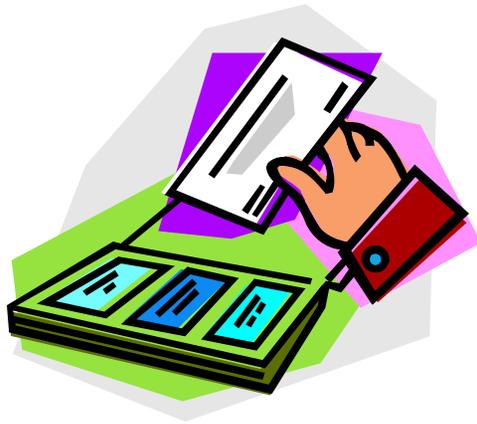


Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Substantial part test
 - One approach is to calculate the percentage of time, money and/or effort that the organization devotes to lobbying.
 - The 6th Circuit has held that an organization that spend less than 5% of its time and effort on lobbying activities was not devoting “a substantial part” of its activities to lobbying. *Seasongood v. Comm’r*, 227 F.2d 907(6th Cir. 1995)



Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)



- Expenditure test
 - 501(h) election
 - Form 5768
 - Form 990

Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Other non-profit organizations
- Tax-exempt organizations other than 501(c)3 entities have the flexibility to engage in lobbying provided that such activity furthers the organization's exempt purpose. The substantial part test does not apply.



Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Other non-profit organizations



- Lobbying expenditures are not deductible as a business expense.

- Organizations that collect dues that may otherwise be deductible as a business expense must disclose the amount of dues that are used for lobbying.

Tax Implications Of Lobbying For Non-Profit Organizations (Cont.)

- Practical tips
 - Be thoughtful about the activities your organization chooses to get involved in (don't "lobby" by mistake)
 - Consider whether the 501(h) election is right for you



Matthew Sanderson, Caplin & Drysdale

**RULES ON GIFTS AND TRIPS
SPONSORED BY 501(C)6S**

Congressional Ethics Rules

- An LDA-registered organization and employees acting on its behalf may not give anything of value to members of Congress or congressional staff, unless the item qualifies for exception.
- Exceptions to the congressional gift prohibition include:
 - Non-meal food and refreshments of nominal value offered at a reception or a business meeting (e.g., hors d'oeuvres and drinks)
 - Free attendance at political events, charity events, and dinners or conferences that meet specified criteria
 - “Widely attended event”: (1) expect 25 or more non-congressional attendees; (2) attendees are a “range of persons”; (3) event sponsor sends invitation; (4) consistent with official duties
 - Certain meal and local transportation costs for a non-recurring facility visit by a House member/staffer outside of Washington
 - Items of little intrinsic value (e.g., greeting cards, baseball caps)
 - Informational materials

Congressional Ethics Rules (Cont.)

- Privately sponsored travel for congressional members and personnel
 - Congressional personnel may accept airfare, local transportation, food and lodging costs from a private source if: (1) travel is pre-approved by appropriate Ethics Committee; (2) restrictions on lobbyist accompaniment/involvement are followed; (3) trip occurs outside D.C. Metro area; (4) trip serves an official purpose
 - Trip is limited to one day (excluding travel/overnight stay) if trip sponsor employs a lobbyist; otherwise, trip in continental U.S. can last up to 96 hours.
 - Exception to one-day rule for lobbyist employers: Sponsored by 501(c)(3) organizations, so long as a lobbyist does not accompany the member *at any point* throughout the trip

Federal Executive Branch Ethics Rules

- Obama administration Appointees
 - An LDA-registered company and employees acting on its behalf may not give anything of value to Obama administration appointees, unless the item qualifies for exception.
 - Exceptions to the gift prohibition include:
 - Modest non-meal food and refreshments (e.g., coffee, donuts, soft drinks)
 - Items with little intrinsic value that are displayed (e.g., plaques)
- Non-appointed “career” personnel
 - Organization may give items \$20 or less/occasion, \$50 or less/ year
 - Exceptions to the gift limit include:
 - Attendance at “widely attended gatherings” pre-approved by agency
 - Modest non-meal food and refreshments (e.g., coffee, donuts, soft drinks)
 - Items with little intrinsic value that are displayed (e.g., plaques)
 - Awards and honorary degrees
- Special status for 501(c)(3) Organizations