

T E N E N B A U M

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L A W G R O U P P L L C

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***Staying Out of Hot Water: The Rules of
the Road for Lobbying and Political
Activity by 501(c)(3) Blood Centers***

America's Blood Centers

501(c)(3) Lobbying Limits

Two Alternative Tests

1. “No Substantial Part” Test:
 - No substantial part of an organization’s activities may be lobbying
 - This is the default test
 - Unclear limits, definition, and the penalty for exceeding the limit is the revocation of tax exemption
2. 501(h) Expenditure Test:
 - ~~Clear dollar-based limits~~
 - Clear definitions of lobbying
 - Direct + Grassroots lobbying
 - Penalty is a tax on the excess lobbying expenditures
 - Requires one-time election using IRS Form 5768



501(h) Legislative Lobbying Limits

- Calculate the organization's total exempt purposes expenditures (how much the organization spends during the tax year, subject to some adjustments)
- Overall Lobbying Limit is:
 - 20% of first \$500,000
 - 15% of next \$500,000
 - 10% of next \$500,000
 - 5% of remainder
- Grassroots lobbying limit is 25% of overall lobbying limit



What is Legislative Lobbying?

Direct Lobbying Definition:

A **Communication** +

That **Expresses a View** +

On **Specific Legislation** +

To a **Legislator** =

Direct Lobbying

Specific Legislation

Action by a legislature, but more than just legislation that has been introduced...

- A bill (e.g., H.R. 7, S. 42)
- Proposed legislation (e.g., model bills)
- Draft amendments
- Specific legislative policy proposals
- Congressional resolutions
- Treaties requiring Senate ratification
- Judicial and executive nominees

Specific Legislative Policy Proposals

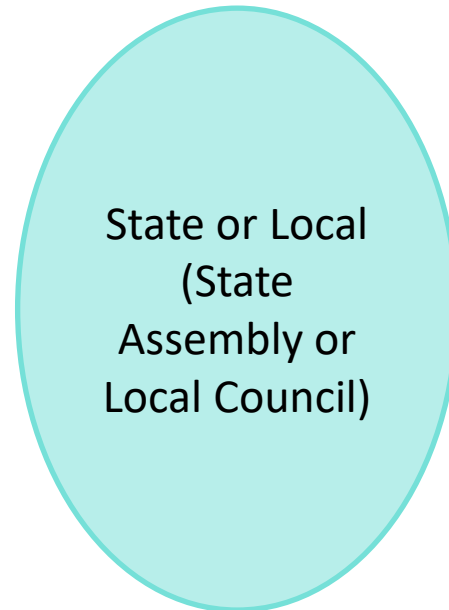
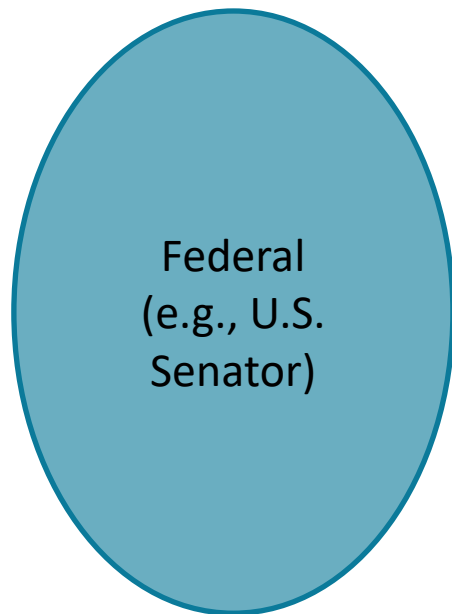
- Policy proposals that are specific enough to enable a legislator to reasonably know the legislation necessary to enact such a proposal, for example:
 - “Congressional action to provide Dreamers with a pathway to citizenship as part of comprehensive immigration reform.”
- Policy proposals that require legislation to implement, for example:
 - Anything related to increasing/decreasing federal spending or appropriations
 - “Lower taxes for the middle class.”

Not Specific Legislation

- Administrative rules
- Court opinions
- Agency decisions
- Executive orders
- Private (non-government) actions

Who is a Legislator?

- A member of a legislative body or their staff



Who is a Legislator?

- Executive Branch Employee only if:
 - The person is in a position to influence the formulation of legislation and
 - The primary purpose of the communication is to influence legislation

What is Legislative Lobbying?

Direct Lobbying Definition:

A **Communication** +

That **Expresses a View** +

On **Specific Legislation** +

To a **Legislator** =

Direct Lobbying

Grassroots Lobbying Definition:

A **Communication** +

That **Expresses a View** +

On **Specific Legislation** +

To the **General Public** +

With a **Call to Action** =

Grassroots Lobbying

Call to Action

- Urging people to contact their legislator
- Providing contact information for a legislator
- Providing a postcard, petition, web link, or other means to contact a legislator
- Identifying legislators who are:
 - On a relevant committee
 - Undecided on legislation
 - Opposed to your view
 - Representing the reader

Generally, if there is no call to action, there is no grassroots lobbying

Special Rule: Paid Mass Media Advertising

- A paid advertisement in Mass Media that does not have the elements of grassroots lobbying may still be grassroots lobbying if it is:

A **Communication** +

In **Mass Media** +

That appears within **two weeks** of a legislative vote on a **Highly Publicized** piece of **Legislation** +

That **Reflects a View** on the **General Subject** of the **Legislation** +

EITHER: +

- Refers to the **Legislation**, or
- Encourages the **Public** to contact **Legislators** on the **General Subject** of the **Legislation** =

Grassroots Lobbying

Mass Media includes TV, radio, billboards, magazines, or newspapers, but NOT the Internet (yet)

Legislation is **Highly Publicized** when it receives frequent media coverage during the two weeks prior to the vote

Special Rule: Subsequent Use



- However, there are two “safe harbors” that communications may take advantage of

Special Rule: Subsequent Use

Primary Purpose:

Non-lobbying
distribution at least as
great as subsequent
grassroots lobbying
use

or

Timing:

Original materials
were paid for at least
six months prior to
the grassroots
lobbying use

Lobbying Exception: Nonpartisan Analysis

Full title: Nonpartisan Analysis, Study, or Research Exception

To qualify, the work:

- Must contain a “full and fair” discussion of the issue
 - OK to advocate a position provided the information included is sufficient for an individual to form an independent conclusion
- Must be made widely available to the general public, a segment of the general public, or to governmental bodies or employees
 - May not be distributed just to those on one side of the issue
- May not contain a direct call to action

Call to Action

- Urging people to contact their legislator
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Generally, if there is no call to action, there is no grassroots lobbying

Lobbying Exception: Request for Technical Assistance

- Written request from a government body, committee or subdivision (cannot be from an individual member or official)
- Request must be issued before technical assistance given
- Response must provide the assistance requested (can't be off topic)
- Response (materials or testimony) must be presented to all members of the body

This exception does not apply to grassroots lobbying

Lobbying Exception: Self-Defense

- Responding to legislation that affects the organization's:
 - existence
 - powers and duties
 - tax-exempt status
 - tax deductibility of contributions
- This exception is rarely relevant

This exception does not apply to grassroots lobbying; it also does not apply to government funding decisions

Recordkeeping

No Federal Funds May Be Used for Lobbying

Expenses

Three general categories of expenses:

- Staff costs (including payroll taxes and benefits)
- Direct costs (e.g., outside lobbyist fees, printing, travel)
- Overhead costs and similar shared costs (e.g., rent, support staff)

Recordkeeping

- Timesheets are key
 - Programmatic employees will report direct, grassroots, or non-lobbying time and expenses
 - Administrative functions (accounting, HR) don't need to track (but cost allocation needs to be made)
- Invoices
- Receipts

Recordkeeping: What to Count

- Include time spent on legislative lobbying communication plus planning, research (e.g., message polling), bill tracking, etc. done to prepare/support the communication
- Time spent supporting other organizations' legislative lobbying (e.g., coalitions)
- Expenses related to the lobbying communication plus planning and research
- Grants made for legislative lobbying activity
- Overhead costs

Recordkeeping: What Not to Count

- General background research not preparing any particular message
- Meetings or trainings that accomplish their own substantive goal (e.g., education)
- Other costs with a substantial non-lobbying use

Political Campaign Activity

501(c)(3) Political Campaign Activity

IMPORTANTLY:

- 501(c)(3)s may not “participate in or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office”
- 501(c)(3)s may not support or oppose candidates for public office or a particular political party.

Common 501(c)(3) Activities that Carry Tax-Exemption-Related Risk

- Certain issue advocacy if the issues are the same or similar to those being debated by the candidates
- Voter registration and “get-out-the-vote” (GOTV) activities
- Candidate outreach and education
- Hosting candidates at events
- Hosting a public-facing event involving candidates such as a debate or candidate forum

“Facts and Circumstances”

- The IRS will evaluate whether a communication is political campaign activity based on all of the “Facts and Circumstances”

Good Facts

- No reference to candidate or elections
- External factor driving timing
- Broad range of issues
- History of similar work on issue

Bad Facts

- Reference to candidate
- Timing motivated by election
- Politically motivated targeting
- Compare preferred position to candidate position
- “Wedge issues”

Issue Advocacy

Common Political Activity Risks:

- Comparing an organization's preferred position to a candidate's position
- Advocacy on issues known to divide candidates for a particular office
- Timing is close to an election
 - Unless driven by external event outside of the control of the organization (e.g., a legislative vote)

Issue Advocacy

Factors to consider:

- Does the statement refer to a candidate?
- Does it express approval or disapproval for the candidate's actions or positions?
- Is it close in time to the election?
- Does it refer to voting or the election?
- Has the issue been raised as one distinguishing the candidates in a race?
- Is the communication part of an ongoing series on the same issue made independent of timing of elections?
- Is timing and candidate reference related to non-electoral event?

Issue Advocacy

Other factors:

- Has the organization historically worked on the issue?
 - Does it relate to your core mission?
- Are you responding to an external event?
 - A candidate mentioned you or your key issue in a statement?
 - The press called you for a comment?
- Is the audience targeted the relevant electorate?
- Why this candidate?
 - Reasonable, objective, non-electoral targeting criteria

Hosting Events with Candidates

- There are no legal issues when hosting elected officials or having press events with elected officials at a blood center, unless the elected official is also a candidate running for reelection. The IRS defines a “candidate” as “any individual who offers [themselves], or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local.”
- The purpose of any event at a blood center that a candidate sponsors or is invited to should be solely to raise awareness and support the mission of the blood center.
- A candidate may appear at an event in a non-candidate capacity – such as current office holders, blood donors, or supporters who also happen to be candidates – or in their capacity as a candidate for public office.
- If a candidate is invited to a blood center event in a non-candidate capacity, ensure there is a reason for the candidate to attend the event, other than their candidacy, such as they are a current office holder, a blood center donor, sponsor, or supporter.

Hosting Events with Candidates

To avoid the appearance of expressing or implying a bias for a candidate appearing at an event or hosting an event at a blood center in their capacity as a candidate:

- If a candidate is invited to or hosting an event at a blood center in their capacity as a candidate, all other viable candidates seeking the same office must be provided an equal opportunity either by extending an invitation to the same event or offering to hold a comparable candidate/political party event. For example, if a candidate is being invited to speak at a blood center event in the capacity of a candidate, then all other viable candidates seeking the same office must also be invited to speak at the same or a comparable event. If a candidate or political party is hosting a blood drive, all other viable candidates seeking the same office should be offered the same opportunity. The candidates need not accept the offers/invitations, but the offers/invitations must be made.

Hosting Events with Candidates

- At the event:
 - No mention of the guest's candidacy or the election may be made.
 - No political fundraising may take place.
- On any invitation to a candidate, or in written materials provided to a candidate hosting an event, alert the candidate(s) that political campaign activity is strictly prohibited. The invitation/written materials should explain the blood center's limitations as a 501(c)(3) organization. For example:

“As a reminder, ABC Blood Center is exempt from federal income taxation under section 501(c)(3) of the federal tax code and the law strictly prohibits any candidate electioneering. Please refrain from any and all mention of the election or the campaign during this event. While media may be in attendance, the purpose of this event is to provide information about the blood center's work, highlight its achievements, and encourage others to donate blood.”

Hosting Events with Candidates

- If media attend the event, the blood center should have messaging ready to respond to questions about the candidacy or political party of a visiting office holder, such as:
“ABC Blood Center is a 501(c)(3) tax-exempt organization dedicated to public health, including encouraging blood donation. Today’s visit is about the importance of donating blood and encouraging others to do so. ABC Blood Center cannot and does not take positions on, or provide any support or opposition to, candidates for public office.”
- The closer in time to an election an event with candidates takes place, the higher the risk the IRS will consider such activity to be prohibited political campaign activity. To be safe, consider implementing a policy that candidates may not hold or be invited to blood center events in a candidate capacity within sixty (60) days before an election.
- Seek legal advice before making a public statement that mentions a candidate, including “thank yous” or other 501(c)(3)-permissible statements, within thirty (30) days of a primary election and within sixty (60) days of a general election. Although such communications may be 501(c)(3)-permissible, they may require a disclaimer under the Federal Election Campaign Act.

Questions?

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