



# Legal Minute

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## Inside the Sausage Factory: Lobbying and Political Activity by Nonprofits

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Federal law limits the extent to which a tax-exempt nonprofit may participate in political activity. There are two main categories of restricted political activity: supporting or opposing a candidate for public office and lobbying. A 501(c)(3) tax-exempt organization must ensure that no *substantial part* of its activities may be the carrying on of propaganda or otherwise *attempting to influence legislation*, and avoid prohibited campaign activity. Despite these limitations, a nonprofit's voice should be heard in the public policy debate on issues that affect a nonprofit's clients.

### Can a nonprofit endorse a candidate or participate in any political campaign on behalf of a candidate?

**No.** Nonprofit directors and staff must not support or oppose a candidate for public office on behalf of the nonprofit. A candidate includes anyone running for an elective public office, even if the race is nonpartisan.

### What is a nonprofit permitted to do during an electoral campaign?

A nonprofit may:

- organize nonpartisan voter registration or voter education drives;
- publish voting records on certain issues as long as there is no intent to target an election campaign;
- invite a candidate to speak as long as all the opposing candidates are also invited to speak;
- prepare broad legislative scorecards as long as the publication does not coincide with an election; or
- distribute scorecards to its members on a narrower range of issues. A nonprofit can state a position on these issues if the scorecards do not include a call to action.

### What is lobbying?

Lobbying is communication intended to influence *specific* legislation in *any legislative body* such as a city council, state legislature, congress, or an administrative agency in its legislative capacity. Lobbying by nonprofit directors or staff includes: (1) writing a letter to a Congressman expressing the nonprofit's position on a particular bill; (2) visiting with legislative staff regarding the nonprofit's legislative agenda; and (3) speaking at a statewide conference and encouraging the audience to vote in favor of a constitutional amendment.

### How can a nonprofit lobby legally?

The IRS has **two tests** to measure whether a nonprofit's lobbying activity is at a permissible level: the *Substantial Part Test* and the *501(b) Expenditure Test*.

**Substantial Part Test.** Whether a nonprofit "attempts to influence legislation" as a "substantial part" of its activities is based upon a variety of factors, including: (1) time devoted by staff and volunteers; (2) expenditures; and (3) the success of the activity. The guidelines under this test are somewhat unclear. There are no suggested expenditure levels, though a nonprofit is generally advised not to spend over 5% of its budget on lobbying. Penalties include: (1) a 5% excise tax on excess spending; (2) possible loss of exemption status; and (3) a tax on managers who agree to the excess spending on lobbying activities.

**501(h) Expenditure Test.** Under this more generous test, a nonprofit can spend resources on lobbying without jeopardizing its tax-exempt status if it makes a 501(h) election and does not exceed the expenditure test. Under the 501(h) election, the following are permissible limits of expenditures:

<b><u>Total Annual Exempt Purpose Expenditures</u></b>	<b><u>Percent that May be Spent on Lobbying</u></b>
\$500,000 or less	20%
\$500,000-\$1 million	\$100,000 + 15% of budget over \$500,000
\$1 million-\$1.5 million	\$175,000 + 10% of budget over \$1 million
\$1.5 million and over	\$224,000 + 5% of budget over \$1.5 million

Under the 501(h) Expenditure Test, total lobbying expenditures cannot exceed \$1 million and only 25% of lobbying expenditures can be spent on grassroots lobbying.

The 501(h) Expenditure Test recognize two types of lobbying: *grassroots lobbying* and *direct lobbying*. Grassroots lobbying is communication aimed directly at the general public that refers to specific legislation, reflects the nonprofit's view, and contains a call to action. Direct lobbying is such communication aimed directly at either a member of a legislative body (or a member's employee) or a nonprofit's own members. Other types of advocacy do not count toward a nonprofit's lobbying expenditures under either the 501(h) Expenditure Test or the Substantial Part Test.

## **How does a nonprofit “make the election?”**

To make a 501(h) election, an eligible nonprofit's board must vote to elect and then file IRS Form 5768. Form 5768 must be filed by December 31<sup>st</sup> of the year in which the lobbying activity occurred and will remain in effect until revoked.

## **Are there any registration requirements to lobby in Texas?**

**Yes.** A nonprofit that spends more than \$500 in a calendar quarter on lobbying expenses on *state level* legislative or administrative actions must register with the Texas Ethics Commission. The fee is \$100 for 501(c)(3) organizations. In addition, a person who individually receives more than \$1,000 or spends more than \$500 must register.

Certain Texas cities also have their own lobbyist registration requirements. A nonprofit should contact the city attorney's office in all cities in which it plans to lobby for information on local registration.

## **Does lobbying affect a nonprofit's eligibility for grants from state and federal agencies or private foundations?**

**Sometimes.** Nonprofits that receive state or federal funds are prohibited from using those funds for lobbying. In addition, some state agencies may require a nonprofit to adopt a conflict of interest policy with rules governing lobbying activities. Nonprofits that engage in lobbying activity may receive funds from private foundations if those funds are donated as operating or project support and are *not* earmarked for lobbying purposes. Nonprofits may also receive donations from private foundations for nonpartisan research on legislative issues.

## **Are there any reporting requirements for nonprofits that choose to lobby?**

Yes. Nonprofits that lobby are required to report lobbying activities or expenditures on the supplementary Schedule A to IRS Form 990. Nonprofits under the default Substantial Part Test must report whether they have attempted to influence legislation, and if yes, must provide a “detailed description” of lobbying activities. Nonprofits that have made a 501(h) Expenditure Test election must report (1) total lobbying expenditures; (2) total exempt purpose expenditures; (3) nontaxable lobbying limit; and (4) nontaxable grassroots lobbying limit. Due to these and other requirements, nonprofits must keep track of time and money spent on lobbying activities.

## **Other useful resources:**

- <http://www.clpi.org>: Charity Lobbying in the Public Interest; Nonprofit Lobbying Guide
- <http://www.afj.org>: Alliance for Justice's Nonprofit Advocacy Project; multiple lobbying guidebooks

Sources: Alliance for Justice, “Worry-Free Lobbying for Nonprofits;” and Center for Non-profit Corporations, “Non-profit Organizations Can Lobby.”