

# NONPROFITS AND POLITICS: SOME MYTHS AND FAQs

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## **Introduction**

Leaders of many nonprofits have fears based on misconceptions about tax laws and other laws that keep them from attempting to influence public policy. Their inaction works to the disadvantage of the country as a whole. This note addresses some of those misconceptions.

The main point of this FAQ is that your 501(c)(3) nonprofit can be doing lobbying as well as other advocacy work, and really should be doing advocacy if you have any views at all on public policy. And if you are doing any useful work as a nonprofit, you really should be developing views on the many public policies that affect your work.

There are legal limits on what share of your expenditures can go to lobbying. Another important point of this FAQ is that many or even most forms of advocacy are NOT lobbying and are NOT limited by tax laws.

**WARNING:** This FAQ is not a substitute for specific legal advice.

**CAUTION:** most lawyers are not very knowledgeable in this highly specialized area of law, and unfortunately many of them are not aware they are not very knowledgeable. Accountants may be even less knowledgeable. You definitely should find a lawyer who will help you and not hinder you from lobbying. And in particular, you should consult a specialist and not allow lawyers who happen to be on your Board of Directors to advise you on this matter. (Even if they really do specialize in non-profit tax law, it is a bad practice for voting Board members to provide legal counsel to the Board.)

## **Types of nonprofits**

Q. Nonprofits and 501(c)(3)s are the same thing, right?

A. **WRONG.** 501(c)(3)s differ from all other nonprofits in two very important ways:

- (1) Contributions to 501(c)(3)s (but not to other nonprofits) can be deducted from income taxes
- (2) 501(c)(3)'s are subjected to different, and stronger, limits on political participation.

Q. What other kinds of nonprofits are there, and how do they differ from each other?

A. There are too many kinds to describe here. All of them (but not their employees) are exempt from paying corporate, partnership, or individual income taxes. Most of them are exempt from various state-level taxes. The US tax code lists some 34 different types that can be officially recognized by the IRS. They differ mainly in the purposes they serve and the kinds of interest groups they support. Another type not listed in IRS regulations is a simple unincorporated association.

## **Rules on 501(c)(3)s and lobbying**

Q. 501(c)(3)s can't lobby, right?

A. WRONG. Congress WANTS 501(c)(3) nonprofits to lobby. However, there are limits on the amount of lobbying you can do.

Q. So all 501(c)(3)s *can* lobby?

A. WRONG. There are two kinds of 501(c)(3)s. "Charities" can lobby, "foundations" can't.

Q. Is my organization a charity or a foundation?

A. It's complicated, but if you are reading this and don't know, then you are probably a charity. And if you have a choice, you probably ought to become a charity. The main condition is that charities are required to get less than two-thirds of their support from a trust fund or endowment. See your attorney.

Q. Money from a foundation can't be used for lobbying, right?

A. WRONG. A charity can use a foundation grant for lobbying, unless the foundation forbids it. Many foundations believe they have to forbid it, but that's wrong.

Many foundations forbid using their grants for lobbying out of timidity. If you get a chance, you should explain to them how wrong this is, because it distorts the political landscape. Many for-profits lobby freely in support of their pure and narrow self-interest, while many nonprofits are afraid to lobby in favor of the public interest.

Q. What is lobbying?

A. Lobbying is any *money* spent on communication with a legislator expressing a view about specific legislation. That includes phone calls or visits with legislators or their staffers, or with other officials when they are formulating legislation. It also includes money spent on "grassroots lobbying" as defined below. It also includes indirect expenditures for the share of office space, etc. that supports those communications.

Q. So if we support reform in general, that's lobbying, right?

A. WRONG. That's education. It's not lobbying until you support or oppose a particular bill or help draft a bill. The following forms of advocacy are generally NOT counted as lobbying:

- Organizing
- Public Education
- Educating Legislators
- Nonpartisan Voter Education
- Getting to Know Legislators
- Educational Conferences
- Research
- Organizing a Rally on a General Topic
- Training
- Regulatory Efforts
- Litigation.

Q. How much lobbying is "too much" for the IRS?

A. That depends on choices you make as a 501(c)(3) about how to manage your lobbying expenses and equally importantly, on how you report them. There are three general approaches you can choose to follow:

a. Take no special action (referred to as "declining the 501(h) election"). Then you are subject to a vague test: lobbying expenditures should be an "insubstantial part" of your expenditures. No one knows what that means, but some attorneys say an amount equaling 5% of your expenditures or less with a total less than \$.5 million would probably be "insubstantial."

b. Elect the special "501(h)" provision by filing a form (5768). Then you can spend up to 20% of the first half million of your expenditures on lobbying (and declining percentages thereafter, up to a total of \$1 million in lobbying expenses). However you have to file a special report each year with your form 990.

c. Set up a parallel 501(c)(4) organization with its own funding sources. The 501(c)(4) organization can do as much lobbying as it wants. The two organizations can be very closely linked, but you need a lawyer who understands these things to help you get the details right.

Q. What are the pros and cons?

A. As follows:

a. "Declining the election" is a good choice if you expend less than \$25,000 a year *and* spend less than, say, 10% of that money on lobbying. Since you generally don't have to file an income tax return (form 990) unless you expend over \$25,000, declining the election keeps you from having to file any forms at all and keeps you under the IRS radar, which is probably a good thing. It also keeps your operating information out of public databases like Guidestar, which might or might not be a good thing, depending on your organizational strategies.

b. "Taking the 501(h) election" is usually a good idea if you plan to do much lobbying. It makes you completely safe from IRS action as long as you stay under the limit (of up to 20%) and file an honest 990. And even if you go over 20%, in most cases you are protected from any penalties other than a tax on the excess expenditure. Also, you are probably *less* likely to be audited if you take the 501(h) election than if you don't.

c. "Taking the election" *and also* forming a 501(c)(4) is a good idea if you want to do substantial amounts of lobbying.

Q. Can we shift between taking the 501(h) election and declining it?

A. Yes, if you don't do it very often.

Q. Why should there be any limits at all on lobbying by 501(c)(3)s?

A. 501(c)(3)s receive special tax privileges because they are expected to give something back to society. Their lobbying should grow naturally out of what they learn from doing good works. If

they just lobbied without doing good works, their advice to government would be based on ideology rather than on facts.

## **Special rules on grassroots and volunteer lobbying**

Q. What is “grassroots lobbying”?

A. Grassroots lobbying refers to money spent on communication with the general public expressing a view on specific legislation, coupled with a call to action.

Q. Why is grassroots lobbying important?

A. It counts as part of your 20% expenditure limit. It is also subject to a separate limit of its own: under the 501(h) election, you cannot spend more than 5% of your money on grassroots lobbying.

Q. Does communication with our members count as grassroots lobbying?

A. No.

Q. If volunteers do unpaid lobbying, that counts as part of our lobbying, right?

A. WRONG. You can have as much unpaid lobbying done by volunteers as you want. (Staff time spent organizing it counts as a lobbying expense, however.) Also, money spent by volunteers does not count. So if a volunteer provides your lobbying materials or transportation, it doesn't count.

## **Rules on 501(c)(3)s and partisan politics**

Q. Can a 501(c)(3) engage in partisan activities?

A. ABSOLUTELY NOT.

Q. What does that mean we can't do?

A. You cannot endorse candidates. You cannot endorse political parties. You cannot support or contribute to candidates or political parties. You cannot provide services to a candidate you do not make available on the same terms to competing candidates.

Q. So what about candidate forums and candidate questionnaires?

A. Forums are great! There are no limits as long as you don't appear to endorse candidates or parties.

Q. What about scorecards?

Scorecards are OK as long as they are not based on votes on a single bill and do not lead to specific or implied endorsements or rankings of candidates.

Q. What about speeches by individual candidates?

A. Speeches sponsored by your organization look like endorsements if they occur during a campaign or are restricted to a particular candidate or party. Otherwise they are usually fine.

Q. What about public perception?

A. If you give a clear public perception that you are endorsing a candidate or party, you are probably violating the law.

## **Fear of audits or penalties**

Q. I'm afraid of being audited. Should I be?

A. NO, unless you are either lazy about filing your 990 or are cheating. First, audits are very rare. Second, adverse IRS action after a nonprofit audit is even rarer. Third, significant penalties tend to be rarer still.

HOWEVER there have been a tiny number of cases (out of some 1.4 million recognized 501(c)(3)s) where the IRS acted politically in investigating (or not investigating) a particular 501(c)(3).<sup>2</sup> Apparently, no significant penalties have ever resulted from such cases. Obviously being investigated would be a stressful event, but your organization can survive and perhaps even benefit from the publicity if you hang tough.

The main point is that these cases are about as rare as being bombed or shot at by opposition terrorists. If you really care about your positions you ought to be able to pull together enough courage to live with the low level risk of terrorist attacks or IRS harassment; events which are less likely than having a serious automobile accident while driving to a lobbying appointment.

Q. I'm afraid of being reported to the IRS because of our advocacy activities. Should I be?

A. If you are politically effective, you will make enemies. There is a very good chance that some of your enemies will look into the possibility of reporting you. If you have done your homework and made your reports most of them will back off. A very few of them might go through it. If you have done your homework and made your reports, the IRS will normally shrug it off; but see above.

Q. What about the other way around: if an opposition 501(c)(3) gets clearly out of line and I complain, will the IRS do anything about it?

A. It's very hard to get the IRS to take action, but they might. If you complain to the IRS and nothing happens, you might be better off trying to promote an inquiry to the IRS, or even a Congressional investigation, through a friendly Congressperson.

Q. Are there limits on advocacy other than the income tax code?

A. Yes. You generally cannot use money from federal grants to lobby. There have been efforts by the executive branch to prevent recipients of federal grants from doing lobbying with their own funds from other sources, but Congress has squelched that. Also, you may have to file

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<sup>2</sup> See e.g. Rick Cohen, "A Politicized Internal Revenue Service Examining Progressive Nonprofits," [http://www.dmiblog.com/archives/2006/05/a\\_politicized\\_internal\\_revenue.html](http://www.dmiblog.com/archives/2006/05/a_politicized_internal_revenue.html).

disclosures of your federal lobbying under the Federal Lobbying Disclosure Act, and disclose your state lobbying under the corresponding state-level acts. (Note that these laws use somewhat different definitions of lobbying than the IRS uses.)

## **Rules on other kinds of nonprofits**

Q. Is there anything that nonprofits in general can't do?

A. They can't pay profits or dividends to owners or partners or employees.

Q. What *can* you do in a nonprofit?

A. You can do almost anything you can do as an individual or for-profit corporation except share profits--but you may have to use the right kind of nonprofit. See your attorney.

Q. So why use a nonprofit?

A. Mainly, so you can incorporate (which protects you as an individual from facing lawsuits) without paying income taxes.

Q. What about payroll taxes and other taxes?

A. You generally may be subject to payroll taxes and income tax withholding and sales taxes and property taxes, but rules vary by tax, by state, and by type of nonprofit. Consult an accountant or attorney.

Q. Can my 501(c)(3) give money to my 501(c)(4)?

A. Yes, but only to do things the 501(c)(3) can legally do.

Q. What about vice versa?

A. There are usually no limits on giving to a 501(c)(3).

## **Some small print on lobbying rules**

Q. Should we change our membership rules so we can minimize exposure to the 5% limit on grassroots lobbying?

A. No. Your membership rules don't matter. What is important is that any communication with persons who give more than "nominal" amounts of time or money to your organization is exempt.

Q. What counts as a "call to action"?

A. Four kinds of things are considered calls to action:

- a. Statements such as "contact your legislator".
- b. Contact information for legislators
- c. Listed names of legislators

d. Contact mechanisms, such as a post card or a check box on website or a free fax number. If your communication does not include any of these things, it is not grassroots lobbying.

Q. Does testimony to a legislative committee count as lobbying?

A. It is not lobbying if you have an official letter of invitation from the Committee. It is not lobbying if you not take a position on specific legislation. Otherwise it is lobbying.

Q. What counts as “specific legislation”?

A. A particular bill that has been introduced, or is about to be introduced; but also a bill that is planned but not yet written; and even a bill that is partially but not fully fleshed out. General policy considerations usually do not constitute “specific legislation”.

Q. Who counts as a legislator?

A. An elected congressperson or state representative or city council person, or their staffers. Also, executive branch officials in their role as drafters of specific proposed legislation. Special purpose boards such as school boards and zoning boards and regulatory boards are not legislators. Courts are not legislators.

Q. Does expenditure for influencing a referendum or initiative count as lobbying?

A. Yes, but only after the initiative petitions begin to circulate.

Q. Does expenditure for influencing a referendum or initiative count as grassroots lobbying?

A. No. The voters are viewed as themselves acting as “legislators” rather than as “general public.”