

Patterson Belknap Webb & Tyler LLP

Lobbying and Political Activity

Laura E. Butzel
Tomer J. Inbar
Megan E. Bell

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CLE Overview

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- II. Lobbying Activities
 - A. Internal Revenue Code
 - B. Lobbying Disclosure Act
 - C. State Lobbying Considerations
- III. Political Activities

Lobbying Activities

U.S. Federal Income Tax Rules Governing Lobbying Activities

Federal Tax Limitations on Lobbying by Section 501(c)(3) Organizations

- Under Section 501(c)(3), public charities may lobby so long as lobbying activities are insubstantial part of organization's overall activities
- Lobbying is any attempt to influence legislation, whether domestic or foreign
- Basic considerations
 - What activities are considered "lobbying" and
 - When are those activities considered "substantial"

What is Legislation?

- Legislation is any action by any legislative body
 - Includes
 - Pending bill
 - Legislative proposal that organization supports or opposes
 - Senate confirmation process of nominees
 - Treaties (from the time President's representative begins to negotiate with parties to proposed treaty)
 - Does not include administrative matters or rulemaking
- Legislation must be specific (but can be inchoate)
 - Includes specific legislative proposal or model legislation that organization either supports or opposes
 - Does not have to already be introduced or pending

What is a Legislative Body?

- Includes Congress, state legislatures, local councils, any similar body
- Does not include executive, judicial, or administrative bodies (example: agency rulemaking)
- In some cases, voters = legislative body
 - Ballot initiatives
 - Referenda
 - Constitutional amendment

What is “Action”?

- Action is
 - The introduction, amendment, enactment, defeat, or repeal
of
 - Bills, resolutions, or similar items

Types of IRC Lobbying Activities: Direct and Grassroots

- Two types of activities that are considered “attempts to influence” legislation under IRC
 - Direct Lobbying
 - Grassroots Lobbying

Types of IRC Lobbying: Direct Lobbying

- Direct lobbying is attempt to influence legislation through communication with
 - Member or staff of legislative body or
 - Any government official or employee who may participate in formulation of legislation
- The communication must
 - Refer to specific legislation and
 - Reflect view on such legislation

Types of IRC Lobbying: Grassroots Lobbying

- Grassroots lobbying is
 - Any attempt to influence legislation by communicating with public to urge them to contact members of legislative body to propose, support, or oppose legislation
- The communication must
 - Refer to specific legislation
 - Reflect a view on legislation and
 - Include direct or indirect “call to action” that encourages recipient to take action with respect to legislation

Grassroots Lobbying: Direct Call to Action

- Communication includes direct “call to action” if it
 - Urges recipient to contact legislator, staffer, or other government employee who participates in formulation of legislation for principal purpose of influencing legislation
 - States address, telephone number, or similar information for legislator or employee of legislative body
 - Provides petition or tear-off postcard for principal purpose of influencing legislation

Grassroots Lobbying: Indirect Call to Action

- Communication includes indirect “call to action” if it
 - Identifies one or more legislators who will vote on legislation as
 - opposed or undecided with respect to legislation
or
 - recipient’s member in legislature
or
 - member of committee or subcommittee that will consider legislation
- Does not include naming main sponsor(s) for purposes of identifying legislation

Grassroots Lobbying: Special Rules

Mass Media Exception

- Paid mass media advertisement involving highly publicized legislation will be presumed to be grassroots lobbying if it
 - Appears in mass media two weeks before vote of legislative body or committee thereof (but not subcommittee) on piece of highly publicized legislation
 - Reflects view on general subject of legislation and
 - Either refers to legislation or encourages public to communicate with legislators on general subject of such legislation
- Mass media includes television, radio, billboards, and general circulation newspapers and magazines

Grassroots Lobbying: Special Rules

Subsequent Use Rule

- Treats costs of materials that originally were not lobbying communications as grassroots lobbying in limited circumstances
- Materials will not be treated as grassroots lobbying communications if organization's primary purpose in preparing materials was not for use in lobbying
 - IRS will assume nonlobbying primary purpose if organization makes “substantial distribution” of materials in nonlobbying form either prior to or contemporaneous with lobbying distribution
 - If there is no such substantial nonlobbying distribution, IRS may treat as lobbying expenditures expenses made within six months of lobbying use

What Isn't IRC Lobbying: Nonpartisan Study, Analysis, and Research

- IRC Lobbying does not include conduct of nonpartisan analysis, study, or research if dissemination of such analysis does not advocate adoption of legislation to implement its findings
- Analysis may conclude that legislation is appropriate to achieve given objective, if it contains “sufficiently full and fair exposition of pertinent facts to enable public or individual to form independent opinion or conclusion”
 - Must not contain direct call to action

What Isn't IRC Lobbying: Nonpartisan Study, Analysis, and Research (cont'd)

- Product may lose qualification as nonpartisan analysis if it is disseminated to those interested in only one side of particular issue
- Broadcast or publication that is part of series will qualify for nonpartisan analysis exception even though it would not if considered on its own, if series, taken as whole, would qualify for this exception
- Activities that can fall under this exception include
 - Panels
 - Summaries
 - Reports

What Isn't IRC Lobbying: Technical Advice or Assistance

- IRC Lobbying does not include provision of technical advice to governmental body, committee, or subcommittee thereof in response to written request by such entity that is made available on bipartisan basis, such as at committee or subcommittee hearing
 - Must have written request from ranking majority or minority member
 - Results must be disseminated to members of both parties
- Exception does not apply to advice provided at request of individual legislator

What Isn't IRC Lobbying: Examinations of Broad Social, Economic, and Similar Problems

- IRC Lobbying does not include examinations of broad social, economic, and similar problems
- Where such examinations are directed to topics which are also subject of specific legislation, however, this exception does not permit references to such legislation or statements encouraging readers to take action with respect to such legislation

What Isn't IRC Lobbying: Self-Defense Exception

- IRC Lobbying does not include contacts with legislators about matters affecting an organization's existence, powers, duties, tax-exempt status, and deductibility of contributions
- Self-defense exception applies only to direct lobbying, not grassroots
- Self-defense exception does not apply to lobbying for/against programs of interest to organization

IRC Lobbying: International Activities

- IRC lobbying rules apply equally to domestic and international activities
- Requires asking whether there is action by a legislative body on specific legislation
- Country-focused lobbying
 - Identify the true legislative body (if any) of the country's government
- Intergovernmental organization-focused lobbying is more complex
 - Created in a number of different ways
 - *E.g.*, Charter, Treaty
 - Given specific powers and authority
 - Identify whether organization is dealing with a true legislative body

IRC Lobbying Restrictions: Substantial Part Test vs. Expenditure Test

- When are activities considered to be substantial?
- Two alternative tests for measuring substantiality
 - Substantial Part Test (facts and circumstances)
 - Expenditure Test (Section 501(h) election)

IRC Lobbying Restrictions: Substantial Part Test vs. Expenditure Test

Substantial Part Test

- Limited guidance re: what level of activities are considered substantial
- Definitional issues
- Measurement of activities
 - Includes expenditures
 - Direct costs, staff time, administrative and overhead expenses
 - Also includes non-expenditures
 - Volunteer time
 - Donated items and services

IRC Lobbying Restrictions: Substantial Part Test vs. Expenditure Test

- Expenditure Test: Section 501(h) election
- Bright-line rules
- Specific dollar limits on direct and grassroots lobbying

Expenditure Limits for Electing Public Charities		
Exempt Purpose Expenditures	Total Lobbying Nontaxable Amount	Grassroots Nontaxable Amount
Up to \$500,000	20% of exempt purpose expenditure	25% of total lobbying nontaxable amount
Over \$500,000 – \$1 million	\$100,000 + 15% of excess over \$500,000	\$25,000 + 3.75% of excess over \$500,000
Over \$1 million - \$1.5 million	\$175,000 + 10% of excess over \$1 million	\$43,750 + 2.5% of excess over \$1 million
Over \$1.5 million - \$17 million	\$225,000 + 5% of excess over \$1.5 million	\$56,250 + 1.25% of excess over \$1.5 million
Over \$17 million	\$1 million	\$250,000

- Ceiling of \$1 million for direct lobbying and \$250,000 for grassroots lobbying

Recordkeeping and Reporting of IRC Lobbying Expenditures

- Measurement of substantiality depends test
 - Under either test, include
 - Time and direct expenses attributable to IRC Lobbying activities and
 - Allocable portion of administrative and overhead expenses
- May use any reasonable allocation method
 - Daily time sheets not necessarily required
- Maintain records to substantiate

IRC Lobbying Rules and Private Foundation Grantmaking

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- Section 4945 effectively prohibits private foundations from engaging in any IRC lobbying activities
 - Private foundations cannot
 - Conduct lobbying activities directly
 - Make grants earmarked for lobbying activities
 - However – private foundations can make non-earmarked grants to public charities that conduct IRC lobbying activities
 - Two types of permissible private foundation grants
 - General support grant
 - Specific project grant

- General Support Grant
 - So long as grant is not earmarked for use in influencing legislation
- Specific Project Grant
 - Grant to public charity for specific project that involves lobbying activities
 - So long as
 - Grant is not earmarked for use in influencing legislation AND
 - Sum of all grants by the private foundation for the same year and same project is not greater than project budget amount for non-lobbying activities
- To ensure compliance with IRC lobbying rules, grant application for specific project must include what portion of the project budget will be expended for lobbying

The Lobbying Disclosure Act

- LDA purpose: to increase public disclosure of identity and general extent of efforts of paid lobbyists to influence federal legislative and executive branch officials
 - Emphasis is on disclosure and transparency
- Applies to private foundations and public charities that employ in-house “lobbyists” or hire outside “lobbyists” and “lobbying firms”
- Requires initial registration, quarterly reporting of lobbying activities, and semiannual disclosure of certain contributions
 - Reports are publicly available on searchable database
- Registration thresholds
 - Organization with employee who is “lobbyist” must register if total lobbying expenses expected to exceed \$11,500 during quarter
 - Lobbying firm must register and list organization as client if firm expects to receive more than \$3,000 from organization during quarter

State Lobbying Considerations

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- Often overlooked by organizations engaged in advocacy
 - Low threshold for registering, reporting
 - Broad definitions
 - State by State differences
 - Could have multiple filing obligations

Political Activities

Absolute Prohibition on Political Activities

- Section 501(c)(3) organizations may not “participate in, or intervene in. . . any political campaign on behalf of (or in opposition to) any candidate for public office”
- Failure to abide by restriction may result in
 - Revocation of tax-exempt status
 - Tax penalties

Political Campaign Intervention

- Few bright line rules
- IRS will look to all the “facts and circumstances”
- Key elements
 - Candidate
 - Someone who holds himself or herself, or is proposed by others, as contestant for public office
 - Need not actually be declared
 - Public Office
 - Created by statute, continuing, fixed term, oath of office

Political Campaign Intervention (cont'd)

- Intervention
 - Organizations may not
 - Endorse or oppose candidate
 - Rate candidate's fitness for office
 - Make contribution to candidate's campaign
 - Publicize candidate's endorsement of organization's position
 - Take any other action that has effect of promoting or opposing candidate
 - Organizations may
 - Engage in nonpartisan educational activities that are political in nature if in accordance with established rules

Permitted Activities: Nonpartisan Voter Education

- Nonpartisan Voter Education
 - Organizations may carry on nonpartisan, neutral voter education programs that
 - Are designed to educate the public and
 - Do not evidence bias for or against particular candidate

Permitted Activities: Speaking Engagements

- Speaking Engagements
 - Organizations may invite candidate to speak in capacity other than as candidate
 - Be careful to avoid prohibited political activity in
 - Wording of invitation
 - Publicizing event
 - Speaker/candidate's presentation
 - No Fundraising
 - As a practical matter, it can be difficult to avoid appearance of endorsing candidacy

Permitted Activities: Candidate Forums

Candidate Forums

- May invite candidates to speak at public forum, but must ensure that all legally qualified candidates seeking same office are offered equal opportunity to speak
- May not indicate support of or opposition to candidate
- Questions must be unbiased and forum should discuss broad array of topics of interest to public
- Each candidate must be given equal opportunity to present his or her views on issues discussed, and must not be asked to agree or disagree with positions or statements taken by the organization
- Moderator must play neutral role and not suggest approval or disapproval of candidates
- Moderator should expressly state that the forum is not endorsement of any candidate and all views expressed are those of particular candidates and not the organization

Permitted Activities: Candidate Education

- Candidate Education
 - May sponsor training programs designed to educate candidates about particular issues
 - These activities may not include strategy advice
 - Must be available to all candidates
 - Must be nonpartisan
 - Watch out for slippery slope

Individual Activities

- Individual political activities of staff & Board
 - Prohibition against political intervention does not apply to organization's staff or directors acting in individual or private capacities
 - Caution
 - Individuals may not utilize organization's financial resources, facilities, equipment, or personnel
 - Watch out for e-mails
 - Not on company time
 - Individuals must make clear that actions taken or statements made are theirs and not those of organization
- Also applies to staff and board members running for office
- Organization should enact policy to govern these types of activities

Issue Advocacy

- Intervention as result of link between issue, candidates, and election
- Factors to consider
 - Whether
 - Statement identifies candidate
 - Statement expresses approval of candidate
 - Statement makes reference to voting or election
 - Statement is delivered close in time to election
 - Issue distinguishes candidates
 - Statement is part of ongoing series of communications independent of election
 - Timing of communication related to non-electoral event

Practical Tips to Ensure Compliance

- Focus on issues, not candidates
 - Promoting issues relevant to organization's charitable purposes
 - Avoid promoting candidates who agree with organization's views
 - Do not distribute information about whether candidates have or have not adopted positions favored by organization
- Be cautious of defining issues too narrowly
 - Cover range of issues and define the issues broadly, rather than in way that clearly divides candidates or parties.
 - Helps to avoid "implicitly" endorsing or opposing candidates

Practical Tips to Ensure Compliance (cont'd)

- Be cautious of distributing issue-oriented materials just before election
 - IRS is suspicious of issue-oriented voter education materials that are widely distributed among electorate, especially when such distribution occurs in final stages of campaign
 - Keep educational communications completely nonpartisan
 - Avoid any bias or preference for views of any candidate or group of candidates
- Be cautious of linking to websites
 - Links to candidate-related material do not necessarily constitute intervention
 - Consider context for link on organization's website, whether all candidates are represented, purpose served by offering link, and directness of link to another website that contains material favoring or opposing candidate

Practical Tips to Ensure Compliance (cont'd)

- Be cautious of making statements about views or actions of public officials who are candidates or other declared candidates that coincide with key moments in campaign
 - IRS tends to question advocacy activities that are timed to coincide with specific elections
 - Be careful of
 - Advocacy activities that express or imply opinion about candidates
 - Statements critical/approving of public official's actions focused on election period (and without timely relationship to activities referenced)

APPENDIX

The Lobbying Disclosure Act: Compliance and Registration Basics

Lobbying Disclosure Act Basics

- LDA purpose: increase public disclosure of identity and general extent of efforts of paid lobbyists to influence federal legislative and executive branch officials
- LDA applies equally to private foundations and public charities
- LDA reach
 - Organizations that employ in-house “lobbyists” and
 - Outside “lobbyists” and “lobbying firms”
- LDA requirements
 - Initial registration
 - Ongoing (quarterly) reporting of LDA lobbying activities
 - Semiannual disclosure of certain contributions
 - Electronic reporting (publicly available on searchable database)

Initial LDA Registration Thresholds

- Organization must register if
 - Its total lobbying expenses are expected to exceed \$11,500 during a quarterly reporting period AND
 - Organization has employee who is “lobbyist”
- If organization retains lobbying firm, lobbying firm must register and list organization as client if the firm
 - Expects to receive more than \$3,000 from organization during quarterly reporting period AND
 - Employs one “lobbyist” who works on behalf of organization

Who is a Lobbyist?

- A lobbyist is any paid individual who
 - Makes at least two lobbying contacts AND
 - Spends at least 20% of time on “lobbying activities”
 - For outside lobbyists, 20% threshold is measured in context of overall services provided on behalf of each individual client

What are LDA Lobbying Contacts and Lobbying Activities?

- Lobbying Contact
 - Any oral, written, or electronic communication with
 - Covered legislative branch official OR
 - Covered executive branch official
 - Regarding
 - Federal legislation (including legislative proposals) or federal rule, regulation, executive order, or any other government program policy or position
 - Federal programs or policies (including contracts, grants, loans, permits, or licenses)
 - Senate nominations
- LDA Lobbying Activity
 - Lobbying contacts
 - Activities in support of lobbying contacts
 - Preparation and planning
 - Research for use in lobbying contacts
 - Coordination with lobbying activities of others

Who is a “Covered Legislative Branch Official”

- Covered Legislative Branch Officials include
 - Members of Congress and their staff
 - Employees of a committee, leadership, or joint committee of Senate or House
 - Employee of working group or caucus organized to provide legislative services or other assistance to Senator or Representative
 - Employees of Secretary of Senate or Clerk of House

Who is a “Covered Executive Branch Official”?

- Covered Executive Branch Officials include
 - President and Vice President, cabinet-level officials and their immediate deputies
 - Executive Office of President
 - Officials serving in an Executive Level I-V position
 - Generals and Admirals of uniformed services
 - “Schedule C” appointees (and some of their support staff)

Key Exceptions

- Speeches, articles, publications, or other materials that are distributed and made available to general public
- Congressional committee, subcommittee, or task force testimony
- Written information in response to request by covered official
- Comments submitted in response to public notice
- Written comments filed on the record in public proceeding
- Written petitions for agency action on public record
- Materials required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of Congress or federal agency
 - Including contract, grant, loan, permit, or license

Methods for Calculating LDA Lobbying Expenses

- A **public charity** that has made the lobbying election under Section 501(h) of the IRC may use either LDA or IRC definitions of lobbying for initial registration and quarterly reporting purposes
 - Method A: Use LDA definitions for all purposes
 - Method B: Use
 - IRC definitions for initial registration and quarterly reporting
 - LDA definitions for all other purposes
- **Private foundations are not eligible to make this election**

Using IRC Definitions

- Eligible public charity may use IRC definitions to
 - Estimate and disclose total lobbying expenditures for quarterly reporting purposes
 - Determine whether total lobbying expenses exceed \$11,500 for quarterly reporting period
 - Determine whether it pays more than \$3,000 to lobbying firm during quarterly reporting period
- For all other purposes “electing” charity must use
 - IRC definition for executive branch lobbying
 - LDA definition for legislative branch lobbying to
 - Determine if an individual made more than one lobbying contact or spent more than 20% of his or her time on lobbying activities
 - Report/track general and specific lobbying issues of “lobbyists”

Basic Differences Between the IRC and LDA Definitions

- IRC includes “grassroots,” “state,” and “local” lobbying efforts and attempts to influence ballot initiatives and referenda
- LDA reaches
 - Self-defense lobbying (*i.e.*, communications regarding the organization’s powers, existence, duties, tax-exempt status, or tax treatment of contributions)
 - Contacts that do not involve a discussion of (but are on the same subject as) legislation or legislative proposals
 - Contacts to influence rules, regulations, executive orders, government contracts, programs, positions, or policies

LDA Quarterly Disclosure

- LDA quarterly reporting periods
 - 1/1 - 3/31
 - 4/1 - 6/30
 - 7/1 - 9/30
 - 10/1 - 12/31
- Reports due 20 days after end of each quarter and require information about
 - Lobbying expenses (using IRC or LDA definitions, as applicable)
 - General lobbying issue areas (*e.g.*, tax)
 - Specific lobbying issues (*e.g.*, H.R. 4, Prenatal Nondiscrimination Act of 2011, all provisions relating to regulation of charitable organizations)
 - Senate, House, and federal agencies contacted
 - Lobbyists (including new lobbyists) with any activity in general issue area

LDA Quarterly Disclosure Using IRC Definitions

- Organization electing to report using IRC definitions must
 - Do so consistently for all reporting periods in given calendar year (so long as 501(h) election is in place)
 - Report all expenses that fall within applicable IRC definition
 - For example, public charity may not exclude grassroots or state or local lobbying expenses from quarterly reporting

Semiannual LDA Disclosure

- LDA requires registrant and each active lobbyist to file report within 30 days of end of each semiannual period (1/1-6/30, 7/1-12/31) including information regarding
 - Payments to presidential libraries or for inaugurations
 - Unless required to be reported under FECA, payments for events or to entities connected with government officials including
 - Events held to honor or recognize a covered government official
 - Entities named for covered legislative branch official, or to person or entity “in recognition” of such official (e.g., “Charles B. Rangel Center for Public Service”)
 - Entities established, maintained, or controlled by covered government official, or entity designated by such official
 - Meetings, conferences, or other similar events held by or in name of one or more covered government officials

Semiannual LDA Disclosure (cont'd)

- Registrants must certify that they
 - Are familiar with the House and Senate gift rules
 - Have not provided, requested, or directed that gift (including travel) be offered to House or Senate Member or employee with knowledge that gift would violate those rules

Terminating LDA Registration

- Organization registered under LDA must continue to file quarterly reports and semiannual reports even if its lobbying expenses fall below initial registration threshold in subsequent periods
- Organization may terminate registration (and thereby eliminate quarterly and semiannual reporting requirement) by submitting a completed quarterly report and checking the appropriate “termination report” box
 - Registrants and registered lobbyists must also submit semiannual disclosure report covering the six month period in which the termination occurs

Tracking Lobbying for LDA and IRC Purposes

- Neither LDA nor IRC mandate specific tracking method
- Method must ultimately be reasonable and allow organization to collect appropriate information to make accurate and timely filings

Contacts

Laura E. Butzel

212.336.2970

lebutzel@pbwt.com

Tomer J. Inbar

212.336.2310

tinbar@pbwt.com

Megan E. Bell

212.336.2077

mbell@pbwt.com

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