

# Can We Lobby? \*

Public charities, also known as non-private foundations, can lobby. (Private foundations face a prohibitive tax if they lobby.) There are limits, but they are very manageable. In addition to meeting IRS definitions and reporting, you may also have to register and report under South Carolina or federal law. You can't use federal funds (including overhead or match funds used to draw them down) to lobby and your other funders may have their own limitations on the use of their funds. You can find other funds to support your lobbying.

## How much can we do?

Until 1976, the only test was: Is lobbying a substantial part of your activities? You can read the regulations and the case law on this all year and not be sure what it means. However, the test is based on how substantial a part of your activity lobbying is – not how much you spend on it. Thus, if you do a lot of lobbying through volunteers, you might have substantial activity without spending a lot of money. See IRS, **Measuring Lobbying: Substantial Part Test**.

In 1976 Congress created an option: the expenditure test. The expenditure test, also known as "the section 501(h) expenditure test," sets up a sliding scale (starting at 20 % for an organization with exempt purpose expenditures up to \$500,000 with a grassroots lobbying limitation of 25 % of that lobbying limitation), for what is substantial. See IRS, **Measuring Lobbying Activity: Expenditure Test**. If you are a church or a private foundation, you can't make this election. If you are very large, you might be better off with the substantial part test. The IRS is less likely to take a close look at your lobbying activities if you take the 501(h) election

You have to elect the expenditure test. Churches and many church-related entities, some supporting organizations for non-charitable exempt organizations and private foundations are ineligible. Otherwise, you remain subject to the substantial part test. You elect the expenditure test by completing and submitting **Form 5768**, Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation.

When you measure your lobbying expenditures, you look at everything it takes, including prep time, research, overhead, benefits, and support, to make that lobbying happen. If you overspend these limits, you have to pay a 25% tax on the overage. If you exceed these limits by more than 50% over a four-year period, kiss your tax-exempt status good-bye. You need good books and good time records.

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*Direct* lobbying refers to attempts to influence a legislative body through communication with a member or employee of a legislative body, or with a government official who participates in formulating legislation. *Grass roots* lobbying refers to attempts to influence legislation by attempting to affect the opinion of the public with respect to the legislation and encouraging the audience to take action with respect to the legislation. In either case, the communications must refer to and reflect a view on the legislation. See IRS, **Direct and Grassroots Lobbying Defined**.

The grassroots limitation is a part of the overall limitation – not in addition to it. If you are involved in a ballot fight – initiative, referendum or constitutional amendment, the general public is the legislators. Then, communications to the general public are direct lobbying and not grassroots expenditures.

Grassroots lobbying is communication with the general public or a segment of the public about legislation in which 1) a view is expressed about a specific piece of legislation and 2) a call to action is made. Grassroots lobbying occurs when you make a call to action that goes primarily beyond your members. Communications that are sent primarily (more than 50%) to your members may reflect a view on specific legislation.

There are a lot of rules on when an activity is and when it is not lobbying. The answer to whether something is lobbying and whether it is grassroots lobbying is very much a facts and circumstance analysis. Issues that should especially cause you to look further relate to 1) subsequent use of research and materials not originally developed for lobbying purposes, 2) communications with members that encourage those members to contact legislators and 3) mass media advertising about highly publicized legislation within two weeks of a vote (including subcommittee and committee votes) even without a call to action. The IRS regulations with very helpful examples can be found at **26 CFR 56.4911-2 - Lobbying expenditures, direct lobbying communications, and grass roots lobbying communications**.

## Okay. So what looks like lobbying but isn't lobbying to the IRS?

There are activities which are not considered lobbying when trying to figure out if you expended money in attempting to influence legislation.

- Making available nonpartisan analysis, study or research unless you produced or distributed that research as part of lobbying within six months of publication. This gets tricky. See the IRS **regs and examples**.
- Providing technical advice or assistance to a governmental body or legislative committee in response to a written request by the body or the committee.
- Self-defense lobbying that is about legislation that might affect an organization's existence, its powers and duties, its tax exempt status or the deduction of contributions to it.
- Communications between an organization and its bona fide members with respect to legislation that is of direct interest to it and which does not include a call to action that they attempt to influence legislation or get members of the general public to influence legislation.
- Discussions of broad social, economic or similar issues
- Routine communications with governmental officials or employees.

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## Okay. So how do we really get in trouble?

The place that public charities keep running afoul of the IRS is by engaging in electioneering. As an organization exempt under Section 501(c)(3), you cannot participate or intervene in political campaign activity. This is an absolute prohibition and can result in your losing your tax-exempt status.

Still, there are lots of things you can do that relate to election-time civic participation and holding elected official's accountable, but this is tricky stuff driven very much by facts and circumstances. See Kindell and Reilly, **Election Year Issues** (2002) and **Rules for Exempt Organizations During an Election Year**. Check out the Alliance for Justice's resources at its [Bolder Advocacy website](#).

If you are going to engage in issue advocacy or civic participation work around election time (especially if you don't at other times), publish candidate scorecards, hold candidate debates or speakings, rent facilities or mailing lists, work to get your position in party platforms or conduct voter registration drives or GOTV efforts, you have to be very careful. Those activities have to be genuinely nonpartisan and not aimed at helping or hurting any candidate for public office or political party. You should look at the materials referenced in the previous paragraph, but you are much better off being guided by a lawyer knowledgeable about these matters than trying to get your tax-exemption back after you've lost it.

## This is all pretty constraining. Are there other options?

If you intend to engage in a substantial amount of lobbying, you can set up an affiliated action organization under Section 501(c)(4) that has no limits on lobbying and can engage in electoral activities if they are less than half of what you do. But contributions to it are not deductible as charitable deductions and the portion of dues which support lobbying aren't deductible as business expenses. Harmon et al., *Being a Player: A guide to the IRS Lobbying Regulations for Advocacy Charities* contains a good discussion of how to do this as does Shadler, *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations*.

## Do we need to register to lobby?

**South Carolina State Registration:** It's a two part inquiry. First, does your organization lobby? Does your organization engage in activities "to influence by direct communication with public officials or public employees?" See SC Ethics Commission [website](#). In addition to legislation and other things decided by the General Assembly, that would include regulations, executive orders, gubernatorial appointments, election or appointment by the General Assembly to a public office and grant awards. It does not include federal lobbying or lobbying local government. This is broader than the IRS definition, meaning you may need to keep two separate tallies of lobby expenditures.

Then, does your organization employ, appoint, or retain someone, with or without compensation, to lobby?

### There's the Law and Then There's Perception

Maybe you can get around registering without breaking the law. But is it worth it to have a newspaper article suggest that you are breaking the law? Or a legislator question your activity from the floor or in a committee meeting? Those are increasingly happening.

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Someone who is not paid to lobby is not required to register unless they spend more than \$500 (not counting what they are paid or travel expenses) in a calendar year lobbying. The SC Ethics Commission interprets “employ, maintain or retain” to mean that you pay someone “to lobby” — not that someone you employ sometimes lobbies. If you hire a contract lobbyist, they and you, as the lobbyist principal, have to register. If you have an employee whose regular job duties involve lobbying, they and the organization should register. Your volunteers and Board members don’t have to register even if they lobby unless they spend more than \$500 lobbying in a year.

To register, go to the SC Ethics Commission website under **Electronic Reporting**, create an account and register. Each lobbyist has to register as a lobbyist and the organization has to register as a lobbyist’s principal. The lobbyist’s principle is the organization—not the contact person who signs the papers. It currently costs \$100 per registration. You should register by January 5 of each legislative year, but no later than 15 days of engaging or hiring the lobbyist. You and your lobbyists will then each file reports twice yearly.

*This is not like joining SCANPO, something you can decide to do or not. If you meet the requirements, you have to register. It does not matter how your Board Chair feels about “lobbying”. It’s the law.*

Even if you conclude that you are not required to register, you still have to report your expenditures to influence legislation on your Form 990 or Form 990EZ.

## Okay, We Registered. Does that Limit Us in Any Way?

South Carolina operates under the “no cup of coffee” rule. A lobbyist or someone acting on the lobbyist’s behalf cannot provide anything of value (lodging, transportation, entertainment, food, meals, beverages, money, contributions or any other thing of value) to any member of the General Assembly, the Governor, Lieutenant Governor, any other statewide constitutional officer, any public official of any state agency who engaged in covered agency actions, or any of their employees. There are limited exceptions. Your lobbyist can’t “offer, solicit, facilitate, or provide to a covered official or public employee” a campaign contribution. If you have a PAC connected to your affiliated 501(c)(4), the lobbyist can’t run it.

The lobbyist principal likewise is limited in that it cannot provide covered persons “lodging, transportation, entertainment, food, meals, beverages, or an invitation to a function paid for by a lobbyist’s principal”. There are exceptions laid out in the law at §§ **2-17-90** and **2-17-100**. Remember, the Lobbyist Principal is the organization. None of the lobbyist principal limitations apply to any officer, employee, director or volunteer except someone meeting the definition of a lobbyist. But those people still can’t make a campaign contribution, buy a meal, give tickets to an athletic event and so forth “to influence” a decision or action by a public official or employee. That’s why best practice is to separate any attempt to influence from any encounter involving such an exchange.

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The most important exceptions for lobbyist's principals include that you can wine and dine legislators as long as you are doing that for an entire House of the General Assembly, committee, subcommittee or caucus. (Feed their staff too, if you know what's good for you.)

You can invite a public official or employee to speak at a conference or convention, but you can't pay them or give them an honorarium for speaking. As long as you are feeding everyone else, you can feed that person "where all participants are entitled to the same meal and the meal is incidental to the speaking engagement". You can reimburse a public official or public member for their actual and reasonable costs of speaking. For a public employee, you should reimburse their employer. "No lobbyist's principal or person acting on behalf of a lobbyist's principal may provide to a public official or a public employee the value of lodging, transportation, entertainment, food meals, or beverages exceeding \$60 in a day or \$480 in a calendar year per public official or public employee." **SC Ethics Commission Website.**

The lobbyist's principal can give a public official or employee informational material or promotional material worth less than \$10 and you can give them a plaque that costs less than \$150.

The SC lobbying **law** is not always crystal clear. The Ethics Commission has issued numerous formal **advisory opinions** at and the staff is always willing to provide guidance.

Congress has fairly comprehensive prohibitions on lobbyist and lobbying organizations from providing gifts or travel. The **House** and the **Senate** each has its own rules.

**Federal Registration:** Do you pay a lobbying firm more than \$3,000 in a quarter to lobby federally for you? If so, they have to register as representing your organization.

Does your organization spend more than \$12,500 in any quarter on federal lobbying, including contact with legislators, their staff, and higher up executive branch folks and efforts in support of such contacts? Here you include not just laws but also agency regulations, agency programs and awards of grants and contracts. And do you employ at least one person who made more than one lobbying contact and spent at least 20% of her time on lobbying? If the answer to either of these is "no," you don't have to register and report federal lobbying unless you hire a lobbying firm and pay them at least \$3,000 in the quarter. See **Understanding the Lobbying Disclosure Act** and Clerk of the House, US House of Representatives, **Lobbying Disclosure Act Guidance, Effective January 1, 2008 (Reviewed June 18, 2013/Last Revised February 15, 2013)**. There are special rules if you are doing a coordinated lobbying effort with other organizations.

A 501(c)(3) organization required to register under the Lobbying Disclosure Act may be able to elect to use the definitions of expenditure test lobbying that apply to its activities as a 501(c)(3) and report the numbers on its Form 990 or 990EZ as its lobbying numbers. If you are close on Lobbying Disclosure Act thresholds, using the narrower expenditure test definitions may help you dodge registration. But if you do state and/or grassroots lobbying that are not ordinarily reportable under the Lobbying Disclosure Act, you still have to include those amounts.

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## Funders and Lobbying.

You cannot use federal grant funds (including the local match) to lobby or to cover overhead costs of lobbying. But that doesn't mean you can't raise other funds to lobby. Keep good time records and books. If you are reporting 100 % of someone's time as federal funds, don't ask them to make a phone call to a Congressperson or member of the General Assembly or their staffs for lobbying purposes.

Private foundations can fund activities which include lobbying as long as they are not earmarked to carry out prohibited activities, i.e. lobbying, electioneering or other non-charitable activity. There are no restrictions on general support grants. Specific project grants can be used for lobbying as long as they are not earmarked for lobbying and as long as the amount of all grants for that project in one year from a funder do not exceed the non-lobbying part of the project's budget. See, Alliance for Justice, **Investing in Change: A Funder's Guide to Supporting Advocacy**. Some funders will still prohibit lobbying with their funds.

A public foundation, a grant making organization such as a community foundation which is publicly supported, can lobby. Any grants they make which are counted as lobbying grants count against the foundation's lobbying limitation if they made the Section 501(h) election. They can make grants earmarked for lobbying. A general support grant is not counted as a lobbying grant. A project grant used in part for lobbying are not counted as a lobbying as long as it is not earmarked for lobbying and the amount of all grants for that project in one year from the funder do not exceed the non-lobbying part of the project's budget. See Levine, Bolder Advocacy, **IRS Provides Needed Guidance on Grants from Public Charities to other Public Charities** [IRS Provides Needed Guidance on Grants from Public Charities to other Public Charities](#).

## About the Author

**John Ruoff, Ph.D.**, of The Ruoff Group, assists SCANPO with advocacy efforts and supported the Advocacy Committee as it tackled legalizing charitable raffles for nonprofits.

