

Myths about Lobbying, Political Activity, and Tax-Exempt Status

Related Topic Area(s): Lobbying and Political Activity, Tax and Employee Benefits

Many 501(c)(3) or 501(c)(6) organizations shy away from lobbying and other politically-related activities out of concern for their tax status. But by failing to employ lobbying and political tactics, associations may be neglecting activities that may be enormously helpful in carrying out their mission. This article explores and debunks some of the most common misconceptions in this area; the first section relates to 501(c)(3) organizations, and the second section relates to 501(c)(6) organizations.

501(c)(3)s

Myths abound about the permissible — or, more often, impermissible — lobbying and political activity of associations and other nonprofit organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. But the fear factor often is unwarranted. 501(c)(3) organizations certainly are limited in the amount of lobbying in which they may engage and are prohibited from engaging in political campaign activity. However, knowing which actions are lobbying or political campaign activity and how to account for those activities are critical questions that need to be answered before leaders of 501(c)(3) entities unnecessarily inhibit their organizations from most fully and effectively furthering their missions.

Myth 1. 501(c)(3)s cannot lobby and will lose their tax exemption if they engage in lobbying.

Absolutely not. 501(c)(3) organizations can — and often should to fully carry out their missions — lobby at all levels of government. Federal tax law always has permitted lobbying by 501(c)(3) organizations, as long as lobbying is not a “substantial part” of an organization’s total activities. There are two ways to determine what is substantial: the facts and circumstances test articulated by the IRS and courts and the more definitive 501(h) election.

Facts and Circumstances: The facts and circumstances test is not clearly articulated, and includes expenditures for lobbying, staff time, and also other activities. It does not specify exactly how much of an organization’s funds may be spent on lobbying, nor does it specify exactly what constitutes lobbying.

501(h) Election: The statute and regulations governing organizations that make the 501(h) election make clear which activities constitute lobbying and which do not. For example, lobbying occurs only when there is an *expenditure of money* by the 501(c)(3) for the purpose of attempting to influence legislation. Where there is no expenditure by the organization for lobbying (such as lobbying by members or volunteers), there is no lobbying by the organization. Generally, organizations that make the 501(h) election under the 1976 lobbying law may spend 20 percent of the first \$500,000 of their annual expenditures on lobbying (\$100,000), 15 percent of the next \$500,000, and so on, up to \$1 million dollars. With this hard cap on the amount of money that may be spent on lobbying, large 501(c)(3)s may not be able to make use of the 501(h) election.

Myth 2. Making the 501(h) election will increase the risk of our organization becoming the target of an IRS audit.

The opposite is actually more likely. If a 501(c)(3) does not make the 501(h) election, it is governed by the much more ambiguous “substantial part” test. Thus, if an organization lobbies but does make the 501(h) election, the organization’s lobbying must be “insubstantial.” This is a vague term that has never been clearly defined. If you remain subject to this rule, you cannot be certain how much lobbying your organization can do — or even what is and is not “lobbying.”

Further, the IRS has made clear that far from singling out for audit 501(c)(3) organizations that elect, the

reverse is true. The IRS has stated, "... our intent has been, and continues to be, one of encouragement [of 501(c)(3) organizations] to make the election ... Experience also suggests that organizations that have made the election are usually in compliance with the restrictions on lobbying activities."

Some 501(c)(3) organizations also have been reluctant to make the 501(h) election for fear that this action will change their 501(c)(3) status. This is not true. Electing organizations remain fully exempt under section 501(c)(3) of the Internal Revenue Code.

Myth 3. 501(c)(3)s cannot support or oppose a specific bill or tell their members to do the same.

501(c)(3)s that make the 501(h) election absolutely can support or oppose a bill and urge members to do likewise, but doing so is considered lobbying and, thus, expenditures made in connection with such actions will count toward the lobbying limit. Under the 501(h) election, generally, your organization is lobbying when it states its position on specific legislation to legislators or other government employees who participate in the formulation of legislation, or urge your members to do so (direct lobbying). In addition, your organization is lobbying when it states its position on legislation to the general public *and* asks the general public to contact legislators or other government employees who participate in the formulation of legislation (grassroots lobbying).

Myth 4. 501(c)(3) organizations are not covered by the congressionally enforced federal lobbying registration requirements.

Yes, they are. Under the federal Lobbying Disclosure Act of 1995 ("LDA"), a 501(c)(3) organization — like all other entities — is required to register and file semi-annual reports concerning its lobbying activities if (1) the organization has at least one employee who is a "lobbyist" (using a combination of the tax law and LDA definitions of lobbying) *and* (2) the organization incurs or expects to incur expenditures on "lobbying activities" of \$11,500 or more in a calendar quarter. Association leaders should note that a "lobbyist" is someone who makes at least one "lobbying contact" and devotes at least 20 percent of his or her time to "lobbying activities."

501(c)(3) organizations that have elected to report lobbying expenditures for tax purposes under section 501(h) of the Internal Revenue Code (hereinafter, "electing group") may use the tax law definition of "influencing legislation" and the tax rules for computing lobbying expenditures for purposes of making semi-annual reports under the LDA. (The LDA only allows 501(c)(3)s to use a combination of the LDA and tax code definitions of lobbying for purposes of determining whether an organization is required to make its initial lobbying registration.) An organization is not required to register under the LDA if its lobbying expenditures do not exceed \$11,500 during the relevant quarterly periods and/or if none of its employees devotes 20 percent or more of his or her time to "influencing legislation" (as defined by a combination of the tax law and LDA definitions of lobbying). For outside lobbyists (i.e., lobbying firms) hired to lobby on behalf of a 501(c)(3) or other organization, it must receive income from a client of \$3,000 or more during the quarterly period.

Myth 5. Encouraging the members of a 501(c)(3) to contact their legislators with respect to pending legislation is grassroots lobbying and is more limited than direct lobbying.

Not true. Under Section 501(h), the definition of "grassroots lobbying" includes only attempts by a 501(c)(3) organization to influence legislation through an attempt to change the opinion of the general public. This is not to be confused with trying to get the members of the 501(c)(3) organization mobilized to support or oppose legislation by contacting their elected officials (encouraging members to contact a legislator is direct lobbying if the organization has made the 501(h) election. *Only when a 501(c)(3) organization tries to reach beyond its membership to get action from the general public does grassroots lobbying occur.*

Myth 6. If an expenditure has any lobbying purpose, it must be allocated entirely to lobbying.

Again, not true. 501(c)(3) organizations are required to allocate costs between lobbying and non-lobbying. Costs of communications with members may be reasonably allocated between lobbying and any other *bona fide* purpose (e.g., education, fundraising, etc.) on any reasonable basis. For communications with nonmembers, all costs attributable to the lobbying portion and to those parts of the communication that are on the same specific subject as the lobbying message must be included as lobbying expenditures. Other cost allocation rules apply as well; for instance, allocation is not permitted for grassroots lobbying expenditures.

Myth 7. A 501(c)(3) cannot provide its members with the voting records of legislators on key issues.

Yes, it can. 501(c)(3) organizations can tell their members how each member of a legislature voted on key issues. While 501(c)(3)s are prohibited from engaging in any political campaign activities, no prohibition exists on this practice if the information is presented and disseminated during political campaigns, as long as it is done in the same manner as it is at other times. A problem arises if an organization waits to disseminate voting records until a campaign is underway. If your organization has not published records regularly throughout the year, your group may not, during the campaign, publish a recap of votes throughout the legislative session.

Myth 8. 501(c)(3)s cannot inform candidates of their organizations' positions on key issues and ask for their support.

You can within limits. A 501(c)(3) organization may inform political candidates of its positions on particular issues and urge them to go on record, pledging their support of those positions. Candidates may distribute their responses (with respect to those positions) both to the members of the 501(c)(3) and to the general public. However, 501(c)(3)s may not publish or distribute *statements* by candidates except as nonpartisan "questionnaires" or as part of *bona fide* news reports.

501(c)(3) organizations with a broad range of concerns can more safely disseminate responses from questionnaires. However, the questions must cover a broad range of subjects, be framed without bias, and be given to all candidates for office. If a 501(c)(3) has a very narrow focus, this may pose a problem. The IRS takes the position that a 501(c)(3)'s narrowness of focus implies endorsement of candidates whose replies are favorable to the questions posed. *Unless you are certain that your organization clearly qualifies as covering a broad range of issues, your organization should avoid disseminating replies from questionnaires.*

Myth 9. 501(c)(3)s cannot engage in get-out-the-vote and voter registration drives.

Not true. A 501(c)(3) can conduct nonpartisan get-out-the-vote and voter registration drives. The campaign must be focused solely on the importance of voting and how to register. There can be no evidence of bias for a particular candidate.

Myth 10. Employees of 501(c)(3)s cannot participate in a candidate's campaign for elective office.

Not true. It is true that a 501(c)(3) organization is prohibited from endorsing, contributing to, working for, or otherwise supporting or opposing a candidate for public office. However, this does not prohibit the officers, directors, members, or employees of a 501(c)(3) organization from participating in a political campaign, provided that they say or do everything as private citizens and not as spokespersons for or agents of the organization, and not while using the organization's resources or assets in any manner.

Myth 11. 501(c)(3)s cannot set up affiliated organizations for use in engaging in unlimited lobbying and certain political activities.

Not true. The U.S. Supreme Court has said that 501(c)(3)s can establish affiliated 501(c)(4)s, 501(c)(6)s, or other tax-exempt affiliates (except Section 527 organizations, which include political action committees

("PACs") to carry on unlimited lobbying activities and otherwise permitted political campaign activities. In fact, an affiliated 501(c)(4) or (c)(6) entity could itself, establish a connected PAC. The affiliated entity generally must have independent funding sources for which no charitable tax deduction will be available.

There are certain ways for the 501(c)(3) to provide support to its related organizations. In general, however, if a 501(c)(3) transfers money, assets, or anything of value to a non-501(c)(3) organization that lobbies, then the transfer will be treated as a lobbying expenditure of the 501(c)(3) unless it fits within certain protected categories. Moreover, the related organization that receives general support may not engage in political activities. There are two ways for the 501(c)(3) to provide support to the related organizations without the support being treated as lobbying or political activity.

First, if the 501(c)(3) receives compensation of fair market value in return from the related organization, then no lobbying expenditures will be attributed to the 501(c)(3). Examples include leases office space, office services, and staff services in return for full reimbursement of the costs of the goods or services provided.

Second, if the support is made using a "controlled grant," whereby the resources or assets transferred are limited to a specific non-lobbying (or non-political) project of the transferee with proper documentation of the control and segregation of funds, then the expenditure will not be treated as one made for lobbying.

Thus, *general purpose* support by a 501(c)(3) of an affiliated non-501(c)(3) is permitted (presuming it falls within the scope of the 501(c)(3)'s mission) but will be treated as a lobbying expense of the 501(c)(3), subject to the limitations on lobbying discussed above. Moreover, the affiliated entity may not engage in political campaign activities.

501(c)(6)s

Myth 1. A 501(c)(6) is limited on how much lobbying it can do.

Not true. Neither federal tax law nor the IRS has put any limits on how much a 501(c)(6) can spend on lobbying. In fact, depending on its purposes, in certain cases, all of a 501(c)(6)'s revenues could be spent on lobbying.

Myth 2. Membership dues paid to 501(c)(6) associations that lobby are fully tax-deductible (as business expenses) by members.

Not true. The federal lobbying tax law, found in Section 162(e) of the Internal Revenue Code, denies a business tax deduction for all lobbying and political activity expenses incurred by businesses. The law also requires that membership dues paid to 501(c)(6) trade or professional associations be treated as nondeductible business expenses to the extent of the association's lobbying and political activity. Therefore, 501(c)(6) associations that lobby must track their lobbying and political activity expenditures and then report to their members each year the percentage of their membership dues that are nondeductible as a result of these expenditures (or, alternatively, the association can elect to pay a "proxy tax" directly on these amounts to the IRS).

Myth 3. Association expenses to administer and solicit contributions to a Political Action Committee are not lobbying.

Not true. All association expenses related to political campaigns and PACs must be counted as lobbying for purposes of the federal lobbying tax law. While under federal election law, the Federal Election Commission ("FEC") permits associations with "connected" PACs to pay the costs of administering and soliciting contributions to the connected PAC, all of these association-incurred expenses must be included in the association's lobbying expenditures for purposes of the lobbying tax law.

Myth 4. A 501(c)(6) cannot endorse candidates for elected office.

Not true. A 501(c)(6) can endorse federal or state candidates for public office. The organization may communicate the endorsement to its membership and share the endorsement with the organization's press list. In its communications to members, the organization can expressly advocate for the election or defeat of a specific candidate. Under the recent Supreme Court decision in *Citizens United v. FEC*, 501(c)(6) organizations may also expressly advocate to the general public, as long as those activities are not coordinated with candidates.

Myth 5. A 501(c)(6) cannot make cash or in-kind contributions to candidates for state office.

Not necessarily true. Depending on state law, in certain states, a 501(c)(6) can, in fact, make direct cash and in-kind contributions to candidates for state public office. Under federal law, however, no corporation—including nonprofits—may make cash or in-kind contributions to federal candidates. Moreover, organizations that make direct contributions to state candidates must be careful of the tax consequences: Section 527(f) of the Internal Revenue Code may impose significant taxes on associations that do not properly segregate their political funds.

Myth 6. A 501(c)(6) risks its exempt status if it publishes a voter guide or legislative scorecard.

Not true. A 501(c)(6) has more leeway on scorecards and guides than a 501(c)(3). It may produce a voter guide that is somewhat biased and is intended to influence the election through its issue selection and targeted distribution. Moreover, the guide may contain express advocacy for particular candidates, as long as the guide is reported to the FEC as an independent expenditure (see Myth 8 below). A good example of a permissible voter guide would be one that lists all Members of Congress and how they voted on the association's top five legislative issues in the most recent congressional session.

Myth 7. 501(c)(6)s cannot engage in get-out-the-vote and voter registration drives.

Not true. A 501(c)(6) can conduct partisan get-out-the-vote and voter registration drives. Both the IRS and FEC allow a 501(c)(6) to conduct theme-based voter registration or get-out-the-vote drives aimed at the general public as long as the drive avoids expressly advocating any particular candidate's election or defeat, and is not coordinated with the candidate.

Myth 8. 501(c)(6)s cannot fund independent expenditures to support or oppose federal candidates.

No longer true. Under the Supreme Court's recent decision in *Citizens United v. FEC*, a corporation may expressly advocate the election or defeat of a federal candidate. Many states that had laws similar to the federal restriction that the Supreme Court overturned have indicated that their laws are also likely unconstitutional. As such, 501(c)(6)s (and other nonprofit corporations other than 501(c)(3)s) will be able to fund television and radio commercials, buy ads in newspapers, endorse candidates on their web sites, send email to non-members, and conduct other public outreach. The only concern is that such activities cannot be coordinated with the candidate or political party—this transforms the independent expenditure into a prohibited contribution (unless your state law allows for corporate contributions).

It is also important to remember that expenditures are also subject to tax under section 527(f) of the tax code (as discussed in Myth 5). Federal law imposes disclosure requirements for independent expenditures and many states have similar laws for state or local candidates.

**501(c)(3) and 501(c)(6) Lobbying and Political Activity
QUICK REFERENCE CHART**

ACTIVITY	501(c)(3)	501(c)(6)
Lobbying	Yes, and can advocate	Yes

	for or against specific legislation	
Expenditure Limits	Yes, but with a sliding scale if organization elects 501(h)	None, but membership dues are not deductible based on amount of lobbying
Federal Lobbying Disclosure	Yes, if threshold met	Yes, if threshold met
Legislator scorecards / voting records	Yes, with limitations	Yes
Political Action Committees	Prohibited	Yes
Endorsing candidates	Prohibited	Yes
Contributions to candidates	None	None to federal candidates, but is permissible in certain states
Voter registration drives and education	Yes, but must be nonpartisan and focused on need to vote	Yes, and may be partisan
Express advocacy	Prohibited	Yes, as long as not coordinated with candidates