

## **Lobbying Without Regret:** **A guide to the rules governing legislative advocacy by charities**

For many nonprofit organizations, "lobbying" is almost a dirty word. At the very least, it provokes great anxiety. Is it even legal for a nonprofit? If so, how much can you do? What exactly is it? What's the difference between "direct" and "grassroots" lobbying? What does it mean to "elect" to lobby? Should you?

Not certain of the answers to these questions and many others -- and not wanting to jeopardize the rest of their work -- many organizations avoid lobbying altogether.

That is unfortunate. After a debate that lasted for more than a decade, Congress and the Internal Revenue Service decided that nonprofits have a valuable role to play in the public policy process. Thus, the lobbying rules the IRS issued in 1990 are quite liberal. Very few community organizations will come close to exceeding the limits.

Yes, these rules are also quite complicated. But most community organizations need to know only a few basics to be sure that the lobbying they do today will not cause problems if the IRS decides to audit them tomorrow.

Fortunately, the Alliance for Justice has put together a very good guide to the rules -- *Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities*. If you do much lobbying, it should be on your reference shelf. (The book costs \$15 and you can get a copy by contacting Alliance for Justice, 1601 Connecticut Avenue NW, Washington, DC 20009; phone 202.332.3224.) This article summarizes some of the points that are important for community organizations whose lobbying is but a relatively small part of their overall mission.

### **A Brief History**

For decades, there has been tension over the appropriate role of charitable organizations technically known as 501(c)(3) organizations. Should such organizations -- which greatly benefit from the ability of donors to deduct gifts to them from their taxes -- be limited to doing things that most would agree directly and immediately benefit society: feed the hungry, care for the sick, educate the illiterate? Or should the government be less prescriptive,

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allowing charities to perform a broad range of activities (including some lobbying) and benefit a broad range of people?

In essence, the government has chosen the latter -- one reason there are more than a half million charitable organizations in the country. And over the last 20 years or so, the government has also chosen to allow these organizations to participate in the public policy process, within limits.

Prior to 1976, charities could only devote an insubstantial amount of their resources to lobbying, a vague standard that led many charities to forsake lobbying altogether. In 1976, Congress passed a law clarifying what charities could do, a law that encouraged greater participation by charities.

But this new law languished until 1990, when rules were finally issued. Most nonprofit organizations were pleased with the way these rules turned out.

Recently, however, there has been a push to impose more restrictions on the lobbying that nonprofits may do. Many new members of Congress believe that charities should be seen rather than heard, and they favor much stricter limits not just on "lobbying" but on other activities that may influence public policy. So far, they have proposed these limits for charities that participate in the federal government's on-the-job fundraising campaign or that receive federal grants. Last year, a large coalition of nonprofits came together to oppose the so-called "Istook amendment," which would have severely restricted advocacy by charitable organizations that receive federal grants. The amendment was passed by the House but blocked in the Senate.

## **To Elect or Not To Elect**

For now the 1990 rules remain the law of the land. And these rules begin by requiring all charities to make a choice: "elect" to be governed by these new rules, or continue to be subject to the old rule, which says your lobbying cannot be a "substantial" part of your work.

Since most community organizations do not do a lot of lobbying, most have not chosen to come under the new standard (known as the "section 501(h) expenditure test"). That's a mistake, say those who wrote *Being a Player* (Gail Harmon, Jessica Ladd and Eleanor Evans). They believe that most organizations should elect, the sole exception perhaps being very large organizations (with budgets exceeding \$17 million). Why? The new rules make it much easier to determine what is and is not lobbying as well as how

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much lobbying you can do. You can look at your overall budget each year and know exactly how much you can spend on lobbying. You can also examine everything your agency puts out (letters to members, newsletters, alerts) and know which would be considered lobbying. If you are getting too close to your limit, you can alter things you send out so they don't constitute lobbying. Plus, the IRS has refused to specify which definition of lobbying will apply to your organization if it fails to elect. The new rules offer nearly all organizations a higher lobbying limit. You can spend up to 20% on lobbying if your budget is under \$500,000. Under the old law, you could spend only an "insubstantial" amount, perhaps about 5%. The new rules also count fewer activities as lobbying expenditures. Most important, they do not count the activities of volunteers as lobbying. Under the old law, an organization "could spend practically no money on lobbying but still surpass its lobbying limit if it had substantial volunteer lobbying activities," write the authors. Organizations are less likely to lose their tax-exempt status under the new rules. Under the old law, the only penalty is in essentially a death penalty -- loss of tax exemption. You could lose it by doing too much lobbying in just one year. The new rules impose a fine (or "excise tax") for exceeding the limits (one quarter of the excess expenditures). You lose your tax exemption only if you exceed the limits by more than 50 percent over a 4-year period. Your expenditures are averaged over these four years, which means you won't be killed if your organization has to lobby like crazy one year. If you or your board is still not convinced, here's the clincher: the managers of "electing" organizations are not personally liable if their organization is fined.

Two reasons many organizations have chosen not to elect are myths, say the authors. The first is that electing organizations are more likely to be audited. The IRS says this is not true, and so far the data on audits show no added risk, according to Harmon. In fact, the opposite may be true.

Second, electing to be covered by the new rules does not impose "any significant additional record-keeping obligations on a public charity," the authors say.

Indeed, beginning in 1992, the IRS requires non-electing charities to itemize their lobbying expenditures and describe their lobbying activities on their 990 annual returns (filed by all organizations whose budgets exceed \$25,000). The upshot is that all organizations that do any lobbying must keep detailed records whether they elect or not.

To make a 501(h) election, simply file Form 5768 with the IRS (many libraries have IRS forms that you can copy).

## **What Is Lobbying?**

Lobbying is an attempt to influence specific legislation. Legislation is an action by a "legislative body," which may be Congress, a state legislature, or a local legislative body such as a city council. Legislation also includes actions by the general public through a referendum, initiative or proposed constitutional amendment.

Significantly, a "legislative body" does not include judicial, executive or administrative bodies, such as school and zoning boards. In other words, attempts to influence your local housing agency (an executive body) or your mayor (an executive) would not constitute lobbying (unless you ask an executive to engage in the legislative process, such as vetoing a bill).

Also significantly, to constitute "lobbying," you must either support or oppose legislation. In other words, making a general argument that government has a role in supporting low-income people, or that the growth in inequality should be halted, is not considered lobbying.

Under the rules, there are two types of lobbying -- direct and grassroots. The limits on grassroots lobbying are much more stringent.

**DIRECT LOBBYING** is communicating your views to a legislator or a staff member or any other government employee who may help develop the legislation. To be lobbying, you must communicate a view on a "specific legislative proposal." Even if there is no bill, you would be engaged in lobbying if you asked a legislator to take an action that would require legislation, such as funding an agency.

If you asked your members to lobby for this bill, that also is considered direct -- not grassroots -- lobbying. People are considered members if they contribute more than a nominal amount of time or money. If a newsletter article that goes to both members and nonmembers urges them to take action, the amount you would need to allocate to grassroots lobbying would be only the percentage of non-members who received your newsletter.

However, if you simply tell people about a specific piece of legislation and your position on it, and you don't encourage them to contact their legislators, that is not counted as lobbying.

Direct lobbying also involves trying to influence the public on referenda and ballot initiatives. (In these cases, the public are, in essence, the legislators.)

**GRASSROOTS LOBBYING** is trying to influence the public to express a particular view to their legislators about a specific legislative proposal. A communication is considered lobbying (a "grassroots call to action") if it states that the reader should contact a legislator, or if it provides the legislator's address and/or telephone number, or provides a post card or petition that the person can use.

It is also considered a lobbying communication if you simply identify legislators who are opposed to or undecided about your view of the legislation, or identify that person's legislators, or state who is on the committee that will vote on the legislation. (This is called "indirect encouragement.") Simply identifying a bill's sponsor (referring to the "Istook amendment," for example) is not considered indirect encouragement.

Special rules apply to paid mass media advertisements. These rules are complex. If you want to place an ad, read *Being a Player* and/or contact a legal expert.

## **The Exceptions**

If your organization is heavily involved in trying to influence public policy -- or you put out a lot of reports, studies, speeches and the like -- you need to know what does not constitute lobbying. Sometimes you can make relatively small changes to a document that will ensure that it will not be considered lobbying. One exception is for "nonpartisan analysis, study or research." The keys are a document's content and the way it is distributed.

To qualify as nonpartisan, an analysis must explain the underlying facts in fair enough way that the audience could form an independent opinion or conclusion. It cannot directly encourage people to act. Also, it must be distributed fairly widely, to at least some segment of the general public, to governmental bodies or to members of Congress (as long as you don't give it only to people interested in one side of the issue).

An analysis can take a point of view about legislation and still qualify as nonpartisan as long as it meets the above criteria. But there is one exception to this exception! If "nonpartisan" materials that reflect a view on specific legislation are later used (within six months) in a grassroots lobbying effort, the cost of preparing these materials may be counted as a lobbying expense. They won't be if you can demonstrate that the primary purpose of the materials was not lobbying. (Being a Player discusses this "quite limited" situation in depth.)

A second very relevant exception is for "examinations and discussions of broad social, economic and similar problems." To qualify, such discussions could not refer to specific legislation or directly encourage people to take action. In other words, you could deliver a speech about the severe lack of affordable housing as long as you didn't talk about an appropriations bill that might cut housing programs, or ask your audience to contact Congress about the issue.

You can also talk all you want about the need for more social programs or better paying jobs or more city services, as long as you don't refer to a specific legislative proposal or tell people to contact their legislators.

The third exception, perhaps the best known, is for testimony or other advice or assistance given in response to a written request from a legislative body (not simply an individual legislator). If you are asked to testify or comment on a law, get the request in writing.

The final exception is for "self-defense." It applies to communications with a legislative body regarding actions that could affect your organization's existence, powers, duties, tax-exempt status or the deductibility of contributions. A good example is the fight over the restrictions proposed for nonprofits that receive federal grants. This exception does not apply to grassroots efforts to defend yourself: If you ask the general public to come to your rescue, that is considered lobbying.

Special rules apply in situations where you are affiliated with another organization or make a "transfer" to an organization that is not a charity. But the definition of "affiliated" is narrow: one organization must be able to control the other's action on legislative issues through interlocking directors or bylaws. Working with other organizations in a coalition would not trigger these rules.

## **Keeping Track of Your Lobbying**

Perhaps the greatest danger to community organizations that lobby is not that they will exceed the limits, but that they won't maintain adequate records. You must keep records of your lobbying whether you elect to come under the new lobbying rules or not.

Your bookkeeping system should include line items for total lobbying expenses as well as grassroots expenses. You also need to be able to figure your total "exempt purpose expenditures." Given that a big lobbying expense is the time of your staff, time sheets need to include lines for both direct and grassroots lobbying. You also need to be able to keep track of lobbying costs as they are incurred by maintaining a "log" for various expenses such as postage, copying and faxing. Employees then record expenses on the log, indicating which ones involved lobbying.

Obviously not every employee is going to be an expert on what constitutes lobbying, so Being a Player strongly suggests that all organizations appoint one person to become the authority on the lobbying rules. "This lobbying monitor should act as a clearinghouse for all projects which may include ... either grassroots or direct lobbying activities," write the authors.

They add that this "monitor" should also maintain copies of all written lobbying communications stay on top of your record-keeping. It will be a lot easier to do it now than two years from now when you receive an audit notice from the IRS.

## **Allocating Expenses**

One important task for a "lobbying monitor" is to learn the complex rules regarding how expenses for things such as newsletters, "action alerts" and direct mail letters should be allocated.

The first allocation question concerns lobbying vs. non-lobbying expenses (such as a letter that urges members to give you money as well as call their legislator).

The second question concerns direct vs. grassroots lobbying (such as an action alert that urges members both to call their legislators and ask their neighbors to call).

While these allocation rules are complex, don't be tempted to throw up your hands in despair and call off lobbying. Many organizations do so little lobbying over the course of an entire year that they could allocate every penny of a particular letter or alert to lobbying -- even grassroots lobbying -- and still fall far short of the limits.

The allocation rules are critical only if you do a lot of lobbying, especially lobbying through written communications, such as widely distributed reports, newsletters, "alerts," and direct mail letters.

In general, if you do a mailing that goes entirely or primarily to your members, you can make a "reasonable" allocation of costs between non-lobbying and lobbying purpose (a non-lobbying purpose can include public education, fundraising or trying to influence an administrative agency).

### **The New Lobbying Law**

For the first time in nearly 50 years, Congress has passed a new law requiring lobbyists to register and disclose the issues they have worked on, the public officials they have contacted and the money they have spent on lobbying. It also bans many gifts by lobbyists to members of Congress.

The law, passed in late 1995, changes a weak law that resulted in only about a third of lobbyists registering and almost no information about what they were doing and spending. The new law should have little impact on most local organizations. Groups must register if they spend at least \$20,000 on "lobbying activities" during a six month period and have at least one employee who spends at least 20% of his or her time on "lobbying activities" (and makes at least two "lobbying contacts" during a six month period).

But only lobbying of federal officials counts. If you spend a lot of time and money lobbying local or state officials, this lobbying will not trigger an obligation to register and report.

If you do spend a lot of time and money lobbying federal officials, get a copy of *Lobby? You? Yes, Your Nonprofit Can! It Should!* This 12-page booklet helps you decide whether you should register and what you must report. It costs \$1.25 (with discounts for bulk orders) and is available from Independent Sector, 1828 L St., NW, Washington, DC 20036.

The new law should make it easier to find out who is lobbying on federal issues you care about and how much they are spending.

But grassroots lobbying campaigns orchestrated by professional lobbyists are not covered by the new law. The National Journal has described such campaigns as "the fastest-growing segment of the lobbying industry." It predicts that they will grow even faster now. "The grassroots loophole is gigantic," says one lobbyist. "You can miss millions of dollars this way on highly visible lobbying battles."

## **How Much Can You Spend?**

The 1990 lobbying rules specify clear limits for how much "direct" and "grassroots" lobbying your organization can do.

The first step is determining what is called your "exempt purpose expenditures." In essence, that's what you spend on your programs. For most small organizations, this will probably be your total budget. (Excluded from this total are expenses such as the cost of producing unrelated business income, constructing a new building or operating a separate fundraising unit.)

Of these expenditures, your lobbying costs may total:

- 20% of the first \$500,000
- 15% of the next \$500,000
- 10% of the third \$500,000
- 5% of the remainder

You cannot spend more than \$1 million on lobbying. Of the overall amount you are allowed to spend on lobbying (not what you actually spend), you can spend no more than 25% on grassroots lobbying. In other words, if your overall limit is \$100,000 but your lobbying expenses total only \$50,000, your grassroots limit is \$25,000 (one fourth of \$100,000).

In calculating your lobbying expenses, you must include total costs of preparing and distributing a communication, not simply the printing and mailing costs. Total costs would include researching, drafting, reviewing, copying and a portion of employee compensation and overhead.