

E-Advocacy: Using the Internet for Lobbying and Other Political Activities

The Internal Revenue Service recently issued a request for comments on how the laws governing nonprofit organizations should apply to activities that nonprofits carry out on the Internet, including political and lobbying activities. (See Announcement 2000-84 in Internal Revenue Bulletin 2000-42, <http://www.irs.gov/pub/irs-irbs/irb00-42.pdf>.)

*The Alliance for Justice, a Washington-based advocacy group, has laid out its interpretation of the laws in a publication entitled *E-Advocacy for Nonprofits: The Law of Lobbying and Election-Related Activity on the Net*, written by Elizabeth Kingsley, Gail Harmon, John Pomeranz, and Kay Guinane. The following Q&A is excerpted from that plain-language legal guide, the full print version of which may be purchased for \$25, or downloaded in PDF format free of charge, through the Alliance for Justice's Web site, <http://www.afj.org>.*

Q. Are the rules for advocacy different depending on the different online tools used?

A. In most cases, the rules for a particular type of advocacy will be the same whether it is distributed through a Web site, listserv, e-mail, or other Internet tools.

For example, a 501(c)(3) organization that sends information to the general public and encourages readers to contact their senators in support of a particular bill will have to treat the communication as lobbying, regardless of whether the information is posted on a Web page, distributed through a listserv, or sent to selected people via e-mail. If the organization only sends the message to its members, it will be able to treat the expenditure as direct lobbying. If the organization sends the message to the general public, the organization will have to treat the communication as grass roots lobbying.

Methods for limiting the communication to members will vary depending on which Internet tool the organization uses to send the message. For Web pages, the organization would probably have to post the message on a password-protected site for it to be considered limited to members. Similarly for a listserv, the organization would have to post the message on a listserv that only its members could join. For e-mail, the organization could simply mail the message only to the e-mail addresses of its members.

Q. What are the basic rules about using the Internet to generate support for a legislative agenda?

A. The same rules that govern lobbying in general apply on the Internet. 501(c)(3) organizations must calculate the cost of Internet lobbying as part of their efforts to stay within their 501(h) expenditure limits. Thus, a 501(c)(3) must either ensure that its communications do not constitute lobbying based on the definitions and exceptions in the IRS regulations, or it must track and report the cost of these communications as lobbying expenditures.

Because of the more favorable rules governing communications with members (as opposed to the general public), many 501(c)(3)s want to make some Web pages accessible only to members of the organization. Password-protected access should certainly allow a 501(c)(3) to treat the site as a members-only communication. If the organization can identify visitors—for example, by using a registration process for their initial visit—it may be possible to demonstrate that the audience is, in fact, primarily members. Because of the complexity involved in this sort of tracking, it may not be useful for many organizations. Anecdotal evidence about who is visiting the site (for example, data based on who is choosing to fill out an online guest book) is probably not sufficient for a 501(c)(3) to demonstrate that most of the people visiting its Web site are members.

Q. May a 501(c)(3) Web site provide links to elected officials or government employees so that visitors to the Web site can send comments on legislation or other issues?

A. A Web site may include links that allow visitors to send e-mail or other communications directly to a legislator or other government official. In some cases, the link may create a grass roots lobbying communication because providing contact information for a legislator is considered a call to action under the grass roots lobbying rules. For example, a flyer that discusses the organization's position on a pending gun control bill will be considered lobbying if it includes the names and phone numbers of key members of the committee considering the legislation. Similarly, on the Internet, an e-mail link to a legislator would be a call to action.

Links to other policymakers often do not involve lobbying. For example, a link to an agency's Web site is not lobbying because regulations are not legislation. Likewise, creating a link that lets users send e-mail to the President about the issuance of an executive order is not lobbying.

Q. Is lobbying on a listserv or chat area direct or grass roots lobbying?

A. If subscription to the listserv or chat area is open, the audience for any posting is the general public. A 501(c)(3) must treat as grass roots lobbying

any communications that it posts on a public listserv that contain a call to action and that reflects a view on specific legislation. Communications on listservs or chat rooms that are accessible only to members of the 501(c)(3) will generally be direct, not grass roots, lobbying.

Q. What costs associated with Internet communications must a 501(c)(3) count as lobbying expenditures?

A. A 501(c)(3) that uses the Internet for lobbying must report a portion of the cost of creating and operating its Web page, listserv, or other Internet communication as a lobbying expenditure under 501(h). The IRS has issued no guidance on how to make these calculations. The basic rule is that allocation methods must represent a good-faith attempt to reflect costs and must be consistently applied. Since there is no pre-approved legal model to follow, an organization would be wise to document at the time that it adopts a particular method why it is a reasonable reflection of actual costs and use.

Given the uncertainty in this area about how much of the cost of operating its Internet capacity should be counted as lobbying expenditures, a 501(c)(3) may deliberately choose to over-report lobbying expenditures. While this reduces the amount of funds the organization may spend on lobbying overall, it also reduces the chance of under-reporting the lobbying expenditures associated with Internet activities.

Q. How should a 501(c)(3) calculate the amount of its Web site devoted to lobbying and non-lobbying?

A. The lobbying content of a Web site can be measured using techniques similar to those for measuring the percentage of lobbying in more traditional forms of communication. Many organizations are accustomed to allocating costs of a newsletter with some lobbying and some non-lobbying content by counting the number of column inches or pages for each type of content and applying the resulting percentage to the general costs of putting out the publication. A Web site poses a new challenge for measuring the “amount” of content to treat as lobbying, especially since the content of a Web site is dynamic and liable to change rapidly over time. There is no distinct “issue” as with a periodical publication. It is possible to estimate the amount of a site devoted to lobbying at a given point in time by applying an analysis similar to counting column inches—either by comparing disk space used by files for different parts of the site or by counting pages or screens of information. Depending how often the site changes, this measurement could be repeated at regular intervals to determine an average percentage of lobbying which could be used for allocating costs.

Q. May a 501(c)(3) link from its Web site to Web sites for candidates, PACs, and other organizations involved in political activity?

A. A 501(c)(3) Web site may link to candidates' Web sites as part of the 501(c)(3)'s nonpartisan voter education activities. As long as the 501(c)(3) treats all candidates in a race equally, its Web site may include links to all of the campaigns as well as additional information to help voters contact the campaigns. If one or more candidates in a race do not have a Web site, it may be acceptable for a voter education site to provide a link to the other candidate or candidates as long as the 501(c)(3) site also provides information—such as a phone number and mailing address for the campaign headquarters—to let voters contact the candidate or candidates without a Web site.

In general, however, it is risky for a 501(c)(3) to provide a link to only one candidate, political party, PAC, or other organization that engages in partisan political activity because this might suggest impermissible partisan favoritism on the part of the 501(c)(3). A 501(c)(3) may not use its resources to develop a Web page and attract visitors whom it then directs to sites with material the 501(c)(3) could not itself post, such as a particular candidate or the endorsement list of a PAC. Until further guidance is available, a cautious 501(c)(3) should avoid links to a single candidate, political party, or PAC.

Q. How can a 501(c)(3) operate a listserv or chat room without violating the IRS restriction on electioneering messages?

A. A 501(c)(3) that operates a listserv or chat area must take steps to ensure that the forum does not violate the IRS prohibition against communications that support or oppose candidates for public office. It should adopt and enforce policies for the forum and guidelines for participants that promote the forum's use for non-electoral purposes and prohibit posting of electioneering messages. It should also clearly and regularly state that the participants, and not the sponsoring 501(c)(3), are responsible for contents of individual postings. If a 501(c)(3) takes these precautionary steps, the organization's tax exemption will probably not be threatened by a single unauthorized electioneering message. However, if such a message is posted, the 501(c)(3) should take the opportunity to remind list participants of the list guidelines, and promptly remove the message (including deletion from publicly available archives of a listserv). Users who repeatedly post political messages must be removed from participation.

On listservs in which a moderator must approve all messages posted, the IRS is likely to consider the sponsoring 501(c)(3) to be more responsible for the

content of messages. A 501(c)(3) that sponsors moderated lists must be certain to screen out any partisan electoral messages.

Q. What steps can an organization take to minimize liability for third-party communications in a listserv or other interactive forum?

A. In general, the risks to organizations operating a listserv, chat area, or other interactive Internet forum are small, but an organization would be wise to protect itself from possible trouble through some simple preventive measures.

A nonprofit running an online forum that allows others to post content should set ground rules for its use. The operating organization should make clear to users what it can and cannot do to accommodate concerns over site content. Disclaimers provide an important tool for dealing with liability issues and help ensure that operation of the site is consistent with the organization's tax-exempt purpose. When forming a content policy, consider the legal constraints that apply to nonprofits' activities, such as the rules governing lobbying and election-related activity discussed in this guide, as well as concerns about postings that could injure third parties, such as defamatory material or copyrighted work reproduced without permission.

The site should ask users to read and indicate their agreement to the site's policy, including a disclaimer on responsibility for user-provided content. There is no guarantee that a court will uphold this kind of contractual agreement, but requiring affirmative acceptance is more likely to be legally effective than just posting the policy on the site. Furthermore, it may deter users from risky behavior.

A nonprofit can increase its legal protection by requiring a registration process that includes assent to a user agreement before allowing access to a bulletin board. (See the Sample User Agreement above.) Such a process would require users to provide identifying information—at minimum a full name, address, and e-mail address—to support enforcement of provisions in the user agreement. The nonprofit needs this information to identify users who transmit information that may injure an individual's reputation, infringe intellectual property rights, or otherwise violate the guidelines for the forum. For the protection of the users, nonprofits may also want to include a privacy statement indicating limits on the organization's use of the information it collects.

The Alliance for Justice's Nonprofit Action Network keeps nonprofits abreast of new rules affecting nonprofit advocacy and distributes other information of interest to nonprofit activists. To become a member of the Nonprofit Action Network, send an e-mail with your name, postal address, phone number, fax number, and e-mail address to advocacy@afj.org.

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