<u>Myths about Lobbying, Political Activity, and Tax-Exempt Status</u>

by Jeffrey S. Tenenbaum and Brian T. Pallasch

By not engaging in lobbying or other permitted political-related activities, your 501(c)(3) or 501(c)(6) organization may be failing to employ important tactics that could be enormously helpful in carrying out its mission. Following are some of the most common misconceptions in this area held by association leaders; the first section relates to 501(c)(3) organizations, while the second section relates to 501(c)(6) organizations.

501(c)(3)s

In this critical election season, myths abound about the permissible — or, more often, impermissible — lobbying and political activity of associations and other nonprofit organizations exempt from taxation under Internal Revenue Code Section 501(c)(3). But the fear factor often is unwarranted. While 501(c)(3) organizations certainly are limited in the amount of lobbying in which they can engage and are prohibited from engaging in political campaign activity, which actions constitute lobbying or political campaign activity and other critical questions 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, lobby at all levels of government, subject to certain limitations. Federal tax law always has permitted some lobbying by 501(c)(3) organizations, as long as such lobbying does not constitute a "substantial part" of an organization's total activities. The 1976 lobbying law and its implementing regulations issued by the Internal Revenue Service ("IRS") guide 501(c)(3) organizations that want to lobby. The law and regulations define "lobbying" and the limits on total lobbying expenditures. To be covered under the 1976 law, a 501(c)(3) organization must make an affirmative election (called a "501(h) election," after the applicable section of the tax code). An organization that does not make the 501(h) election is still allowed to lobby, but it cannot take advantage of the objective definitions and limits that are part of that law; rather, such an organization will be governed by the vague "substantial part" test.

Organizations that make the 501(h) election will recognize that federal tax law and regulations provide wide latitude for 501(c)(3) groups to lobby.

The law makes it very clear how much a 501(c)(3) organization can spend on lobbying — up to $1 million, depending on the size of the organization — if the 501(h) election is made. The law also makes it 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.

The right of citizens to petition their government is basic to our democratic way of life, and

associations, including 501(c)(3)s, are among the most effective vehicles for making use of citizen participation in shaping public policy. 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.

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 elect to come under the protections of the 1976 lobby law, it is governed by the much more ambiguous "substantial part" test. If your organization lobbies but does not elect to be subject to the 1976 law, your 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.

Making the 501(h) election also has many other valuable benefits.

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. Understanding what constitutes lobbying under the 1976 law is not difficult. In general, you are lobbying when you state your position on specific legislation to legislators or other government employees who participate in the formulation of legislation, or urge your members to do so (*e.g.,* direct lobbying). In addition, you are lobbying when you state your position on legislation to the general public *and* ask the general public to contact legislators or other government employees who participate in the formulation of legislation (*e.g.,* 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 $24,500 or more in a six-month period (January-June, July-December). 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 $24,500 during the relevant semi-annual 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 hired to lobby on behalf of a 501(c)(3) or other organization, the semiannual expenditure threshold is $6,000 rather than $24,500.

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. The IRS definition of “grassroots lobbying” only includes 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. *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 provided that if the information is presented and disseminated during political campaigns, 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. One example of this type of activity can be found at www.engineeringthevote.org.

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. Even 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 (an affiliated 501(c)(4) or (c)(6) entity could itself, however, establish a connected PAC). But the affiliated entity generally must have independent funding sources for which no charitable tax deduction will be available.

The general rule is that 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. Specifically, such transferred resources or assets will be treated as lobbying expenses of the 501(c)(3) unless (a) the support constitutes a "controlled grant" (whereby the resources or assets transferred are limited to a specific non-lobbying project of the transferee with proper documentation of such control and segregation), or (b) the 501(c)(3) receives goods, services, or compensation of fair market value in return. (Another narrow exception also applies.)

Consequently, *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 and presuming that the non-501(c)(3) is not engaged in political campaign activities. But if the 501(c)(3) makes a "controlled grant" to its affiliate to fund an educational program, for instance, or if the 501(c)(3) leases office space, office services, and staff services to its affiliate in return for full reimbursement of the costs of doing so, then no lobbying expenditures will be attributed to the 501(c)(3). Other rules apply with respect to overlapping officers and directors.

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 (contained in Internal Revenue Code Section 162(e)), as it is often called, denies a business tax deduction for all lobbying and political activity expenses incurred by businesses. The law also requires that membership dues paid to trade or professional associations (that are tax-exempt under 501(c)(6)) be treated as nondeductible business expenses to the extent of the association's lobbying and political activity. 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. However, the organization may not make communications to the general public that include express advocacy for a federal or state candidate for public office.

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.

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. However, the guide should not contain *any* express advocacy for particular candidates. 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.

* * * * *

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 for or against specific legislation	Yes
Expenditure limits	Yes, 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

* * * * *

Jeffrey S. Tenenbaum, Esq. is a partner in the Association Practice Group of Venable LLP in Washington, D.C. Brian T. Pallasch, CAE is director of government relations for the American Society of Civil Engineers in Washington, D.C. The authors can be reached at jstenenbaum@venable.com or bpallasch@asce.org.

Additional Resources:

Internal Revenue Service (http://www.irs.gov/charities/index.html)
Federal Election Commission (www.fec.gov)
Clerk of the House of Representatives (http://lobbyingdisclosure.house.gov/)
Secretary of the Senate
(http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm)
Alliance for Justice (http://www.afj.org/nonprofit/)
Center for Lobbying in the Public Interest (http://www.clpi.org/)