

# How to Lobby Without Regrets

## A guide to the rules governing lobbying by charities

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**Note:** This article was written in early 1996. The overall law governing lobbying by nonprofit organizations has not changed. However, the law is continuously being interpreted by the IRS, so the law is evolving. This article should be used as a general guide to this difficult subject, not as legal advice. We note many resources at the end of this section for those who want to know more or who have specific questions.

There has been a change in the law concerning contacts with the federal government (including Congress and the administration). Organizations doing a certain amount of lobbying on the federal level need to register and regularly disclose their expenditures

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 we do? What exactly is it? What's the difference between "direct" and "grassroots" lobbying? What does it mean to "elect" to lobby? Should we?

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. This is too bad. 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 only really need to know 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. 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.

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### A brief history

For decades, there has been a tension over the appropriate role of organizations that the IRS calls "public charities"--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, etc. Or should the government be less prescriptive, 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 was clearly intended to encourage more participation by charities.

But rules implementing this new law languished for years. Finally, in 1990, rules were issued that pleased most nonprofit organizations.

But the struggle is certainly far from over. There was a big push in 1995 to impose much stricter limits not just on "lobbying," but on other activities that may influence public policy (the "Istook amendment"). A very broad coalition of charities fought off this attempt, which at one time had passed the House by a comfortable margin. But those who believe that lobbying is a legitimate and important activity of nonprofits are wary of future attempts to restrict lobbying.

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### To elect or not to elect

For now however, the 1990 rules are 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").

This is a mistake, say the lawyers who wrote "Being a Player" (Gail Harmon, Jessica Ladd and Eleanor Evans). They believe 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 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, if you don't elect, the IRS says you are subject to the lobbying definitions applicable to business lobbying, which are broader.
- **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 "unsubstantial" 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 essence the 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 shows no added risk, according to Harmon. If anything, 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 return (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 request Form 5768 from 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 can 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.

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. You can do only one quarter of the amount of grassroots lobbying as you can direct lobbying.

**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 piece of legislation (though you don't necessarily have to mention the bill number).

Significantly, if you ask 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.

However, if you simply tell your members about a specific piece of legislation and your position on it but you don't encourage them to contact their legislators, this is not counted as lobbying. For example, if your newsletter goes mostly to your members (more than 50% of your list), an article that explains a legislative proposal and offers your view of it would not be considered 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 bill. 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.")

Special rules apply to paid mass media advertisements. An ad is considered grassroots lobbying if it appears within two weeks of a vote on a particular piece of legislation, reflects a view on the general subject of that legislation, and either refers to the highly publicized legislation or encourages the public to contact their legislators about the general subject of the legislation. These rules are both controversial and complex: if you are considering placing an ad, read *Being a Player* and/or contact a legal expert.

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### **The Exceptions: What is not considered lobbying**

If your organization is very involved in trying to influence public policy--and/or you put out a lot of reports, studies, speeches and the like--you need to know about what doesn't 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 can take a view about legislation, but it must also explain the underlying facts in a fair enough way that the audience could form an independent opinion or conclusion. It also cannot directly encourage people to act (though it can indirectly encourage people to act--see above).

It must also 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).

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 it 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. 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 by-laws. Clearly, working with other organizations in a coalition would not trigger these rules.

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## 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 book-keeping 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 at least include lines for both direct and grassroots lobbying.

You also need to be able to keep track of lobbying costs as they are incurred. *Being a Player* suggests maintaining a "log" for various expenses such as postage, copying, faxing and messenger services. Employees then record every expense on the log, indicating which 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 should 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 as well as examine your record-keeping. It will be a lot easier to do it now rather than two years from now when you receive an audit notice from the IRS (and the key employees are long gone).

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## 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 people 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 people both to call their legislator 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 all 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. If you do, you will want to get *Being a Player* and study this section closely.

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

## **How much can you spend?**

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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, what you spend on your programs. For most small organizations, this will simply 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 fund-raising unit.)

Of these expenditures, your lobbying costs can 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 (1/4 of \$100,000).

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

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#### **Lambda Consulting, Inc.**

1525 North Park Avenue #1, Indianapolis, Indiana 46202-2644

Ph: 317-684-0684 Fax: 317-684-7053 E-mail: [info@lambdaconsulting.net](mailto:info@lambdaconsulting.net)

[www.lambdaconsulting.net](http://www.lambdaconsulting.net)