
Nonprofit Law Resource Library

Lobbying & Advocacy – Lobbying & 501(c)(4) Primer

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Generally speaking, under the Internal Revenue Code, "lobbying" is support of or opposition to, or a call to action on, specific legislation. Specific legislation refers to the complete range of proposed bills and legislative enactments, at federal, state, and local levels, from constitutional amendments to local zoning ordinances.

However, as you can see from the emphasis on specific legislation, lobbying is narrowly defined by the IRS. Lobbying does not include general advocacy on public issues and public policy nor does it include grass roots campaigning on matters of public importance when no legislation is involved or at issue. Furthermore, lobbying does not usually include advocacy on regulations, appearances before regulatory agencies or other non-legislative bodies, or even "impartial" analysis of legislation.

Many 501(c)(3) organizations are unduly fearful of restrictions on lobbying without fully understanding the narrow definition of lobbying or that these exceptions apply.

There are also a number of important exclusions to this already narrow definition of lobbying. Among the most important are appearances before legislative committees to testify on proposed legislation if invited to do so in writing by the committee itself. Likewise, lobbying in "self-defense", to preserve one's budgetary appropriations for instance, does not constitute lobbying.

In addition, 501(c)(3) organizations are not entirely prohibited from engaging in lobbying. 501(c)(3)s are prohibited from devoting more than an "insubstantial" portion of their resources on lobbying. The term insubstantial has not been clearly defined in this context. Suffice it to say that if no more than five to ten percent of an organization's total efforts are devoted to lobbying, it is probably acting within legal limits.

If more than an insubstantial amount of an organization's resources are devoted to lobbying, the organization may wish to choose to take what is called a 501(h) election. By completing the appropriate 501(h) form (namely, Form 5768), attaching the form to your organization's annual Form 990, and disclosing the extent of your organization's lobbying to the IRS, your organization will be permitted to expend up to approximately 20 percent of your funds on lobbying.

To lobby more than that, you may wish to establish a separate 501(c)(4) tax-exempt organization. 501(c)(4) organizations serve purposes that are tax-exempt but which do not rise to the level of charitable purposes. 501(c)(4) organizations are classified as "social welfare" organizations. Initially this classification included civic groups and community betterment organizations, but these days the most common purpose of new 501(c)(4) organizations is lobbying.

For tax purposes, 501(c)(3)s and 501(c)(4)s are similar in many respects, including most importantly, that their income is exempt from federal income taxes. The main legal difference, under the Internal Revenue Code, is that contributions to 501(c)(4)s are not tax-deductible to donors.

In nearly all states, 501(c)(4)s are exempt from state income and franchise taxes. However, most states do not give sales tax exemptions to 501(c)(4)s nor are postal rate reductions as easy to obtain.

In order to establish the new 501(c)(4) you would need first to incorporate in your state as a separate nonprofit corporation and then apply for federal and local tax exemptions, just as your 501(c)(3) originally did. At the federal level, you will file Form 1024 with the IRS.

The governing board of the 501(c)(4) may be identical to, interlocking with, or completely independent from the 501(c)(3)'s board of directors. The bylaws of the new organization may mirror those of the 501(c)(3), showing differences in the organization's purposes and in the nature of the board and officers. The staffs of the two organizations may also be the same or shared.

In fact, many if not most such 501(c)(3)/(c)(4) combinations share overlapping board and staff. It is essential, though, to maintain the organizational distinctions for legal, accounting, and reporting purposes. At the board level, for instance, the 501(c)(3) board of directors should first convene and adjourn a meeting of the 501(c)(3) board followed by a meeting of the 501(c)(4). Likewise, your staff will have to complete time sheets, accounting for time allocated to each organization. **Most importantly, funds given to the 501(c)(3) for its charitable purposes may not be used by or commingled with the 501(c)(4).**

As a practical matter, many smaller and medium size organizations utilizing this combined structure try to limit the use of the 501(c)(4) in terms of revenues, staff time, and expenses. This allows organizations to take greatest advantage of favorable 501(c)(3) charitable contribution deductions, sales tax exemptions, and postal rates.

Finally, let's look at an unlikely scenario. Suppose the IRS audited your organization and determined that you were engaged in a pattern of excessive lobbying. The IRS would then likely offer the possibility of converting to a 501(c)(4) in lieu of revoking exempt status. You would then need to weigh the costs and benefits of becoming a 501(c)(4), and whether you might successfully negotiate with the IRS to preserve the status of 501(c)(3) by establishing a separate 501(c)(4).