

# Lobbying and Political Activity

## Introduction

Nonprofit organizations frequently want to — and do — engage in political activities, but federal tax laws regulate what is permissible. The restrictions are very important because the penalties for violating them are serious, from taxes to fines, and even revocation of tax exemption. Federal law defines actions designed to influence or affect legislation as lobbying, and actions designed to affect elections as electioneering.

The nature of an organization's tax exemption shapes what it may and may not do. For example, public charities (501(c)(3)s) may engage in lobbying, within limits, but not electioneering. Yet, they may conduct voter education and get-out-the-vote efforts, which are not considered electioneering. In contrast, social welfare organizations (501(c)(4)s) and trade associations (501(c)(6)s) have more latitude with both lobbying and electioneering. Private foundations, on the other hand, may not earmark *any* part of their grants for lobbying purposes. Nor may organizations use federal grant funds for lobbying activities.

## Key Elements

- Even though the law is strict about lobbying by public charities, a policy not only spells out what is acceptable within your organization but also reminds people of what is prohibited.
- It is not uncommon to find two related but independent entities. Charities that deal with public policy issues, such as children's welfare, environmental protection, or human rights, may create a social welfare organization to separate lobbying and advocacy work from educational and service delivery activities. Likewise, trade associations and professional societies may create foundations so they can receive charitable contributions for scholarships and other educational programs. It is important that the distinction between the two organizations is clear in their structure (boards, bookkeeping, etc.) as well as their messaging.
- If a public charity engages in lobbying, it should distinguish grass-roots from direct lobbying. Grass-roots lobbying includes activities designed to influence legislation by encouraging the general public, or a segment of it, to contact legislators. Direct lobbying includes communicating directly with legislators involved in formulating the legislation.

## Practical Tips

- ✓ Within the organization, clarify who is responsible for lobbying activities and how the funds will be tracked. The latter, in particular, has implications for the organization's overall reporting requirements.
- ✓ Federal tax law allows 501(c)(3) public charities to engage in lobbying within certain limits. An organization may choose one of two tests when determining the extent of

its lobbying activities: 1) the “no substantial part” test, which the IRS does not define explicitly; and 2) the expenditures test, also known as the 501(h) election, which sets specific dollar limits based on the organization’s total expenses.

- ✓ Before embarking on lobbying activities (under a 501(h) election), a charity should be sure that it is administratively equipped to handle the significant record keeping required. For example, it must be able to track staff time and expenses not only for communicating with legislators but also for preparing for the contact, conducting the research, and writing the communications. Additionally, it must document all direct costs, such as printing and mailing, related to lobbying activities.
- ✓ Because the definitions of legislative activity can be murky and because of the many exceptions and exemptions, those nonprofit organizations that are involved in any kind of legislative activity should seek guidance from legal counsel. The risks are too great should the organization make a mistake.

### **Sample Lobbying and Political Activity Policies**

The samples introduce a range of issues, including definitions, limitations, and acceptable practices.

1. This policy outlines the parameters for limited lobbying, reporting requirements, and clarifies what constitutes lobbying. It also provides guidance to field offices of the organization.
2. This brief policy statement is strict about inappropriate political contributions.
3. This more complicated policy, from an organization that focuses on public policy issues, outlines what employees may and may not do during elections.

#### **Sample #1**

*This policy outlines the parameters for limited lobbying, reporting requirements, and clarifies what constitutes lobbying. It also provides guidance to field offices of the organization.*

#### **Lobbying Expenditures**

- XYZ engages in limited lobbying to advance its mission. It is XYZ policy to adhere strictly to limitations on lobbying expenditures imposed by the Internal Revenue Service. Lobbying expenditures are reported annually to the IRS on Form 990.
- To ensure adherence to this policy, lobbying expenditures must be included in the approved XYZ budget or authorized in advance by the [responsible senior staff]. [Senior staff] will alert the chief operating officer to any significant lobbying expenditures in advance, to facilitate compliance with the limits on direct and grass-roots lobbying expenditures.
- Both expenditures and staff time must be charged to a lobbying project code, which will indicate whether the lobbying is “direct” or “grass-roots.” Below is some general

guidance about lobbying, as defined by the IRS. Please contact the general counsel's office if you have any questions about lobbying.

- The following organizationwide policies apply to field offices just as they apply to the national office.

### **Definition of Lobbying**

- Lobbying is generally defined as communicating, directly or indirectly, with policymakers for the purpose of trying to influence legislation, whether federal, state, local, or foreign (non-U.S.).
- U.S. law divides lobbying into two principal categories: “direct” lobbying and “grass-roots” lobbying.
- *Direct lobbying* involves communications that
  - Are directed towards government officials;
  - Refer to specific legislation; and
  - State or strongly imply a position on it.
- *Grass-roots lobbying* involves communications that
  - Are directed to segments of the general public;
  - Refer to specific legislation;
  - State or strongly imply a position on the legislation; and
  - Encourage the recipient of the communication to contact government officials with respect to the specific legislation. (This is sometimes called a “call to action.”)
- In order to be considered lobbying, an activity must generally meet all the parts of either one definition or the other. In addition, there are certain exceptions to the definitions of lobbying that may apply. Please consult the general counsel's office.
- When recording lobbying expenditures, it is critical to specify whether the spending was for direct lobbying or for grass-roots lobbying.
- The general counsel's office can provide further advice on applying the lobbying policies.

### **Lobbying with Foundation Funds**

- In general, foundation grant funds may not be used for lobbying.
- If a project gets only part of its funding from a foundation, the project can include lobbying, so long as the lobbying expenditures are funded by sources that do not exclude lobbying.
- When designing a project that will include funding from a foundation, any lobbying must be paid for out of general funds or other non–foundation funds that can be used for lobbying.

### **Lobbying with Government Funds**

- In general, we are prohibited from using any government funds for lobbying, including using government funds to hire consultants or make grants that involve lobbying. If you have any questions, please contact the general counsel's office.

### **Responsibility — Lobbying Expenditures by Field Offices**

- In each year's budget request, the [chief executive of field office] is responsible for identifying and labeling any proposed expenditures for lobbying.
- In carrying out the approved budget, the [chief executive of field office] is responsible for accurately recording the actual allocation of staff time and other expenditures for lobbying.
- The [chief executive of field office] is responsible for obtaining authorization before incurring any unbudgeted expenditure for lobbying. Requests for authorization are to be submitted to the [designated senior staff].

In addition to reporting our lobbying expenses annually to the IRS, we are required to report to Congress twice yearly on our lobbying activities that involve trying to influence U.S. federal programs, policies, and practices through communications with congressional employees and certain high-ranking agency employees. If you engage in any activity along these lines, or retain others to do so on our behalf, please contact the general counsel's office.

### **Sample #2**

*This brief policy statement is strict about inappropriate political contributions.*

#### **Political Contributions**

XYZ encourages individual participation in civic affairs. However, as a charitable organization, XYZ may not make contributions to any candidate for public office or political committee and may not intervene in any political campaign on behalf of or in opposition to any candidate for public office.

We therefore

- Refrain from making any contributions to any candidate for public office or political committee on behalf of XYZ.
- Refrain from making any contributions to any candidate for public office or political committee in a manner that may create the appearance that the contribution is on behalf of XYZ.
- Refrain from using any organizational financial resources, facilities, or personnel to endorse or oppose a candidate for public office.
- Clearly communicate that we are not acting on behalf of the organization, if identified as an official of XYZ, while engaging in political activities in an individual capacity.
- Refrain from engaging in political activities in a manner that may create the appearance that such activity is by or on behalf of XYZ.

### **Sample #3**

*This more complicated policy, from an organization that focuses on public policy issues, outlines what employees may and may not do during elections.*

During election years or cycles — and especially within 120 days of any election — it is very important that XYZ employees understand what they may and may not do during an election campaign vis-à-vis political candidates and their campaigns. **As a general rule, involvement in election campaigns by XYZ or its employees is strictly forbidden by the Internal Revenue Code.** The public policy reason for this is that the federal government, understandably, does not want nonprofit organizations to use their tax-deductible donations or foundation grants to influence elections. Violation of the law subjects the organization to loss of its tax-exempt status and loss of the tax-deductibility of donor contributions to the organization, both very dire penalties.

### **What election activities you *may not* engage in, as an employee of XYZ**

XYZ and its employees may not endorse, work for, or otherwise support a candidate for public office at any level (federal, state, or local). Likewise, no candidate may be opposed. No funds or resources of XYZ may be used to support or oppose any candidate. XYZ must also take care that any informal or formal coalition of which it is a member does not engage in any partisan electioneering activity.

This does not prohibit you, **as an individual**, from exercising your right to engage in partisan electioneering activities. You may actively work for any candidate during after-work hours, while on leave without pay, or while using accrued vacation. But you must *not* do it as a representative of XYZ; it must be clearly and solely in your capacity as a private individual. You should be careful, if engaging in personal electioneering activities, not to identify yourself as speaking or acting on XYZ's behalf. Nor should you be identified as being employed by XYZ in any printed campaign materials or in any public forum.

No XYZ funds or resources (e.g., photocopying, postage, telephones, etc.) may be used in your personal electioneering activities.

### **What limited election activities you *may* engage in, as an employee of XYZ**

XYZ and its employees may

- Inform candidates or their campaigns of XYZ's position on issues and provide materials to them. It is important, however, that if the opportunity for a briefing or to receive materials is extended to one candidate for an office, it be extended to *all* candidates for that office.
- Ask candidates to support XYZ's position, if elected. The request must be made privately, *not* publicly.
- If a candidate agrees to XYZ's request to support an XYZ position, XYZ is very restricted as to what use it may make of that agreement. *There is a flat prohibition against XYZ "publishing or distributing statements" about a candidate's response to a request to pledge to support its position on an issue.* So any responses must be kept strictly internal within XYZ and may not be published to members, subscribers, the media, or the general public.
- Somewhat less strict rules govern candidate questionnaires. The results of a questionnaire may be publicly distributed if they 1) cover a broad range of issues, 2)

include all candidates in a race on an equal basis, and 3) present the issues neutrally, without suggesting a “correct” position. Voting records of incumbents may be compiled and distributed, but they must also cover a broad range of issues, include all incumbents without identifying those up for reelection, and not indicate a “correct” vote. No overall grade or score may be given.

- *After an election*, it is permissible for XYZ to make publicly known that a now-elected candidate supports XYZ’s position, or to release the results of any pledge effort.
- Ask candidates to go on record publicly as supporting XYZ’s position. Again, the request to the candidate must be made privately, not publicly. Most importantly, the *candidate* must make the public announcement of his or her support; XYZ may not do so, nor publicize the candidate’s announcement or position in any way.
- Submit position statements to and testify before the platform committee of a political party. But if statements or testimony are given to one party’s committee, the same request and submissions must be made to other parties’ committees.
- Sponsor a public forum to which all candidates are invited to discuss issues important to XYZ — although the forum must obviously be conducted with an even hand in a nonpartisan manner.
- In the situation where you are called on the phone or visited by a staff member of a presidential or congressional campaign committee who is seeking information on your subject area, you can provide information to them under these conditions:
  - The campaign staffer must have initiated the call or visit to you, not the other way around.
  - The information you provide to a campaign staffer *orally* is **not** specially prepared or researched for them; it must be information that you would normally supply to anyone calling and asking for this type of information.
  - If the campaign staffer requests any *written* materials from you, you should ideally refer him or her to XYZ’s Web site where he or she can print out the materials himself or herself. If the materials requested are not posted on the Web site, then you may provide it in printed or written form, but whatever you provide must be available to the general public, not something specially prepared for that campaign.

If the information requested by a campaign staffer requires special research or is something not available from XYZ to the general public, then your choices are

You can decline to provide the information to the campaign staffer, citing federal election laws; or

You can provide special information or research to a campaign committee or staff, but you must also make it available in printed or written form to all other candidates.

If and when you work in the field with members of the staff of a congressperson, a state legislator, or a local elected official, you should make certain that the staff member is *not* working for the official’s election-campaign committee, but is, indeed, on the official’s government-paid staff. You may not have conversations with election-campaign committee employees about legislation, strategy, or any

other subject, except in the very limited circumstances described above.

In 2003, the Federal Election Commission also published its own rules that restrict so-called “coordinated communications” and other activities with a candidate for federal office. Put simply, 501(c)(3) organizations and their employees may not make “*coordinated communications*” with candidates for federal office. Communications activities that are made in cooperation with a candidate or party and that are directed to voters are considered electioneering and in-kind election contributions to a candidate, which are, of course, prohibited under IRS rules for nonprofit 501(c)(3) organizations, like XYZ. So a coordinated communication is particularly dangerous because it violates both federal election laws and federal tax laws.

*Because of the extreme complexity and the significant danger to XYZ of any activity by employees that might be considered electioneering, XYZ employees should not engage even in the very limited activities permitted, without the explicit approval of the chief executive.*

*If you have any questions about this memo, its guidance, or interpretation, please contact the chief executive or chief financial officer.*

### **Suggested Resources**

- Pidgeon, Jr., Walter P. (Editor). *The Legislative Labyrinth: A Map for Not-for-Profits*. New York: John Wiley & Sons, 2001.
- Sen, Rinku and Kim Klein (Series Editor). *Stir It Up: Lessons in Community Organizing and Advocacy*. San Francisco: Jossey-Bass, 2003.
- *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations*. Washington, DC: Alliance for Justice, 2006.