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To Elect or Not Elect: That is the (Lobbying) Question

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It's a common misconception that 501(c)(3) organizations are not allowed to lobby.

This may stem from people wrongly conflating the absolute ban on political activities with activities meant to influence legislation.

It's true that 501(c)(3)s are flatly prohibited from intervening in political campaigns. But the reference to legislative activities is not absolute:

. . . (N)o substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Lobbying – shorthand for "carrying on propaganda, or otherwise attempting to influence legislation . . ." – is allowed as long as it's not a "substantial part" of the organization's activities.

So — that's great. A 501(c)(3) can, indeed, lobby until it's gets too "substantial." But what exactly does "substantial" mean?

Section 501(c)(3) of the Internal Revenue Code and the Treasury regulations written to interpret that governing statute are notoriously vague.

"Substantial" means "not insubstantial." Well, that's not exactly helpful. And "substantially" sometimes means "primarily." But "exclusively" also sometimes mean "primarily."

An Alternative to Vagueness

So, what's a diligent 501(c)(3) to do? This is a big deal: if the organization does too much — that is, "substantial" — lobbying — it will face large excise taxes and its tax exemption may be yanked.

Eventually, Congress addressed the problem, creating an objective "expenditures" test as an alternative to the fuzzy and highly subjective test based on "substantiality." Adding the new Section 501(h) in 1976 has been a huge improvement to the retroactive facts and circumstances analysis.

Now, the 501(c)(3) has a choice of the Substantiality Test or the Expenditure Test. Most choose the Expenditures Test; it's an objective, easy to apply, mathematical, calculation comparing lobbying expenditures against total expenditures.

For some large nonprofits, though, the Expenditures Test is not available or is not the best alternative because of its monetary limits. But for most 501(c)(3)s, the subjectivity is eliminated and — better still — the allowable percentages are quite generous.

There's still the matter we mentioned in "It's That Time of Year Again": determining if a particular activity will be considered advocacy (not included in the percentage calculations because it's allowable in full) or "attempting to influence legislation" (included in the calculations).

There's an additional issue: distinguishing between "direct lobbying" and "grassroots lobbying." This is significant because there is a limit to how much of the latter that's allowed. "Direct lobbying" refers to lobbying aimed at the legislators or their staff. "Grassroots lobbying" means "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, . . ."

How to Choose the Expenditure Test

Becoming eligible to select the Expenditure Test over the Substantiality Test is easy: the organization completes the 1-page Form 5768 (Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation).

This document operates as an election by the 501(c)(3) to forego the subjective Substantiality Test and, instead, have its lobbying expenditures measured by the objective Expenditure Test.

For many public charities, making this election is the best way to protect the organization from exceeding the lobbying limits. This election can be done at any time, and can be revoked by the organization.

There are additional advantages, too: several exceptions to what is considered lobbying, penalty taxes are imposed instead of an immediate loss of tax exemption, and an exclusion for lobbying time "donated" by volunteers – even volunteer board members. And, according to the IRS, making this election does *not* increase a 501(c)(3)'s chances of being audited.