Top Ten Myths about 501(c)(3) Lobbying and Political Activity

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"501(c)(3)s cannot lobby and will lose their tax exemption if they engage in lobbying" is the first (of the ten) myth that Jeffrey Tenenbaum, Esq. attempts to debunk in this concise overview of 501(c)(3) lobbying. If your organization is currently engaged in or is looking to explore possible lobbying activities, then this quick snapshot is a must read.

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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. Federal tax law has always permitted some lobbying by nonprofits. The 1976 lobbying tax law passed by Congress made that expressly clear. The Internal Revenue Service ("IRS") followed with implementing regulations. The federal government clearly supports lobbying by 501(c)(3) organizations. Together, the law and regulations provide wide latitude for 501(c)(3) organizations 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 are lobbying and which are 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 one of the most effective vehicles for making use of citizen participation in shaping public policy. Fortunately, the legislation passed by Congress in 1976 makes it possible for 501(c)(3)s to lobby freely for the causes, communities and constituencies they serve.

Generally, organizations that make the 501(h) election under the 1976 lobbying law may spend 20% of the first $500,000 of their annual expenditures on lobbying ($100,000), 15% of the next $500,000, and so on, up to $1 million dollars.

Finally, by not engaging in lobbying, your organization may be failing to employ a very important activity that could be enormously helpful in carrying out its mission.

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 "insubstantial part" test. If you do lobbying but don't elect to be subject to the 1976 law, your 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.

Some 501(c)(3) organizations have been reluctant to make the 501(h) election for fear that this action will either change their section 501(c)(3) status or serve as a "red flag" to the IRS and prompt an audit of the organization. Neither concern is at all justified. Electing to come under the 1976 law does *not* affect a 501(c)(3)'s tax exempt status. Electing organizations remain fully exempt under section 501(c)(3) of the Internal Revenue Code.

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."

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

3. 501(c)(3)s cannot support or oppose a specific bill, or tell their members to do the same.
You absolutely can, it just falls under the 1976 definition of lobbying. 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 (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 (grassroots lobbying).

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 is required to register and file semiannual 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) - that is,

who makes at least one "lobbying contact" and devotes at least 20 percent of his or her time to "lobbying activities," *and* (2) the organization incurs, or expects to incur, expenditures on "lobbying activities" of $20,500 or more, in a six-month period (January-June, July-December).

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 determining whether they are required to register and report under the LDA. Thus, an electing group will not be required to register under the LDA if its tax law lobbying expenditures do not exceed $20,500 during the relevant semiannual periods and/or if none of its employees devotes 20 percent or more of their 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 $5,000 rather than $20,500.

5. Encouraging a 501(c)(3)'s members 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) 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*.

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 non-members, 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.

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, there is no prohibition 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.

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 501(c)(3)'s members and to the general public. However, 501(c)(3) organizations 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) organization's narrowness of focus implies endorsement of candidates whose replies are favorable to the questions posed. *Unless your are certain that your organization clearly qualifies as covering a broad range of issues, your organization should avoid disseminating replies from questionnaires.*

9. 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 PACs) to carry on unlimited lobbying activities and otherwise permitted political activities. However, no resources or assets of the 501(c)(3) may be used to fund or support the affiliate; all funding and support must come from independent sources (for which no charitable tax deduction will be available). A 501(c)(3) and its lobbying affiliate may even share office space, office services, and staff - so long as the affiliate pays or reimburses the 501(c)(3) for *all* space, services and staff time it uses. Other rules apply with respect to overlapping officers and/or directors.

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.

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Pamela Richardson Walker, August 18, 2010
Is this paper going to be update to reflect the new lobbying laws and Supreme Court case.

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