Sustainable Philanthropy

Advising and Representing *Exempt Organization*s and *Donor*s

Electioneering and Lobbying by Exempt {IRC §501(c)(3)} Organizations

Principles, Guidelines, and Sources for Administrators and Directors

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Notes and Conventions

This is the second installment of our treatise on the care and nurture of *Donors* and *Exempt Organizations*.

The treatise expresses Steven Roy Management and Cambyses Financial Advisors' "*Sustainable Philanthropy*" approach to *Donors*, *Exempt Organizations*, and their Stakeholders.

Sustainable Philanthropy emphasizes practices, attitudes, and collaborations that foster equitable, resilient, stable, scalable, and compliant *Donor*, Organization, and Stakeholder interactions that give birth to perpetual giving, perpetual operations, and perpetual benefits.

The treatise addresses the needs of:

- *Donors,* to facilitate decisions on their path to *Sustainable Philanthropy*.
- *Exempt Organizations*, their *Boards of Directors*, *Executives*, Employees, and Volunteers who nurture their *Donors* and provide *Public Benefits* to their Stakeholders and Constituents.
- Non-Profit Advisors – the Accountants, Attorneys, Financial and Insurance Advisors, Governance Consultants and other professionals who serve the philanthropic community's needs.
- Public Policy Makers and Gatekeepers – In the hope that we shed light on the consequences of your regulatory and legislative actions.

Our ultimate goal is to produce a comprehensive body of authoritative and reliable materials viewed from the perspective of both *Donors* and *Exempt Organizations*. These materials are divided between a, more-or-less, linear main body narrative, and a supporting cast of <<*Technical and Procedural Notes*>>.

The main body narrative provides an overview and introduction to the installment topic: i.e., What the topic involves, where it fits in the philanthropic firmament, how to interpret it, information sources to facilitate interpretation, further study, and action, and digressions about its origin, purpose, and history. To the extent possible, the main body of the treatise is non-technical and provides general coverage of the most likely scenarios Donors, Organizations (and their personnel), and Advisors encounter.

<<*Technical and Procedural Notes*>> aim at users with a deep-seated need for sophisticated analysis. <<*Technical and Procedural Notes*>> address topics at a foundational level, dissecting rules, vocabulary, precedents, analytics, and exceptions at a level that addresses the needs of representatives who make and effectuate strategic decisions or advise those who make them. <<*Technical and Procedural Notes*>> "read like an operations management, tax, or accounting textbook," because that is exactly what they are intended to be! Note, however, that they are not a substitute for well-grounded professional input!

Each installment covers a single, rather narrow, subject. E.g., This installment covers principles and procedures that *Donors* and their advisors use to evaluate *Donee* organizations. Reading between the lines, this installment also provides a roadmap that organizations can use to make themselves more *Donor* friendly.

To improve readability, we footnote topic sources rather than including them in the narrative. In the main body, we limit analysis and exposition about the footnoted sources to the extent possible. We reserve that, more detailed, exploration our <<*Technical and Procedural Notes*>>.

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We employ several orthographic conventions in our main body and <<*Technical and Procedural Notes*>>.

- Technical terms and terms-of-trade are *Italicized and Capitalized* when we invoke their trade meaning. We define many of these terms on our Definitions page. (Which is not linked to the narrative at this time.)
- **Important Distinctions and Instructions** appear in boldface.
- Headings and direct quotes from outside sources appear in blocked, sans serif typeface (usually Calibri or Calibri Light)
- Active links to collateral sources appear in *Blue Underlined Text*
- Titles and Titled-linked material is italicized and underscored.

***Note to fellow advisors, professionals, and colleagues*:**

We welcome your feedback, constructive comments, and questions... and we will publish them and credit you for them if appropriate. We sometimes miss the obvious your feedback helps remedy that. We view our colleagues as collaborators - not competition. Feel free to use any of our library materials in your own practice - just give us credit (where credit is appropriate) and don't re-publish them without our permission and acknowledgement (that could get nasty).

Apropos that last paragraph: Tell us what you do well - especially if it is a service we don't offer. We generate a "steady trickle" of referrals for other professional services and would be happy to add you to our referral list after we've vetted you and gotten to know you. Contact us by email or phone to start the relationship.

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Preliminary Note:

In this topic, we discuss the current status of political interaction and lobbying restrictions applied to Internal Revenue Code (IRC) 501(c)(3) organizations. This document is intended for instructional purposes for Board of Directors education, Administrator Education, and as a general guide for tax professionals who review the Organization's interactions (if any) with the political sphere.

The material covers the applicable rules as of the publication date (11/2021). It (unlike previous versions of the document) also considers the ramifications of the Trump Administration's (and several Congressperson's) efforts to repeal or significantly modify those rules. Much of that discussion, although fascinating to those of us who follow such things, is not relevant to design or maintenance of a compliance program under the current rules. We touch on the fringes of that discussion in several "Brief Historical Digressions," below. By-and-large, the Trump Administration's efforts did not change the rules.

Had the Trump Administration's efforts been successful, they would have altered the application and/or obviated the relevance of some or all of the information in this publication. Since there are still several remnants of that effort in Congressional Committees, we strongly advise you to seek advice from your tax representative or counsel regarding the continuing relevance of this publication.

Core Issue - Tax Exemption under Internal Revenue Code §501(c)(3) is Contingent:

Championing a cause and the advocacy that follows from it often mandates interaction with the political arena. Organization officers, management, and members of "Legislative and Municipalities" committees are the sharp point of that interaction. They must be mindful that the Organization's tax exempt, "501(c)(3)," status

- Absolutely prohibits Organization-level political activity on behalf of candidates for public office, and
- Restricts Organizations' latitude to lobby on behalf of legislation

when they act as the Organization's representatives.

The Organization's "tax exempt" status under Internal Revenue Code (IRC) §501(c)(3) and its state counterparts (e.g., California Revenue and Taxation Code (R&TC) §23701d) requires, among other things, that:

- The Organization operate "exclusively for religious, charitable … or educational purposes,"
- No "substantial part" of [the organization's] activities "is carrying on propaganda, or otherwise attempting, to influence legislation," and
- The Organization 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."

The Organization's promise to observe these restrictions benefits the Organization and its Donors:

- The Organization (with certain exceptions) pays no state or Federal income tax on its net income derived from exempt-purpose activities, and
- The Organization can solicit, and its Donors may "deduct," charitable contributions that enable the Organization to continue its work.

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The Organization's promise is only as good as its performance. If the Organization does not fulfill that promise, the Internal Revenue Service and state authorities (e.g., California Franchise Tax Board) can:

- Censure the Organization (publicly or privately)
- Impose fines on the Organization, its management, and officers, and
- Revoke the Organization's exempt status, and
- Challenge Donors' tax returns and deductions.

Obviously, it behooves Organizations to play by IRS's and states (Franchise Tax Board's) rules.

"Political Activity" is Prohibited:

The prohibition on participation or intervention in political campaigns by exempt organizations is absolute.

The Organization, its board, management, and officers, and members of Legislative or Municipalities committees, acting on behalf of the Organization, simply cannot act on behalf of any candidate for public office. The prohibition applies to candidates running for office, not advocacy about issues the candidate may (or may not) support. As a practical rule:

When representing the Organization, directors, management, and officers can discuss issues, but cannot support candidates.

Organizational representatives must be cautious if several candidates have taken contrasting positions on the same issue. Presentations must offer equal opportunity to all the candidates' views and not identify a particular candidate as a proponent of the Organization's "favored" view.

The IRS displays "zero tolerance for favoritism:"

- The Service challenged a Southern California theatre company's exemption because the theatre "intervened" in a political campaign. The company allowed an incumbent US Congressional candidate to rent its phone bank (a service that was not available to the general public). After a great deal of litigation and expense, the theatre's exemption was reinstated. Reinstatement did not help the theatre avoid bankruptcy and didn't keep the candidate out of jail for other campaign law violations.
- An environmental charity ran afoul of the Service by offering transport to polling places for voters sympathetic to a candidate who favored the charity's position. Had they offered transport to all voters, they would probably have been OK.

Political rivals often come down on opposite sides of "lightning rod issues," ("environment," "global-warming," or, "caribou stew"). This poses an obvious dilemma – how does the Organization support (or oppose) an issue without supporting (or opposing) a candidate?

Until 2007, the answer was vague. Neither the Internal Revenue Code nor the Regulations contains clear guidance. Instead, we drew inferences from provisions of the Code that restrict "political expenditures." Three things were clear:

- Exempt organizations could (and would) be held to a higher standard than for-profit entities,

- If an exempt-organization's actions favor one candidate over another sanctions may be imposed, and
- The magnitude and dimensions of the issue were unclear.

In 2004 and 2006, the IRS conducted "Political Activities Compliance Initiative" studies to clarify the rules and determine the extent of the issues.[1] The Initiative examined 210 (of 403) referrals[2] alleging political campaign intervention by section 501(c)(3) organizations. The alleged violations are instructive, as are the case dispositions:

Allegations	Total #
1. Exempt organization distributed printed documents supporting candidates.	38
2. Church official made a statement during normal services endorsing candidates.	32
3. Candidate spoke at an official Exempt Organization function.	27
4. Organization distributed improper voter guides or candidate ratings.	21
5. Organization posted a sign on its property endorsing a candidate.	27
6. Organization endorsed candidates on its website or through links on its website.	26
7. Organization official verbally endorsed a candidate.	13
8. Organization made a political contribution to a candidate.	18
9. Organization allowed a non-candidate to endorse a candidate during a speech at the organization's function.	6
10. Organization's facilities used for political campaign intervention.	6

Disposition of Closed Cases	Total #	Percent
Final revocations	5	3.5%
Proposed revocations	2	1.5%
Political intervention substantiated: written advisory issued	95	65.5%
Non-political intervention violations	6	4.0%
Political intervention not substantiated upon exam	37	25.5%
Total Closed Cases	145*	
* 65 cases remained unresolved at the time the Service released its report on the Initiative.		

Unfortunately, the Service did not discuss two political intervention issues in their report:

- What behaviors were alleged in the 193 (of 403) referrals that the Service elected not to pursue, and why were they deemed unworthy of the Service's attention?
- What behaviors were alleged in the 37 referrals in which "Political intervention (*was*) not substantiated upon exam" and why were they deemed "unsubstantiated."

Thus, the Service's initial report gave a (fairly) clear picture of what behavior IRC §501(c)(3) proscribes but little insight about where the boundary lies between (acceptable) issue-advocacy and

[1] http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf (The report did not reproduce well when we tried to cut-and-paste from the original document.) For a study of how the IRS conducted the examinations that led to the report, link to: http://www.treas.gov/tigta/auditreports/2005reports/200510035fr.pdf

[2] The majority of referrals for "campaigning" violations are filed by supporters of the "other side" of the issue the Organization's representative supported.

(prohibited) political-intervention. The Internal Revenue Service's Political Activities Compliance Initiative (PACI) remained in effect for the 2008 election season, but the Service generated no report on that election cycle.

Further, incremental, enlightenment came soon after when the Service released Revenue Ruling 2007-41[3] The Ruling analyzes twenty-one scenarios and seven organization/politician interactions and provides the Service's rationale for their positions. The entire Ruling is reproduced in the appendix. The ruling makes it clear that regardless of the context or interaction: The Organization (through its publications or statements), and/or Organization management, officers, and committee members when they represent the Organization may not issue any statement (directly or indirectly) and may take no action in connection with an election or campaign if that statement or action favors one candidate over another.

Interaction: Voter Education, Voter Registration and Get Out the Vote Drives	
	Prohibited if conducted in a manner that favors or opposes one or more candidates.
Interaction: **Individual Political Activity by Organization Leaders**	
	Permitted if Organization leaders speak for themselves as individuals or address only public policy issues.
	Prohibited if Organization leaders make partisan comments in official Organization publications or at official Organization functions.
Interaction: Candidate Appearances at Organization Functions	
	Prohibited unless the Organization provides equal (and substantially identical) opportunity to participate for all political candidates seeking the same office
	Prohibited if the Organization indicates any support for or opposition to the candidate (including in candidate introductions and communications concerning the candidate's attendance)
	Prohibited if any political fundraising occurs
Interaction: Candidate Appearances Where Speaking or Participating as a Non-Candidate	
	Permitted if candidates were chosen to speak solely for reasons other than their candidacy for public office, speak only in a non-candidate capacity, and their candidacy is not mentioned.
	Prohibited if any campaign activity occurs in connection with the candidates' attendance or the Organization fails to maintain a nonpartisan atmosphere on the premises or at the event where the candidates are present
	In all cases, the Organization's communications must indicate the capacity in which the candidates are appearing and may not mention the individuals' political candidacy or the upcoming election.
Interaction: Issue Advocacy vs. Political Campaign Intervention	
	Questionable if the statement identifies one or more candidates, expresses approval or disapproval for one or more candidates' positions and/or actions, makes reference to voting or an election, or addresses issues that have been raised in the campaign. (It is best to err on the side of caution.)
	Timing and frequency influence the permissible content of Organization statements:

[3] Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007)

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	• **Permitted** if the communication is part of an ongoing series of Organization communications on the same issue that are made independent of the timing of any election (and the communication does not otherwise favor any candidate) • **Permitted** if the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office (and the communication does not otherwise favor any candidate - "Write Congressman Smith" is permitted. "Don't Vote for Smith If He Votes against This Bill" is not.) • Awkward if the statement is delivered close in time to an election.
Interaction: Business Activity	
	Permitted if the good, service or facility is available to all the candidates in the same election and to the general public on an equal basis.
	Permitted only if fees charged to candidates are the Organization's customary and usual rates and the activity is an ongoing Organization activity.
Interaction: Websites and Links	
	Organization representatives must evaluate links from the Organization's website to candidates' sites using the same criteria used for other Organization statements and communication. Pay particular attention to the context of the link on the Organization's website, whether all candidates are represented, the exempt purpose served by offering the link, and the directness of the links between the organization's website and any web page that contains material favoring or opposing a candidate.
	Side Note on Websites and Links: Candidates' web pages change frequently. Links from the Organization website to candidate sites should be reviewed periodically to make sure they remain permissible.

Limited Lobbying Activity is Permitted

The IRC draws a distinction between political intervention and lobbying. Political intervention is prohibited. Lobbying is permitted, provided it is not a "substantial part" of the Organization's activities. This segues to several questions:

- What is the difference between lobbying and political intervention?
- What is the difference between lobbying and the Organization's administrative-educational program?
- What constitutes a "substantial part" of the Organization's activities?

Important Note: Though it is outside the scope of our topic, Private Foundations are not prohibited from lobbying but may incur "excise tax" (aka penalties) and possible loss of tax-exempt status for doing so.4 as the Service itself notes, this tax is so significant that it generally acts as a lobbying prohibition. For activities that are subject to the confiscatory excise tax, see: *Private Foundation Taxable Expenditures: "Taxable Expenditures" Defined*

[4] IRC §4945 and Treas. Reg. 53.4945-1, as the Service itself notes, this tax is so significant that it generally acts as a lobbying prohibition.

Regulations permit Private Foundations to:

- Make general support grants to publicly supported charities that engage in lobbying, provided the grant is not earmarked for lobbying purposes;
- Make special purpose grants for projects that involve lobbying, provided the grant is not earmarked for lobbying purposes, and the grant does not exceed the amount of the project grant that supports non-lobbying activity.

Regulations protect private foundations that make grants in accordance with IRS guidelines to charities that later lose their tax exemption because of excess lobbying.

Distinguishing Lobbying from Intervention:

In the most basic terms:

- Lobbying focuses on legislation,
- Political intervention focuses on candidates and campaigns for election.

Legislation means any action by:

- Congress, a state or local legislative body in the form of a bill or motion, or
- The public in a referendum, proposition, initiative, constitutional amendment, or similar procedure

A communication is considered lobbying if it is

- Addressed (directly or indirectly) to anyone outside the Organization,
- Refers to a specific piece of legislation,
- Advocates a position on the legislation, and
- Urges action on it.

Neither the statute nor regulations carve out specific exclusions from this generalization. However, some activities are not considered lobbying:[5]

- Making available the results of nonpartisan analysis, study, or research,
- Examining and discussing broad social, economic, and similar issues,
- Providing technical advice or assistance (where the advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by that body or subdivision,[6]

[5] IRC §4911[c](2)
[6] C.f. Rev. Rul. 70-449, 1970-2 C.B. 112

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- Appearing before, or communicating with, any legislative body about a possible decision of that body that might affect the existence of the organization, its powers and duties, its tax-exempt status, or the deduction of contributions to the organization,
- Communicating with a government official or employee, other than:
    - A communication with a member or employee of a legislative body (when the communication would otherwise constitute the influencing of legislation), or
    - A communication with the principal purpose of influencing legislation.

Some activities are not considered lobbying because the issues have been litigated or are subject to Revenue Rulings or Procedures.:

- Attempting to influence an administrative agency with respect to regulations or rulings,
- Attempting to influence the President, a governor or mayor with respect to executive decisions,
- Attempting to influence legislators on non-legislative matters (e.g., to conduct an investigative hearing, to intervene with a government agency), or
- Engaging in litigation to obtain a judicial interpretation of the law.

Because ballot measures, including referenda, initiatives, constitutional amendments, and bond measures, are considered legislative proposals the Organization may support or oppose ballot measures that relate to the Organization's exempt purposes without jeopardizing its tax-exempt status.[7] Similarly, they may approach legislators regarding items under the legislator's jurisdiction that relate to the Organization's exempt purposes. Both generalizations are subject to a caveat. Lobbying cannot become a "substantial part of the Organization's activity." (We consider the caveat at length below.)

By practice and convention lobbying includes:

- Direct lobbying-contacting members of a *legislative body* for the purpose of proposing, supporting, or opposing legislation or advocating the adoption or rejection of legislation, and
- Grassroots lobbying-attempting to influence legislation by affecting the general public's opinion.

IRC §501(c)(3) limits the <u>total</u> amount of lobbying the Organization may undertake. The distinction between direct and grassroots lobbying becomes relevant if the Organization makes elections related to <u>how</u> it determines how much lobbying is too much. (We consider the election in more detail below.)

Distinguishing Lobbying from Education:

The distinction between lobbying and the Organization's administrative-educational program follows immediately from the definition of lobbying. Lobbying is any communication (written or oral):

- Addressed to anyone outside the Organization, that
- Makes reference to a specific piece of legislation, and
- Urges action on it.

[7] Treas. Reg. §1.501(c)(3)-1(c)(3)(iii)

Any other communication is either administrative (related to running the Organization), or educational. Administrative communication is easily identified and seldom contains specific lobbying content.

Education relates to the Organization's primary objective. Virtually all the Organization's educational communications are addressed, directly or indirectly, to someone outside the Organization. Hence, the IRS considers educational communications to be lobbying if they refer to a specific piece of legislation AND urge action on it. (This is true whether the Organization elects under IRC §501(h) (discussed below) or not. Interpreting the statement is more difficult if the Organization does not make an IRC §501(h) election since, in those circumstances, both the time and the money spent on the materials enters into the consideration.)

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This suggests the Organization should adopt three administrative and educational policy positions:

1. **Review all of the Organization's written and oral communications to determine if they contain references to specific legislation and urge action on the legislation.**
2. **Unless the reference and advocacy are absolutely necessary to accomplish the purposes of the communication, delete one or the other (the reference or the advocacy).**
3. **If deleting the reference or the advocacy doesn't serve the communications' purpose, account for the cost of the communication as lobbying expense. (If the Organization has not made the election under IRC §501(h), account for the time required to prepare the communication, as well.)**

Example: Educational materials intended for use in a seminar on sheathing and wall materials contain the following statement:

> "Under the state's proposed regulation governing the use of urea-formaldehyde in composite wood materials, the California Air Resources Board (CARB) could, subsequent to the effective date and the grace period, seize any materials that contain urea-formaldehyde, order the material destroyed, and penalize the contractor or subcontractor that possesses it. I urge all of you to contact your state assembly representative to make sure these regulations do not become law."

As written, the statement contains elements that make it lobbying communication (reference to specific pending legislation and a call to action).

- The Organization could keep the reference to specific pending legislation and the call to action in the communication. If they do, they must account for the cost of creating and distributing the material. (And the time spent to create the materials if the Organization has not made an IRC §501(h) election.)
- The Organization could remove the call to action, thus eliminating one element of lobbying communication. Change the statement to read: "Under the state's proposed regulation governing the use of urea-formaldehyde in composite wood materials, the California Air Resources Board (CARB) could, subsequent to the effective date and the grace period, seize any materials that contain urea-formaldehyde, order the material destroyed, and penalize the contractor or subcontractor that possesses it. The state assembly will vote on this measure next week." Without the explicit call to action, the communication is not lobbying.

Side note: The Service takes a "baby-and-bathwater" approach to lobbying communication. If a communication contains lobbying content, the Service treats the entire communication as lobbying communication. This can ricochet into the organization, even if they have made an IRC §501(h) election (discussed later). The cost of producing the entire communication, not just the "offending content" is attributed to lobbying expenditure. This quickly exhausts the organization's expenditure limit. If the organization does not make an IRC §501(h) election, the time spent to prepare, reproduce, and present the entire communication must be considered, measured, and reported as well.

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How much lobbying is too much lobbying? The "no substantial part" test:

IRC §501(c)(3) limits the amount of lobbying the Organization can do; it does not prohibit lobbying.

How much is too much? Surprisingly, neither the IRC nor the regulations define what "substantial" means. Instead, courts attempt to determine where that line lies. Despite a fair amount of litigation, the line remains hazy:

- In Seasongood v. Commissioner the Court found less than 5% of an organization's time and effort to be insubstantial.[8]
- In Haswell v. United States the Court of Claims found that lobbying expenditures of 16.6% to 20.5% of total expenditures over a four-year period were substantial.[9]
- In *Christian Echoes National Ministry, Inc. v. United States* the Tenth Circuit rejected the use of a bright-line percentage test to determine whether activities were substantial.[10]

The No Substantial Part test considers all the facts and circumstances of the Organization's lobbying activities, including cash expenditures, volunteer efforts and donated resources.

Accordingly, if the Organization is subject to the Substantial Part Test, the Organization, its management and officers, members of the Legislative or Municipalities committees, and the Organization's volunteers must document all of their lobbying activities, time, and expense.

If the Organization engages in substantial lobbying (in whatever way that is defined) it may be fined or have its tax-exempt status revoked. Violating the Substantial Part test may result in the imposition of: (a) a 5% tax on the organization on all lobbying expenditures, and (b) a 5% tax on organizational managers (e.g., directors and officers) who permitted such expenditures knowing that it would jeopardize the organization's tax-exempt status.[11] .

The 501(h) Election-a simpler alternative to the Substantial Part Test:

The IRS recognizes that the Substantial Part test is vague. The test provides neither IRS agents nor exempt organizations with guidance about what constitutes "too much lobbying." Hence, the Service urged Congress to adopt an elective "bright line–safe harbor" test to provide clarity. Congress adopted one, in the form of IRC §501(h), in 1976. Unlike much of the rest of 1976's "Lobby Law," IRC §501(h) is both useful and effective. It creates clarity in an otherwise murky region of law. It reduces conflict between the Service and exempt organizations. It is also simple – requiring only:

[8] *Seasongood v. Commissioner of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955)
[9] *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975)
[10] *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1974); Also, Same plaintiff and cause of action, 404 U.S. 561
[11] IRC §4912

- Board of Directors authorization,
- Filing a form, and
- Monitoring and reporting "lobbying expenditures," (two lines, a checkbox, and a calculation) on the organization's annual tax information return (Form 990, Schedule A, Part VI – reproduced in the appendix).

In 1990, the IRS published final rules implementing the Lobby Law. The rules make it clear that most nonprofits (and all of those with annual budgets less than $17 million) are better off when they elect to be covered by the lobbying-expenditure test rather than the insubstantial part test.

IRC §501(h) establishes a "lobbying limit" on total lobbying expenditures an organization may incur, and a related limit on "grassroots lobbying" expenditures. The **total** lobbying expenditure limits under the IRC §501(h) election are:

- 20% of the first $500,000 of exempt purpose expenditures, plus
- 15% of the next $500,000 of exempt purpose expenditures, plus
- 10% of the next $500,000 of exempt purpose expenditures,
- plus 5% of the remaining exempt purpose expenditures up to a total cap of $1 million

The limit for "grassroots lobbying expenditures" is 25% of the total lobbying expenditure limit. (An organization with a $400,000 annual "exempt purpose" budget could spend up to $80,000 on lobbying, provided they spend less than $20,000 on grassroots efforts.)

In return for making this simple election and monitoring/reporting lobbying expenditures, the Organization gains benefits:

- There is no limit on lobbying that does not incur expenses (e.g. unreimbursed activities conducted by bona fide volunteers). Hence there is no need to keep track of how much uncompensated time officers, board members, managers, and committee members or staff devote to lobbying.
- Clear definitions of what constitutes lobbying communication. This enables the Organization to control whether it is "lobbying" or not.
- High lobbying dollar limits and fewer items that count toward those limits.
- The Organization is less likely to lose its exemption. The IRS may revoke exempt status from electing organizations only if the organization exceeds its lobbying limits by at least 50%, on average, over a four-year period.
- No penalty exposure for the Organization's managers, board, officers, or committee members if the Organization exceeds its lobbying limit.

The details of electing and administering the IRC §501(h) election are defined in the Appendix.

Most Small Organizations should strongly consider making the IRC §501(h) election.

The election mentioned in IRC §501(h)(3) is accomplished by filing IRS Form 5768. The current form can be downloaded from the IRS website.

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Technical and Procedural Note – Political Intervention -- Sources and Explanations
Restrictions on Political Intervention – Code and Regulations

The restrictions on exempt organizations' political activities derive directly from the statute.

The regulations provide minor clarifications relating to the political activity ban. The regulations;[12]

- Prohibit political activity that "directly or indirectly" intervenes in any political campaign.
- Provide a definition of "candidate for public office. ("The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.") and
- Provide that prohibited activities under the political activity ban "include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate."

The regulations call organizations that violate the political activity ban "action organizations," a term that occurs nowhere else in the code.

IRC §501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation
An organization described in subsection (c) or (d) or section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.
…

(c) List of exempt organizations
The following organizations are referred to in subsection (a):
…

(3) Corporations, and any community chest, fund, or Organization, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no 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.

Tax Regulations under IRC §501(c)(3)[13] outline the consequences of lobbying and political intervention but do little to identify the behaviors that are classified as lobbying or political intervention. The Regulations shed almost no light on the limits for either lobbying or political intervention by exempt organizations. The Regulations refer to organizations that engage in lobbying or political intervention as "Action Organizations."

[12] Treas. Reg. §1.501(c)(3)-1(c)(3)
[13] Treas. Reg. §1.501(c)(3)-1(c)(3)

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The political intervention rule, as applied by the IRS, has been characterized as "an imprecise and malleable facts and circumstances test."[14]

Regs. §1.501(c)(3)-1 Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

…

(3) **Action organizations.**

(i) An organization is not operated exclusively for one or more exempt purposes if it is an action organization as defined in subdivisions (ii), (iii), or (iv) of this subparagraph.

(ii) An organization is an action organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization:

(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or

(b) Advocates the adoption or rejection of legislation.

The term legislation, as used in this subdivision, includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation. An organization for which the expenditure test election of section 501(h) is in effect for a taxable year will not be considered an action organization by reason of this paragraph (c)(3)(ii) for that year if it is not denied exemption from taxation under section 501(a) by reason of section 501(h).

(iii) An organization is an action organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

(iv) An organization is an action organization if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.

[14] Zwak, Julia D; *A Manageable Solution with Meaningful Results: Illuminating IRS Enforcement of § 501(c)(3)'s Prohibition on Political Intervention*; Minnesota Law Review 99:381 (2014-11)

IRS's Right to Impose Fines

The IRS's right to impose fines and penalties for violation of the restrictions on political activity and lobbying are contained in the statute – which refers to them as "excise taxes" and uses the amount of "political expenditures" as the basis for the fine. The nature of the prohibited acts remained vague until 2007. The statute clearly allows the Service to impose the penalty on the Organization's management and officers as well as on the Organization itself. It establishes joint-and-several liability for the penalties.

IRC §4955. Taxes on political expenditures of section 501 (c)(3) organizations
(a) Initial taxes

(1) On the organization

There is hereby imposed on each political expenditure by a section 501 (c)(3) organization a tax equal to 10 percent of the amount thereof. The tax imposed by this paragraph shall be paid by the organization.

(2) On the management

There is hereby imposed on the agreement of any organization manager to the making of any expenditure, knowing that it is a political expenditure, a tax equal to 21/2 percent of the amount thereof, unless such agreement is not willful and is due to reasonable cause. The tax imposed by this paragraph shall be paid by any organization manager who agreed to the making of the expenditure.

(b) Additional taxes

(1) On the organization

In any case in which an initial tax is imposed by subsection (a)(1) on a political expenditure and such expenditure is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount of the expenditure. The tax imposed by this paragraph shall be paid by the organization.

(2) On the management

In any case in which an additional tax is imposed by paragraph (1), if an organization manager refused to agree to part or all of the correction, there is hereby imposed a tax equal to 50 percent of the amount of the political expenditure. The tax imposed by this paragraph shall be paid by any organization manager who refused to agree to part or all of the correction.

(c) Special rules

For purposes of subsections (a) and (b)—

(1) Joint and several liability

If more than 1 person is liable under subsection (a)(2) or (b)(2) with respect to the making of a political expenditure, all such persons shall be jointly and severally liable under such subsection with respect to such expenditure.

(2) Limit for management

With respect to any 1 political expenditure, the maximum amount of the tax imposed by subsection (a)(2) shall not exceed $5,000, and the maximum amount of the tax imposed by subsection (b)(2) shall not exceed $10,000.

…

(f) Other definitions

For purposes of this section—

…

(2) Organization manager

The term "organization manager" means—

(A) any officer, director, or trustee of the organization (or individual having powers or responsibilities similar to those of officers, directors, or trustees of the organization), and

> **(B)** with respect to any expenditure, any employee of the organization having authority or responsibility with respect to such expenditure.

Political Intervention–By Inference

Until 2007, the IRC and Regulations gave only inferential guidance regarding prohibited "intervention" in a political campaign. For example, IRC §4955 imposes an excise tax on prohibited political intervention expenditures and bases that tax on "political expenditures," but leaves to your imagination what acts and expenses might be contained within that rubric.

> **(d) Political expenditure**
> For purposes of this section—
> **(1)** In general
> The term "political expenditure" means any amount paid or incurred by a section 501 (c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.
> **(2)** Certain other expenditures included
> In the case of an organization which is formed primarily for purposes of promoting the candidacy (or prospective candidacy) of an individual for public office (or which is effectively controlled by a candidate or prospective candidate and which is availed of primarily for such purposes), the term "political expenditure" includes any of the following amounts paid or incurred by the organization:
> **(A)** Amounts paid or incurred to such individual for speeches or other services.
> **(B)** Travel expenses of such individual.
> **(C)** Expenses of conducting polls, surveys, or other studies, or preparing papers or other materials, for use by such individual.
> **(D)** Expenses of advertising, publicity, and fundraising for such individual.
> **(E)** Any other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit, of such individual.

To date, no Regulations interpret these provisions.

There is no exception to disqualification based on *de minimis* political intervention. However, IRC §4955's excise tax provisions sometimes shield organizations, their officers, and managers from financial responsibility in cases where the organizations behavior is prohibited but no "expenditures" were incurred, or when penalties are assessed in lieu of revocation.

IRC §4955 imposes a two-tier excise tax on exempt organizations and their management for political expenditures made in contravention of IRC §501(c)(3). The exempt organization faces an initial 10% tax on political expenditures. If the expenditure is not corrected, an additional 100% tax may be imposed. The initial tax may be abated if the organization establishes that the political expenditure was not willful and flagrant.

IRC §4955 also imposes a 2½% tax on any organization *manager* who knowingly agrees to a political expenditure unless such agreement is not willful or is due to reasonable cause. If the manager refuses to agree to correction, an additional 50% tax is imposed. The first-tier tax on managers may not exceed $5,000 and the second-tier tax may not exceed $10,000 for any single political expenditure. For this purpose, "manager" is defined as an officer, director or trustee, or another individual with comparable responsibilities. The term includes any employee of the organization having authority or responsibility with respect to the political expenditure.

IRS may seek immediate determination and assessment of the excise taxes due to *flagrant* political expenditures. IRS also may bring action in United States District Court seeking an injunction barring further political expenditures. IRS first must notify the organization of its intention to seek an injunction unless the organization immediately ceases making political expenditures and must also conclude there has been a flagrant violation of the political activity prohibition and that injunctive relief would be appropriate to prevent further political expenditures.[15]

The excise tax penalties may be imposed *in addition to* revocation of exemption. As a general rule, however, IRS imposes the excise tax penalties in lieu of revocation of exemption if the violation of the political campaign intervention prohibition is unintentional, small in amount, and the organization has adopted procedures to prevent future similar violations.

Clarity of a Sort

The 2004 and 2006 IRS Political Activities Compliance Initiatives received over 400, and examined over 200, referrals based on alleged violations of the political activity prohibition. The initial report clarified which organizational behaviors fall within the prohibition but provides little guidance about what behaviors lie in the "gray zone."[16]

Additional Illumination - Revenue Ruling 2007-41

The Service issued Rev. Rul. 2007-41[17] to clarify which behaviors are prohibited political intervention and which are not. The examples are, for the most part, self-explanatory – even though no specific "facts and circumstances test" is articulated in the ruling. (Note: Revenue Rulings represent the Service's interpretation of Code provisions and do not have the "force and effect of law." They are, however, a reliable guide to the Service's attitude and the limits of their tolerance.)

Rev. Rul. 2007-41 builds on several other rulings, notably:

- Rev. Rul. 78-248,[18] which describes voter education activities that will not be deemed political activity;
- Rev. Rul. 80-282,[19] which illustrates circumstances under which a newsletter identifying the voting records of Congressional incumbents will be deemed appropriate; and
- Rev. Rul. 86-95,[20] which describing how 501(c)(3) tax-exempt organization can present a candidate forum without violating the prohibition.

Full text of Rev. Rul. 2007-41:

Part I
Section 501.—Exemption from tax on corporations, certain trusts, etc.

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[15] IRC §§ 4955, 685, 7409(a)(1), and 7409(a)(2)
[16] http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf (The report did not reproduce well when we tried to cut-and-paste from the original document.) For a study of how the IRS conducted the examinations that led to the report, link to: http://www.treas.gov/tigta/auditreports/2005reports/200510035fr.pdf
[17] Rev. Rul. 2007-41 {2007-25 I.R.B. (June 18, 2007)}
[18] Rev. Rul. 78-248, 1978-1 C.B. 154
[19] Rev. Rul. 80-282, 1980-2 C.B. 178
[20] Rev. Rul. 86-95, 1986-2 C.B. 73

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26 CFR 1.501(c)(3)-1: Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals.

Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007)

Organizations that are exempt from income tax under section 501(a) of the Internal Revenue Code as organizations described in section 501(c)(3) may 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.

ISSUE

In each of the 21 situations described below, has the organization participated or intervened in a political campaign on behalf of (or in opposition to) any candidate for public office within the meaning of section 501(c)(3)?

LAW

Section 501(c)(3) provides for the exemption from federal income tax of organizations organized and operated exclusively for charitable or educational purposes, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in section 501(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.

Section 1.501(c) (3)-1(c)(3)(i) of the Income Tax Regulations states that an organization is not operated exclusively for one or more exempt purposes if it is an "action" organization.

Section 1.501(c)(3)-1(c)(3)(iii) of the regulations defines an "action" organization as an organization that participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The term "candidate for public office" is defined as an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local. The regulations further provide that activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to such a candidate.

Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.

For example, certain "voter education" activities, including preparation and distribution of certain voter guides, conducted in a non-partisan manner may not constitute prohibited political activities under section 501(c)(3) of the Code.

Other so-called "voter education" activities may be proscribed by the statute. Rev. Rul. 78-248, 1978-1 C.B. 154, contrasts several situations illustrating when an organization that publishes a compilation of candidate positions or voting records has or has not engaged in prohibited political activities based on whether the questionnaire used to solicit candidate positions or the voters guide itself shows a bias or preference in content or structure with respect to the views of a particular candidate. See also Rev. Rul. 80-282, 1980-2 C.B. 178, amplifying Rev. Rul. 78-248 regarding the timing and distribution of voter education materials.

The presentation of public forums or debates is a recognized method of educating the public. See Rev. Rul. 66-256, 1966-2 C.B. 210 (nonprofit organization formed to conduct public forums at which lectures and debates on social, political, and international matters are presented qualifies for exemption from federal income tax under section 501(c)(3)). Providing a forum for candidates is not, in and of itself, prohibited political activity. See Rev. Rul. 74-574, 1974-2 C.B. 160 (organization operating a broadcast station is not participating in political campaigns on behalf of public candidates by providing reasonable amounts of air time equally available to all legally qualified candidates for election to public office in compliance with the reasonable access provisions of the Communications Act of 1934). However, a forum for candidates could be operated in a manner that would show a bias or preference for or against a particular candidate. This could be done, for example, through biased questioning procedures. On the other hand, a forum held for the purpose of educating and informing the voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another, would not constitute participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office. See Rev. Rul. 86-95, 1986-2 C.B. 73 (organization that proposes to educate voters by conducting a series of public forums in congressional districts during congressional election campaigns is not participating in a political campaign on behalf of any candidate due to the neutral form and content of its proposed forums).

ANALYSIS OF FACTUAL SITUATIONS

The 21 factual situations appear below under specific subheadings relating to types of activities. In each of the factual situations, all the facts and circumstances are considered in determining whether an organization's activities result in political campaign intervention. Note that each of these situations involves only one type of activity. In the case of an organization that combines one or more types of activity, the interaction among the activities may affect the determination of whether or not the organization is engaged in political campaign intervention.

Voter Education, Voter Registration and Get Out the Vote Drives

Section 501(c)(3) organizations are permitted to conduct certain voter education activities (including the presentation of public forums and the publication of voter education guides) if they are carried out in a non-partisan manner. In addition, section 501(c)(3) organizations may encourage people to participate in the electoral process through voter registration and get-out-the-vote drives, conducted in a non-partisan manner. On the other hand, voter education or registration activities conducted in a biased manner that favors (or opposes) one or more candidates is prohibited.

Situation 1. B, a section 501(c)(3) organization that promotes community involvement, sets up a booth at the state fair where citizens can register to vote. The signs and banners in and around the booth give only the name of the organization, the date of the next upcoming statewide election, and notice of the opportunity to register. No reference to any candidate or political party is made by the volunteers staffing the booth or in the materials available at the booth, other than the official voter registration forms which allow registrants to select a party affiliation. B is not engaged in political campaign intervention when it operates this voter registration booth.

Situation 2. C is a section 501(c)(3) organization that educates the public on environmental issues. Candidate G is running for the state legislature and an important element of her platform is challenging the environmental policies of the incumbent. Shortly before the election, C sets up a telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C's representative tells the voter about the importance of environmental issues and asks questions about the voter's views on these issues. If the voter appears to agree with the incumbent's position, C's representative thanks the voter and ends the call. If the voter appears to agree with Candidate G's position, C's representative reminds the voter about the upcoming election, stresses the importance of

voting in the election and offers to provide transportation to the polls. C is engaged in political campaign intervention when it conducts this get-out-the-vote drive.

Individual Activity by Organization Leaders

The political campaign intervention prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy. However, for their organizations to remain tax exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization.

Situation 3. President A is the Chief Executive Officer of Hospital J, a section 501(c)(3) organization, and is well known in the community. With the permission of five prominent healthcare industry leaders, including President A, who have personally endorsed Candidate T, Candidate T publishes a full page ad in the local newspaper listing the names of the five leaders. President A is identified in the ad as the CEO of Hospital J. The ad states, "Titles and affiliations of each individual are provided for identification purposes only." The ad is paid for by Candidate T's campaign committee. Because the ad was not paid for by Hospital J, the ad is not otherwise in an official publication of Hospital J, and the endorsement is made by President A in a personal capacity, the ad does not constitute campaign intervention by Hospital J.

Situation 4. President B is the president of University K, a section 501(c)(3) organization. University K publishes a monthly alumni newsletter that is distributed to all alumni of the university. In each issue, President B has a column titled "My Views." The month before the election, President B states in the "My Views" column, "It is my personal opinion that Candidate U should be reelected." For that one issue, President B pays from his personal funds the portion of the cost of the newsletter attributable to the "My Views" column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the university. Because the endorsement appeared in an official publication of University K, it constitutes campaign intervention by University K.

Situation 5. Minister C is the minister of Church L, a section 501(c)(3) organization and Minister C is well known in the community. Three weeks before the election, he attends a press conference at Candidate V's campaign headquarters and states that Candidate V should be reelected. Minister C does not say he is speaking on behalf of Church L. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church L. Because Minister C did not make the endorsement at an official church function, in an official church publication or otherwise use the church's assets, and did not state that he was speaking as a representative of Church L, his actions do not constitute campaign intervention by Church L.

Situation 6. Chairman D is the chairman of the Board of Directors of M, a section 501(c)(3) organization that educates the public on conservation issues. During a regular meeting of M shortly before the election, Chairman D spoke on a number of issues, including the importance of voting in the upcoming election, and concluded by stating, "It is important that you all do your duty in the election and vote for Candidate W." Because Chairman D's remarks indicating support for Candidate W were made during an official organization meeting, they constitute political campaign intervention by M.

Candidate Appearances

Depending on the facts and circumstances, an organization may invite political candidates to speak at its events without jeopardizing its tax-exempt status. Political candidates may be invited in their capacity as candidates, or in their individual capacity (not as a candidate). Candidates may also appear without an invitation at organization events that are open to the public.

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When a candidate is invited to speak at an organization event in his or her capacity as a political candidate, factors in determining whether the organization participated or intervened in a political campaign include the following:

- Whether the organization provides an equal opportunity to participate to political candidates seeking the same office;
- Whether the organization indicates any support for or opposition to the candidate (including candidate introductions and communications concerning the candidate's attendance); and
- Whether any political fundraising occurs.

In determining whether candidates are given an equal opportunity to participate, the nature of the event to which each candidate is invited will be considered, in addition to the manner of presentation. For example, an organization that invites one candidate to speak at its well attended annual banquet, but invites the opposing candidate to speak at a sparsely attended general meeting, will likely have violated the political campaign prohibition, even if the manner of presentation for both speakers is otherwise neutral. When an organization invites several candidates for the same office to speak at a public forum, factors in determining whether the forum results in political campaign intervention include the following:

- Whether questions for the candidates are prepared and presented by an independent nonpartisan panel,
- Whether the topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the office sought and are of interest to the public,
- Whether each candidate is given an equal opportunity to present his or her view on each of the issues discussed,
- Whether the candidates are asked to agree or disagree with positions, agendas, platforms or statements of the organization, and
- Whether a moderator comments on the questions or otherwise implies approval or disapproval of the candidates.

Situation 7. President E is the president of Society N, a historical society that is a section 501(c)(3) organization. In the month prior to the election, President E invites the three Congressional candidates for the district in which Society N is located to address the members, one each at a regular meeting held on three successive weeks. Each candidate is given an equal opportunity to address and field questions on a wide variety of topics from the members. Society N's publicity announcing the dates for each of the candidate's speeches and President E's introduction of each candidate include no comments on their qualifications or any indication of a preference for any candidate. Society N's actions do not constitute political campaign intervention.

Situation 8. The facts are the same as in Situation 7 except that there are four candidates in the race rather than three, and one of the candidates declines the invitation to speak. In the publicity announcing the dates for each of the candidate's speeches, Society N includes a statement that the order of the speakers was determined at random and the fourth candidate declined the Society's invitation to speak. President E makes the same statement in his opening remarks at each of the meetings where one of the candidates is speaking. Society N's actions do not constitute political campaign intervention.

Situation 9. Minister F is the minister of Church O, a section 501(c)(3) organization. The Sunday before the November election, Minister F invites Senate Candidate X to preach to her congregation during worship services. During his remarks, Candidate X states, "I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday." Minister F invites no other candidate to address her congregation during the Senatorial campaign. Because these activities take place during official church services, they are attributed to Church O. By selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O's actions constitute political campaign intervention.

Candidate Appearances Where Speaking or Participating as a Non-Candidate

Candidates may also appear or speak at organization events in a non-candidate capacity. For instance, a political candidate may be a public figure who is invited to speak because he or she: (a) currently holds, or formerly held, public office; (b) is considered an expert in a non political field; or (c) is a celebrity or has led a distinguished military, legal, or public service career. A candidate may choose to attend an event that is open to the public, such as a lecture, concert or worship service. The candidate's presence at an organization-sponsored event does not, by itself, cause the organization to be engaged in political campaign intervention. However, if the candidate is publicly recognized by the organization, or if the candidate is invited to speak, factors in determining whether the candidate's appearance results in political campaign intervention include the following:

- Whether the individual is chosen to speak solely for reasons other than candidacy for public office;
- Whether the individual speaks only in a non-candidate capacity;
- Whether either the individual or any representative of the organization makes any mention of his or her candidacy or the election;
- Whether any campaign activity occurs in connection with the candidate's attendance;
- Whether the organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present; and
- Whether the organization clearly indicates the capacity in which the candidate is appearing and does not mention the individual's political candidacy or the upcoming election in the communications announcing the candidate's attendance at the event.

Situation 10. Historical society P is a section 501(c)(3) organization. Society P is located in the state capital. President G is the president of Society P and customarily acknowledges the presence of any public officials present during meetings. During the state gubernatorial race, Lieutenant Governor Y, a candidate, attends a meeting of the historical society. President G acknowledges the Lieutenant Governor's presence in his customary manner, saying, "We are happy to have joining us this evening Lieutenant Governor Y." President G makes no reference in his welcome to the Lieutenant Governor's candidacy or the election. Society P has not engaged in political campaign intervention as a result of President G's actions.

Situation 11. Chairman H is the chairman of the Board of Hospital Q, a section 501(c)(3) organization. Hospital Q is building a new wing. Chairman H invites Congressman Z, the representative for the district containing Hospital Q, to attend the groundbreaking ceremony for the new wing. Congressman Z is running for reelection at the time. Chairman H makes no reference in her introduction to Congressman Z's candidacy or the election. Congressman Z also makes no reference to his candidacy or the election and does not do any political campaign fundraising while at Hospital Q. Hospital Q has not intervened in a political campaign.

Situation 12. University X is a section 501(c)(3) organization. X publishes an alumni newsletter on a regular basis. Individual alumni are invited to send in updates about themselves which are printed in each edition of the newsletter. After receiving an update letter from Alumnus Q, X prints the following: "Alumnus Q, class of 'XX is running for mayor of Metropolis." The newsletter does not contain any reference to this election or to Alumnus Q's candidacy other than this statement of fact. University X has not intervened in a political campaign.

Situation 13. Mayor G attends a concert performed by Symphony S, a section 501(c)(3) organization, in City Park. The concert is free and open to the public. Mayor G is a candidate for reelection, and the concert takes place after the primary and before the general election. During the concert, the chairman of S's board addresses the crowd and says, "I am pleased to see Mayor G here tonight. Without his support, these free concerts in City Park would not be possible. We will need his help if we want these concerts to continue next year so please support Mayor G in November as he has supported us." As a result of these remarks, Symphony S has engaged in political campaign intervention.

Issue Advocacy vs. Political Campaign Intervention

Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an

audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by stating the candidate's name but also by other

means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention. Key factors in determining whether a communication results in political campaign intervention include the following:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election. Nevertheless, the communication must still be considered in context before arriving at any conclusions.

Situation 14. University O, a section 501(c)(3) organization, prepares and finances a full page newspaper advertisement that is published in several large circulation newspapers in State V shortly before an election in which Senator C is a candidate for nomination in a party primary. Senator C represents State V in the United States Senate. The advertisement states that S. 24, a pending bill in the United States Senate, would provide additional opportunities for State V residents to attend college, but Senator C has opposed similar measures in the past. The advertisement ends with the statement "Call or write Senator C to tell him to vote for S. 24." Educational issues have not been raised as an issue distinguishing Senator C from any opponent. S. 24 is scheduled for a vote in the United States Senate before the election, soon after the date that the advertisement is published in the newspapers. Even though the advertisement appears shortly before the election and identifies Senator C's position on the issue as contrary to O's position, University O has not violated the political campaign intervention prohibition because the advertisement does not mention the election or the candidacy of Senator C, education issues have not been raised as distinguishing Senator C from any opponent, and the timing of the advertisement and the identification of Senator C are directly related to the specifically identified legislation University O is supporting and appears immediately before the United States Senate is scheduled to vote on that particular legislation. The candidate identified, Senator C, is an officeholder who is in a position to vote on the legislation.

Situation 15. Organization R, a section 501(c)(3) organization that educates the public about the need for improved public education, prepares and finances a radio advertisement urging an increase in state funding for public education in State X, which requires a legislative appropriation. Governor E is the governor of State X. The radio advertisement is first broadcast on several radio stations in State X beginning shortly before an election in which Governor E is a candidate for re-election. The advertisement is not part of an ongoing series of substantially similar advocacy communications by Organization R on the same issue. The advertisement cites numerous statistics indicating that public education in State X is

under funded. While the advertisement does not say anything about Governor E's position on funding for public education, it ends with "Tell Governor E what you think about our under-funded schools." In public appearances and campaign literature, Governor E's opponent has made funding of public education an issue in the campaign by focusing on Governor E's veto of an income tax increase the previous year to increase funding of public education. At the time the advertisement is broadcast, no legislative vote or other major legislative activity is scheduled in the State X legislature on state funding of public education. Organization R has violated the political campaign prohibition because the advertisement identifies Governor E, appears shortly before an election in which Governor E is a candidate, is not part of an ongoing series of substantially similar advocacy communications by Organization R on the same issue, is not timed to coincide with a non election event such as a legislative vote or other major legislative action on that issue, and takes a position on an issue that the opponent has used to distinguish himself from Governor E.

Situation 16. Candidate A and Candidate B are candidates for the state senate in District W of State X. The issue of State X funding for a new mass transit project in District W is a prominent issue in the campaign. Both candidates have spoken out on the issue. Candidate A supports funding the new mass transit project. Candidate B opposes the project and supports State X funding for highway improvements instead. P is the executive director of C, a section 501(c)(3) organization that promotes community development in District W. At C's annual fundraising dinner in District W, which takes place in the month before the election in State X, P gives a lengthy speech about community development issues including the transportation issues. P does not mention the name of any candidate or any political party. However, at the conclusion of the speech, P makes the following statement, "For those of you who care about quality of life in District W and the growing traffic congestion, there is a very important choice coming up next month. We need new mass transit. More highway funding will not make a difference. You have the power to relieve the congestion and improve your quality of life in District W. Use that power when you go to the polls and cast your vote in the election for your state senator." C has violated the political campaign intervention as a result of P's remarks at C's official function shortly before the election, in which P referred to the upcoming election after stating a position on an issue that is a prominent issue in a campaign that distinguishes the candidates.

Business Activity

The question of whether an activity constitutes participation or intervention in a political campaign may also arise in the context of a business activity of the organization, such as selling or renting of mailing lists, the leasing of office space, or the acceptance of paid political advertising. In this context, some of the factors to be considered in determining whether the organization has engaged in political campaign intervention include the following:

- Whether the good, service or facility is available to candidates in the same election on an equal basis,
- Whether the good, service, or facility is available only to candidates and not to the general public,
- Whether the fees charged to candidates are at the organization's customary and usual rates, and
- Whether the activity is an ongoing activity of the organization or whether it is conducted only for a particular candidate.

Situation 17. Museum K is a section 501(c)(3) organization. It owns an historic building that has a large hall suitable for hosting dinners and receptions. For several years, Museum K has made the hall available for rent to members of the public. Standard fees are set for renting the hall based on the number of people in attendance, and a number of different organizations have rented the hall. Museum K rents the hall on a first come, first served basis. Candidate P rents Museum K's social hall for a fundraising dinner. Candidate P's campaign pays the standard fee for the dinner. Museum K is not involved in political campaign intervention as a result of renting the hall to Candidate P for use as the site of a campaign fundraising dinner.

Situation 18. Theater L is a section 501(c)(3) organization. It maintains a mailing list of all of its subscribers and contributors. Theater L has never rented its mailing list to a third party. Theater L is approached by the campaign committee of Candidate Q, who supports increased funding for the arts. Candidate Q's campaign committee offers to rent Theater L's mailing list for a fee that is comparable to fees charged by other similar organizations. Theater L rents its mailing list to Candidate Q's campaign committee. Theater L declines similar requests from campaign committees of other candidates. Theater L has intervened in a political campaign.

Web Sites

The Internet has become a widely used communications tool. Section 501(c)(3) organizations use their own web sites to disseminate statements and information. They also routinely link their web sites to web sites maintained by other organizations as a way of providing additional information that the organizations believe is useful or relevant to the public.

A web site is a form of communication. If an organization posts something on its web site that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements or broadcasts that favored or opposed a candidate.

An organization has control over whether it establishes a link to another site. When an organization establishes a link to another web site, the organization is responsible for the consequences of establishing and maintaining that link, even if the organization does not have control over the content of the linked site. Because the linked content may change over time, an organization may reduce the risk of political campaign intervention by monitoring the linked content and adjusting the links accordingly.

Links to candidate-related material, by themselves, do not necessarily constitute political campaign intervention. All the facts and circumstances must be taken into account when assessing whether a link produces that result. The facts and circumstances to be considered include, but are not limited to, the context for the link on the organization's web site, whether all candidates are represented, any exempt purpose served by offering the link, and the directness of the links between the organization's web site and the web page that contains material favoring or opposing a candidate for public office.

Situation 19. M, a section 501(c)(3) organization, maintains a web site and posts an unbiased, nonpartisan voter guide that is prepared consistent with the principles discussed in Rev. Rul. 78-248. For each candidate covered in the voter guide, M includes a link to that candidate's official campaign web site. The links to the candidate web sites are presented on a consistent neutral basis for each candidate, with text saying "For more information on Candidate X, you may consult [URL]." M has not intervened in a political campaign because the links are provided for the exempt purpose of educating voters and are presented in a neutral, unbiased manner that includes all candidates for a particular office.

Situation 20. Hospital N, a section 501(c)(3) organization, maintains a web site that includes such information as medical staff listings, directions to Hospital N, and descriptions of its specialty health programs, major research projects, and other community outreach programs. On one page of the web site, Hospital N describes its treatment program for a particular disease. At the end of the page, it includes a section of links to other web sites titled "More Information." These links include links to other hospitals that have treatment programs for this disease, research organizations seeking cures for that disease, and articles about treatment programs. This section includes a link to an article on the web site of O, a major national newspaper, praising Hospital N's treatment program for the disease. The page containing the article on O's web site contains no reference to any candidate or election and has no direct links to candidate or election information. Elsewhere on O's web site, there is a page displaying editorials that O has published. Several of the editorials endorse candidates in an election that has not yet occurred. Hospital N has not intervened in a political campaign by maintaining the link to the article on O's web site because the link is provided for the exempt purpose of educating the public about Hospital N's programs and neither the context for the link, nor the relationship between Hospital N and O nor the arrangement of

the links going from Hospital N's web site to the endorsement on O's web site indicate that Hospital N was favoring or opposing any candidate.

Situation 21. Church P, a section 501(c)(3) organization, maintains a web site that includes such information as biographies of its ministers, times of services, details of community outreach programs, and activities of members of its congregation. B, a member of the congregation of Church P, is running for a seat on the town council. Shortly before the election, Church P posts the following message on its web site, "Lend your support to B, your fellow parishioner, in Tuesday's election for town council." Church P has intervened in a political campaign on behalf of B.

HOLDINGS

In situations 2, 4, 6, 9, 13, 15, 16, 18 and 21, the organization intervened in a political campaign within the meaning of section 501(c)(3). In situations 1, 3, 5, 7, 8, 10, 11, 12, 14, 17, 19 and 20, the organization did not intervene in a political campaign within the meaning of section 501(c)(3)

DRAFTING INFORMATION
The principal author of this revenue ruling is Judith Kindell of Exempt Organizations, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling contact Ms. Kindell on (202) 283-8964 (not a toll-free call)

The Revenue Ruling verifies most of what we infer from litigation history and the IRS's public pronouncements. For example, a 1991 IRS press release announced a settlement with Jimmy Swaggart Ministries[21] over political campaign activities during the 1986 presidential campaign. The release stated that if an endorsement or statement of opposition occurs during an official organizational function or in an organization's official publication, the endorsement will be attributed to the organization. The release went on to state that the individual's actions would be attributed to the organization unless the individual "do[*es*] not in any way utilize the organization's financial resources, facilities or personnel, and clearly and unambiguously indicate that the actions taken or statements made are those of the individuals and not of the organization." This position is reinforced by the Ruling in Situations 3 through 6.

Who is a Candidate? - When do they Become One?

According to Reg. §1.501(c)(3)-1(c)(3)(iii) (reproduced above) an individual is a "candidate" if he/she offers himself/herself, or is proposed by others, as a contestant for an *elective public office*, whether national, state, or local. Neither the IRC nor the regulations define the term "public office." However, a General Counsel Memorandum[22] (GCM) notes that an office is "public" if there is some statutory or constitutional basis for construing the office as "public". For example, elective positions *in a political party*, such as a precinct committee, may be considered "public office" if they (1) are created by statute; (2) are continuing; (3) are not occasional or contractual; (4) possess fixed terms of office; and (5) require an oath of office.

Once an individual announces their intention to seek public office he/she is clearly a candidate. However, an individual who has not announced their intentions and never becomes a candidate (e.g., Michael Bloomberg's 2008 presidential aspirations) may also be considered a candidate for purposes of IRC §501(c)(3). The timing is determined by all of the facts and circumstances but certainly requires the candidate or others to

[21] Also in this context: *Jimmy Swaggart Ministries v. Board of Equalization*, 493 US 378 (1990)

[22] GCM 39811 (June 30, 1989)

take some action or urge the candidate's election. Simple perennial candidacy is not sufficient. As stated in a Service Technical Advice Memorandum[23] (TAM), "Some action must be taken to make one a candidate, but the action need not be taken by the candidate or require his consent"

A Brief Historical Digression – Just in Case You Were Wondering

Congress first prohibited 501(c)(3) organizations from engaging in political campaign activity in 1954. Then-Senator Lyndon Johnson introduced the political campaign intervention prohibition during Senate floor debate on the 1954 revision-recompilation of the tax code. LBJ was probably reacting to support provided to Dudley Dogherty, his challenger in the 1954 primary election, by several tax-exempt organizations. The legislative history does not explain definitively why LBJ sought this restriction, but as one writer observed; "[t]he IRS rule that strips tax exemption from churches engaged in electioneering was born of Lyndon Johnson's Texas politics, not the U.S. Constitution." Nevertheless, a Republican legislature and a Republican President (Eisenhower) enacted the provision without substantive debate. Ironically, two organizations that supported the "*Johnson Amendment*" were later sanctioned for their support of Johnson during the 1964 presidential campaign.

The most recent change to the section's language came in 1987 when Congress amended it to clarify that the prohibition applies to statements opposing candidates as well as those in favor of candidates.

The constitutionality of the prohibition has been litigated on First Amendment as well as selective and discriminatory prosecution grounds, most notably in *Branch Ministries Inc. versus Rossotti*[24] and *Christian Echoes National Ministry, Inc. versus United States*.[25]

The courts have consistently upheld the constitutionality of the ban on political activity when challenged on First Amendment grounds.[26] The code provision is viewed as a condition for exemption, not a prior restraint of speech. The decision language in Branch Ministries is typical: "The government has a compelling interest in maintaining the integrity of the tax system and in not subsidizing partisan political activity, and Section 501(c)(3) is the least restrictive means of accomplishing that purpose."

Although case law addresses exemption from tax under IRC§501(c)(3), the holdings also impact the Organization's donors. IRC§170(c)(2), which defines tax-deductible gifts, contain conditions that parallel the conditions under IRC§501(c)(3). When an organization loses its tax exemption its donors lose the right to deduct their gifts as charitable contributions. Surprisingly, there have been few, if any, litigated cases that raise this issue.

These decisions state that the restriction a) places no special burden on churches (as opposed to other 501c3 organizations); b) does not prohibit the pastor or the congregations from making political statements; it

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[23] TAM 9130008 (April 16, 1991)

[24] *Branch Ministries v. Rossotti*, 211 F.3d 137, and *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999). (D.C. Cir. 2000). (Originally, *Branch Ministries Inc. v. Richardson*)

[25] *Christian Echoes National Ministry, Inc. v. United States* {470 F.2d 849, 853 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973)}. Also, Same plaintiff and cause of action, 404 U.S. 561

[26] *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); A "lobbying" case that touches on *Johnson Amendment* First Amendment issues. The case is fundamental to the non-subvention justification for the *Johnson Amendment*. Also see *Agency for International Development v. Alliance for Open Society*, 133 S. Ct. 2321 (2013)

bars them from using tax-deductible donations to do so; c) does not bar pastors or congregations from participating in campaigns; it prohibits donors from making tax-deductible political contributions for that purpose, and finally d) does not act as a prior restraint of speech – but as a prerequisite for the tax advantages that flow from tax exemption and contribution deductibility.

Establishment Clause based arguments [The above cases and *Texas Monthly vs. Bullock*][27] fail because the restriction a) does not impose a "substantial burden" on exercise of religious functions, and; b) does not prevent religious organizations from engaging in religious activity. Viewed another way, it does not entangle government and religion because the IRS need not evaluate a sermon's theological merit to determine that the sermon promotes a politician.

Texas Monthly also implies that removing the *Johnson Amendment* solely for churches and religious organizations would violate the Establishment Clause – because it creates disparate, and favorable, treatment for religious institutions; it provides religious organizations a significant benefit not extended to other charitable organizations.

Resistance to the *Johnson Amendment* blossoms on a regular basis. The most recent instance began in 2008 when the Alliance Defending Freedom (ADF)[28] mounted its Pulpit Freedom initiative. Despite substantial court precedent to the contrary, ADF maintains that the *Johnson Amendment* violates the First Amendment's guarantees of free speech and religious liberty. The Alliance encourages its members to openly violate the statute. In perhaps the most notorious instance, pastor Gus Booth encouraged his congregation to vote in the 2008 United States presidential election for Senator John McCain, and prohibited them from voting for Senator Barack Obama because of his position on abortion. It does not appear that the Alliance gained much traction on this issue. The Service ignored the violations rather than join a legal mud-tussle.

A more serious repeal effort began in 2016 when, then candidate, Donald Trump called for repeal, and Louisiana Representative Steven Scalise introduced legislation, the Free Speech Fairness Act[29] designed to effectuate repeal. Despite Scalise's (and his 18 Cosponsors') enthusiasm for the measure, it never received a vote in either Committee or on the House Floor. Scalise has reintroduced his bill on at least three subsequent occasions. The subsequent bills[30] stimulated equally meagre enthusiasm among his colleagues.

Less than one month into his Presidency, Donald Trump vowed to "totally destroy the *Johnson Amendment*" in a rambling speech that also touched briefly on Arnold Schwarzenegger's television ratings and the need to pray for them. Three months later, Trump issued the *"Presidential Executive Order Promoting Free Speech and Religious Liberty."*

Contrary to Trump's later claims, the Executive Order does not repeal the *Johnson Amendment*, it shields Organizations and Individuals from some enforcement actions: "churches should not be found guilty of implied endorsements where secular organizations would not be." The fact that there are no instances in which churches have been subject to that kind of prosecution seems to have escaped the Administration's attention.

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[27] *Texas Monthly vs. Bullock*, 498 US 1 (1989)
[28] https://adfmedia.org/
[29] *Free Speech Fairness Act* (HR 6195, 114th Congress)
[30] HR 781, 115th Congress; HR 949, 116th Congress, and HR 837. 117th Congress

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Sustainable Philanthropy

Initially, the Republicans' signature tax legislation, The *Tax Cuts and Jobs Act*[31] included language drafted by Kevin Brady (R-TX) and Walter Jones (R-NC) that repealed the *Johnson Amendment*. That language was excised from the final bill based on the Byrd Rule which limits permanent provisions in reconciliation bills.

At the risk of sounding cynical: Donald Trump's personal antagonism to the *Johnson Amendment* may derive as much from personal considerations as from concern for religious liberty. In addition to numerous self-dealing allegations, the allegations raised by the New York State Attorney General's office included a stunning array of campaign finance and transactions that the NYAG stated "serve Mr. Trump's business and political interests." Those allegations eventually resulted in four stipulated agreements to dissolve the Trump's private foundation and civil litigation to ban Donald Trump and several of his family members from non-profit management in perpetuity.

If we listen to the opposition long enough, we gain two general impressions:

- Reprimand, revocation, and denial of exemption are frequent, and
- The opposition's position has broad public and community support.

Neither of those perceptions aligns with reality.

Arguably, churches routinely engage in activities that endorse or promote a particular candidate (the church's moral and ethical positions are usually clearly stated, one or another candidate comes closest to reflecting those views, and most of the congregation is aware of it – often through the pastor's statements and attitudes). These activities contravene the literal statute, but the IRS generally ignores them. The Service's ability to obtain admissible evidence of casual mentions from the pulpit is limited. Unless significant funds are expended on political activities and detected during examination (e.g., *Branch Ministries*), the Service is unlikely to be aware of the violations, much less intervene.

The *Johnson Amendment* enjoys broad support in the civic, faith, and not-for-profit communities and the general public. Surveys regarding this issue indicate that 72% of the general public, and roughly 90% of faith leaders endorse the amendment.[32] Support from State NFP law and §501(c)(3) administrators is nearly unanimous. For more information on this topic, visit the National Council of Non-Profits website.

Additional Source Materials – Political Intervention

In theory, an Organization could apply for a Letter Ruling to determine whether a particular action constitutes intervention. While possible, this may not be practical:

- Rulings are expensive – IRS Ruling Fees Range from $250-$50,000, Legal advice is also expensive.
- The Ruling Process is slow.

[31] *The Tax Cuts and Jobs Act* (HR 1, 115th Congress)

[32] We have not validated the methodology or database of any of these surveys, so cannot offer an unequivocal opinion regarding their accuracy or the generality of their findings. In at least one case (public support for the Amendment) we are extremely dubious of the survey methodology. We find it difficult to believe that 72% of the public is even aware of this issue, much less that they have a well-considered opinion regarding it.

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- IRS may decline to issue a ruling if it determines it is not "appropriate in the interest of sound tax administration."

For additional information regarding proposals to repeal or alter the *Johnson Amendment*, see:

- Aprril, Ellen; *Amending the Johnson Amendment in the Age of Cheap Speech*[33]
- Goldfelder, Mark and Terry, Michelle; *To Repeal, or not to Repeal the Johnson Amendment*; University of Memphis Law Review 48:210 (2017);[34] This article contains a comprehensive discussion of the *Johnson Amendment*'s enaction and legislative history and several earlier attempts to enact similar provisions.
- Zwak, Julia D; *A Manageable Solution with Meaningful Results: Illuminating IRS Enforcement of §501(c)(3)'s Prohibition on Political Intervention;*[35]

It is interesting to speculate regarding what, if any, impact Citizens United[36] and the Tax Cuts and Jobs Act have on this discussion – especially as they relate to the non-subvention argument made in Regan v. Taxation with Representation.[37] That, however, is well beyond the scope of this presentation.

Technical and Procedural Note – Lobbying -- Sources and Explanations

Lobbying – Legislative History

In 1934 Congress enacted a rule that limits lobbying activities of organizations exempt from taxation under §501(c)(3).[38] Under that rule, if a substantial part of an organization's activities consists of "carrying on propaganda, or otherwise attempting, to influence legislation," the Organization could no longer qualify for tax exemption.

The 1934 provision responded to a 1930 decision by the Second Circuit,[39] which held that American Birth Control League was not entitled to exemption because it engaged in propaganda seeking to influence legislation, an action inconsistent with exclusively religious, educational, or scientific purposes.

At that time, Congress considered placing additional restrictions, similar to the *Johnson Amendment*, on "participation in partisan politics" but chose to limit only lobbying activities because the ban would otherwise have been "too broad." [40]

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[33] Aprril, Ellen; *Amending the Johnson Amendment in the Age of Cheap Speech*; Illinois Law Review (2018-01-16)
[34] Goldfelder, Mark and Terry, Michelle; *To Repeal, or not to Repeal the Johnson Amendment*; University of Memphis Law Review 48:210 (2017)
[35] Zwak, Julia D; *A Manageable Solution with Meaningful Results: Illuminating IRS Enforcement of §501(c)(3)'s Prohibition on Political Intervention*; Minnesota Law Review 99:381 (2014-11)
[36] *Citizens United; Citizens United v. Federal Elections Commission*; (558 US 310)
[37] *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)
[38] *Income Tax Act of 1934*, ch. 277
[39] *Slee v. Commissioner*, 42 F.2d 184, 185–86 (2d Cir. 1930)
[40] STAFF OF S. COMM. ON FINANCE, 73D CONG., REVENUE ACT OF 1934, at 32 (Comm. Print 1934); and 78 CONG. REC. 7831 (1934) (statement of Rep. Samuel B. Hill)

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Lobbying – Defined by the Code (IRC §4911)

Lobbying is the act of attempting to influence legislation, either directly or indirectly, and is defined in the IRC at IRC §4911(d) and IRC §4911(e).

IRC §4911(d). Influencing legislation

(**1**) **General rule**
Except as otherwise provided in paragraph (2), for purposes of this section, the term ''influencing legislation'' means –

(**A**) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and
(**B**) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

(**2**) **Exceptions**
For purposes of this section, the term ''influencing legislation'', with respect to an organization, does **not** include -

(**A**) making available the results of nonpartisan analysis, study, or research;
(**B**) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;
(**C**) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;
(**D**) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and
(**E**) any communication with a governmental official or employee, other than -

(**i**) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or
(**ii**) a communication the principal purpose of which is to influence legislation.

(**3**) **Communications with members**

(**A**) A communication between an organization and any bona fide member of such organization to directly encourage such member to communicate as provided in paragraph (1)(B) shall be treated as a communication described in paragraph (1)(B).
(**B**) A communication between an organization and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in either subparagraph (A) or subparagraph (B) of paragraph (1) shall be treated as a communication described in paragraph (1)(A).

IRC 4911(e)(2). Legislation
The term ''legislation'' includes action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.

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Lobbying is divided into two categories:[41]

Grass roots lobbying

Any attempt to influence any legislation through an effort to affect the opinions of the general public or any segment thereof.

Direct lobbying

Any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of legislation.

The distinction between direct and grassroots lobbying becomes relevant when an Organization makes elections related to how we determine how much lobbying is too much. (For purposes of the election, communications that are considered lobbying because they urge action on a legislative matter and are addressed to members are treated as direct lobbying.)

How Much Lobbying is Too Much? - The Substantial Part Test

Whether the Organization's attempts to influence legislation constitute a substantial part of its overall activities is determined on the basis of all the pertinent facts and circumstances. There is no statutory or regulatory definition of the amount of legislative activity that constitutes a "substantial part" of any organization's activity.

The Service has considered a variety of factors to determine whether the lobbying activity is substantial:

- The time devoted to lobbying and non-lobbying activity by both compensated and volunteer workers,
- The expenditures devoted by the organization to lobbying and non-lobbying activity,
- The amount of publicity the organization devotes to lobbying and non-lobbying activity, or
- The continuous or intermittent nature of the lobbying activity,

Court decisions have not been notably informative or consistent:

- *Seasongood v. Commissioner of Internal Revenue*,[42] found less than 5% of an organization's time and effort to be insubstantial.
- *World Family Corp v. Commissioner*[43] concluded that 10% of an organization's time and effort is also insubstantial.
- In *Haswell v. United States*[44] the Court of Claims found that lobbying expenditures of 16.6% to 20.5% of total expenditures over a four-year period were substantial.
- The Tenth Circuit rejected the use of a percentage test to determine whether activities were substantial in *Christian Echoes National Ministry, Inc. v. United States*,[45]

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[41] IRC §§4911(d)(1)(A-B)
[42] *Seasongood v. Commissioner of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955)
[43] *World Family Corp v. Commissioner*, 81 TC 958 (1983)
[44] *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975)
[45] *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1974) – Also, Same plaintiff and cause of action, 404 U.S. 561

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- *Kuper v. Commissioner*[46], and *League of Women Voters of the United States v. United States*[47] digress endlessly about what should or shouldn't be included in the determination.

The court cases give birth to the 5-15 rule summarized by one practitioner as: "The right answer to the Substantial Part Test lies somewhere between five and fifteen percent–of something." The IRS rejects this "too vague" notion, opting for a facts and circumstances approach that is "more often one of characterizing the various activities as attempts to influence legislation."[48]

Not surprisingly, none of this muddle contributes to anyone's sense of security or fair play. Most NFP advisors suggest that non-church NFP organizations make the election under IRC §501(h), if only to avoid the uncertainty of the Substantial Part Test. {N.B. Churches are ineligible to make the election under IRC §501(h). Churches must use the Substantial Part Test.}

Record Keeping and Reporting under the Substantial Part Test

Whether the Organization elects under IRC §501(h) or not it reports annual lobbying expenditures.

If the organization makes the 501(h) election it need only report how much was spent, in total, on lobbying and how much of that total was spent on grassroots lobbying. As noted below, this requirement can be satisfied relatively easily by establishing two "classes" or "project definitions" within the accounting system.

If the organization does not elect under IRC §501(h) it must report both time spent, and expenditures incurred by volunteers and paid staff and must segregate lobbying expenses and time into nine (not quite mutually exclusive) categories:

1. Volunteers
2. Paid staff or management (Include compensation in expenses reported on lines **c** through **h.**)
3. Media advertisements
4. Mailings to members, legislators, or the public
5. Publications, or published or broadcast statements
6. Grants to other organizations for lobbying purposes
7. Direct contact with legislators, their staffs, government officials, or a legislative body
8. Rallies, demonstrations, seminars, conventions, speeches, lectures, or
9. any other means

The need to demonstrate that "no substantial part" of the Organization's total efforts are expended on lobbying also mandates that the Organization keep track of how much time is spent by both volunteers and paid staff on non-lobbying activities (to provide a basis for comparison).

The Organization must adopt an extensive system of time and expense tracking in order to comply with the Substantial Part Test's requirements. Complex systems of this sort are rarely "sustainable."

Most Small Organizations should strongly consider making the IRC §501(h) election.

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[46] Kuper v. Commissioner, 332 F.2d 563 (3rd Cir. 1964), *cert. denied*, 379 U.S. 920 (1964)
[47] League of Women Voters of the United States v. United States, 180 F. Supp. 379 (Ct. Cl. 1960)
[48] Internal Revenue Manual (IRM) at §§392-394, sometimes called the baby-and-bathwater approach.

Effectuate the election mentioned in IRC §501(h)(3) by filing IRS Form 5768. Download the current form from the IRS website.

Technical and Procedural Note – the 501(h) Election

The IRC §501(h) Election – An Alternative to the Substantial Part Test

IRC §501(h) establishes a "lobbying limit" on total lobbying expenditures an organization may incur, and a related limit on "grassroots lobbying" expenditures. It does so by cross references to IRC §4911.

IRC §501. Exemption from tax on corporations, certain trusts, etc.
…
(h) Expenditures by public charities to influence legislation

(1) General rule
In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally—

(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

(2) Definitions
For purposes of this subsection—

(A) Lobbying expenditures
The term "lobbying expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911 (d)).

(B) Lobbying ceiling amount
The lobbying ceiling amount for any organization for any taxable year is 150 percent of the lobbying nontaxable amount for such organization for such taxable year, determined under section 4911.

(C) Grass roots expenditures
The term "grass roots expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911 (d) without regard to paragraph (1)(B) thereof).

(D) Grass roots ceiling amount
The grass roots ceiling amount for any organization for any taxable year is 150 percent of the grass roots nontaxable amount for such organization for such taxable year, determined under section 4911.

(3) Organizations to which this subsection applies
This subsection shall apply to any organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of this subsection apply to such organization and which, for the taxable year which includes the date the election is made, is described in subsection (c)(3) and—

(A) is described in paragraph (4), and

(B) is not a disqualified organization under paragraph (5).

(4) Organizations permitted to elect to have this subsection apply
An organization is described in this paragraph if it is described in—

(A) section 170 (b)(1)(A)(ii) (relating to educational institutions),
(B) section 170 (b)(1)(A)(iii) (relating to hospitals and medical research organizations),
(C) section 170 (b)(1)(A)(iv) (relating to organizations supporting government schools),
(D) section 170 (b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),
(E) section 509 (a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or
(F) section 509 (a)(3) (relating to organizations supporting certain types of public charities) except that for purposes of this subparagraph, section 509 (a)(3) shall be applied without regard to the last sentence of section 509 (a).

(5) Disqualified organizations
For purposes of paragraph (3) an organization is a disqualified organization if it is—
(A) described in section 170 (b)(1)(A)(i) (relating to churches),
(B) an integrated auxiliary of a church or of a convention or association of churches, or
(C) a member of an affiliated group of organizations (within the meaning of section 4911 (f)(2)) if one or more members of such group is described in subparagraph (A) or (B).

(6) Years for which election is effective
An election by an organization under this subsection shall be effective for all taxable years of such organization which—
(A) end after the date the election is made, and
(B) begin before the date the election is revoked by such organization (under regulations prescribed by the Secretary).

(7) No effect on certain organizations
With respect to any organization for a taxable year for which—
(A) such organization is a disqualified organization (within the meaning of paragraph (5)), or
(B) an election under this subsection is not in effect for such organization,
nothing in this subsection or in section 4911 shall be construed to affect the interpretation of the phrase, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation," under subsection (c)(3).

(8) Affiliated organizations
For rules regarding affiliated organizations, see section 4911 (f).

The four defined terms identified in IRC §501(h) (2) are explained in IRC §4911(c)(2)-(4):

IRC §4911. Tax on excess expenditures to influence legislation

(c) Definitions
For purposes of this section—

(2) Lobbying nontaxable amount
The lobbying nontaxable amount for any organization for any taxable year is the lesser of
(A) $1,000,000 or
(B) the amount determined under the following table:

If the exempt purpose expenditures are—	The lobbying nontaxable amount is—
Not over $500,000	20 percent of the exempt purpose expenditures.
Over $500,000 but not over $1,000,000	$100,000, plus 15 percent of the excess of the exempt purpose expenditures over $500,000.
Over $1,000,000 but not over $1,500,000	$175,000 plus 10 percent of the excess of the exempt purpose expenditures over $1,000,000.
Over $1,500,000	$225,000 plus 5 percent of the excess of the exempt purpose expenditures over $1,500,000.

(3) Grass roots expenditures

The term "grass roots expenditures" means expenditures for the purpose of influencing legislation (as defined in subsection (d) without regard to paragraph (1)(B) thereof).

(4) Grass roots nontaxable amount

The grass roots nontaxable amount for any organization for any taxable year is 25 percent of the lobbying nontaxable amount (determined under paragraph (2)) for such organization for such taxable year.

The term *exempt purpose expenditure* is defined in regulations. It means the total of the amounts paid or incurred (including depreciation and amortization, but not capital expenditures) by the Organization for the tax year to accomplish its exempt purposes. In addition, it includes:

1. Administrative expenses paid or incurred for the organization's exempt purposes, and
2. Amounts paid or incurred for the purpose of influencing legislation, whether or not the legislation promotes the organization's exempt purposes.

Exempt purpose expenditures ***do not include*** amounts paid or incurred to or for:

1. A separate fund-raising unit of the organization, or
2. One or more other organizations, if the amounts are paid or incurred primarily for fund raising.

The IRC §501(h)(3) election is effectuated by filing IRS Form 5768. The form and instructions can be downloaded from the IRS website.

Record Keeping and Reporting under the IRC §501(h) Election

After making the IRC §501(h) election the Organization need only track and report how much was spent, in total, on lobbying and how much of that total was spent on grassroots lobbying. This can be accomplished expeditiously by establishing a "class" and one or more "subclasses" (project or subproject)[49] in most common software used by small organizations as follows:

Class or Project: Lobbying Expenditures
- Subclass or Subproject: Direct Lobbying Expenditures (Optional)
- Subclass or Subproject: Grassroots Lobbying Expenditures

[49] This approach is generally favorable vs. direct tracking in the general ledger – chart of accounts.

Making the IRC §501(h) election obviates the need to keep a time/use record of volunteer activities.[50] Paid staff must keep records of time spent on lobbying activities to provide a basis for allocating staff expense. (A simple Hours x Rate calculation can be used to make the allocation – eliminating the need for the detailed record keeping required under the Substantial Part Test.)

Organizations report lobbying expense (under either the IRC §501(h) election or the Substantial Part Test) on Schedule C[51] of the Organization's annual exempt organization information return (IRS Form 990). The form and instructions can be downloaded from the IRS website.

Another Historical Digression – Just in Case You Are Still Wondering

The 501(h) election is not available to churches, integrated auxiliaries of churches, or conventions and associations of churches. Nor is it available to governmental units or private Organizations. The omission does not evidence any anti-church bias on the part of either Congress or the IRS.

When Congress enacted IRC §501(h) in 1976 several churches, conventions or associations of churches, and integrated auxiliaries of churches requested that they be excluded from the election. Thus, (arch)dioceses, churches, parishes, and other religious organizations are not eligible to make the section 501(h) lobbying election, and remain subject to the general "substantiality" test, *i.e.* only an insubstantial amount of their activities can be devoted to lobbying as determined under the "Insubstantial Part" facts and circumstances test.

Recently several church organizations have tested the limits of the substantiality test.

Operationalizing the IRC §501(h) Election – The Detailed Regulations

The Service has issued detailed regulations that clarify IRC §501(h)'s intent, the manner in which the election is made, and the calculation of its limits and factors.

Regs. §1.501(h)-1 Application of the expenditure test to expenditures to influence legislation; introduction.

(a) Scope.

(1) There are certain requirements an organization must meet in order to be a charity described in section 501(c)(3). Among other things, section 501(c)(3) states that ``no substantial part of the activities of [a charity may consist of] carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h)).'' This requirement is called the substantial part test.

(2) Under section 501(h), many public charities may elect the expenditure test as a substitute for the substantial part test. The expenditure test is described in section 501(h) and this Sec. 1.501(h). A public charity is any charity that is not a private Organization under section 509(a). (Unlike a public charity, a private Organization may not make any lobbying expenditures:

[50] There may be other reasons to track volunteer time, e.g. in order to substantiate exemption from UBIT under the "volunteer labor" provisions.

[51] Disclosure of political activities using Schedule C is required under IRC §§4962 and 6033(b). Schedule C is also used by IRC §501[c](4-6) and §527 organizations; see Rev. Proc. 98-19, 1998-1 C.B. 547. Membership organizations {§§501[c](4-6)} must also disclose this information to their members, IRC §6033[e].

If a private Organization does make a lobbying expenditure, it is subject to an excise tax under section 4945). Section 1.501(h)-2 lists which public charities are eligible to make the expenditure test election. Section 1.501(h)-2 also provides information about how a public charity makes and revokes the election to be covered by the expenditure test.

(3) A public charity that makes the election may make lobbying expenditures within specified dollar limits. If an electing public charity's lobbying expenditures are within the dollar limits determined under section 4911(c), the electing public charity will not owe tax under section 4911 nor will it lose its tax exempt status as a charity by virtue of section 501(h). If, however, that electing public charity's lobbying expenditures exceed its section 4911 lobbying limit, the organization is subject to an excise tax on the excess lobbying expenditures. Further, under section 501(h), if an electing public charity's lobbying expenditures normally are more than 150 percent of its section 4911 lobbying limit, the organization will cease to be a charity described in section 501(c)(3).

(4) A public charity that elects the expenditure test may nevertheless lose its tax exempt status if it is an action organization under Sec. 1.501(c)(3)-1(c)(3)(iii) or (iv). A public charity that does not elect the expenditure test remains subject to the substantial part test. The substantial part test is applied without regard to the provisions of section 501(h) and 4911 and the related regulations.

(b) Effective date.

The provisions of Sec. 1.501(h)-1 through Sec. 1.501(h)-3, are effective for taxable years beginning after August 31, 1990. An election made before August 31, 1990, under the provisions of Sec. 7.0(c)(4) or the instructions to Form 5768, will be effective under these regulations without again filing Form 5768.

Regs. §1.501(h)-2 Electing the expenditure test.

(a) In general

The election to be governed by section 501(h) may be made by an eligible organization (as described in paragraph (b) of this section) for any taxable year of the organization beginning after December 31, 1976, other than the first taxable year for which a voluntary revocation of the election is effective (see paragraph (d) of this section). The election is made by filing a completed Form 5768, Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation, with the appropriate Internal Revenue Service Center listed on that form. Under section 501(h)(6), the election is effective with the beginning of the taxable year in which the form is filed. For example, if an eligible organization whose taxable year is the calendar year files Form 5768 on December 31, 1979, the organization is governed by section 501(h) for its taxable year beginning January 1, 1979. Once made, the expenditure test election is effective (without again filing Form 5768) for each succeeding taxable year for which the organization is an eligible organization and which begins before a notice of revocation is filed under paragraph (d) of this section.

(b) Organizations eligible to elect the expenditure test

(1) In general. For purposes of section 501(h) and the regulations thereunder, an organization is an eligible organization for a taxable year if, for that taxable year, it is--

(i) Described in section 501(c)(3) (determined, in any year for which an election is in effect, without regard to the substantial part test of section 501(c)(3)),

(ii) Described in section 501(h)(4) and paragraph (b)(2) of this section, and

(iii) Not a disqualified organization described in section 501(h)(5) and paragraph (b)(3) of this section.

(2) Certain organizations listed. An organization is described in section 501(h)(4) and this paragraph (b)(2) if it is an organization described in--

(i) Section 170(b)(1)(A)(ii) (relating to educational institutions),

(ii) Section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),

(iii) Section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),

(iv) Section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),

(v) Section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or

(vi) Section 509(a)(3) (relating to organizations supporting public charities), except that for purposes of this paragraph (b)(2), section 509(a)(3) shall be applied without regard to the last sentence of section 509(a).

(3) Disqualified organizations. An organization is a disqualified organization described in section 501(h)(5) and this paragraph (b)(3) if the organization is--

(i) Described in section 170(b)(1)(A)(i) (relating to churches),

(ii) An integrated auxiliary of a church or of a convention or association of churches see (Sec. 1.6033-2(g)(5)), or

(iii) Described in section 501(c)(3) and affiliated (within the meaning of Sec. 56.4911-7) with one or more organizations described in paragraph (b)(3) (i) or (ii) of this section.

(4) Other organizations ineligible to elect. Under section 501(h)(4), certain organizations, although not disqualified organizations, are not eligible to elect the expenditure test. For example, organizations described in section 509(a)(4) are not listed in section 501(h)(4) and therefore are not eligible to elect. Similarly, private Organizations (within the meaning of section 509(a)) are not eligible to elect. For the treatment of expenditures by a private Organization for the purpose of carrying on propaganda, or otherwise attempting, to influence legislation, see Sec. 53.4945-2.

(c) New organizations.

A newly created organization may submit Form 5768 to elect the expenditure test under section 501(h) before it is determined to be an eligible organization and may submit Form 5768 at the time it submits its application for recognition of exemption (Form 1023). If the newly created organization is determined to be an eligible organization, the election will be effective under the provisions of paragraph (a) of this section, that is, with the beginning of the taxable year in which the Form 5768 is filed by the eligible organization. However, if a newly created organization is determined by the Service not to be an eligible organization, the organization's election will not be effective and the substantial part test will apply from the effective date of its section 501(c)(3) classification.

(d) Voluntary revocation of expenditure test election—

(1) Revocation effective. An organization may voluntarily revoke an expenditure test election by filing a notice of voluntary revocation with the appropriate Internal Revenue Service Center listed on Form 5768. Under section 501(h)(6)(B), a voluntary revocation is effective with the beginning of the first taxable year after the taxable year in which the notice is filed. If an organization voluntarily revokes its election, the substantial part test of section 501(c)(3) will apply with respect to the organization's activities in attempting to influence legislation beginning with the taxable year for which the voluntary revocation is effective.

(2) Re-election of expenditure test. If an organization's expenditure test election is voluntarily revoked, the organization may again make the expenditure test election, effective no earlier than for the taxable year following the first taxable year for which the revocation is effective.

(3) Example. X, an organization whose taxable year is the calendar year, plans to voluntarily revoke its expenditure test election effective beginning with its taxable year 1985. X must file its notice of voluntary revocation on Form 5768 after December 31, 1983, and before January 1, 1985. If X files a notice of voluntary revocation on December 31, 1984, the revocation is effective beginning with its taxable year 1985. The organization may again elect the expenditure test by filing Form 5768. Under paragraph (d)(2) of this section, the election may not be made for taxable year 1985. Under paragraph (a) of this section, a new expenditure test election will be

effective for taxable years beginning with taxable year 1986, if the Form 5768 is filed after December 31, 1985, and before January 1, 1987.

(e) Involuntary revocation of expenditure test election.

If, while an election by an eligible organization is in effect, the organization ceases to be an eligible organization, its election is automatically revoked. The revocation is effective with the beginning of the first full taxable year for which it is determined that the organization is not an eligible organization. If an organization's expenditure test election is involuntarily revoked under this paragraph (e) but the organization continues to be described in section 501(c)(3), the substantial part test of section 501(c)(3) will apply with respect to the organization's activities in attempting to influence legislation beginning with the first taxable year for which the involuntary revocation is effective.

(f) Supersession

This section supersedes Sec. 7.0(c)(4) of the Temporary Income Tax Regulations under the Tax Reform Act of 1976, effective August 31, 1990.

Regs. §1.501(h)-3 Lobbying or grass roots expenditures normally in excess of ceiling amount.

(a) Scope

This section provides rules under section 501(h) for determining whether an organization that has elected the expenditure test and that is not a member of an affiliated group of organizations (as defined in Sec. 56.4911-7(e)) either normally makes lobbying expenditures in excess of its lobbying ceiling amount or normally makes grass roots expenditures in excess of its grass roots ceiling amount. Under section 501(h) and this section, an organization that has elected the expenditure test and that normally makes expenditures in excess of the corresponding ceiling amount will cease to be exempt from tax under section 501(a) as an organization described in section 501(c)(3). For similar rules relating to members of an affiliated group of organizations, see Sec. 56.4911-9.

(b) Loss of exemption

(1) In general. Under section 501(h)(1), an organization that has elected the expenditure test shall be denied exemption from taxation under section 501(a) as an organization described in section 501(c)(3) for the taxable year following a determination year if--

(i) The sum of the organization's lobbying expenditures for the base years exceeds 150 percent of the sum of its lobbying nontaxable amounts for the base years, or

(ii) The sum of the organization's grass roots expenditures for its base years exceeds 150 percent of the sum of its grass roots nontaxable amounts for the base years.

The organization thereafter shall not be exempt from tax under section 501(a) as an organization described in section 501(c)(3) unless, pursuant to paragraph (d) of this section, the organization reapplies for recognition of exemption and is recognized as exempt.

(2) Special exception for organization's first election. For the first, second, or third consecutive determination year for which an organization's first expenditure test election is in effect, no determination is required under paragraph (b)(1) of this section, and the organization will not be denied exemption from tax by reason of section 501(h) and this section if, taking into account as base years only those years for which the expenditure test election is in effect--

(i) The sum of the organization's lobbying expenditures for such base years does not exceed 150 percent of the sum of its lobbying nontaxable amounts for the same base years, and

(ii) The sum of the organization's grass roots expenditure for those base years does not exceed 150 percent of the sum of its grass roots nontaxable amounts for such base years. If an organization does not satisfy the requirements of this paragraph (b)(2), paragraph (b)(1) of this section will apply.

(c) Definitions

For purposes of this section--

(1) The term lobbying expenditures means lobbying expenditures as defined in section 4911(c)(1) or section 4911(f)(4)(A) and Sec. 56.4911-2(a).

(2) The term lobbying nontaxable amount is defined in Sec. 56.4911-1(c)(1).

(3) An organization's lobbying ceiling amount is 150 percent of the organization's lobbying nontaxable amount for a taxable year.

(4) The term grass roots expenditures means expenditures for grass roots lobbying communications as defined in section 4911(c)(3) or section 4911(f)(4)(A) and Sec. Sec. 56.4911-2 and 56.4911-3.

(5) The term grass roots nontaxable amount is defined in Sec. 56.4911-1(c)(2).

(6) An organization's grass roots ceiling amount is 150 percent of the organization's grass roots nontaxable amount for a taxable year.

(7) In general, the term base years means the determination year and the three taxable years immediately preceding the determination year. The base years, however, do not include any taxable year preceding the taxable year for which the organization is first treated as described in section 501(c)(3).

(8) A taxable year is a determination year if it is a year for which the expenditure test election is in effect, other than the taxable year for which the organization is first treated as described in section 501(c)(3).

(d) Reapplication for recognition of exemption

(1) Time of application. An organization that is denied exemption from taxation under section 501(a) by reason of section 501(h) and this section may apply on Form 1023 for recognition of exemption as an organization described in section 501(c)(3) for any taxable year following the first taxable year for which exemption is so denied. See paragraphs (d)(2) and (d)(3) of this section for material to be included with an application described in the preceding sentence.

(2) Section 501(h) calculation. An application described in paragraph (d)(1) of this section must demonstrate that the organization would not be denied exemption from taxation under section 501(a) by reason of section 501(h) if the expenditure test election has been in effect for all of its last taxable year ending before the application is made by providing the calculations, described either in paragraphs (b)(1) (i) and (ii) of this section or in Sec. 56.4911-9(b), that would have applied to the organization for that year.

(3) Operations not disqualifying. An application described in paragraph (d)(1) of this section must include information that demonstrates to the satisfaction of the Commissioner that the organization will not knowingly operate in a manner that would

disqualify the organization for tax exemption under section 501(c)(3) by reason of attempting to influence legislation.

(4) Reelection of expenditure test. If an organization is denied exemption from tax for a taxable year by reason of section 501(h) and this section, and thereafter is again recognized as an organization described in section 501(c)(3) pursuant to this paragraph (d), it may again elect the expenditure test under section 501(h) in accordance with Sec. 1.501(h)-2(a).

(e) Examples

The provisions of this section are illustrated by the following examples, which also illustrate the operation of the tax imposed by section 4911.

Example 1.

(1) The following table contains information used in this example concerning organization X.

	Lobbying

Year	Exempt Purpose Expenditures (EPE)	Calculation	Non-Taxable Amount (LNTA)	Lobbying Expenditures (LE)
1979	$400,000	20% x 400,000	$80,000	$100,000
1980	$300,000	20% x 300,000	$60,000	$100,000
1981	$600,000	20% x 500,000 Plus 15% x 100,000	$115,000	$120,000
1982	$500,000	20% x 500,000	$100,000	$100,000
Totals	$1,800,000		$355,000	$420,000

(2) Organization X, whose taxable year is the calendar year, was organized in 1971. X first made the expenditure test election under section 501(h) effective for taxable years beginning with 1979 and has not revoked the election. None of X's lobbying expenditures for its taxable years 1979 through 1982 are grass roots expenditures. Under section 4911(a) and Sec. 56.4911-1(a), X must determine for each year for which the expenditure test election is effective whether it is liable for the 25 percent excise tax imposed by section 4911(a) on excess lobbying expenditures. X is liable for this tax for each of its taxable years 1979, 1980, and 1981, because in each year its lobbying expenditures exceeded its lobbying nontaxable amount for the year. For 1979, the tax imposed by section 4911(a) is $5,000 {25%x($100,000-$80,000)=$5,000{time} . For 1980, the tax is $10,000. For 1981, the tax is $1,250.

(3) The taxable years 1979 through 1981 are all determination years under paragraph (c)(8) of this section. On its annual return for determination year 1979, the first year of its first election, X can demonstrate, under paragraph (b)(2) of this section, that its lobbying expenditures during 1979 ($100,000) do not exceed 150 percent of its lobbying nontaxable amount for 1979 ($120,000). For determination year 1980, under paragraph (b)(2), X can demonstrate that the sum of its lobbying expenditures for 1979 and 1980 ($200,000) does not exceed 150 percent of the sum of its lobbying nontaxable amounts for 1979 and 1980 ($210,000). For 1981, under paragraph (b)(2), X can demonstrate that the sum of its lobbying expenditures for 1979, 1980, and 1981 ($320,000) does not exceed 150 percent of the sum of its lobbying nontaxable amounts for 1979, 1980, and 1981 ($382,500). For each of the determination years 1979, 1980, and 1981, the first three years of its first election, X satisfies the requirements of paragraph (b)(2). Accordingly, no determination under paragraph (b)(1) of this section is required for those years, and X is not denied tax exemption by reason of section 501(h).

(4) Under paragraph (b)(1) of this section, X must determine for its determination year 1982 whether it has normally made lobbying expenditures in excess of the lobbying ceiling amount. This determination takes into account expenditures in base years 1979 through 1982. The sum of X's lobbying expenditures for the base years ($420,000) does not exceed 150 percent of the sum of the lobbying nontaxable amounts for the base years 150%x$355,000=$532,500). Accordingly, X is not denied tax exemption by reason of section 501(h).

Example 2

(1) The following table contains information used in this example concerning W.

		Lobbying			Grass Roots	
Year	Exempt Purpose Expenditures (EPE)	Calculation	Non-Taxable Amount (LNTA)	Lobbying Expenditures (LE)	NonTaxable Amount 25% x (LNTA)	Expenditures

1977	$700,000	20% x 500,000 + 15% x 200,000	$130,000	$180,000	$32,500	$30,000
1978	$800,000	20% x 500,000 + 15% x 300,000	$145,000	$224,750	$36,250	$35,000
Subtotal	$1,500,000	N/A	$275,000	$406,750	$68,750	$65,000
1979	$900,000	20% x 500,000 + 15% x 400,000	$160,000	$264,000	$40,000	$50,000
Totals	$2,400,000		$435,000	$670,750	$108,750	$115,000

(2) Organization W, whose taxable year is the calendar year, made the expenditure test election under section 501(h) effective for taxable years beginning with 1979 and has not revoked the election. W has been treated as an organization described in section 501(c)(3) for each of its taxable years beginning within its taxable year 1974.

(3) Under section 4911(a) and Sec. 56.4911-1(a), W must determine for each year for which the expenditure test election is effective whether it is liable for the 25 percent excise tax imposed by section 4911(a) on excess lobbying expenditures. In 1980, 1981, and 1982, W has excess lobbying expenditures because its grass roots expenditures in each of those years exceeded its grass roots nontaxable amount for the year. Therefore, W is liable for the excise tax under section 4911(a) for those years. The tax imposed by section 4911(a) for 1980 is $5,937.50 {25%x($60,000-$36,250)= $5,937.50{time} . For 1981, the tax is $7,187.50. For 1982, the tax is $6,250.

(4) On its annual return for its determination years 1979, 1980, and 1981, the first three years of its first election, W demonstrates that it satisfies the requirements of paragraph (b)(2) of this section. Accordingly, no determination under paragraph (b)(1) of this section is required for those years, and W is not denied tax exemption by reason of section 501(h).

(5) On its annual return for its determination year 1982, W must determine under paragraph (b)(1) whether it has normally made lobbying expenditures or grass roots expenditures in excess of the corresponding ceiling amount. This determination takes into account expenditures in base years 1979 through 1982. The sum of W's lobbying expenditures for the base years ($470,000) does not exceed 150% of the sum of W's lobbying nontaxable amounts for those years (150%x$580,000=$870,000). However, the sum of W's grass roots expenditures for the base years ($220,000) does exceed 150% of the sum of W's grass roots nontaxable amonts for those years (150%x$145,000=$217,500). Under section 501(h), W is denied tax exemption under section 501(a) as an organization described in section 501(c)(3) for its taxable year 1983. For its taxable year 1984 and any taxable year thereafter, W is exempt from tax as an organization described in section 501(c)(3) only if W applies for recognition of its exempt status under paragraph (d) of this section and is recognized as exempt from tax.

Example 3.

(1) The following table contains information used in this example concerning organization Y.

		Lobbying			Grass Roots	
Year	Exempt Purpose Expenditures (EPE)	Calculation	Non-Taxable Amount (LNTA)	Lobbying Expenditures (LE)	NonTaxable Amount 25% x (LNTA)	Expenditures

1977	$700,000	20% x 500,000 + 15% x 200,000	$130,000	$180,000	$32,500	$30,000
1978	$800,000	20% x 500,000 + 15% x 300,000	$145,000	$224,750	$36,250	$35,000
Subtotal	$1,500,000	N/A	$275,000	$406,750	$68,750	$65,000
1979	$900,000	20% x 500,000 + 15% x 400,000	$160,000	$264,000	$40,000	$50,000
Totals	$2,400,000		$435,000	$670,750	$108,750	$115,000

(2) Organization Y, whose taxable year is the calendar year, was first treated as an organization described in section 501(c)(3) on February 1, 1977. Y made the expenditure test election under section 501(h) effective for taxable years beginning with 1977 and has not revoked the election.

(3) For 1977, Y has excess lobbying expenditures of $52,000 because its lobbying expenditures ($182,000) exceed its lobbying nontaxable amount ($130,000) for the taxable year. Accordingly, Y is liable for the 25 percent excise tax imposed by section 4911(a). The amount of the tax is $13,000 [25%x($182,000-$130,000)=$13,000].

(4) For 1978, Y again has excess lobbying expenditures and is again liable for the 25 percent excise tax imposed by section 4911(a). The amount of the tax is $19,937.50 [25%x($224,750-$145,000)=$19,937.50].

(5) For 1979, Y's lobbying expenditures ($264,000) exceed its lobbying nontaxable amount ($160,000) by $104,000, and its grass roots expenditures ($50,000) exceed its grass roots nontaxable amount ($40,000) by $10,000. Under Sec. 56.4911-1(b), Y's excess lobbying expenditures are the greater of $104,000 or $10,000. The amount of the tax, therefore, is $26,000 [25%x$104,000=$26,000].

(6) Under paragraph (c)(8) of this section, 1977 is not a determination year because it is the first year for which the organization is treated as described in section 501(c)(3). For 1977, Y need not determine whether it has normally made lobbying expenditures or grass roots expenditures in excess of the corresponding ceiling amount for purposes of determining whether it is denied exemption under section 501(h) for its taxable year 1978.

(7) For determination year 1978, Y must determine whether it has normally made lobbying or grass roots expenditures in excess of the corresponding ceiling amount, taking into account expenditures for the base years 1977 and 1978. For Y, the determination under paragraph (b)(2) of this section considers the same base years as the determination under paragraph (b)(1) of this section and is, therefore, redundant. Accordingly, Y proceeds to determine, under (b)(1), whether it is denied exemption. Y's grass roots expenditures for 1977 and 1978 ($65,000) did not exceed 150 percent of the sum of its grass roots nontaxable amounts for those years ($103,125). Y's lobbying expenditures for 1977 and 1978 ($406,750) did not exceed 150% of its lobbying nontaxable amount for those years (150%x$275,000=$412,500). Therefore, Y is not denied tax exemption under section 501(h) for its taxable year 1979.

(8) For determination year 1979, the sum of Y's grass roots expenditures in base years 1977, 1978, and 1979 does not exceed 150 percent of its grass roots nontaxable amount (calculation omitted).

However, the sum of Y's lobbying expenditures for the base years ($670,750) does exceed 150% of the sum of the lobbying nontaxable amounts for those years (150%x$435,000=$652,500). Since Y was not described in section 501(c)(3) prior to 1977, only the years 1977, 1978, and 1979 may be considered in determining whether Y has normally made lobbying expenditures in excess of its lobbying ceiling. Therefore, Y determines that it has normally made lobbying expenditures in excess of its lobbying ceiling. Under section 501(h), Y is denied tax exemption under section 501(a) as an organization described in section 501(c)(3) for its taxable year 1980. For its taxable year 1981, and any taxable year thereafter, Y

is exempt from tax as an organization described in section 501(c)(3) only if Y applies for recognition of its exempt status under paragraph (d) of this section and is recognized as exempt from tax.

Example 4.

Organization M made the expenditure test election under section 501(h) effective for taxable years beginning with 1977 and has not revoked the election. M has $500,000 of exempt purpose expenditures during each of the years 1981 through 1984. In addition, during each of those years, M spends $75,000 for direct lobbying and $25,000 for grass roots lobbying. Since the amount expended for M's lobbying (both total lobbying and grass roots lobbying) is within the respective nontaxable expenditure limitations, M is not liable for the 25 percent excise tax imposed under section 4911(a) upon excess lobbying expenditures, nor is M denied tax-exempt status by reason of section 501 (h).

Example 5.

Assume the same facts as in Example 4, except that, on behalf of M, numerous unpaid volunteers conduct substantial lobbying activities with no reimbursement. Since the substantial lobbying activities of the unpaid volunteers are not counted towards the expenditure limitations and the amount expended for M's lobbying is within the respective nontaxable expenditure limitations, M is not liable for the 25 percent excise tax under section 4911, nor is M denied tax-exempt status by reason of section 501(h).

Technical and Procedural Note – Lobbying Disclosure Act and State Reporting Requirements

This Technical and Procedural Note is currently undergoing a major revision.

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