

T E N E N B A U M

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L A W G R O U P P L L C

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September 16, 2022

## Climate Advocacy: Yes! You Can!

# Goals

- Empower your land trust to engage in policy activities by providing expertise
- Help identify situations where different rules may apply, or where you may need additional advice
- Have fun!

# Agenda/Applicable Laws

- Lobbying
  - IRS - “Influencing Legislation”
  - Federal Lobbying Disclosure Act
  - State and Local Lobbying Disclosure Laws
- Ethics and Gift Rules
- Political Campaign Activity

# Lobbying Definitions

Depending on where you are lobbying, multiple definitions of lobbying may apply to your activities:

IRS – “Influencing Legislation”

Federal/Lobbying Disclosure Act

State Lobbying Disclosure Laws

Local/Municipal Disclosure Laws

Country-Specific Lobbying Laws

# IRS Legislative Lobbying

# 501(c)(3) Lobbying Limits

## Two Alternative Tests

1. “No Substantial Part” Test:
  - No substantial part of an organization’s activities may be lobbying
  - This is the default test
  - Unclear limits, definition, and the penalty for exceeding the limit is the revocation of tax exemption
2. 501(h) Expenditure Test:
  - ~~Clear dollar-based limits~~
  - Clear definitions of lobbying
    - Direct + Grassroots lobbying
  - Penalty is a tax on the excess lobbying expenditures
  - Requires one-time election using IRS Form 5768



# 501(h) Legislative Lobbying Limits

- Calculate the organization's total exempt purposes expenditures (how much the organization spends during the tax year, subject to some adjustments)
- Overall Lobbying Limit is:
  - 20% of first \$500,000
  - 15% of next \$500,000
  - 10% of next \$500,000
  - 5% of remainder
- Grassroots lobbying limit is 25% of overall lobbying limit



# What is Legislative Lobbying?

**Direct Lobbying** Definition:

A **Communication** +

That **Expresses a View** +

On **Specific Legislation** +

To a **Legislator** =

**Direct Lobbying**

# Specific Legislation

Action by a legislature, but more than just legislation that has been introduced...

- A bill (e.g., H.R. 7, S. 42)
- Proposed legislation (e.g., model bills)
- Draft amendments
- Specific legislative policy proposals
- Congressional resolutions
- Treaties requiring Senate ratification
- Judicial and executive nominees

# Specific Legislative Policy Proposals

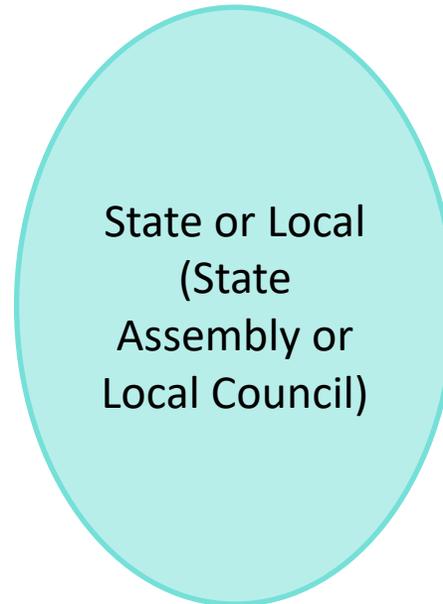
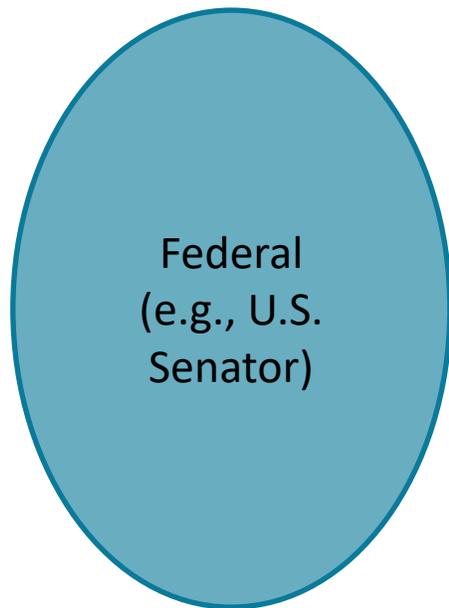
- Policy proposals that are specific enough to enable a legislator to reasonably know the legislation necessary to enact such a proposal, for example:
  - A tax on carbon emissions
- Policy proposals that require legislation to implement, for example:
  - Anything related to increasing/decreasing federal spending or appropriations

# Not Specific Legislation

- Administrative rules
- Court opinions
- Agency decisions
- Executive orders
- Private (non-government) actions

# Who is a Legislator?

- A member of a legislative body or their staff



# Who is a Legislator?

- A member of legislative branch

**REMEMEMBER!!** If you're not talking about specific legislation, then you are not lobbying!

(e.g. U.S. Senator)

or

National, regional, or local

# Who is a Legislator?

- Executive Branch Employee only if:
  - The person is in a position to influence the formulation of legislation and
  - The primary purpose of the communication is to influence legislation

# What is Legislative Lobbying?

**Direct Lobbying** Definition:

A **Communication** +

That **Expresses a View** +

On **Specific Legislation** +

To a **Legislator** =

**Direct Lobbying**

**Grassroots Lobbying** Definition:

A **Communication** +

That **Expresses a View** +

On **Specific Legislation** +

To the **General Public** +

With a **Call to Action** =

**Grassroots Lobbying**

# Call to Action

- Urging people to contact their legislator
- Providing contact information for a legislator
- Providing a postcard, petition, web link, or other means to contact a legislator
- Identifying legislators who are:
  - On a relevant committee
  - Undecided on legislation
  - Opposed to your view
  - Representing the reader

Generally, if there is no call to action, there is no grassroots lobbying

# Examples

Providing information about renewable energy legislation in your state that your organization supports in a mailer to your supporters without encouraging them to take any other action

Note, however, that under the “no substantial part” test, all of the facts and circumstances need to be considered before determining whether this is lobbying or not

- A **Communication** +
- That **Expresses a View** +
- On **Specific Legislation** +
- To the **General Public** +
- With a **Call to Action** =

**Not Grassroots Lobbying**

# Examples

Same facts except the mailer asks supporters to contact their legislators and ask them to vote “yes” for the legislation.

Under the “no substantial part” test, this is also lobbying

- ✓ A **Communication +**
- ✓ That **Expresses a View +**
- ✓ On **Specific Legislation +**
- ✓ To the **General Public +**
- ✓ With a **Call to Action =**

**Grassroots Lobbying**

# Exceptions and Other Rules

Exclusions from the definition of Influencing Legislation:

- Requests for Technical Assistance
- Self-Defense Communications
- Nonpartisan Analysis, Study, or Research
- Executive Lobbying

Special Rules for 501(h) Electors:

- Membership Rule
- Mass Media Communications
- Subsequent Use Rule

These Exceptions and Other Rules are covered in detail in the handout.

# Federal Lobbying Disclosure Act

# Federal Lobbying Disclosure Act (LDA)

Are You a Lobbyist under the Federal LDA?

If:

1. You make at least 2 “lobbying contacts” with “covered legislative or executive branch officials” AND
2. You spend 20% or more of your time in a quarter on such contacts (including preparing for them), whether made by you or someone else

THEN:

You will qualify as a federal “lobbyist” under the LDA

# “Covered Officials”

- Covered Legislative Official
  - A Member of Congress
  - An elected officer of either the House or the Senate
  - Congressional staff (including committees, House or Senate leadership, a joint committee, a Congressional working group or caucus)
- Covered Executive Branch Official
  - Someone in the Federal Executive Branch who participates in the formulation of **legislation** (hint: this is the same as the IRS definition), such as the President, White House Legislative Affairs Director, HHS Assistant Secretary for Legislation

# “Lobbying Contacts”

- Communication to a “covered legislative branch official” on:
  - Federal legislative proposals
  - Federal agency regulations, executive orders, or any other program, policy, or position of the US Government
  - Administration or execution of a federal program or policy (including contracts, grants, permits, etc.)
  - Nomination or confirmation of a person for a position subject to confirmation by the Senate
- Communication to a “covered executive branch official” reflecting a view on:
  - Federal legislative proposals only where the main purpose is to influence the legislation rather than an agency action (same as IRS definition)

# Exceptions

- Testimony before a congressional committee or subcommittee
- Written response to an oral or written request by a covered official or in response to Federal Register and similar notices
- Publicly available material (e.g., speeches, articles)
- Inquiry to official regarding status of an action
- Written comment filed in the course of a public proceeding
- Communications compelled by law
- Federal Advisory Committee participation

This exception only applies to Covered Legislative Branch Officials

# Recordkeeping: What to Count

- Include time spent on legislative lobbying communication plus planning, research (e.g., message polling), bill tracking, etc. done to prepare/support the communication
- Time spent supporting other organization's legislative lobbying (e.g., coalition work)
- Expenses related to the lobbying communication plus planning and research
- Grants made for legislative lobbying activity
- Overhead Costs

# State and Local Lobbying Disclosure Laws

# Analyzing State and Local Lobbying Laws

- How is lobbying defined?
  - Which officials/what agencies are covered?
  - Both legislature and executive branch?
  - Which executive branch agencies? Which executive branch employees? Only elected officials? Only policymaking personnel? Or all?
  - Are local officials and agencies covered under state law? Is there a local law?
- What activities are considered lobbying?
  - Lobbying contacts with officials only? Background work too? Grassroots lobbying?

# Analyzing State and Local Lobbying Laws

- What governmental actions are covered?
  - For legislature, is it legislation only? Or other official duties of legislators?
  - For executive branch, what actions are covered – the development and approval/veto of legislation, rulemaking, administrative decisions, regulatory approvals, procurement, policymaking generally?
- Who is a lobbyist?
  - Are there any thresholds (% of time spent lobbying, amount of \$ spent on lobbying, etc.)? Any exceptions?

# Analyzing State and Local Lobbying Laws

- Who registers?
  - Lobbyist only? Does the nonprofit register? As an employer or principal?
- What must be disclosed?
  - Issues? Details on contacts? Expenses? Gifts?
- Any prohibited activities?
  - Gifts? Political contributions? Contingent fees?
- Other requirements?
  - Ethics training?
  - Anti-Harassment Policy?

# State and Local Resources

- State and Local Lobbying Regulators
- National Conference of State Legislatures:  
<http://www.ncsl.org/research/ethics/lobbyist-regulation.aspx>
- Alliance for Justice/Bolder Advocacy:  
<http://www.bolderadvocacy.org/navigate-the-rules/state-resources>
- State & Federal Communications (subscription):  
<http://www.stateandfed.com/>
- Council on Governmental Ethics Laws (membership) :  
<http://www.cogel.org/>

# Ethics and Gift Rules

- Federal government, all states, and most localities have ethics rules applicable to government officials and employees.
- Most govern conduct and the *acceptance* of gifts by government personnel, but a growing number restrict what lobbyists and others can *offer* and *give*.
- Gifts are often defined very broadly to include not only tangible items but also invitations, attendance at events, training, meals, etc.
- Often a confusing patchwork of rules (*e.g.*, federal executive branch and congressional rules).

- What rules are relevant?
  - Different or separate rules for legislative vs. executive branch? Rules contained in statutes? Regulations? Executive orders? Agency policies?
- Is proposed gift covered?
  - Most rules cover “anything of value.”
  - What exceptions are available? Specific types of gifts and invitations? De minimis value?
- Do rules differ?
  - For lobbyists/lobbying entities? Regulated entities? Nonprofits?

- Could the gift prompt a conflict of interest and/or disqualification for the government official?
- Any disclosure obligation?
  - For the official? For the nonprofit (especially if registered to lobby)?

# Political Campaign Activity

also known as “Candidate Electioneering”

# 501(c)(3) Political Campaign Activity

## IMPORTANTLY:

- 501(c)(3)s may not “participate in or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office”
- 501(c)(3)s may not support or oppose candidates for public office
- No “Candidate Electioneering”

# Common Land Trust Activities that Carry Risk

- Certain issue advocacy if the issues are the same or similar to those being debated by the candidates
- Candidate outreach and education
- Hosting candidates at events or on your preserves
- Supporting or opposing a ballot measure
- Voter registration and “get-out-the-vote” (GOTV) activities
- Hosting a public-facing event involving candidates such as a debate or candidate forum
- Any other activity involving Candidates that could be perceived as Political Campaign Activity

# “Facts and Circumstances”

- The IRS will evaluate whether a communication is political campaign activity based on all of the “Facts and Circumstances”

## Good Facts

- No reference to candidate or elections
- External factor driving timing of your activity
- Your communication focuses on a broad range of issues
- History of similar work on issue



## Bad Facts

- Reference to candidate
- Timing motivated by election
- Politically motivated targeting
- Compare preferred position to candidate position
- “Wedge issues”

# Issue Advocacy

## Common Political Activity Risks:

- Comparing an organization's preferred position to a candidate's position
- Advocacy on issues known to divide candidates for a particular office
- Timing of your activity or communication is close to an election
  - Unless driven by external event outside of the control of the organization (e.g., a legislative vote)

# Issue Advocacy

Factors to consider:

- Does the statement refer to a candidate?
- Does it express approval or disapproval for the candidate's actions or positions?
- Is it close in time to the election?
- Does it refer to voting or the election?
- Has the issue been raised as one distinguishing the candidates in a race?
- Is the communication part of an ongoing series on the same issue made independent of timing of elections?
- Is timing and candidate reference related to non-electoral event?

# Issue Advocacy

Other factors:

- Has the organization historically worked on the issue?
  - Does it relate to your core mission?
- Are you responding to an external event?
  - A candidate mentioned you or your key issue in a statement?
  - The press called you for a comment?
- Is the audience targeted the relevant electorate?
- Why this candidate?
  - Reasonable, objective, non-electoral targeting criteria

# Questions?

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