

EDUCATION AND LOBBYING BY SECTION 501(C)(3) AND (C)(4) ORGANIZATIONS
AS PART OF AN ADVOCACY CAMPAIGN ¹

Presentation as Part of DC Bar Course on
Legal Issues in Creating and Managing an Advocacy Campaign

Julian H. Spirer
Spirer Law Firm, P.C.

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- I. Introduction. As vehicles for conducting advocacy campaigns, section 501(c)(3) and (c)(4) organizations have the virtue of being exempt from federal taxation. A section 501(c)(3) organization enjoys the additional advantage of offering contributors income tax deductions for their contributions. Neither organization permits electioneering activities. For a section 501(c)(3) organization that wishes to undertake an advocacy campaign, the creation of section 501(c)(4) organization affiliate will facilitate the limitless lobbying activity unavailable to the 501(c)(3) organization.
- II. Role of a Section 501(c)(3) Organization
 - A. Summary. An section 501(c)(3) organization, whether a public charity or private foundation, can engage in limitless educational activities, limited lobbying activities, and no electioneering activities. The principal appeals of using an educational organization in an advocacy campaign are that its activities are tax exempt and that contributions to the organization are tax-deductible.
 - B. Creating and Operating a 501(c)(3) Organization
 1. District of Columbia Requirements: Incorporation, application for tax exemption, and the obtaining of a business license.

¹ The structure, content, and language of this presentation owe a great deal to two excellent continuing professional education texts prepared by the Internal Revenue Service: *Lobbying Issues*, Kindell and Reilly, 1997 EO CPE Text, and *Election Year Issues*, Kindell and Reilly, 2002 EO CPE Text.

2. Federal Requirements. “The Treasury Regulations specify three conditions which must be satisfied for an organization to meet the operational test. *Church By Mail, Inc. v. Commissioner*, 765 F.2d 1387, 1391 (9th Cir. 1985), *aff’g* T.C. Memo. 1984-349. First, the organization must be primarily engaged in activities which accomplish one or more of the exempt purposes specified in section 501(c)(3). Section 1.501(c)(3)-1(c)(1), Income Tax Regs. Second, the organization’s net earnings must not be distributed in whole or in part to the benefit of private shareholders or individuals. Section 1.501(c)(3)-1(c)(2), Income Tax Regs. Third, the organization must not be an ‘action’ organization, *i.e.*, one which devotes a substantial part of its activities attempting to influence legislation, or participates or intervenes, directly or indirectly, in any political campaign. Section 1.501(c)(3)-1(c)(3), Income Tax Regs.” *American Campaign Academy v. Commissioner*, 92 T.C. 1053, 1064-65 (1989).
 3. Distinction between a public charity and a private foundation.
- C. Educating vs. Impermissible Electioneering
1. Basic rule: The Code describes a 501(c)(3) organization, in part, as one that “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.” 26 U.S.C. § 501(c)(3).
 - a. The provision was added on a floor amendment to the Revenue Act of 1954 by Lyndon Johnson, without great explanation.
 - b. It has been determined that this rule is violated “by participation in any political campaign on behalf of any candidate for public office. It need not form a substantial part of the organization’s activities.” *United States v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981).
 - c. The premise behind the prohibition is “that the U.S. Treasury should be neutral in political affairs.” H.R. Rep. No. 391, 100th

Cong., 1st Sess. 1621, 1625 (1987), reprinted in 1987 *U.S. Code Cong. & Admin. News* 2313–1, 2313–1201, 2313–1205.

2. Special rule for private foundations: Under section 4945, private foundations may not directly or indirectly carry on any voter registration drive, unless certain requirements are met. 26 U.S.C. § 4945(d)(2).
3. Candidate for public office: The regulations recite that “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.” 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii).
 - a. Neither the statute nor regulation define the term “public office” and the IRS will consider all of the applicable facts and circumstances. The IRS, however, has provided guidance. Thus, in G.C.M. 39811 (June 30, 1989), the IRS addressed the issue of whether an office or position in a political party, specifically a precinct committeeman position, is a public office. In concluding that it was a public office, the IRS relied on five characteristics of the office under state law: The office was (1) created by statute, (2) continuing; (3) not occasional or contractual; (4) had a fixed term; and (5) occasioned the taking of an oath by the occupant.
 - b. Candidates for public office must be engaged in election campaigns. Thus, the provision would not bar an attempt to influence the Senate confirmation of an individual nominated for a federal judgeship. IRS Notice 88-76, 1988-2 C.B. 392.
 - c. Offers himself or is proposed by others: An individual who has publicly announced an intention to seek election to public office has clearly offered himself. The publication by an unannounced candidate’s campaign committee of material regarding the individual’s “prospective candidacy” may also make the individual a candidate for public office. TAM 91-30-008 (April 16, 1991).

Indeed, an individual may be a candidate for public office even when he has announced an intention of not seeking election to the office, provided that some action towards election, more than speculation, has occurred, *e.g.*, the existence of a draft committee.

- d. FEC rules cannot be used. Senator Proxmire did not accept contributions in his last Senatorial campaign and would not have been a candidate under FEC regulations. A 501(c)(3) would none the less have been prohibited from supporting or opposing him.
4. Participation or Intervention: Under the regulations, “[a]ctivities 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.” 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii).
- a. A written or oral endorsement is clearly prohibited.
 - b. The rating of candidates, even on a non-partisan basis, is barred. *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).
 - c. Can an organization disseminate an issue-oriented message during an election campaign? Coded language in such a message, such as “conservative,” “liberal,” “pro-choice,” “pro-life,” substituting for a candidate’s name, would be objectionable. In TAM 1999-07-021, the IRS determined that an organization did not participate or intervene in a political campaign when, a few days before Congressional elections, it distributed an “I’m Fed Up With Congress” piece that urged voter participation in the election. The IRS emphasized that there was no evidence that the material was sent to targeted states or Congressional districts. Query: Would the

outcome have been different if the incumbents were heavily drawn from one political party?

- d. It is clear that the conduct that is prohibited goes well beyond the express advocacy standard applied by the FEC. Kindell and Reilly, “Election Year Issues,” 2002 EO CPE Text, at 349.
- e. Material that qualifies as “educational” for purposes of determining whether an organization should be considered to be tax-exempt under section 501(c)(3) can be prohibited electioneering. Thus, Rev. Rul. 67-71, 1967-1 C.B. 125, finds that an organization that undertakes an ostensibly unbiased and objective review of school board members and intended to educate the public in evaluating the candidates had violated the electioneering prohibition when it supported a particular slate of candidates.
- f. The motivation, either good or bad, is irrelevant. An organization that was involved in upgrading the ethics of political campaigning intervened in a political campaign when it solicited candidates to sign a code of fair campaign practices and released the names of those who signed and those who refused to sign. Rev. Rul. 76-456, 1976-2 C.B. 151. In *Association of the Bar of the City of New York v. Commissioner*, the court confirmed that an organization was not eligible for tax-exempt status under section 501(c)(3) when it distributed ratings of candidates for elective judgeships as “approved,” “non-approved,” and “approved as highly qualified.”
- g. An organization may not distribute voter education material prepared by a candidate, political party, or PAC.
- h. Voters’ guides may be appropriate if they either support solely the lobbying activities of the organization or are intended to encourage participation in the electoral process.

- (1) Several factors indicate that a voter guide is educational.
Rev. Rul 78-248, 1978-1 C.B. 154.
 - (a) The publication reports on a neutral group of elected officials or candidates such as all members of Congress or all candidates for a particular office.
 - (b) The publication reports elected officials' or candidates' views or their voting records on a wide range of subjects.
 - (c) The publication includes no editorial opinion on the elected officials or candidates, or on their views.
 - (d) The publication does not indicate approval of elected officials or candidates in the contents or structure of the publication.
 - (e) The organization makes the publication generally available to the public.
- (2) In Rev. Rul. 80-282, 1980-2 C.B. 178, the IRS determined that a legislative scorecard did not represent political intervention, relying on a variety of factors.
 - (a) Voting records of all incumbents were presented.
 - (b) Candidates for reelection were not identified.
 - (c) No comment was made on an individual's overall qualifications for public office.
 - (d) No statements expressly or impliedly endorsed or rejected any incumbent as a candidate for public office.
 - (e) No comparison of incumbents with other candidates was made.
 - (f) The organization pointed out the inherent limitations of judging the qualifications of an

incumbent on the basis of the selected votes by stating the need to consider other unrecorded matters.

(g) No attempt was made to time the date of publication to coincide with an election.

(h) The organization did not distribute the voting records widely.

i. Publications of an organization can include news coverage but not articles that promote or oppose a particular candidate. The IRS will ask certain questions in making the distinction.

(1) What does the publication normally do when it covers news stories?

(2) Does it have a policy of covering only particular candidates or does it in fact only cover particular candidates?

(3) Is any coverage slanted to show any particular candidate in a favorable or unfavorable light?

j. Voter questionnaires may qualify as educational. The following factors will support the educational character of the questionnaires.

(1) The questionnaires are sent to all candidates.

(2) All responses are published.

(3) The questions cover a variety of issues.

(4) The questions do not indicate a bias toward the organization's preferred answer.

(5) The responses are not compared to the organization's positions on the issues.

(6) The responses are not edited prior to publication.

k. Public forums may be educational.

- (1) In Rev. Rul. 86-95, 1986-2 C.B. 73, the IRS approved as educational a forum of Congressional candidates with the following characteristics.
 - (a) The organization invited all legally qualified candidates. (The IRS has elsewhere indicated that this might not be necessary where inviting all candidates may be impractical, the organization applies reasonable and objective criteria in making a selection, such as the results of a reliable poll of public support, the criteria are applied in nondiscriminatory fashion, and all other indicia of neutrality are present.)
 - (b) An independent nonpartisan panel prepared and presented all questions.
 - (c) The questions covered a range of issues of interest to the public.
 - (d) Each candidate had an equal opportunity to present the candidate's views.
- (2) Candidates should not be permitted to distribute literature unless all candidates appear.
- (3) The moderator gave no indication of any approval or disapproval of a response.
1. Voter registration drives are permissible as long as they are conducted in a nonpartisan manner.
 - (1) The following factors suggest a permissible purpose.
 - (a) No candidate is named or depicted or favored over another
 - (b) Political parties are mentioned only for candidate identification purposes

- (c) The communication is limited to encouragement of voting and registration.
 - (d) The voters' preferences are not a factor.
 - (2) Private foundations, with limited exceptions set forth in section 4945(f) of the Code, cannot carry out a voter registration drive without the expenditures being considered taxable under section 4945.
 - m. Summary of factors tending to show an educational rather than a political purpose.
 - (1) The organization has manifested a preexisting commitment to promote awareness of the applicable issues outside of an election context.
 - (2) The organization's officers and directors, by board resolution and otherwise, emphasize the non-electoral purpose of the activity.
 - (3) The organization can demonstrate a need for public awareness of the issues.
 - (4) The organization, as appropriate, disclaims any purpose of endorsing any candidate.
 - (5) The organization limits its communications to the substance of the issues without regard to the persons who might be favoring or opposing the organization's positions on the issues.
- 5. Can individuals associated with the organization engage in political activity without attribution of that activity to the organization?
 - a. The prohibition against political campaign activity does not preclude officials of the organization from engaging in political activity, but only if they do so in a way that does not utilize the organization's financial resources, facilities, or personnel. Thus,

officials may not electioneer at official functions or through official publications. In general the principals of agency will be applied, including those of apparent authority, in making the determination. An organization may also explicitly or implicitly ratify the action of the official.

- b. The goodwill of the organization may also not be used so that any actions taken or statements made by the official must be identified as being done by the official in his personal capacity. An IRS training piece suggests the following disclaimer language:
“Organization shown for identification purposes only; no endorsement by the organization is implied.”
 - c. The actions of students are generally not to be attributed to the institution.
 - d. The test is a facts and circumstances test.
6. Will actions of other entities be attributed to the organization?
- a. A 501(c)(3) organization may not establish a PAC. S. Rep. No. 93-1374, 93d Cong., 2d Sess. 30 (1974); 26 C.F.R. § 1.527-6(g); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). But the establishment and operation of a voluntary payroll deduction plan for employees to contribute to a PAC will not constitute intervention in a political campaign. See PLR 201127013 (July 08, 2011).
 - b. The activities of an affiliated 501(c)(4) organization may be attributed to the 501(c)(3) if it can be established that the former is a sham or is acting for the other. However, so long as the organizations are kept separate through appropriate record keeping and fair market reimbursement by the (c)(4) for facilities and services, the activities of the (c)(4) or any related PAC will not be deemed to be those of the (c)(3). See *Center on Corporate*

Responsibility, Inc. v. Schultz, 368 F. Supp. 863 (D.D.C. 1973) (similar names, purposes, and board members are not enough to require attribution).

- c. Any joint fundraising between the 501(c)(3) and a non-501(c)(3) organization will be closely scrutinized because of the risk that the 501(c)(3)'s goodwill is being used to attract moneys for other organization.

7. Potential Consequences of Electioneering

- a. Private parties may have standing to challenge the continued tax-exempt status of a 501(c)(3) that violates the limitations on electioneering and lobbying. *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989) (third party candidate could trace injury from debates exclusion to tax-exempt status of organization which status alone allowed conduct of debate under federal election rules).
- b. Tax on electioneering expenditures: Sections 4945 and 4955 impose an initial tax of 10% on each political expenditure and an additional 100% tax on each taxable expenditure previously taxed and not corrected within the taxable period.
 - (1) A tax of 2 1/2% of the political expenditure is also imposed on any organization manager who agreed to the making of the expenditure. Organization managers who refused to agree to all or part of the correction are subject to a tax of 50% of the political expenditure. The first tier tax is capped at \$5,000 and the second tier tax at \$10,000 of each expenditure.
 - (a) A tax on managers will only be imposed when three conditions exist.

- i) A tax is also being imposed on the organization.
 - ii) The organization manager knew the expenditure that he sanctioned is a political expenditure.
 - iii) The expenditure was wilful and not due to reasonable cause, *i.e.*, the manager did not exercise ordinary business care and prudence.
 - (b) An organization manager will not be liable if he or she relied on the advice of counsel contained in a reasoned written legal opinion that an expenditure is not a political expenditure. (Such an opinion would not, however, protect the organization itself from liability.)
- (2) Section 6852 authorizes an immediate audit to determine the amount of money that might be owed under these sections, and section 7409 permits the IRS to seek an injunction to prevent further political expenditures.
- (3) The tax may be imposed in lieu of revocation where the political expenditure is unintentional and small in amount and where the organization has adopted procedures

D. Educating vs. Limited Lobbying

- 1. Basic Regime for Public Charities: The Code defines a section 501(c)(3) organization as one “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)).” 26 U.S.C. § 501(c)(3).
 - a. Insubstantial Part Test: The regulations make it clear that “[a]n organization will not fail to meet the [requirements for

tax exemption] merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation.” 26 C.F.R. § 1.501(c)(3)-1(c)(3)(ii).

- b. Lobbying as Necessary to Attainment of Objectives: The insubstantial part test is qualified, however, in that an organization cannot be exempt even if its lobbying is insubstantial if: “(a) [i]ts 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.” 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iv).
- c. Influencing Legislation: “[A]n 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. “ 26 C.F.R. 1.501(c)(3)-1(c)(3)(ii).
- d. Meaning of “legislation”: the term “legislation” 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.”
 - (1) Section 1.501(c)(3)-1(c)(3)(ii) of the regulations does not elaborate on the precise meaning of the word “action.”
In section 4911(e)(3) of the Code, Congress limited the

meaning of the term “action,” as that term is used in section 4911, to “the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items.” 26 C.F.R. § 56.4911-2(d)(2). These share the characteristic of an item to be the subject of a vote. A confirmation vote on an Executive Branch nominee comes, accordingly, within the category of a “similar item” since it is an item voted upon by a legislative body.

- (2) Section 56.4911-2(d)(3) of the regulations provides that legislation does not include actions by executive, judicial, or administrative bodies. Section 56.4911-2(d)(4) provides that the term “administrative bodies” includes school boards, housing authorities, sewer and water districts, zoning boards, and other similar Federal, State, or local special purpose bodies, whether elective or appointive. Requesting executive bodies to support or oppose legislation is, however, included in the purview of attempting to influence legislation. Communication with any government official or employee may be lobbying if the principal purpose of the communication is to influence legislation. Communication sent to an official or employee regarding regulations implementing legislation is not lobbying. The negotiation of a treaty is considered to be legislative action since the treaty will ultimately require legislative approval.
- (3) The consideration of zoning matters varies from jurisdiction to jurisdiction. Where zoning issues are under the jurisdiction of legislators, who express their

will by a vote, the matter is within the purview of the term “legislation.”

- (4) The term “legislation” encompasses foreign as well as domestic laws. It also may include actions by American Indian tribal governments.
 - (5) Attempts to influence legislation are not restricted to direct communications to members of a legislature (“direct” lobbying) but include indirect communications through the electorate or general public (“grass roots” lobbying).
 - (6) It is not necessary that legislation be pending in order for lobbying influence to be brought to bear. It is sufficient that the proposal being promoted be put forward as an appropriate subject for legislation.
 - (7) For a communication to be treated as direct lobbying, it must refer to specific legislation and reflect a view of the organization as to the merits of such legislation.
 - (8) In determining whether the action of an individual is attributable to an organization, the IRS will rely on agency principles, including apparent authority and organization ratification.
 - (9) Legislation may be identified by its formal name or by a term that has been widely used in connection with specific pending legislation.
- e. Nonpartisan analysis distinguished from attempts to influence legislation: Nonpartisan analysis, study, or research of matters pertaining to legislation may be educational and not constitute attempts to influence legislation.

- (1) Nonpartisan analysis, study, or research means an independent and objective exposition of a particular subject matter, including activity that is considered “educational” for purposes of section 501(c)(3). It may advocate a particular position as long as the exposition is sufficiently fair and full to permit the public to reach an independent opinion or conclusion. 26 C.F.R. § 56.4911-2(c)(1)(ii).
 - (2) Any suitable means may be chosen to distribute the analysis, study, or research, except that the communication cannot be distributed or directed solely to persons with an interest in one side of an issue.
 - (3) If a presentation is done as part of a series, the series as a whole will be judged for qualification for the exception.
- f. Appearance before a legislative committee: If an organization appears before a legislative committee to discuss legislation, that action will be an attempt to influence legislation, unless the appearance is in response to official requests for testimony.
- g. Technical advice: Under section 56.4911-2(c)(3) of the regulations, a communication will not be considered lobbying if it consists of technical advice or assistance to a governmental body or committee in response to a written request, provided that the response is available to every member of the body or committee.
- h. Self-defense: A communication is not lobbying if it pertains to a possible action by a legislative body that might affect the existence of the organization, its powers and duties, its tax-exempt status, or the deductibility of contributions to the organization. The self-defense exemption is not available, however, to protect the organization’s future work, such as lobbying to preserve a government contract.

- i. Communications to members: Communications to members will not be considered lobbying if they meet the following four criteria:
 - (1) The communication is directed only to members of the organization;
 - (2) The specific legislation the communication refers to, and reflects a view on, is of direct interest to the organization and its members;
 - (3) The communication does not directly encourage the member to engage in direct lobbying (whether individually or through the organization); and
 - (4) The communication does not directly encourage the member to engage in grass roots lobbying (whether individually or through the organization).
- j. When are attempts to influence legislation considered substantial?
 - (1) One court decision has held that 5% of total activities was insubstantial while 16.6% to 20.5 % was substantial.
 - (2) The IRS rejects reliance on a percentage of activities test due to the asserted need to consider other factors such as “the amount of volunteer time devoted to the activity, the amount of publicity the organization assigns to the activity, and the continuous or intermittent nature of the organization’s attention to it.” G.C.M. 36148 (Jan. 28, 1975).
 - (3) Also to be considered is the time spent in supporting activities, such as discussing public issues, formulating and agreeing upon positions, and studying them preparatory to adopting a position.
- k. Consequence of violation of substantial part test: In addition to revocation of exempt status, a non-electing public charity may

be subject to a 5% excise tax imposed by section on its “lobbying expenditures,” for the year of loss of the exemption. “Lobbying expenditure” is defined in section 4912(d)(1) as any amount paid or incurred by a charitable organization in carrying on propaganda or otherwise attempting to influence legislation. IRC 4912 also imposes a similar tax at the same rate on any manager of the organization who wilfully and without reasonable cause consented to making the lobbying expenditures knowing the expenditures would likely result in the organization’s no longer qualifying under section 501(c)(3). There is no limit on the amount of this tax that may be imposed against either the organization or its managers.

2. Lobbying Election Regime for Public Charities: With the enactment of section 501(h) as part of the Tax Reform Act of 1976, certain public charities (principally those other than religious organizations) may make an election and have their lobbying activities governed by expenditure tests in lieu of being subject to the section 501(c)(3) “substantial part” test. Should the expenditure limits be exceeded, a tax under section 4911 will be imposed or, if the limits are exceeded by 150% over a defined period, then the organization’s exempt status may be lost.
 - a. Purpose: The safe harbor was created, according to a Congressional committee report, due to “uncertainty in the meaning of the terms ‘substantial part’ and ‘activities.’”
 - b. Cannot change to (c)(4): At the same time, Congress enacted a provision, section 504 of the Code, precluding any 501(c)(3) organization that loses its exempt status due to excessive lobbying from being treated any time thereafter as a 501(c)(4) organization.
 - c. Sliding scale: Section 501(h) creates a sliding scale of permissible “lobbying nontaxable amounts.” These nontaxable amounts are separately computed for total lobbying and for grass roots

lobbying. Any amounts expended in excess of these nontaxable amounts are considered “excess lobbying expenditures” and are subject to a tax under section 4911 equal to 25% of the excess. If both total lobbying and grass roots permissible amounts are exceeded, then the tax is imposed on whichever excess is the greater.

- d. Eligibility to make section 501(h) election: Substantially all 501(c)(3) entities are eligible to be subject to the safe harbor other than religious organizations, supporting organizations other than those that support 501(c)(3) organizations, organizations engaged in public safety, and private foundations. Religious organizations sought the exclusion because they did not want to allow it to appear that they recognized any limitation on their lobbying abilities.
- e. Manner of making election:
 - (1) A Form 5768 is filed with the appropriate Internal Revenue Service Center.
 - (2) An election is effective beginning with the first day of the taxable year in which the Form 5768 is filed. It may be filed at the same time as an organization submits its Form 1023 seeking recognition of exemption.
 - (3) Once filed, the election remains effective for all taxable years up to the taxable year next following the year in which a notice of revocation on Form 5768 is filed.
 - (4) An organization that revokes may elect again, but only as long as there is at least one year between during which the organization is not subject to the safe harbor.
- f. Scale: The nontaxable amount is the lesser of \$1 million or the amount determined under section 501(h) as a percentage of

the organization's exempt purpose expenditures. The highest percentage, for exempt purpose expenditures up to \$500,000, is 20% for total lobbying expenditures of which 5% can be for grass roots lobbying.

- g. Denial of exemption: An electing organization cannot be denied exemption unless its lobbying or grass roots expenditures exceed 150% of the lobbying nontaxable amounts for the base years, meaning the determination year and the three immediately preceding taxable years.
- h. Exempt purpose expenditures: The denominator of the fraction consists of an organization's exempt purpose expenditures consisting of the categories of expenditure set out in section 56.4911-4(b) of the regulations. Categories of expense that are excluded include fundraising activities done by other than employees or affiliated organizations, amounts paid or chargeable to a capital account, and amounts paid or incurred for the production of income.
- i. Determining grassroots lobbying totals: Grassroots lobbying consists of "attempts to influence legislation through an attempt to affect the opinions of the general public or any segment of the public." 26 C.F.R. §56.4911(d)(1)(A). All other lobbying is considered to be "direct lobbying."
 - (1) A communication will be considered grass roots lobbying if it meets each of three requirements:
 - (a) The communication refers to specific legislation;
 - (b) The communication reflects a view on such legislation; and
 - (c) The communication encourages the recipient of the communication to take action with respect to

such legislation. This element is commonly referred to as the “call to action” requirement. Essentially, what this requirement means is that one can decry a legislative proposal to the public but that is not grass roots lobbying unless it encourages the recipient to take action, meaning it meets one of the following requirements:

- i) The communication states that the recipient should contact a person who might affect the legislation;
- ii) The communication states the address, telephone number, or similar information of such a person;
- iii) The communication provides a petition, tear-off postcard, or similar material for the recipient to communicate with such a person; or
- iv) The communication specifically identifies one or more legislators who will vote on the legislation as: opposing the organization’s view with respect to the legislation; being undecided with respect to the legislation; being the recipient’s representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation. Merely naming the main sponsor(s) of the legislation for purposes of identifying the legislation will

not constitute encouraging the recipient to take action.

- (d) A communication that contains a call to action on the basis of any one of the first three of the criteria above cannot qualify for the exception from lobbying for nonpartisan analysis, study, or research.
 - (e) Certain advocacy communications or research materials that are not initially lobbying communications may become grass roots lobbying communications if they come to be used to encourage recipients to take action with respect to specific legislation, unless the primary purpose of their preparation was not for use in lobbying.
 - (f) Certain mass media advertisements that would not otherwise be grassroots lobbying can be considered grassroots lobbying if they appear two weeks before a vote and concern themselves with a highly publicized piece of legislation, even if they do not contain a call to action.
- j. Determining lobbying expenditures: Any costs incurred by volunteers in carrying on a lobbying activity are not lobbying expenditures. (These expenses are also not deductible by the volunteers.) The organization's costs in soliciting the help of and training the volunteers, however, are lobbying expenditures.
3. Private Foundations: Any lobbying expenditures are deemed to be taxable expenditures under section 4945(d)(1) and subject to the excise tax imposed by section 4945(a). The tax is equal to 10% of the taxable expenditure, with an additional 100% tax on taxable expenditures that

are not corrected within the taxable period. In addition, an initial tax equal to 2.5% of the taxable expenditure is imposed on foundation managers who knowingly agreed to the making of the taxable expenditure. Any foundation managers who refuse to agree to all or part of the correction are subject to a tax equal to 50% of the taxable expenditure.

- a. With some exceptions, the definition of lobbying for foundations is the same as for public charities.
- b. A grant by a private foundation to fund a specific project of a public charity is not a taxable expenditure, even if the public charity engages in lobbying activities as part of the project, if the following requirements are met:
 - (1) The grant is not earmarked to be used in an attempt to influence legislation; and
 - (2) The sum of all grants made by the private foundation for the same project for the same year does not exceed the amount budgeted for the year of the grant by the grantee organization for activities of the project that are not attempts to influence legislation.

III. Role of a Section 501(c)(4) (Social Welfare) Organization

- A. Summary. A social welfare organization can engage in limitless educational activities. It may conduct political campaign activities and may establish a political organization described in section 527(e), as long as political campaign activity is not the primary activity of the section 501(c)(4) organization. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii); PLR 201127013 (July 08, 2011). A social welfare organization may engage in unlimited lobbying activities. Indeed, lobbying may be its only activity. Rev. Rul. 71-530, 1971-2 C.B.
- B. Relation to section 501(c)(3) organization: A 501(c)(3) organization can have a related section 501(c)(4) organization so long as the organizations are kept separate (with appropriate record keeping and fair market reimbursement for

facilities and services used). The 501(c)(4) should err in supporting the 501(c)(3) and not vice versa.