

# Lobbying and Political Action

## What is Permissible by 501(c)3 Organizations?

NATIONAL TRUST FOR  
HISTORIC PRESERVATION

A Chapter from the *Advocacy Training Manual*  
Produced by the Center for State and Local Policy



Advocates look on as Governor Ernie Fletcher signs HB 272, the JOBS for Kentucky Tax Modernization Plan, the most extensive reform of Kentucky's tax code in more than half a century. Advocacy efforts by concerned citizens ensured that the legislation included a state tax credit for the certified rehabilitation of certified historic structures in the Commonwealth of Kentucky. Photo courtesy of Preservation Kentucky, Inc.

Elected officials have a responsibility to represent their constituents in federal, state, and/or local government. The constituents who elected them also have a responsibility to ensure they provide their elected officials with the most up-to-date information so their officials craft responsible, forward-thinking legislative policies.

As a historic preservation advocate, you are the voice of historic preservation to elected officials, and lobbying is your means for reaching them. Lobbying is a critical component of effective preservation advocacy. It helps to educate legislators about preservation concerns, and encourages them to promote the protection of historic properties and the laws advancing historic preservation.

Contrary to what many people believe, tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code

can lobby without losing their tax-exempt status. Such organizations must abide by certain restrictions established by federal tax laws. (Note that there may be additional state restrictions on tax-exempt organizations.) While 501(c)(3) organizations may lobby within the limitations noted below, they are strictly prohibited from engaging in “political activity” (that is, activity to influence the election campaign of a candidate for public office). The lobbying limitations and political activity prohibition applies at the federal, state, and local levels.

### LOBBYING LIMITATIONS

In general, 501(c)(3) organizations are limited in lobbying by the requirement that “no substantial part of the activities be used for carrying on propaganda or otherwise attempting to influence legislation.” Because this vague rule was difficult to

interpret and apply, Congress modified the tax code in 1976 to permit certain 501(c)(3) organizations to “elect” to lobby under prescribed limits, providing a “safe harbor” for the lobbying activities of 501(c)(3) organizations. “Safe harbor” means that a 501(c)(3) organization can participate in lobbying activities without losing its tax exempt status, but must adhere to specific limitations which are discussed below. An organization that chooses not to elect to follow the safe harbor limits of the tax code can still lobby, but only if lobbying does not constitute a substantial part of the activities of the organization. There is no definition for “substantial,” thus the organization should be cautious if it decides not to elect the safe harbor option.

If an organization elects to participate in lobbying activities under the safe harbor provisions of the tax code, it must file Form 5768 with the Internal Revenue Service. The organization is then subject to specific expenditure limits for lobbying activities rather than the more vague “no substantial part” rule. The expenditure limits under the election rules are graduated beginning at 20 percent of the first \$500,000 of the organization’s annual expenditures for “exempt purposes,” plus 15 percent of the second \$500,000 of “exempt purposes,” plus 10 percent of the third \$500,000, plus 5 percent of any additional expenditures, subject to a maximum of \$1,000,000 for total lobbying expenditures in any one year. “Exempt purpose expenditures” include the total of an organization’s annual amount paid or incurred to accomplish its stated mission, such as administrative expenses, but excludes amounts paid or incurred to or for an organization’s separate fundraising unit. Expenditure limits differ depending on whether the lobbying activity is direct or indirect (“grassroots”). (See What Activities Constitute Lobbying?)

Organizations that exceed these expenditure limits will be subject to a 25 percent excise tax based on the lobbying expenditures for the year in question.

A 501(c)(3) organization that elects to participate in lobbying activities must include the following types of expenditures as contributing to the calculated limit:

- Compensation of employees engaged in lobbying, based on the percentage of time devoted to lobbying.
- Costs associated with communication intended to influence legislation—printing, postage, telephone calls, etc. This must also include the staff and facility costs to prepare lobbying communications and materials.
- Overhead expenses proportionate to the percentage of an employee's time spent lobbying.
- Payment to another organization to do lobbying on its behalf.

## WHAT ACTIVITIES CONSTITUTE LOBBYING?

It is important to understand which actions constitute “lobbying.” Lobbying activities are those that seek to influence specific legislation. Any action by Congress, state legislature, local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure is considered “legislation.” An “action” by Congress refers to the introduction, amendment, enactment, defeat, or repeal of acts, bills, resolutions, or similar items. Influencing legislation is deemed to be “(a) any attempt ... to affect the opinions of the general public or any segment thereof, and (b) any attempt ... to communicate 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.” 26 U.S.C. § 4911(c)(d)(1)(A)-(B).

The Internal Revenue Code recognizes two forms of lobbying: direct lobbying and indirect lobbying (“grassroots” lobbying). Direct lobbying includes contacting members and employees of legislative bodies, such as members of Congress, senators, state legislators, city council members, their staffs, or others who formulate legislation. To constitute direct lobbying, the organization’s communication must refer to specific legislation and express an opinion about the legislation.

Grassroots lobbying, by comparison, is an attempt to influence the general public on specific legislative matters. Communication with the general public constitutes grassroots lobbying if it references specific legislation, reflects a view of the legislation, and encourages the general public to take action regarding the legislation. Within the limits on lobbying expenditures, a separate limitation is placed on “grassroots” lobbying. Only 25 percent of the permitted

lobbying expenditures may be made on “grassroots” lobbying.

A 501(c)(3) organization’s public policy activities are not always considered lobbying. For example, an organization may provide nonpartisan analysis, study, or research regarding legislation as long as it is intended to be educational; it is available to the public, governmental bodies, officials, and employees; and it does not attempt to influence legislation or advocate the adoption or rejection of legislation. An organization may also advocate for actions by executive, judicial, or administrative bodies that do not fall within the definition of legislation, and, thus, are not considered lobbying. Of course, it depends on what the organization is asking of an executive or administrative body. For example, if a 501(c)(3) organization is asking an executive or administrative body to support or oppose legislation, then the activity constitutes lobbying.

## IS PARTICIPATION IN “POLITICAL ACTIVITY” PROHIBITED?

It is critical for nonprofit organizations to understand the distinction between “lobbying” and “political activity.” While 501(c)(3) organizations may lobby within the limitations noted above, they are prohibited from engaging in political activity and may lose their tax-exempt status if they do so. Political activity is defined as participating in or intervening in any political campaign on behalf of or in opposition to any candidate for public office. This is true at the federal, state, and local levels.

A 501(c)(3) organization may participate in certain activities as long as the participation is nonpartisan and could not be perceived as intervening in support of or in opposition to a candidate. Whether an organization’s activity constitutes participation or intervening in any political campaign supporting or opposing a candidate is dependent on the facts and circumstances of the activity. A 501(c)(3) organization *can* have some involvement in political activities under specific circumstances and with strict limitations. A 501(c)(3) organization cannot

<b>5768</b>	<b>Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation</b>	<b>For IRS Use Only</b>
<small>Form 5768 (Rev. December 2004) Department of the Treasury Internal Revenue Service</small>	<small>(Under Section 501(h) of the Internal Revenue Code)</small>	
Name of organization	Employer identification number	
Number and street or P.O. box no., if mail is not delivered to street address	Room/suite	
City, town or post office, and state	ZIP + 4	
<p><b>1 Election</b>—As an eligible organization, we hereby elect to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending _____, and all subsequent tax years until revoked. <small>(Month, day, and year)</small></p> <p><b>Note:</b> This election must be signed and postmarked within the first taxable year to which it applies.</p> <p><b>2 Revocation</b>—As an eligible organization, we hereby revoke our election to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending _____, and all subsequent tax years until revoked. <small>(Month, day, and year)</small></p> <p><b>Note:</b> This revocation must be signed and postmarked before the first day of the tax year to which it applies.</p> <p>Under penalties of perjury, I declare that I am authorized to make this (check applicable box) <input type="checkbox"/> election <input type="checkbox"/> revocation on behalf of the above named organization.</p> <p>_____ <small>(Signature of officer or trustee)</small></p>		
<p><b>General Instructions</b></p> <p>Section references are to the Internal Revenue Code.</p> <p>Section 501(c)(3) states that an organization exempt under that section will lose its tax-exempt status and its qualification to receive deductible charitable contributions if a substantial part of its activities are carried on to influence legislation. Section 501(h), however, permits certain eligible 501(c)(3) organizations to elect to make limited expenditures to influence legislation. An organization making the election will, however, be subject to an excise tax under section 4911 if it spends more than the amounts permitted by that section. Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period. For any tax year in which an election under section 501(h) is in effect, an electing organization must report the actual and permitted amounts of its lobbying expenditures and grass roots expenditures (as defined in section 4911(c)) on its annual return required under section 6033. See Schedule A (Form 990 or Form 990-EZ). Each electing member of an affiliated group must report these amounts for both itself and the affiliated group as a whole.</p>		
<p>To make or revoke the election, enter the ending date of the tax year to which the election or revocation applies in item 1 or 2, as applicable, and sign and date the form in the spaces provided.</p> <p><b>Eligible Organizations.</b>—A section 501(c)(3) organization is permitted to make the election if it is not a disqualified organization (see below) and is described in:</p> <ol style="list-style-type: none"> <li>Section 170(b)(1)(A)(ii) (relating to educational institutions),</li> <li>Section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),</li> <li>Section 170(b)(1)(A)(iv) (relating to organizations supporting government organizations),</li> <li>Section 170(b)(1)(A)(v) (relating to organizations publicly supported by charitable contributions),</li> <li>Section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or</li> <li>Section 509(a)(3) (relating to organizations supporting certain types of public charities other than those that support section 501(c)(4), (5), or (6) organizations).</li> </ol> <p><b>Disqualified Organizations.</b>—The following types of organizations are not permitted to make the election:</p> <ol style="list-style-type: none"> <li>Section 170(b)(1)(A)(i) organizations (relating to churches),</li> <li>An integrated auxiliary of a church or of a convention or association of churches, or</li> <li>A member of an affiliated group of organizations if one or more members of such group is described in a or b of this paragraph.</li> </ol> <p><b>Affiliated Organizations.</b>—Organizations are members of an affiliated group of organizations only if (1) the governing instrument of one such organization requires it to be bound by the decisions of the other organization on legislative issues, or (2) the governing board of one such organization includes persons (i) who are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and (ii) who, by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by (B) the first such organization.</p> <p><b>Where to File.</b>—Mail Form 5768 to the Internal Revenue Service Center, Ogden, UT 84201-0027.</p>		
<small>Cat. No. 12129M</small>	<small>Form 5768 (Rev. 12-2004)</small>	

## EXAMPLES OF ACTIVITIES

### LOBBYING:

Encouraging your organization's members to contact the member's legislators regarding pending legislation.

Advocating that a city council with the authority to adopt comprehensive zoning ordinances repeal a zoning variance.

Encouraging the general public to contact elected officials regarding the support of or opposition to pending legislation (grassroots).

### NOT LOBBYING:

Communications with your members with respect to legislation of direct interest to the organization that does not directly encourage members to communicate with a legislative body regarding specific legislation or attempt to influence the general public.

Advocating that a historic preservation review board deny a demolition permit.

Mass media communication opposing specific legislation, as long as it does not encourage the general public to take action on the legislation.

Providing technical advice or assistance to a governmental body or a committee or other subdivision thereof in response to a written request.

Making results of nonpartisan analysis, study, or research available.

Appearance before, or communications to, any legislative body with respect to a possible decision of such body that might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization.

work directly for or advertise support of the election of a single political candidate, but such an organization can provide candidates and/or elected officials with information about its position on policy issues and urge candidates and/or elected official to support or oppose certain issues. The executive director of a 501(c)(3) organization cannot make partisan comments in official organization publications or at the organization's functions, but can make partisan comments at a non-organizational function as long as he or she is not speaking as a representative of the organization. (See IRS, Rev. Ruling 2007-41 at [www.irs.gov/pub/irs-drop/rr-07-41.pdf](http://www.irs.gov/pub/irs-drop/rr-07-41.pdf) [June 1, 2007] for additional information on what does and does not constitute political activities.)

### DISTINCTION BETWEEN A 501(C)(3) AND 501(C)(4) ORGANIZATION

501(c)(3) organizations are "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, ... or for the prevention of cruelty to children or animals." 26 U.S.C. § 501(c)(3). 501(c)(4) organizations are "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." 26 U.S.C. § 501(c)(4).

501(c)(4) organizations, unlike 501(c)(3) organizations, may lobby without limits and may participate in political activities, but will be taxed on expenditures for political activities. One practical distinction is that donations to 501(c)(4) organizations are not tax deductible for the donor as a charitable contribution. Additionally, a qualifying 501(c)(4) must operate for the promotion of social welfare by promoting

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 from 26 U.S.C. § 4911(c)(2):

#### If the exempt purpose expenditures are:

Not over \$500,000

Over \$500,000 but not over \$1,000,000

Over \$1,000,000 but not over \$1,500,000

Over \$1,500,000

#### The lobbying non-taxable amount is:

20 percent of the exempt purpose expenditures.

\$100,000 plus 15 percent of the excess of the exempt purpose expenditures over \$500,000.

\$175,000 plus 10 percent of the excess of the exempt purpose expenditures over \$1,000,000.

\$225,000 plus 5 percent of the excess of the exempt purpose expenditures over \$1,500,000.

Grassroots (indirect) lobbying nontaxable amount for any organization for any taxable year is 25 percent of the lobbying nontaxable amount established by the above chart.



This thumbnail description of lobbying and political activity is a summary to assist organizations in identifying these issues. This brief description is not intended as legal advice. Organizations should seek the advice of qualified legal counsel if they are considering engaging in lobbying or similar activities.

## RESOURCES AND LINKS

*A Blueprint for Lobbying*  
by Susan West Montgomery  
National Trust for Historic Preservation  
[www.preservationbooks.org](http://www.preservationbooks.org)

*Tax Information for Charities and Other Nonprofits*  
Internal Revenue Service  
[www.irs.gov/charities/nonprofits/index.html](http://www.irs.gov/charities/nonprofits/index.html)

*The Nonprofit Lobbying Guide*  
by Bob Smucker  
Independent Sector  
[www.independentsector.org/programs/gr/lobbyguide.html](http://www.independentsector.org/programs/gr/lobbyguide.html)

“Lobbying by Historic Preservation Organizations: Understanding the Rules,” by Stephanie Ann Ades, *Preservation Law Reporter* (June 1994). Available from the National Trust for Historic Preservation’s Law Department; contact [law@nthp.org](mailto:law@nthp.org).

IRS, Rev. Ruling 2007-41 at [www.irs.gov/pub/irs-drop/rr-07-41.pdf](http://www.irs.gov/pub/irs-drop/rr-07-41.pdf) (June 1, 2007) provides examples of what does and does not constitute political activities.

The National Trust Center for State and Local Policy is helping preservationists influence policy-makers in their own communities, through training, technical assistance, and promotion of effective advocacy tools. This publication is part of the Center’s *Advocacy Training Manual*. To get assistance with your policy issue, or the latest information about advocacy techniques, or to order additional copies of this chapter of the manual, e-mail the National Trust Center for State and Local Policy at [policy@nthp.org](mailto:policy@nthp.org), call (202) 588-6167, or visit [www.preservationnation.org/take-action/advocacy-center](http://www.preservationnation.org/take-action/advocacy-center). This project is made possible in part through the generous support of the Jessie Ball duPont Fund.

Virginians prepare to promote preservation to General Assembly members during Virginia Preservation Day organized by APVA Preservation Virginia. Photo by Stacey Van Bellengham.

the common good and general welfare of the people of the community; i.e., it may not carry on a business with the general public similar to a for-profit operation as its primary activity. By comparison, a 501(c)(3) can operate like a for-profit as long as its primary purpose is to raise funds for charity.

It is possible for a 501(c)(3) organization to incorporate a separate 501(c)(4) entity for the purpose of carrying on the organization’s lobbying. However, this can be tricky for many reasons, including (1) charitable contributions from the 501(c)(3) organization cannot be used by or commingled with the 501(c)(4) entity, and (2) the organization must pay taxes on all expenditures considered to be political activities. See IRS, Rev. Ruling 2004-6 at [www.irs.gov/pub/irs-drop/rr-04-6.pdf](http://www.irs.gov/pub/irs-drop/rr-04-6.pdf) (Jan. 26, 2004). A 501(c)(3) organization seeking to incorporate a separate 501(c)(4) entity should seek the advice of a knowledgeable tax attorney.

## IN SUMMARY

- A 501(c)(3) organization can lobby.
- Whether a 501(c)(3) organization should consider filing Form 5768 with the IRS will depend on whether and how much it plans to lobby. If the organization chooses not to elect to lobby, it must keep its lobbying activities to a minimum.
- An election to lobby will require the organization to do close accounting of expenditures that support the lobbying activities and be cognizant of the expenditure limits.
- An organization must segregate its lobbying expenditures into direct or grassroots.
- Participation in political activity by a 501(c)(3) organization is strictly prohibited. A 501(c)(3) organization should carefully consider whether or not its activities constitute a political activity. ■

Michael Smith is assistant general counsel in the Law Department at the National Trust for Historic Preservation.