**WHEN A NON-PROFIT WANTS TO LOBBY**

INTRODUCTION

In the last podcast in this series, we learned a lot about the difference between advocacy and lobbying. We also began to discuss when a non-profit that wants to lobby might consider taking what is known as the 501(h) election. This podcast explores this issue in greater depth.

Question: In the last podcast, we learned that a non-profit group that wants to lobby is prohibited from engaging in a substantial amount of lobbying, but the IRS does not really define what that is. We also learned that a group that does want to engage in some lobbying might gain a little more certainty in its lobbying activities by taking what is known as the 501(h) election. Can you explain what you mean by that?

Answer:

When a group takes the 501(h) election, it operates under a clear standard. The group will calculate the amount it can spend on lobbying expenses for a given year based on the group’s total expenditures for the year. Because the group is using hard and fast numbers, rather than merely “facts and circumstances” in the IRS’s words, the group has certainty as to whether it is in compliance with the law or not. The use of a mathematical equation allows a charity to plan/budget how much lobbying expenditures it can make in the coming year. Also, it simplifies the charity’s tax reporting. All charitable organizations must file a version of Form 990 with the IRS and report its expenses paid in connection with lobbying. However, groups without this election in place must complete Schedule C Part II-B which requires a detailed description of the group’s lobbying expenditures. Charities with the election in place only need to complete the simpler Schedule C Part II-A. This section only requires the charity to report its lobbying expenditure in two broad categories: direct lobbying expenditures and grassroots lobbying expenditures.

Question: Well, it sounds like it IS getting complicated again. What is the difference between direct and grassroots lobbying?

To get technical, direct lobbying refers to the attempt to influence any legislation through a group’s direct communication with a legislator, an employee of a legislative body or other government official, which: (1) refers to specific legislation; and (2) reflects a view on such legislation.

Grassroots Lobbying refers to any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof. A grassroots lobbying communication is one which: (1) refers to specific legislation; (2) reflects a view on that legislation; and (3) encourages the recipient to take certain actions with respect to the legislation. When we talk about direct lobbying we are talking about specific actions.

Question: Can you give me an example of these different types of lobbying?

Answer: Of course, let’s go back to some of the examples used in the last podcast:

* Asking a member of Congress to vote for or against, or amend, introduced legislation. This is an example of DIRECT LOBBYING.
* Emailing a “call to action” to a group’s members urging them to contact their member of Congress in support of action on introduced legislation or pending regulations. This is an example of GRASSROOTS LOBBYING.
* Asking Congress to increase funding for the Prevention and Public Health Fund is an example of Lobbying.
* Recommending that a local school board implement intergenerational learning programs is not an example of lobbying under IRS rules.

Question: OK, sounds like non-profits may want to seriously consider engaging in some kinds of lobbying if they think it could further their mission. If they do decide to do that, you have said that there are some requirements they would have to follow. Can you explain those?

Answer:

Well, first things first, before a group decides it may want to engage in what the IRS might consider lobbying, a group should always consult with its lawyer before doing so. What that lawyer will likely say is that the group should take what we have been describing as “501(h) Election”.

Question: Yes, you have mentioned that several times. Let’s get into what it means to take the 501(h) election. That sounds complicated.

Answer:

Actually, it isn’t complicated at all. Organizations that plan to use an expenditure test granted by the 501(h) election to keep track of their lobbying expenses must file Form 5768 with the IRS. This form is titled *Election/Revocation of Election by an Eligible IRC Section 501(c)(3) Organization to Make Expenditures to Influence Legislation*. When an organization successfully files this form, it will face a cap on how much the organization can spend on lobbying based on the organization’s annual exempt purpose spending. The form holds no annual due date and may be filed at any point during the year.

Question: When does that election become effective after being filed with the IRS?

Answer:

The election becomes effective in the beginning of the same year in which it was filed! Therefore, if an organization is to file its form 5768 on October 1st of 2018, it will become effective on January 1st of 2018. Once the election becomes effective it will remain in effect until the organization decides it wants to revoke the election.

Question: Sounds pretty straightforward. But can any non-profit file for the 501(h) election?

Answer:

Essentially many non-profit organization that plan to engage in lobbying activity may be interested in this election and will be eligible to file. This includes educational institutions, hospitals, medical research organizations, organizations supporting governmental schools, organizations publicly supported by charitable contributions, agricultural organizations, organizations publicly supported by admissions, sales, etc., and organizations supporting certain types of public charities. At the same time, there is also a specific list of organizations that will not be eligible to make the 501(h) election, which includes religious organizations or a convention of an association of religious organizations, integrated auxiliaries of churches, a member of an affiliated group which includes religious organizations, private foundations, testing for public safety organizations, a supporting organization for civic leagues, social welfare organizations, labor unions, or business leagues.

Question: All that makes sense. What about an organization that is eligible, takes the election, but then does not want to engage in lobbying anymore. Can it revoke the election?

Answer:

This may be the easiest question to answer. Revoking the election is simple. In order to do so, an organization simply fills out the revocation portion of the same Form 5678 it used to take the election and again file it with the IRS. This revocation will begin its effect the first day of the following year in which it was filed. So, if that same organization decided to revoke its 501(h) election on October 1st of 2019, the revocation will not take effect until January 1st of 2020.

Question: Ok, it actually sounds pretty easy to take the election, and you have done a great job of explaining why taking the 501(h) election makes sense for any group that wants to engage in any lobbying just to be safe, but groups should always consult their attorney to decide what makes the most sense for them, right? In fact, it sounds like taking this 501(h) election can be a good option for a group, if its lawyer agrees, even if the group does not intend on engaging in a lot of lobbying, just to be on the safe side. But let’s say a group and its lawyer agrees to take the 501(h) and the group does so, can a group that makes the 501(h) election engage in unlimited lobbying now?

Answer:

Well, I’d like to say that makes it easier, and it certainly makes it easier to engage in lobbying, but there are complicated rules around how much lobbying a group can engage in even when it does take the 501(h) election.

Question: OK. I’m all ears. Tell me about what a group can or cannot do when it takes the 501(h) election?

Answer:

So, we have talked about the benefits of the election and that, once a non-profit takes the election, it can engage in some amount of lobbying. But there is a limit on the amount of time a group can spend on lobbying in relation to all of the activities the group engages in throughout its fiscal year. Because of that, any group taking the election needs to know how to measure its activities to make sure that it does not go over the limit.

Question: Alright, let’s get back to actually making the calculations, because it looks pretty important to a group to make sure it is staying within the law. Can we talk about the calculation that a group must do to make sure it’s staying within the limits under the 501(h) election?

Answer:

Sure, as we have said, the 501(h) election provides a group with a set limit that can be spent on lobbying expenses for a given year based on the group’s total expenditures for the year. When a group is thinking about the lobbying limits it is best to separate it out into two concepts: (1) The expenditure test and (2) the test to determine whether an organization normally makes excessive lobbying expenditures. The expenditure test measures how much the organization lobbies in a given fiscal year; the excessive lobbying test kicks in when the group exceeds those limits. But that’s a lot of information to take in all at once. Let’s break each test down starting with the expenditure test.

The way to think about the expenditure test is that it is an annual test which sets the maximum amount a group can spend on lobbying annually. If a non-profit makes lobbying expenditures in excess of this amount, then it will be subject to penalties, which we will describe in a bit. When we say cap, we should be a little more specific as there are actually two separate, but related caps. First, there is a cap on the total amount of lobbying expenditures for the year. Then there is a separate cap on grassroots lobbying expenditures for the year.

Question: Alright. Two caps. But how do they work? What is a lobbying expenditure and what is a grassroot lobbying expenditure? How are they different and why are there two caps? I thought you said there was a limit on how much a group can spend on lobbying, but now it sounds like there are two limits?

Answer:

Yes. That’s right. But the two limits are closely related. Let me explain. A lobbying expenditure is an expenditure made for the purposes of influencing legislation. Lobbying expenditures are then broken out into two categories: direct lobbying expenditures and grassroots lobbying expenditures. Direct lobbying expenditures are any expenditure made to influence any legislation through communication with any member or employee of a legislative body or with a government official or employee who may participate in the formulation of the legislation. Again, think of this as direct lobbying. In order to constitute a direct lobbying expenditure, the communication must (1) refer to specific legislation and (2) reflect a view on such legislation. Grassroots lobbying is any expenditure made for the purpose of influencing any legislation through an attempt to affect the opinions of the general public provided the communication (1) refers to specific legislation, (2) reflects a view on such legislation, and (3) encourage the recipients of the communication to take action with respect to such legislation. So, those two types of lobbying, direct and indirect, or direct and grassroots, that form the source of a group’s lobbying expenditures.

Question: I’m still confused though. How do these different types of expenditures work together and what is the limit imposed on them?

Answer:

Put simply, there is an overall cap on lobbying generally, and then, as a portion of that overall cap, there is an even lower cap on the amount of lobbying that can be grassroots lobbying. But let’s start with the overall cap on all lobbying activities. Let me show you how the larger cap works and then we can get to the second cap on grassroots lobbying. In order to calculate the lobbying activities of a group, we lump all of its lobbying activities together to come up with a total amount of lobbying activities as a percentage of the organization’s activities as a whole. If a group has expenditures (or, to put it another way, a budget), of $1 Million, and the amount the organization spends on lobbying is $100,000, then we would say its lobbying activities is 10 percent of its overall activities. The group then has to determine what percentage of its lobbying activities were directed towards grassroots lobbying specifically (or, if you prefer, indirect lobbying), to get the grassroots lobbying amount. Let’s say this group spent $10,000 on a mailing to its members to encourage them to call their elected officials to get them to vote a particular way on a piece of pending legislation. That would mean that the group’s grassroots lobbying was 10 percent of its overall lobbying activities. This group would report that its overall lobbying activities constituted 10 percent of its expenditures and that its grassroots lobbying constituted 10 percent of those activities, or 1 percent of its activities as a whole.

Question: OK. So, is that group acting within the law?

Answer:

It depends on a number of factors. The amount that can be spent on lobbying is based on the charity’s total exempt purpose expenditures which is just a fancy phrase for the total amount paid by the charity to accomplish its exempt purpose (which *includes* the charity’s lobbying expenditures). The percentage of its expenditures a group can direct towards lobbying activities depends on the size of the group’s budget. Different organizations with different budgets have different restrictions. I can go over those restrictions if you would like.

Question: Yes, please, but it’s sounding like it’s about to get complicated again.

Yes and no. The guidelines are fairly straightforward and you can read about them in greater depth on our accompanying website, but here’s a basic thumbnail sketch of them.

If the charity’s annual expenditures are less than $500,000 in a given year, then it is allowed to spend 20% of that amount on lobbying. Its grassroots lobbying expenditures are capped at 25% of the allowable lobbying expenditures. So, if the allowable lobbying percentage is 20%, then the grassroots percentage would be 5% (25% of 20% = 5%).

Here’s another example:

* + Assume a charitable organization’s budget (i.e., exempt purposes expenditures) for the year is $400,000. That means its total expenditures are less than $500,000, so the 20% and 5% limits on lobbying and grassroots lobbying apply to it.
  + How much can be spent on lobbying?
    - Answer: $80,000 = $400,000 x 20%
  + Of that $80,000, how much of that can be spent on grassroots lobbying?
    - Answer: $20,000 = $400,000 x 5%

Think about it like you are purchasing supplies for your office. You have $100 to spend, but you want to spend only $20 on pens, and, from that, you only want to spend $5 on blue pens. You’ve got a cap on how much you can spend on pens and then, as a subset of that amount, you’ve got another limit on how much you can spend on blue pens. The lobbying limits and the grassroots lobbying limits operate very similarly. You’ve got an overall number a group can spend on lobbying and then, within that amount, another limit on how much the group can spend on grassroots lobbying itself.

As the charity’s expenditures go up, the percentage that may be spent on lobbying expenditures decreases. Once a group has its applicable percentages, all it has to do is multiply that by its exempt purpose expenditures for the year. That will help the group identify the lobbying nontaxable amount and your grassroots nontaxable amount. Let’s work through some more numbers.

As the charity’s expenditures go up, the percentage that may be spent on lobbying and grassroots lobbying gradually decreases to 5% and 1.25%, respectively. Once a charity’s expenditures exceed $17,000,000, lobbying expenditures are capped at $1,000,000 and grassroots expenditures are capped at $250,000. Remember not to get too bogged down with these numbers. We offer a web-based calculator that will generate this for your charitable organization. And you should consult your organization’s lawyer if you have questions about what limits might apply to your organization.

Question: OK. I think I’m starting to get it. How can a group make sure it is staying within these limits, whatever those limits might be based on the group’s size?

Answer:

Great question. Let’s do a brief recap of how a group calculates its activities. We’ll then look at how the group would make sure it’s staying within the limits that apply to it. What the IRS calls the expenditure test provides a means of understanding the annual cap on a charity’s lobbying expenses for the year. The cap is based on a sliding scale percentage of the charity’s total expenditures for the year. Once a group figures out which limits apply to it, it can get a sense of whether it is complying with the law. If a group has any questions about this, it should definitely consult with both its accountant and its attorney to make sure it is doing the calculation right and has all of its ducks in a row.

If there is a calculation that must mean there are inputs. Fortunately, this calculation only requires three pieces of information: the charity’s exempt purpose expenditures, its lobbying expenditures, and its grassroots lobbying expenditures. And let’s review the definitions of these terms:

* Exempt purposes expenditures is the total amount paid by the charity to accomplish its exempt purpose. This figure would include its lobbying expenditures as well.
* Lobbying communication expenditures is any expenditure made for the purpose to influence any legislation. In order to constitute a lobbying expenditure, the communication must refer to specific legislation and reflect a view on the legislation.
* Grassroots lobbying communication expenditures are a subset of lobbying expenditures. Grassroots lobbying expenditures are any expenditure made for the purpose to influence any legislation through an attempt to affect the opinions of the general public. In order to constitute a grassroots lobbying expenditure, the communication must refer to specific legislation, must reflect a view on such legislation and encourage the recipient of the communication to take action with respect to such legislation.

As we have already mentioned, there are actual two caps to consider. In addition to the cap on a group’s total lobbying expenditures, there is a separate cap on its grassroots lobbying expenditures. Once the group identifies its expenditures according to these different categories, it looks at the IRS limits based on the size of the group to determine whether it is in compliance with the law. Again, checking with your lawyer (who will probably also check with your accountant), is the best way to monitor compliance with these requirements.

Question: Thank You. This has all been very helpful. I want to learn more about the 501(h) election and what happens when a group might violate even these restrictions on lobbying, but let’s leave that for the next podcast.

Answer:

Sounds good. Talk to you then.