

Advocacy Restrictions and Limitations on Federally Funded Health Centers

Questions and Answers on Health Center Lobbying

Q. What is lobbying?

A. As a general matter, "lobbying" is an attempt to influence the passage or defeat of laws, resolutions, or similar items by Congress or a state or local legislative body, or a referendum, constitutional amendment, or similar procedure. Lobbying should not be confused with "political activities" (i.e. supporting or opposing candidates for elective office).

Q. Is it okay for a health center to lobby?

A. Yes. Health centers, like all organizations exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, may lobby for or against legislation. In fact, lobbying on issues affecting its clients may be an important means for a Section 501(c)(3) to accomplish its mission. However, there are two important qualifications:

1. Federal grant funds may **NOT** be used to pay for any lobbying expenses.
2. A health center's lobbying activities cannot constitute a "substantial part" of the center's total activities.

Q. How do we know if our health center's lobbying activities are excessive and might threaten Section 501(c)(3) income tax exemption?

A. Unfortunately, there is no precise test for determining whether lobbying activities are a "substantial part" of an organization's activities. At least one court has held that 5% of an organization's time and effort spent on lobbying activities is not substantial, and some have argued that as much as 15% could be considered to be an insubstantial amount of lobbying. Nevertheless, because it focuses on the scope of an organization's activities, the "substantial part" test is, by its nature, vague. However, health centers (and other Section 501(c)(3) organizations) may elect, under Section 501(h) of the Internal Revenue Code, to have their lobbying activities measured by the "expenditure test."

Q. What kinds of activities are considered to be lobbying?

A. There are **two types** of activities that are considered to be lobbying. **Direct lobbying** consists of communicating with (by writing or speaking to) a member **or an employee** of Congress or a state or local legislative body, or a government official who may participate in the formulation or amendment of legislation, in an attempt to influence the passage, amendment, or defeat of legislation (a bill, an amendment, a funding level, or the like).

Communicating with the general public concerning proposed legislation **when the communication calls upon a member of the public to contact legislators to support or oppose specific legislation** also is a lobbying activity. This kind of lobbying is called "**grassroots**" lobbying.

Generally speaking, **communications that do not advocate the passage or defeat of legislation or similar measures are not considered to be lobbying.** For example, meeting with a Congressman to provide objective and educational information about health centers, the need for primary health care services, and other general information is **not** considered to be lobbying.

Also, responding to requests from a Member of Congress for information or data is not considered to be lobbying.

Q. Our health center gets a Section 330 grant from the U.S. Department of Health and Human Services. Can we still lobby?

A. Yes, provided that Section 330 (and other federal grant) funds are **NOT** used to pay for any expenses that the health center might incur in the course of lobbying (*e.g.* staff time, space costs, telephone costs, postage, photocopying, facsimiles, printing, travel reimbursements, *etc.*).

Q. What health center funds can be used to pay for lobbying expenses?

A. Revenues unrelated to the grant-supported project (and not restricted by other payors), unrestricted donations, and investment income can be used to pay for lobbying expenses. Furthermore, under the 1996 amendments to Section 330, a health center's fees, premiums, and third party reimbursements (including Medicaid and Medicare payments) and state, local, and other operational funding are not subject to the same restrictions that apply to the use of federal grant funds. Those funds may be used for "such other purposes as are not specifically prohibited [under Section 330] if such use furthers the objectives of the [federally-funded] project." While DHHS has not issued guidance definitively authorizing the use of such funds for lobbying, it can reasonably be argued that they may be used to pay the costs of lobbying for legislation that promotes the health center's mission (*e.g.* extension of FQHC rights, additional funding for primary health care, *etc.*).

Q. Is it okay for health center staff and patients to lobby?

A. Yes, provided that no federal grant funds are used to pay for any expenses incurred in lobbying (*e.g.* the allocable amount of staff salaries), and provided that the total amount of lobbying activities they conduct on behalf of the center is "insubstantial" in relation to all of the health center's activities. Further, nothing prevents health center staff from lobbying on their own time without using health center resources. However, "volunteer" lobbyists should be careful not to use the health center's name in connection with their lobbying activities unless authorized by the board of directors and/or CEO.

Q. What happens if federal funds are used to pay for lobbying activities?

A. The cost of the lobbying activities will be disallowed. That is, the health center will be required to pay back to the federal government the amount of grant funds that were spent on lobbying activities.

Q. How do I account for any time or resources used for lobbying?

A. Most health centers deal with multiple fund sources and must segregate related costs on their general ledger. Lobbying activities should be set up as a cost center and any direct expenses (*e.g.* salary, travel expenses, *etc.*) can be charged to that cost center. In addition, overhead or general & administrative costs should be allocated consistently as with other programs. Circular A-122, which describes allowable and unallowable costs under federal awards, states that anyone whose salary is either directly or indirectly charged to a federal grant or contract must complete an activity report that corresponds with a pay-period. This activity report (timesheet) must include the total number of hours worked and the fund source. Failure to complete an activity report is one of the most cited compliance weaknesses on Circular A-133 audits for organizations receiving federal awards. Unless health center staff are doing the lobbying on their own time, health centers should have an area on their timesheet that includes lobbying activity, either direct or grassroots. Salary and fringe benefit cost should be allocated to the cost center accordingly.

As long as a health center can identify sufficient nongrant funds to cover the lobbying costs, there should not be a problem.

Q. What are the consequences if a health center engages in an excessive amount of lobbying activity?

A. Health centers and other Section 501(c)(3) organizations may lose their Section 501(c)(3) status if lobbying constitutes a "substantial part" of their overall activities. Moreover, an organization that loses its Section 501(c)(3) tax exemption on account of its lobbying activities is liable for a tax in the amount of 5% of the amount of its lobbying expenditures.

Q. What happens if an organization elects the "expenditure test" under Section 501(h)?

A. Under the "expenditure test," only the actual expenditure of funds for lobbying activities (as defined under the IRS regulations) counts for purposes of measuring the organization's allowable lobbying. An organization electing under Section 501(h) can spend up to 20% of the first \$500,000 of its annual expenditures for carrying out its mission (*i.e.* up to \$100,000) for direct lobbying and 25% of that amount (*i.e.* \$25,000) for grassroots lobbying. The allowable lobbying amounts decrease on a sliding scale as overall expenditures increase, up to a maximum lobbying limit of \$1 million annually (and \$250,000 for grassroots lobbying). Moreover, the regulations under Section 501(h) contain very detailed rules regarding what expenditures are and are not considered to be lobbying expenditures. Of course, even expenses that are legitimate from the IRS's perspective may **NOT** be paid for with federal grant funds.

Q. Are there any advantages to filing a Section 501(h) election?

A. Yes. Health centers and other 501(c)(3) organizations (such as State Primary Care Associations) that plan to engage in any significant amount of lobbying should consider electing the Section 501(h) expenditure test. Electing organizations can take advantage of the IRS regulations under Section 501(h) which define clearly what kind of activities are and are not considered lobbying. These regulations may not be relied upon by non-electing organizations. Since, under Section 501(h), allowable lobbying is measured by the amount of the expenditures made for lobbying, lobbying efforts conducted at no cost to the health center (such as by patients and other volunteers) do not count against the allowable lobbying limits. They would, however, be treated as a health center lobbying activity under the "substantial part" test. Accordingly, it is unlikely that a health center would exceed its allowable lobbying expenditure limit under Section 501(h).

Q. How does an organization elect the Section 501(h) expenditures test?

A. The election to be covered under Section 501(h) is made by filing Form 5768 with the IRS. An organization can file an election for a particular tax year at any time within the tax year (*e.g.* an organization with a calendar tax year can file the election as late as December 31). Similarly, an organization can revoke the election at any time prior to the beginning of a tax year (*e.g.* a revocation filed on December 31 is effective January 1 of the next year for a calendar year taxpayer).

Q. Isn't there a lot of paperwork involved in keeping track of lobbying expenditures if an organization files a Section 501(h) election?

A. IRS regulations require an electing organization to keep records of its expenditures for direct and grassroots lobbying; the portion of amounts paid or incurred for employees' services for direct and grassroots lobbying; the amounts paid for out-of-pocket expenditures incurred on

behalf of the organization for direct and grassroots lobbying; and the allocable portion of administration, overhead, and other general expenditures attributable to direct and grassroots lobbying.

While there are no specific record-keeping requirements for non-electing organizations, it should be noted that ALL Section 501(c)(3) organizations must report lobbying expenditures on their annual IRS return (IRS Form 990). Moreover, non-electing organizations (*i.e.* those subject to the "substantial part" test) must provide a "detailed description" of their lobbying activities during the year (including those conducted by volunteers), and detail the amount of expenditures on various types of lobbying activities.

Q. Is the lobbying information reported on IRS Form 990 available to the public?

A. Yes. Form 990s are posted on the Internet at www.guidestar.org. In addition, all tax-exempt organizations are required to make their three most recent Form 990s available for public inspection and to provide copies upon request.

Q. What happens if a health center spends more than the allowable amount for lobbying expenditures?

A. An electing organization that exceeds its allowable lobbying expenditure limit (for either direct or grassroots lobbying) is liable for a tax in the amount of 25% of the excess amount. However, an electing organization will not lose its Section 501(c)(3) exemption unless its lobbying expenditures, on average over a four year period, exceed 150% of the allowable lobbying limit.

Q. Our Senator voted for increased appropriations for health centers last year. We want to thank her for her past support, and encourage her to support us again this year. Can the health center make a contribution to her re-election campaign?

A. No. Health centers (and all other Section 501(c)(3) organizations) may not support or oppose candidates for elective office. Unlike lobbying, which is allowable within certain limits, no political campaign intervention whatsoever is permitted. Prohibited political campaign intervention includes making campaign contributions and any other activity (*e.g.* supporting political parties or political action committees) for the purpose of influencing the outcomes of elections. Keep in mind, however, that **no law prohibits individual employees or patients of a health center from supporting the candidate or party of their choice**, so long as they do not use health center resources for that purpose or otherwise associate the health center with a particular candidate or campaign (*e.g.* by using the health center's name in speeches or letters).

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LOBBYING RULES FOR ELECTING AND NONELECTING CHARITIES

	Electing Charity	Nonelecting Charity
Lobbying Limits	20% of first \$500,000 of "exempt purpose expenditures" and decreasing percentages after that, up to \$1 million cap	Less than a "substantial" part of activities; IRS employs subjective "balancing" test*
Volunteer and other Cost-free Activities	Do not count against limits on lobbying	Count in determining "substantial"
Lobbying Definition	Defined, with specific exclusions for invited testimony; nonpartisan analysis, study & research; self defense	Not defined, no specific exclusions in statute or regulations
Excessive Lobbying Penalty for Organization	25% excise tax on <u>excess</u> over limits in any year	5% excise tax on all lobbying expenses if substantial lobbying results in revocation
Excessive Lobbying Penalty for Organization's Officers/Directors	No specific liability	5% if "substantial" lobbying willfully or unreasonably authorized
Revocation of Tax Status	If lobbying exceeds 150% of limits generally over 4 years	If "substantial" lobbying in any <u>one</u> year
Recordkeeping	Must document all lobbying <u>expenses</u> , both grassroots and direct	Must document all lobbying <u>activities and expenses</u>
Tax Form 990A	Numbers only are required: grassroots and overall lobbying expenditures and percentages of "exempt purpose expenditures" that these expenditures comprise	Detailed description of the legislative activities and a classified schedule of the expenses paid or incurred
Audit Exposure	No difference, whether electing or nonelecting	

*The factors the IRS will "balance" in determining if lobbying is "substantial" include the importance of lobbying activities to the organization's objectives and circumstances, the organization's expenditures on lobbying activities, and the organization's overall level of spending and activity.

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