



# Ballot Initiatives: Yes You CAN Influence That Vote!

## Federal Tax Rules

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## Lobbying vs. Electioneering

- Electioneering: Participating in, or intervening in, any ***political campaign*** on behalf of (or in opposition to) any candidate for public office.

***PROHIBITED!***

- Lobbying: Carrying on propaganda, or otherwise attempting, to ***influence legislation*** (except as otherwise provided in § 501(h)).

***PERMITTED! (within limits)***

# How much lobbying is permitted?

- ***It varies*** depending on
  - What paragraph of § 501(c) provides exemption?  
501(c)(3)? 501(c)(4)? 501(c)(6)? etc.
  - Public charity or private foundation?
  - Is a 501(h) election in effect?
    - Is your entity eligible to make a § 501(h) election?

## Substantial Part Test

- No substantial part of the activities of a charity may consist of carrying on propaganda, or otherwise attempting to influence legislation . . .  
  
... except as otherwise provided in § 501(h).

## Substantial Part Test – *attempting to influence*

- For purposes of the substantial part test, an organization is ***attempting to influence*** legislation if it
  - Contacts, or urges the public to contact, ***members of a legislative body*** for the purpose of ***proposing, supporting, or opposing*** legislation; or
  - Advocates the adoption or rejection of legislation.

## Substantial Part Test – *attempting to influence*

- The following are ***NOT attempts to influence*** legislation:
  - A representative's testimony as an expert witness on pending legislation at the request of a legislative committee. Rev. Rul. 70-449.
  - Nonpartisan analysis, study, and research. Rev. Rul. 70-79.

## Substantial Part Test – *legislation*

- For purposes of the substantial part test, ***“legislation”*** includes
  - Action by the Congress, by any State legislature, by any local council or similar governing body, including
    - appropriations bills and
    - judicial nominee confirmations (Notice 88-76), and
  - **Action by the public in a referendum, initiative, constitutional amendment, or similar procedure.**

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## Substantial Part Test – *legislation*

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- **Legislation** generally does **NOT** include:
  - Action by an executive branch, including promulgation of rules and regulations.



## Substantial Part Test – “*substantial part*”

- An organization fails the substantial part test only if lobbying constitutes a “***substantial part of the activities***” of the organization.
  - All the surrounding facts and circumstances are considered.
  - “Substantial part” is not defined!
  - What is the measure?
    - Time spent?
    - Expenditures?
    - Effectiveness or influence?
    - Some combination of the above?

## Substantial Part Test – *Effects of failure*

- Loss of tax-exempt status
  - Net income is taxable – federal and state.
  - Revenue is lost
    - Donations are not deductible to donors.
    - Grants are forfeited.
    - Endowment funds may revert or be “gifted over” to another charity.
  - Property tax and/or sales tax exemption is lost.
  
- Excise tax
  - Organization is liable for tax of 5% of the year’s lobbying expenditures, as are...
  - ... Managers who agreed to make the expenditures, knowing that they were likely to cause loss of 501(c)(3) status, unless such agreement was not willful and was due to reasonable cause.

# Expenditure Test

- Alternative to Substantial Part Test
- More certainty:
  - Only expenditures are considered.
  - The line is clear; a specific amount may be spent on lobbying.
- Intermediate sanction – excise tax.

## Expenditure Test – Eligibility

- **Eligible** for 501(h) election:
  - Schools
  - Hospitals
  - Publicly supported charities: 170(b)(1)(A)(vi) and 509(a)(2)
  - Most supporting organizations
- (Only 501(c)(3) organizations.)

## Expenditure Test – Eligibility

- ***NOT eligible*** for 501(h) election :
  - Most religious institutions
    - Churches
    - Integrated auxiliaries of a church
    - Associations of churches
    - Certain affiliates of the foregoing
  - Private foundations
    - Private foundations are, in effect, prohibited from lobbying because lobbying costs are taxable expenditures.
    - ***This another reason to watch your public support ratio!***

## Expenditure Test – Election

- To operate under the Expenditure Test instead of the Substantial Part Test, an organization ***must file a 501(h) election*** on IRS Form 5768.
- An election becomes effective as of the beginning of the year during which it is filed, and it remains in effect unless it is revoked by the organization.
- Revocation is effective beginning with the year following the year in which the revocation is filed.

# Expenditure Test

- Regarding definitions....
  - The Expenditure Test and the Substantial Part Test employ ***different definitions*** – even of the same term.
  - The additional certainty afforded by the Expenditure Test comes with ***added complexity***. The regulations are dense and detailed. In planning lobbying activities and expenditures, organizations should seek assistance of a tax professional.

## Expenditure Test – The Basics

- Under the Expenditure Test, an organization may make “lobbying expenditures” up to its “lobbying nontaxable amount” and “grass roots expenditures” up to its “grass roots nontaxable amount” without penalty.
- If an organization exceeds either of these limits, it is liable for an excise tax of 25% of the excess expenditures.
- If an organization “normally” exceeds either of these limits by more than 50%, its tax-exempt status will be revoked.



## Expenditure Test – lobbying nontaxable amount

- An organization’s “lobbying nontaxable amount” for a given year is the lesser of \$1,000,000 and the sum of

Rate	X	exempt purpose expenditures	=	lobbying nontaxable amount
20%	X	up to \$500,000	=	\$100,000
15%	X	\$500,000 to \$1,000,000	=	75,000
10%	X	\$1,000,000 to \$1,500,000	=	50,000
5%	X	\$1,500,000 to \$17,000,000	=	<u>775,000</u>
				\$1,000,000

## Expenditure Test – lobbying nontaxable amount

- “Exempt purpose expenditures” generally means all amounts paid or incurred by the organization to accomplish its charitable purposes, including
  - administrative expenses and
  - all lobbying expenses.
- but ***NOT***
  - expenses of a separate fundraising unit or affiliate and
  - amounts paid to unrelated persons for fundraising, fundraising counseling or similar services.

## Expenditure Test – grass roots nontaxable amount

- An organization’s “grass roots nontaxable amount” for a given year is 25% of its “lobbying nontaxable amount.”

## Expenditure Test – Example

- An organization's exempt purpose expenditures for a given year total \$900,000. Its "lobbying nontaxable amount" is \$160,000:

Rate	X	exempt purpose expenditures	=	lobbying nontaxable amount
20%	X	first \$500,000	=	\$100,000
15%	X	next \$400,000	=	<u>60,000</u>
				\$160,000

- Generally, the organization may spend – without penalty – up to \$160,000 in total for lobbying, *including* up to \$40,000 for grass roots lobbying. (Grass roots lobbying is a subset of lobbying.)

## Expenditure Test – “lobbying expenditures”

- An organization’s lobbying expenditures for a year are the sum of
  - its ***direct lobbying expenditures***, i.e., its expenditures during that year for ***direct lobbying communications***
  - plus
  - its ***grass roots expenditures***, i.e., its expenditures during that year for ***grass roots lobbying communications***.

**direct lobbying expenditures**  
**+ grass roots expenditures**  
**lobbying expenditures**

## Expenditure Test – “lobbying expenditures”

- Generally, all costs of preparing a lobbying communication are included as “lobbying expenditures.” Such amounts generally include
  - all expenditures for researching, drafting, reviewing, copying, publishing and mailing the communication,
  - compensation (current and deferred) for an employee's services attributable to the communication, and
  - the allocable portion of administrative, overhead, and other general expenditures attributable to the communication.

## Expenditure Test – “lobbying expenditures”

- ***Dual-purpose communications***: Expenses of communications having both a lobbying and nonlobbying purpose are ***allocated*** under special rules.

## Expenditure Test – direct lobbying

- A ***direct lobbying communication*** is any attempt to influence any legislation through communication with:
  - Any member or employee of a ***legislative body***; or
  - Any other government official or employee who may participate in the formulation of the legislation, but only if the principal purpose of the communication is to influence legislation.



## Expenditure Test – direct lobbying

- “Legislative body” does not include executive, judicial, or administrative bodies, such as
  - school boards,
  - housing authorities,
  - sewer and water districts,
  - zoning boards, and
  - other similar Federal, State, or local special purpose bodies, whether elective or appointive.

## Expenditure Test – direct lobbying

- Example: Organization M's president writes a letter to the Congresswoman representing the district in which M is headquartered, requesting that the Congresswoman write an administrative agency regarding proposed regulations recently published by that agency. M's president also requests that the Congresswoman's letter to the agency state the Congresswoman's support of M's application for a particular type of permit granted by the agency.
- The letter is **not a direct lobbying communication.**

## Expenditure Test – direct lobbying

- Where a communication refers to and reflects a view on a ballot measure, individual members of the general public are deemed to be legislators.
- Thus, if such a communication is made to one or more members of the general public, it is a **direct lobbying communication**.

## Expenditure Test – direct lobbying

- REQUIRED ELEMENTS: A communication with a legislator or government official – or, for ballot measures, a member of the general public – will be treated as a direct lobbying communication only if the communication
  - Refers to ***specific legislation*** and
  - Reflects a view on the legislation.

## Expenditure Test – “specific legislation”

- “Specific legislation” includes
  - any **legislation** that has already been introduced in a legislative body and
  - any **specific legislative proposal**.

## Expenditure Test – “specific legislation”

- For purposes of the Expenditure Test, “**legislation**” includes
  - Action by the Congress, any state legislature, any local council, or similar governing body, and
  - ***Action by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure.***

## Expenditure Test – “specific legislation”

- In the case of a ballot measure that is placed on the ballot by petitions signed by a required number or percentage of voters, ***an item becomes “specific legislation” when the petition is first circulated among voters for signature.***

## Expenditure Test – “specific legislation”

- Example of a ***specific legislative proposal***:

An organization based in Maine notes in its newsletter that New Hampshire has passed a bill to accomplish a stated purpose and then says that Maine should pass such a bill. No such bill has been introduced in the Maine legislature.

The organization has referred to and reflected a view on a specific legislative proposal.



## Expenditure Test – *NOT* lobbying: NASR

- Under the Expenditure Test, lobbying does not include
  - engaging in ***nonpartisan analysis, study, or research*** and making the results of such work available to the general public (or a segment or members thereof) or to governmental bodies, officials, or employees.

## Expenditure Test – *NOT* lobbying: NASR

- “Nonpartisan analysis, study, or research” (**NASR**) means an independent and objective exposition of a particular subject matter, including any activity that is “educational.”
- NASR may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion.
- Mere unsupported opinion does not qualify.

## Expenditure Test – *NOT* lobbying: NASR

- A communication that reflects a view on specific legislation is not NASR if it ***directly encourages the recipient to take action*** with respect to such legislation.

## Expenditure Test – *NOT* lobbying: NASR

- **Distribution:** An organization may choose any suitable means, including oral or written presentations, to distribute the results of its nonpartisan analysis, study, or research, with or without charge.
- However, to qualify as nonpartisan analysis, study, or research, such communications may not be limited to, or be directed toward, persons who are interested solely in one side of a particular issue.

## Expenditure Test – *NOT* lobbying: NASR

- If a ***series of publications or broadcasts*** qualifies as nonpartisan analysis, study, or research, then any individual publication or broadcast within the series is not a lobbying communication even though it does not, by itself, qualify as nonpartisan analysis, study, or research...
- ... but not if the organization times or channels a part of a series in a manner designed to influence the general public or the action of a legislative body with respect to a specific legislative proposal.

## Expenditure Test – *NOT* lobbying: discussions

- Under the Expenditure Test, lobbying does not include
  - examinations and discussions of broad social, economic, and similar problems, even if the problems are of the type with which government would be expected to deal ultimately.
  - Thus, public discussion and communications with members of legislative bodies – including, for ballot measures, the public – are not lobbying communications even though their general subject is also the subject of legislation before a legislative body, so long as they do not address the merits of a specific legislative proposal and do not directly encourage recipients to take action with respect to legislation.

## Expenditure Test – *NOT* lobbying: testimony

- Under the Expenditure Test, lobbying does not include
  - providing of technical advice or assistance to a governmental body (or committee or other subdivision thereof) in response to a written request by such body or subdivision.
- A request from a single legislator is not sufficient.

## Expenditure Test – *NOT* lobbying: testimony

- Example: On the organization's own initiative, representatives of Organization F present written testimony to a Congressional committee. The news media report on the testimony of Organization F, detailing F's opposition to a pending bill.



## Expenditure Test – *NOT* lobbying: testimony

- Example: On the organization's own initiative, representatives of Organization F present written testimony to a Congressional committee. The news media report on the testimony of Organization F, detailing F's opposition to a pending bill.
- ANSWER:  
The testimony ***is a direct lobbying communication*** but is ***not a grass roots lobbying communication.***

## Expenditure Test – *NOT* lobbying: self-defense

- Under the Expenditure Test, lobbying does not include
  - appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization.

## Expenditure Test – *NOT* lobbying: self-defense

- Under the self-defense exception, the organization
  - may communicate with ***anyone*** – the entire legislative body, committees or subcommittees, individual legislators, legislative staff members, or representatives of the executive branch who are involved with the legislative process – so long as the communication is limited to the above subjects.
  - may make expenditures in order to ***initiate legislation*** if the legislation is limited to the above subjects.

## Expenditure Test – *NOT* lobbying: self-defense

- Example 1: A bill is being considered by the Maine Legislature under which the State would assume certain responsibilities for nursing care of the aged. An organization that provides nursing care of the aged, appears before the Legislature and contends that such activities can be better performed by privately supported organizations.
- Expenditures paid or incurred with respect to such appearance are ***not*** made with respect to possible decisions of the State legislature which might affect the existence of the organization, etc., but rather ***merely affect the scope of the organization's future activities.***

## Expenditure Test – *NOT* lobbying: self-defense

- Example 2: The Maine Legislature is considering the annual appropriations bill. An organization which normally performs research under contract with the State, appears before the appropriations committee in order to attempt to persuade the committee of the advisability of continuing the program.
- Expenditures paid or incurred with respect to such appearance are ***not*** made with respect to possible decisions of the State legislature which might affect the existence of the organization, etc., but rather ***merely affect the scope of the organization's future activities.***

## Expenditure Test – *NOT* lobbying: members

- Under the Expenditure Test, lobbying does not include
  - communications directed only to bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, **except that**
  - such a communication that directly encourages the member to engage in direct lobbying is treated as directly lobbying, and
  - such a communication that directly encourages the member to urge nonmembers to engage in lobbying (grass roots or direct) is treated as grass roots lobbying.

## Expenditure Test – *NOT* lobbying: members

- Generally, a ***member*** is someone who
  - pays dues or makes a contribution of more than a nominal amount,
  - makes a contribution of more than a nominal amount of time, or
  - is one of a limited number of “honorary” or “life” members who have more than a nominal connection with the charity and who have been chosen for a valid reason unrelated to the charity's dissemination of information to its members.

## Expenditure Test – *NOT* lobbying: other

- Under the Expenditure Test, lobbying does not include any communication with a governmental official or employee, other than
  - a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or
  - a communication the principal purpose of which is to influence legislation.



## Expenditure Test – grass roots lobbying

- A ***grass roots lobbying communication*** is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.

## Expenditure Test – grass roots lobbying

- REQUIRED ELEMENTS: A communication will be treated as a grass roots lobbying communication only if it
  - Refers to ***specific legislation***,
  - Reflects a view on the legislation, and
  - Encourages the recipient of the communication to take action with respect to such legislation (“***call to action***”).
- Special rules, e.g., subsequent use of NASR.

## Expenditure Test – *Loss of exempt status*

- If an organization “normally” exceeds either of these limits by more than 50%, its tax-exempt status will be revoked.
- The test is applied each year, taking into account the current year and the three preceding years.

## Expenditure Test – *Effects of failure*

- Loss of tax-exempt status
  - Net income is taxable – federal and state.
  - Revenue is lost
    - Donations are not deductible to donors.
    - Grants are forfeited.
    - Endowment funds may revert or be “gifted over” to another charity.
  - Property tax and/or sales tax exemption is lost.
- Excise tax of 25% of the year’s excess lobbying expenditures is still due.

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## Miscellaneous

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- Affiliated organizations file a joint election.
- 501(c)(3) / 501(c)(4) affiliates.