**INTRODUCTION AND OVERVIEW: LOBBYING AND NON-PROFIT ACTIVITIES GENERALLY**

Albany Law School’s “Informed Advocate” Podcast Series

Welcome Albany Law School’s podcast series “The Informed Activist,” which provides guidance to non-profit organizations from across the United States who are seeking to learn more about their rights and obligations. This short series was prepared by students and faculty at Albany Law School, the law school at the heart of New York’s capital city. We hope you enjoy this podcast and find the information it contains useful. Please know that the information contained in this podcasts is for informational purposes only, to give non-profit groups a general sense of the contours of the rights and obligations of non-profit groups generally but should not serve as a substitute for the advice of a lawyer providing representation and guidance on the individualized needs of a specific non-profit group. The first few podcasts in this series address the limits on certain types of political and advocacy activities of non-profits under federal, that is, U.S., law. It does not address any state-specific law, however. As we will do in points throughout this podcast, we will suggest you consult with your lawyer. This podcast will also only describe issues related to formal organizations operating as recognized as what are known as 501(c)(3) organizations. If you have any questions about whether your organization is such an organization or for information about how to become one, please consult an attorney experienced in representing non-profit organizations.

But before we get any farther, let’s start with introductions. My name is XXX and I’m a second-year law student at Albany Law School. With me are YYY and ZZZ. [YYY and ZZZ say hello] They, too, are second-year law students at Albany Law. I’ve got lots of questions for them about when a non-profit can engage in certain types of political activities. This first podcast will address general issues around non-profit lobbying. Subsequent podcasts deal with other questions about lobbying and what is known as electioneering. But let’s start here with general questions about non-profits and lobbying. Here we go.

Question: Hello YYY and ZZZ, I’ve got a lot of questions for you. It seems that a lot of groups might want to try to make social change. That’s what many non-profits are about. But I have heard that non-profits are not allowed to engage in lobbying or any political activities. Is that true?

Answer:

Well, the IRS has very clear prohibitions related to what is known as “electioneering” which involves picking sides in a partisan election. Another podcast in this series will get into that a little later. There are also restrictions on lobbying but none on what we might call advocacy. So, to start, we have to define what the IRS means by lobbying before we can really answer the question whether the IRS allows a group to engage in it.

Question: So, let’s start there. What is lobbying?

Answer:

Lobbying is the attempt to influence the passage, defeat, introduction or amendment of legislation, including bills introduced by a federal, state or local legislative body. It also relates to bond issues, ballot referenda, constitutional amendments, and legislative confirmation votes on nominees to government positions, like when the U.S. Senate votes to consider confirming someone who has been selected by the president to become a federal judge.

In the eyes of the IRS, there are also two kinds of lobbying, direct lobbying and grassroots lobbying, and the distinction between these two types of lobbying is something that will be important later when we talk about instances in which non-profits can engage in lobbying.

Question: So, is any type of advocacy before a government agency considered lobbying by the IRS?

Answer:

No, lobbying does not include when a non-profit group is involved in advocacy before a court, like when a group sues someone or is sued. It also does not involve actions involving administrative agencies, like the U.S. Department of Environmental Protection Agency, or EPA, or other executive branch bodies, like the U.S. Food and Drug Administration. To be considered lobbying by the IRS, a communication must reflect a view on a specific legislative proposal or legislation that has been introduced before a legislative body (international, federal, state, or local). If the communication does not refer to specific legislation, it may be considered issue advocacy, which is permitted, and which we can discuss as well if you would like.

Question: I think I would like to hear that, but first, can you give me some more examples of lobbying?

Answer:

Sure. Here are some examples of what the IRS would consider lobbying:

* Asking your member of Congress to vote for or against, or amend, introduced legislation. This is an example of LOBBYING.
* Emailing a “call to action” to your members urging them to contact their member of Congress in support of action on introduced legislation or pending regulations. This is an also an example of LOBBYING.
* Asking Congress to increase funding for the Prevention and Public Health Fund, this too is an example of Lobbying.

At the same time, if a group recommended that a local school board implement intergenerational learning programs, this would not be considered an example of lobbying under IRS rules.

Remember, when engaging in lobbying, its goal typically is to communicate with a member of the government in support of or in opposition to specific legislation, whether directly or indirectly.

At the same time, encouraging members of the general public or even people connected to a specific organization as members of that organization to “get involved” “learn more” or “support” an organization’s efforts is a simple call to action. That is different from lobbying itself. And many groups may want to engage in this sort of activity, which the IRS would merely categorize as advocacy.

Question: OK, you mentioned that earlier, there is activity that is considered lobbying and other activity that is considered advocacy. Can you explain the difference between lobbying and advocacy?

Answer: Yes. There is a difference and the difference has important ramifications for non-profit groups. General activities around an issue not directed toward specific legislation can be classified as “advocacy” as opposed to lobbying. A group can hold a rally to draw attention to the problem of climate change. That is considered advocacy by the IRS because the group is not promoting the adoption, repeal, or amendment of any particular law. If a group advocates for a strengthening of an environmental law, like the Clean Air Act, that would be lobbying.

Question: OK. I think I’m starting to get it. If a group wants a specific law to change, it’s lobbying; if it is merely acting to raise awareness about an issue, it’s more like issue advocacy.

Answer:

That’s a great way to think about it. Let’s put it another way: Issue advocacy is the attempt to influence public opinion about an issue. Advocating for a social cause or issue generally is different from lobbying to promote a specific change in the law or for a specific law. This can be a little confusing at first, but let’s use another specific example to help explained the difference.

Question: Great. I like examples.

Answer:

I do too. Let’s use the example of a group advocating for the rights of individuals who are homeless. The group can hold events that promote the welfare of these individuals and talk to politicians about how the group feels it is important to ensure there are resources available to homeless individuals. The group could also engage its community to educate them about the homeless and how the community can help the homeless. On the other hand, a group could also lobby for specific legislation to help the homeless. That would be lobbying because it was related to specific legislation. Advocacy is, essentially, promoting a social cause, and not a specific piece of legislation or a politician or political party.

Question: I think I get this difference. But why does it matter? Does the IRS treat lobbying by non-profit groups differently than it does advocacy?

Answer:

Yes. Although it’s complicated. First, all advocacy is permitted, provided it does not become lobbying. If a group does engage in lobbying, it becomes tricky.

Question: What do you mean?

Answer:

Again, it’s complicated. So, there are two issues. First, the IRS does permit some lobbying under certain circumstances provided a non-profit takes an important step to allow it to engage in some degree of lobbying. The first question to ask, really, is whether a group plans to engage in any lobbying. And the way the IRS looks at things, it says a group cannot engage in more than an “insubstantial” amount of lobbying without taking the important step we can talk about more in a moment: that of taking what is called the “501(h) Election”.

Question: Ok, that does sound complicated. Let’s start with the first part of this question. What if a group does want to engage in some lobbying, but does not take this 501(h) election? How much lobbying is too much lobbying?

Answer:

Good question. Let’s start there. Let’s assume a group wants to engage in just a small amount of lobbying as part of its overall advocacy on behalf of the community it serves. The IRS says that non-profits that do not take the 501(h) election cannot engage in an insubstantial amount of lobbying. I hate to go “double negative” on you, so, let’s put it another way: a group that engages in a substantial amount of lobbying without taking the 501(h) election faces the possibility of punishment from the IRS.

Put simply, employees in all non-profit organizations can engage in some legislative lobbying activities. Non-profit employees are free to influence legislation so long as the non-profit’s activities, in the aggregate, amount to only an insubstantial amount of the organization’s activities. This is known as the substantial activity test.

Question: Alright. That doesn’t seem to complicated after all. Just tell me what an insubstantial amount of lobbying or a substantial amount for that matter. Once I know the definition of either of those, then I’ll know how much a group can engage in lobbying without seeking the 501(h) election.

Answer:

Well, that’s actually where it gets complicated. The IRS has not provided a concrete definition of “substantial” or “insubstantial” for the purposes of the substantial activity test, however. It is important to establish that we are not talking about simply putting a dollar amount on the printed materials you might use to lobby. Lobbying expenditures include a variety of things, including the value of the time a group spends lobbying and other resources that are consumed in the process. All of these are considered in the “substantial part test.”

The IRS judges each case by its own merits, focusing on the facts and circumstances unique to that case. Because the substantial activity test is so inexact, it is hard for non-profit groups to know when they have crossed the line. Accordingly, groups that engage in any level of lobbying should consider taking the 501(h) election. The 501(h) election allows non-profits to opt out of the substantial activity test in favor of following the expenditure test, which is significantly easier for non-profits to follow.

Question: Why is that? What’s the difference between the two tests?

Answer:

If a non-profit organization has not taken the 501(h) election and remains governed by the substantial activity test, the IRS will judge the organization’s lobbying activities by the following factors:

-the amount of time spent lobbying by employees and volunteers

-the portion of the organization's budget devoted to lobbying

-the amount of publicity the organization assigns to the activity, and

-the continuous or intermittent nature of the activity

These factors demonstrate the subjective nature of the substantial activity test. It is therefore hard to quantify. Nonetheless, some case law provides helpful guidance that allows for approximate, ballpark estimations. For instance, in a case entitled Seasongood v. Commissioner, a federal appeals court found that an organization engaged in an insubstantial amount of lobbying when less than 5 percent of its activities were devoted to lobbying. Conversely, in another case, called Haswell v. U.S., another court found that an organization engaged in a substantial amount of lobbying when it devoted between 16.6 and 20.5 percent of its budget to lobbying activities.

Importantly, the substantial activity test does not permit certain types of lobbying activities and forbid other types of lobbying activities. The question that matters is not what can members of non-profit groups do, but how much. Unfortunately, again here we see that the IRS guidance is limited. The IRS has not defined substantial or insubstantial. If an organization plans on lobbying, it should discuss the matter with its attorney and consider taking the 501(h) election. The election makes it easier to predict how much a group can spend on lobbying and leaves little to the discretion of the IRS or the courts. At the same time, if you do plan on lobbying without making the 501(h) election, consult your organization’s attorney.

Question: So, what if a group doesn’t want to take the 501(h) election yet engages in lobbying, what types of punishments can a non-profit face if it does engage in lobbying in this way?

Answer:

Again, the question is not whether non-profits are lobbying at all, but rather what is the degree to which they are lobbying. If the IRS determines that a non-profit group that has not taken the 501(h) election is devoting a substantial amount of its activities to lobbying, the group can lose its tax-exempt status. Further, 501(c)(3) organizations that violate the substantial activity test are subject to an excise tax equal to five percent of their lobbying expenditures for the year in which they cease to qualify for the exemption. Beyond that, a tax equal to five percent of the lobbying expenditures for the year may be imposed against organization managers, jointly and severally, who agree to the making of such expenditures knowing that the expenditures would likely result in the loss of tax-exempt status.

Question: That’s not good.

No. There are substantial penalties for violating the substantial activity test, both for non-profit groups and their individual employees. Consequently, all non-profit groups that engage in any level of lobbying should seriously consider taking the 501(h) election, which replaces the murky substantial activity test with the easy-to-follow, quantifiable expenditure test. Ultimately, all non-profit groups should understand that the expenditure test allows non-profit groups to track their lobbying activities quantitatively, which places the power of compliance and monitoring in the hands of the non-profit group, not the IRS.

Question: So, if it’s this complicated, and there are these punishments for engaging in improper lobbying, should a non-profit engage in lobbying at all?

Answer:

We suggest thinking of lobbying as just one of the many tools a non-profit group might use to meet its goals. First, lobbying can play a vital role in fulfilling an organizations mission. Not only do many groups provides social services, but engaging in advocacy on behalf of a group’s clients or constituents can help shape the world around the group. For those organizations that serve vulnerable communities think about who else is standing up and using their voice to make sure these communities have an impact in policy discussions and the legislative process. A group can have a substantial impact by making sure the government and private sector actually enacting policies and taking actions reflecting the community’s needs and concerns. Non-profit groups that do not take advantage of their ability to lobby may miss opportunities to create and impact policies that can have a direct impact on the lives of the people they are serving. We are not suggesting that any non-profit group should or should not engage in lobbying. This podcast is merely designed to talk about some of the benefits of lobbying and to clear up the misconception that non-profit groups can never engage in lobbying. While there are certainly many reasons to engage in lobbying, and non-profits are permitted to lobby under certain circumstances, before groups engage in such lobbying, they must understand the restrictions imposed on organizations who do wish to do so. This podcast is designed to help organizations understand the ins and outs of lobbying – why they might engage in it and how they can stay within the law should they decide to do so. We see some of the benefits of taking the 501(h) election that it can certainly permit groups that take the election to engage in some degree of lobbying and it gives them some certainty about what is and what is not permitted.

Question: What do you mean?

Answer:

As we said before, if a group engages in some degree of lobbying without taking the 501(h) election, the group must not engage in a “substantial” amount of lobbying, but the IRS doesn’t really say what that means. This uncertainty and the risk involved if a group should exceed this limit means that this unclear test creates a chilling effect on a charity’s lobbying activities. Instead of trying to figure how close a charity is to the line of improper conduct, it is much simpler and safer to stay as far away from the line as possible simply by refraining from lobbying altogether. If there is no lobbying activity, then it can’t be deemed to be substantial. It is a practical answer to problem but isn’t necessary a good answer. Is there a better answer out there?

Question: Well, it sounds like there might be – you’ve been mentioning it all along: a group should consider taking the 501(h) election.

Answer:

Bingo! We do believe here there may be a better answer for many groups. As you have guessed, the 501(h) election could be the better answer for many groups. This election can provide a workable alternative to groups that want to engage in a certain degree of lobbying and not worry that their activities are so substantial that they violate IRS restrictions. With this election in place you replace the uncertainty with certainty. You are no longer at the mercy of the “no substantial part” test as it is replaced with what is called the “expenditure” test.

Question: Ok, I thought you said this was going to get easier. What’s the expenditure test?

Answer: Let’s leave that to the next podcast in this series.

Question: Oh, I love a good cliffhanger.

That concludes this first podcast on lobbying on non-profits. If you want to learn more, please consult the other podcasts in this series. The next podcast in this series, picks up where we left off here.