

# THE NASAA ADVOCATE

## Strategies for Building Arts Support

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### **ADVOCACY BY ARTS ORGANIZATIONS: TAX LAWS AND LOBBYING**

#### **advocacy: a first amendment right**

The U.S. Constitution guarantees the basic democratic right of all citizens to petition their government—to contact their legislators and plead a case. The leaders, members and supporters of nonprofit organizations have proven themselves to be effective and respected players participating in advocacy and shaping public policy. Because nonprofit organizations are an effective channel for citizens to participate in the process and for discussion of policy and legislation, the federal government clearly supports lobbying by charities.

Recognizing the value of the research and information provided by nonprofit groups lobbying on various public issues, Congress enacted legislation in 1976 making it possible for charities to lobby freely for their causes, and for the communities and individuals they serve. Federal tax code regulations, issued by the IRS in 1990, reiterate the policy of providing wide latitude for charities to lobby.

#### **lobbying by charities in the public interest**

The 1976 legislation passed by Congress and enacted into law permits charitable 501(c)(3) organizations greater freedom in spending on lobbying activities. This law and its 1990 regulations are clearer than the prior law applied to 501(c)(3) groups, and are more generous about the lobbying activities in which a nonprofit can engage. Under prior law, charities could spend no more than five percent of total expenditures—less than a “substantial” amount, as determined in a federal court ruling—on lobbying. With the 1990 regulations, nonprofit organizations that are tax exempt under section 501(c)(3) of the IRS code can easily elect to conduct their lobbying under the 501(h) provisions of the 1976 law, which allows expenditures of up to 20 percent for lobbying and advocacy activities.

In general, nonprofit organizations that select 501(h) status under the lobby law may spend 20 percent of the first \$500,000 of their annual budget on lobbying (\$100,000) and 15 percent of the next \$500,000. Because lobbying by nonprofit groups is rarely expensive—involving communications and printing costs, some staff time, and considerable volunteer activity—arts groups and other charities are not likely even to approach overspending the legal limits on lobbying.

## the main elements of the federal lobbying law

### 1. Specific permitted levels of lobbying spending

The 1976 law states that lobbying activities are permitted, provided only that they fall within spending ceilings established in the law. The overall budget ceiling is based on a percentage of an organization's annual budget, starting at 20 percent of the first \$500,000 and scaling down for expenditures over that. For an organization with a \$1,000,000 budget, for example, 20 percent of the first \$500,000 and 15 percent of the remaining \$500,000 can be used for lobbying, for a total \$175,000 lobbying budget.

The law makes a distinction between "direct" lobbying—direct communications with legislators and their staffs, with executive branch officials who participate in the formulation of legislation and with the organization's members to urge them to contact legislators—and "grassroots" lobbying—seeking "to influence legislation through an attempt to affect the opinions of the general public or any segment thereof."

Expenses for grassroots lobbying are limited to one-quarter of the overall ceiling (\$43,750 of the allowed \$175,000 for a charity with a \$1,000,000 budget). Lobbying expenses over \$43,750 in the example must be for direct lobbying.

### 2. Defined exclusions from lobbying

The law describes which expenditures for activities related to public policy and legislative issues are *not* considered lobbying. These include:

- Communications to members of the organization that discuss legislation but do not urge action by the members.
- Providing results of analysis or research on a legislative issue with a full and fair exposition of the pertinent facts to enable the audience to form an independent opinion. This applies even to research that takes a direct position on the merits of legislation, but which presents the facts fully and fairly and does not urge the reader to contact legislators.
- Responding to written requests from a legislative committee or subcommittee for technical advice on pending legislation.
- "Self-defense" lobbying on issues that might affect the organization's own existence or exempt status, for example.
- Discussion of broad social, economic and similar policy issues whose resolution would require legislation, so long as there is no discussion of specific legislative measures.

## ADVOCACY BY ARTS ORGANIZATIONS: TAX LAW AND LOBBYING

Under the rules defining lobbying activities, a charity can make any public statement it likes on a legislative issue—so long as it does not call for the public to act—without the costs counting against its limit for grassroots lobbying.

### 3. Flexible sanctions

The law includes a system of sanctions more flexible than the tax law before 1976, to replace the "death sentence" of loss of exemption as the only sanction for violating the substantiality test. The initial sanction for spending above the overall or grassroots limits is a 25 percent excise tax on the lobbying spent in any year above the ceiling. Loss of exemption is imposed only if spending exceeds 150 percent of either the grassroots or total lobbying limit aggregated over a four-year period.

### 4. Clear financial standards

The previous law was unclear about what activity counts against the substantiality standard, but under section 501 (h) the only factor that must be taken into account is the cost of communications for direct and grassroots lobbying, including the cost of preparing the communication, such as staff time, facilities and allocable overhead.

### 5. Little additional accounting

All section 501 (c) (3) organizations, if they have elected 501 (h) or not, must report the total amount of their lobbying expenditures on IRS Form 990. Organizations electing under 501 (h) will be able to omit the detailed descriptions of lobbying activities from their tax returns. The only additional requirement for electing organizations is that they break down the expenditures into direct and grassroots lobbying activities. Both classes of organizations must maintain records to support the entries on the tax return.

### 6. Managers' liability removed

For organizations not electing, there is a tax on managers "who willfully and unreasonably agree to lobbying expenditures knowing they are likely to cause loss of exemptions." This rule does not apply to organizations under section 501 (h).

Congress enacted legislation in 1976 making it possible for charities to lobby freely for their causes, and for the communities and individuals they serve.

Organizations that elect to come under section 501 (h) of the IRS code need to file IRS Form 5786, which identifies the organization and indicates that its governing body has elected to come under the provisions of the 1976 law.

### **some questions about 501(h) status**

#### **Does 501(h) status provide a nonprofit organization with more leeway to spend on lobbying activities?**

Yes. The law establishes a specific dollar ceiling based on a percentage of the organization's overall budget (higher than the vague percentage used under the old substantiality test) with clear definitions for deciding whether an activity that could affect public policy is lobbying. The new rules are relatively generous in their percentage and specific in their definitions, relieving an organization from the ambiguity of the old situation.

#### **Does electing 501(h) status negatively affect the ability of a charity to receive grants?**

No. In fact, the IRS regulations specifically allow a private foundation to make a general purpose grant to an electing organization without any liability. Additionally, a private foundation may make a grant to support a specific project that includes lobbying so long as the grant is less than the amount budgeted for the nonlobbying parts of the project.

#### **Does electing put an organization on an IRS "advocacy hit list"?**

No. Electing to come under the 1976 lobby law does not increase the chances of being audited by the IRS. The IRS indicates no connection between electing 501(h) and becoming subject to an audit on account of lobbying activities. To the contrary, IRS auditors anticipate that questions about lobbying expenditures are more likely to arise on an audit in the case of organizations that have not elected.

#### **Does electing 501(h) change an organization's status from that of a 501(c)(3)?**

No. The election is a subcategory. Electing organizations retain their 501(c)(3) status and identity.

#### **Will agencies of state government be prohibited from paying dues to an organization that has made the 501(h) election?**

No. The extent of an organization's lobbying and advocacy activities does not change because of the election. The 501(h) designation is one that exists for purposes of accounting between the IRS and the 501(c)(3) organization.

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