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Taking the 501(h) election

The Powerful, Free, and Easy 501(h) Election

Federal tax laws already allow every charitable nonprofit to engage in *some* legislative lobbying activities. There are spending limits and technicalities that curb nonprofits from spending all of their time and money engaged in legislative lobbying, but knowing your rights ensures your organization's participation in the public policy process. The language Congress put in the Internal Revenue Code in 1934, rather than imposing an absolute ban on all lobbying by charitable nonprofits, instead sets a limit, providing that, "no substantial part of the activities" may be for "carrying on propaganda, or otherwise attempting, to influence legislation." *Source* : [26 US Code, Section 501 \(c\)\(3\)](#). Thus, while many people do not realize it, all charitable nonprofits may freely engage in legislative lobbying *as long as* that activity amounts to only an "*insubstantial*" amount of the nonprofit's activities.

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What is “insubstantial?”

Here's the rub. The definition of “insubstantial” has not been provided by Congress or the IRS, and the line between an “insubstantial” and a “substantial” amount of legislative lobbying activities is hazy at best, especially because it depends on how the IRS retroactively weighs the “facts and circumstances” of each situation. Therefore, to avoid the uncertainty of a nonprofit's lobbying activity being measured with this subjective test, charitable nonprofits should consider filing a short form with a long name: IRS [Form 5768 \(Election/Revocation of Election by an Eligible Section 501\(c\)\(3\) Organization to Make Expenditures to Influence Legislation\)](#). Filing the form (also known as “taking the 501(h) election”) allows nonprofits to elect to be measured by the objective “**expenditure test**” instead. Importantly, a 501(c)(3) charitable nonprofit taking the 501(h) election remains a 501(c)(3) charitable nonprofit. The (h) election simply allows that nonprofit to opt out of the vague “substantial” activity test and use the friendlier expenditure test.

The expenditure test has great advantages over the more uncertain “substantial part” test. Indeed, in the opinion of informed attorneys and accountants, filing the 501(h) election is, for the vast majority of nonprofits, the easiest, most effective “insurance” a nonprofit can secure to protect itself from overstepping IRS limitations on lobbying activities.

- Read what the IRS says about [nonprofits and lobbying](#)
- Read [the law \(US Code\) about the 501\(h\) election](#)
- Review all the practical [benefits of filing the 501\(h\) election](#)

That’s not to say that every nonprofit should automatically take the 501(h) election. Very large nonprofits with large budgets dedicated to direct lobbying activities may either be ineligible to file the 501(h) election (such as those that spend more than \$250,000 in grass roots lobbying) or may find it advantageous to follow the substantial part test – but it is riskier.

How easy is it?

Simply by submitting IRS [Form 5768](#), a nonprofit sets lobbying expenditure ceilings using a sliding scale based on a nonprofit’s annual exempt purpose expenditures. Separate ceiling limits are calculated for overall total lobbying as well as for grass

roots lobbying.

How safe is it?

As the IRS website points out: “Under the expenditure test, the extent of an organization’s lobbying activity will not jeopardize its tax-exempt status, provided its expenditures, related to such activity, do not normally exceed an amount specified in section 4911. This limit is generally based upon the size of the organization and may not exceed \$1,000,000, as indicated in the table below.”

If the amount of exempt purpose expenditures is:

≤ \$500,000

>\$500,00 but ≤ \$1,000,000

> \$1,000,000 but ≤ \$1,500,000

>\$1,500,000

Lobbying nontaxable amount is:

20% of the exempt purpose expenditures

\$100,000 plus 15% of the excess of exempt purpose expenditures over \$500,000

\$175,000 plus 10% of the excess of exempt purpose expenditures over \$1,000,000

\$225,000 plus 5% of the exempt purpose expenditures over \$1,500,000

Source: [IRS Website](#)

When should we file?

Organizations electing to file the 501(h) election must submit [Form 5768](#) at any time during the tax year for which it is to be effective. The election remains in effect for succeeding years unless it is revoked by the organization. Revocation of the election is effective beginning with the year following the year in which the revocation is filed.

What if we spend more money on lobbying than we are allowed?

Under the expenditure test, an organization that engages in excessive lobbying activity over a four-year period may lose its tax-exempt status, making all of its income for that period subject to tax. Should the organization exceed its lobbying

expenditure dollar limit in a particular year, it must pay an excise tax equal to 25 percent of the excess.

Source: [IRS website](#).

Note: The 501(h) election is not for every nonprofit.

Private foundations, churches, and integrated auxiliaries of churches are not permitted to file the 501(h) election.

Caution when using certain funds for lobbying. Also nonprofits that receive federal funds may not use those funds (whether received by the nonprofit as a result of a "contract" or "grant") to attempt to influence any federal or state legislation, through direct or grass roots lobbying campaigns. See Federal Acquisition Regulations (FAR), 48 C.F.R. §§ 31.205-22; 31-701 *et seq.*

Read more: [Benefits of Filing the 501\(h\) Election](#)