

# advocacy resource

## **BEING A PLAYER**

A Guide to the IRS Lobbying Regulations  
for Advocacy Charities

Gail M. Harmon  
Jessica A. Ladd  
Eleanor A. Evans

Harmon, Curran,  
Spielberg & Eisenberg, LLP



**ALLIANCE<sup>FOR</sup>JUSTICE**



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A Guide to the IRS Lobbying Regulations  
for Advocacy Charities

A Publication by Alliance for Justice

Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street, NW, Suite 600  
Washington, D.C. 20036  
(202) 328-3500

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# Preface

Nonprofits have visions for achieving real, sustainable, and systemic change. We develop policies and programs for social justice, human rights, and a better world for us all. But none of our visions and none of our plans can become reality unless we become forceful and effective advocates.

Advocacy enfranchises and empowers individuals and sparks public debate and progress on the most important issues faced by our society. Advocacy connects policymakers with the ideas that will move our country forward.

Unfortunately, many people—including elected officials, the media, and even nonprofit staff and directors—think that it's inappropriate or even illegal for tax-exempt organizations to engage in advocacy and participate in the policymaking process. This is simply not true.

*Being a Player* is designed to encourage public charities to participate in improving and initiating government programs and policies. One of the most effective ways to bring about policy change is by lobbying.

This guide explains the Internal Revenue Service regulations on lobbying by public charities— an activity that Congress has declared to be an appropriate and legitimate activity for charitable organizations. *Being a Player* defines lobbying, outlines the extent of permissible lobbying, offers guidance on recordkeeping, and much more.

*Being a Player* was prepared by Gail Harmon, Jessica Ladd, and Eleanor Evans of the Washington, DC law firm of Harmon, Curran, Spielberg & Eisenberg. Alliance for Justice staff updated the guide in 2011.

## **About Alliance for Justice**

Alliance for Justice is a national association of more than 100 organizations dedicated to advancing justice and democracy. For over 30 years we have been leaders in the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil and women's rights, children's, senior citizens' and other groups. Alliance for Justice is premised on the belief that all Americans have the right to secure justice in the courts and to have our voice heard when government makes decisions that affect our lives.

Alliance for Justice is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process. AFJ is based in Washington, D.C., with a satellite office in Oakland, California. Additional information can be found at [www.afj.org](http://www.afj.org).

Nan Aron

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# Introduction

This Guide has been created to help advocacy-oriented charities understand and use the Treasury Department regulations regarding lobbying activities by public charities. Although many charities may not be aware of it, charities are clearly entitled to engage in lobbying activities. Congress reaffirmed this right when it enacted the 1976 legislation that is the basis for the regulations discussed in this Guide. Sections of the Guide explain the basic law on lobbying activity, how to determine your organization's lobbying expenditure limits and, most importantly, how to determine when you are lobbying and when you are not.

**These regulations are effective for tax years beginning after August 31, 1990.**

Although the Guide directly addresses the law on this topic, it is *not* intended as legal advice. Rather, it is our hope that the Guide will provide you with enough information and clarification to help you navigate the regulations' varied provisions as they apply to the day-to-day management of a public charity (the Guide uses the terms "501(c)(3) organization" and "public charity" interchangeably). In order to use this Guide successfully, you should read the *entire* booklet to gain a full understanding of the regulations. Ultimately, we hope that this knowledge will enable you to make informed choices as you structure your lobbying activities, to be aware of potential legal questions and problems associated with these activities, and to know when to consult legal counsel should such questions and problems arise.

**These regulations are effective for tax years beginning after August 31, 1990.**

In addition, we hope that the Guide will be useful to both public charities and private foundations. For public charities, the only type of exempt organization eligible to elect to follow the expenditure test, the Guide explains the lobbying limits and which expenses count as lobbying. For private foundations, which are prohibited from lobbying or making grants earmarked for lobbying purposes, the Guide explains how to determine whether advocacy activities count as lobbying and how to make grants to charities which lobby.

Public charities and private foundations are both types of 501(c)(3) organizations. However, while public charities are supported by a variety of financial sources, private foundations are generally funded from a single source (usually an individual, a family or a corporation). In addition, private foundations usually receive continuing funding from investment income, rather than contributions, and generally make grants to other organizations for charitable purposes instead of conducting their own programs. Congress believes that the fact that private foundations are funded by a single source creates potential for abuse; therefore private foundations are subject to more stringent rules (including additional penalties and restrictions on their lobbying activities) than are public charities.

## **A Word About the Examples Used in this Guide**

In order for the examples used in the Guide to build logically upon each other, we have created the fictional Dragon Lovers' Association for Research and Education, Inc., or DARE for short. You will need to know the following background information about DARE:

DARE is a charitable and educational organization tax-exempt under section 501(c)(3) of the Internal Revenue Code and has a fiscal year that coincides with the calendar year. DARE strives to educate members of the general public regarding the endangered North American Dragon and, ultimately, to protect the dragon from extinction. Among its various activities, DARE researches the dragon and makes research results available to the public through lectures, discussion groups and publications. DARE also publishes the DARE Quarterly magazine, and operates the Adopt-A-Dragon program to raise funds and help ensure protection of individual members of the species. Most importantly, DARE engages in lobbying activities aimed at protecting the dragon and its habitat and, therefore, has elected to be subject to the section 501(h) expenditure test as it is described in later sections of this Guide.

**By providing legal support to nonprofits to participate in the political process, Alliance for Justice seeks to enhance their participation in public policy debates.**

# I. Background Law on Lobbying Limits and Public Charities

## A. Standards to Measure Lobbying by Public Charities

The Internal Revenue Code limits the amount of lobbying activities in which section 501(c)(3) public charities may engage. Charities may choose one of two standards by which their compliance will be measured. One standard, known as the “**insubstantial part test**,” requires that “no substantial part of a charity’s activities...be carrying on propaganda or otherwise attempting to influence legislation.” If charities exceed this vague standard, they risk losing their exemptions altogether. Furthermore, when the IRS examines the lobbying activities of non-electing charities, it does not limit itself to determining the amounts spent for lobbying but instead will examine a host of “softer” factors such as the organization’s goals and success in achieving them as well as the amount of time and energy devoted to legislative matters by the charity’s board and volunteers, regardless of cost.

The other standard, known as the “**section 501(h) expenditure test**,” sets specific dollar limits, calculated as a percentage of a charity’s total exempt purpose expenditures (*i.e.*, 20 percent of the first \$500,000...), on the amount public charities electing to follow this method may spend to influence legislation without incurring penalty taxes or losing their exempt status. Congress enacted sections 501(h) and 4911 in 1976 to provide the option of an objective standard rather than the vague insubstantial part test. Unlike the insubstantial part test, the expenditure test imposes no limit on lobbying activities that do not require expenditures, such as unreimbursed lobbying activities conducted by *bona fide* volunteers. A charity wishing to be subject to the expenditure test must take the affirmative step of filing an election; charities that do not file an election are subject to the insubstantial part standard.

**If charities exceed the vague, insubstantial part standard, they risk losing their exemptions altogether.**

## B. To Elect or Not to Elect?

Federal regulations define and clarify the application of the expenditure test to electing public charities. For a variety of reasons, many public charities will now find it more advantageous to elect rather than to be governed by the vaguer provisions of the insubstantial part standard.

### Ability to Plan

The regulations contain a wealth of planning information, so if you are an electing public charity, you will find it easier to determine the amount you are allowed to spend on lobbying and how to spend this money wisely. In particular, the definitions of various kinds of lobbying communications enable you to control whether you are lobbying or not by structuring particular communications to fall inside or outside the definitions, as you wish. Although one might argue that these definitions should apply to non-electing charities as well as to electing charities, the IRS has issued no authoritative guidance on this point. Therefore, organizations subject to the insubstantial part standard should use caution in relying on the new definitions for planning purposes.

### Larger Limits

Although some very large organizations may benefit from the insubstantial part test, it is generally thought that most organizations will have higher lobbying limits under the expenditure test (only organizations with exempt purpose expenditures in excess of \$17 million will reach the \$1 million ceiling). Not only does the expenditure test’s percentage calculation generally allow charities higher dollar limits than does the insubstantial part test, but fewer items count toward the exhaustion of those limits. While the limits of electing organizations are determined purely on the basis of lobbying expenditures, the insubstantial part standard for nonelecting charities applies to all “activities” regardless of whether

**The regulations contain a wealth of planning information, so if you are an electing public charity, you will find it easier to determine the amount you are allowed to spend on lobbying and how to spend it wisely.**

they generate any expenditures or not. In practical terms, this means that an organization governed by the insubstantial part test could spend practically no money on lobbying but still surpass its lobbying limit if it had substantial volunteer lobbying activities.

### **Less Likely to Lose Exemption**

In addition, electing organizations probably have less chance of losing their tax exemption than do their nonelecting counterparts. This is because the IRS considers the electing organization's lobbying and grass roots expenditures as a moving average over a four-year period and can revoke the organization's exemption only if it exceeds either limit by 50 percent. In contrast, the nonelecting group could lose its exemption on the basis of substantial lobbying within a single tax year.

### **No Personal Penalty Taxes**

Even where an electing organization exceeds its lobbying expenditure limits and must pay the applicable penalty taxes for the excess, only the organization is liable. In a non-electing organization, however, individual managers may be held personally liable for the penalty taxes if their actions may be characterized as willful or not due to reasonable cause.

### **Myth Versus Fact**

#### *Audit Risk*

Contrary to popular belief, the IRS has publicly stated that there is no increased risk of an IRS audit if an organization files an election. In fact, a recent addition to the IRS agents' manual expresses the belief that it is *nonelecting* organizations that are most likely to have exceeded their lobbying limits.

#### *Extra Record-Keeping*

Moreover, filing an election may actually reduce the record-keeping obligations on a public charity. All public charities with receipts greater than \$25,000 per year are already required to file a Form 990 and Schedule C (organizations with receipts less than \$25,000 per year must file Form 990-N).

Part VI-B of the Form 990's Schedule C requires lobbying nonelecting organizations to list their lobbying expenditures in each of the following categories: paid staff; advertisements; mailings to members, legislators or the public; grants to other organizations for lobbying purposes; direct contact with legislators, their staffs, government officials, or legislative bodies; and rallies, demonstrations, seminars, conventions, speeches, and lectures. In addition, such organizations must attach a detailed description of lobbying activities, including the use of volunteers.

#### *Other Restrictions*

Even though federal and some local laws prohibit charities from using government funds for lobbying activities (*e.g.*, rules in OMB Circular A-122), charities are entitled to use other funds for lobbying activities. Similarly, rules requiring registration of lobbyists and reporting of lobbying activities should not deter charities from exercising their legal right to lobby.

#### *Reversible Decision*

Finally, if you are not already convinced of the desirability of electing the expenditure test, you should be aware that the election is reversible for future years. It may be voluntarily revoked at any time in essentially the same manner as it was originally filed.

## Final Word of Caution

Despite the relative advantages of electing for most organizations, there is still a small group of lobbying organizations that may be better off with the vaguer insubstantial part standard instead of the expenditures calculation. For instance, universities, hospitals and large human services organizations which may combine large budgets and small lobbying agendas may want to avoid electing. In addition, the special rules governing “affiliated” organizations will complicate the decision as to whether to elect. Note, however, that for some organizations, the best approach may be to “un-affiliate” rather than to be subject to the insubstantial part test. Those organizations with exempt purpose expenditures greater than \$17 million per year will be limited to a \$1 million cap on lobbying expenditures under the expenditure test but might be allowed to do more lobbying under the insubstantial part test. Finally, some organizations whose lobbying is mostly or exclusively “grass roots lobbying” (a term defined in Part II of this book) may be able to engage in more grass roots lobbying under the insubstantial part standard than under the expenditure standard.

**Contrary to popular belief the IRS has publicly stated that there is no increased risk of an IRS audit if an organization files an election.**

## C. How to Elect

Once your organization has decided to elect to be governed by the expenditure test, you must file a Form 5768, “Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation” (reproduced in the margin and in Appendix B). The organization simply supplies its name, address, and the first tax year to which it wants the election to apply and then has the form signed by an authorized officer, usually the president or treasurer. Generally, the election will apply to the designated year and to all subsequent tax years (until such time as the election is revoked). Revocation of election is made by filing another Form 5768, but it becomes effective only prospectively, unlike the original election which is retroactive to the beginning of the tax year in which it is filed. An organization may then re-elect if it wants to, but the re-election cannot become effective until at least one tax year after the year in which a voluntary revocation is filed.

*Example:*

DARE, which uses the calendar year as its fiscal year, files an election on July 31, 2010 designating 2010 as the first taxable year to which the election should apply. The election is effective for the tax year beginning January 1, 2010, even though it was filed at a later date. If DARE decides in 2011 that it would be better off with the insubstantial part test instead and files a revocation of election on July 31, 2011, the revocation would not become effective until January 1, 2012. Finally, if DARE changes its decision again in early 2012 and wants to re-elect, it may file a new election during 2012, but the new election would not apply until tax year 2013.

## D. Effect of Electing

Assuming that you have decided to file an election, your organization will be subject to two lobbying expenditure limits. The first restricts the total amount of lobbying expenditures an electing public charity may make, and the second controls a subset of those expenditures, known as “grass roots” lobbying expenditures. Reflecting these two expenditure

SCHEDULE C (Form 990 or 990-EZ)		Political Campaign and Lobbying Activities		OMB No. 1545-0047
Department of the Treasury Internal Revenue Service		For Organizations Exempt From Income Tax Under section 501(c) and section 527		2010 Open to Public Inspection
<p>► Complete if the organization is described below. ► Attach to Form 990 or Form 990-EZ. ► See separate instructions.</p> <p>If the organization answered “Yes,” to Form 990, Part IV, line 3, or Form 990-EZ, Part V, line 46 (Political Campaign Activities), then</p> <ul style="list-style-type: none"> <li>Section 501(c)(3) organizations: Complete Parts I-A and B. Do not complete Part I-C.</li> <li>Section 501(c) (other than section 501(c)(3)) organizations: Complete Parts I-A and C below. Do not complete Part I-B.</li> <li>Section 527 organizations: Complete Part I-A only.</li> </ul> <p>If the organization answered “Yes,” to Form 990, Part IV, line 4, or Form 990-EZ, Part VI, line 47 (Lobbying Activities), then</p> <ul style="list-style-type: none"> <li>Section 501(c)(3) organizations that have filed Form 5768 (election under section 501(h)): Complete Part II-A. Do not complete Part II-B.</li> <li>Section 501(c)(3) organizations that have NOT filed Form 5768 (election under section 501(h)): Complete Part II-B. Do not complete Part II-A.</li> </ul> <p>If the organization answered “Yes,” to Form 990, Part IV, line 5 (Proxy Tax) or Form 990-EZ, Part V, line 35a (Proxy Tax), then</p> <ul style="list-style-type: none"> <li>Section 501(c)(4), (5), or (6) organizations: Complete Part III.</li> </ul>				
Name of organization		Employer identification number		
<b>Part I-A Complete if the organization is exempt under section 501(c) or is a section 527 organization.</b>				
1 Provide a description of the organization's direct and indirect political campaign activities in Part IV.				
2 Political expenditures . . . . . \$				
3 Volunteer hours . . . . .				
<b>Part I-B Complete if the organization is exempt under section 501(c)(3).</b>				
1 Enter the amount of any excise tax incurred by the organization under section 4955 . . . . . \$				
2 Enter the amount of any excise tax incurred by organization managers under section 4955 . . . . . \$				
3 If the organization incurred a section 4955 tax, did it file Form 4720 for this year? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No				
4a Was a correction made? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No				
b If “Yes,” describe in Part IV.				
<b>Part I-C Complete if the organization is exempt under section 501(c), except section 501(c)(3).</b>				
1 Enter the amount directly expended by the filing organization for section 527 exempt function activities . . . . . \$				
2 Enter the amount of the filing organization's funds contributed to other organizations for section 527 exempt function activities . . . . . \$				
3 Total exempt function expenditures. Add lines 1 and 2. Enter here and on Form 1120-POL, line 17b . . . . . \$				
4 Did the filing organization file Form 1120-POL for this year? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No				
5 Enter the names, addresses and employer identification number (EIN) of all section 527 political organizations to which the filing organization made payments. For each organization listed, enter the amount paid from the filing organization's funds. Also enter the amount of political contributions received that were promptly and directly delivered to a separate political organization, such as a separate segregated fund or a political action committee (PAC). If additional space is needed, provide information in Part IV				
(a) Name	(b) Address	(c) EIN	(d) Amount paid from filing organization's funds. If none, enter -0-	(e) Amount of political contributions received and promptly and directly delivered to a separate political organization. If none, enter -0-
(1)				
(2)				
(3)				
(4)				
(5)				
(6)				

limits, attempts to influence legislation are divided into two categories: “direct lobbying communications” and “grass roots lobbying communications.”

### How to Calculate Your Expenditure Limits

The first step in determining dollar figures for your lobbying expenditure limits is to calculate what your organization’s “**exempt purpose expenditures**” are for the year in question. Broadly defined, exempt purpose expenditures include all the amounts your organization pays or incurs in furtherance of its exempt purposes, including expenditures for lobbying, depreciation and amortization on its assets, controlled grants (i.e., pursuant to an agreement that the grant money may only be used for certain non-lobbying purposes), and costs of most in-house fund-raising that is not conducted by a separate fund-raising unit. Exempt purpose expenditures do not include: payments of tax on unrelated business income; expenses associated with attempts to produce unrelated business income; capital account expenses such as amounts paid out for new buildings or permanent improvements to increase the value of any property or real estate; and expenses for a separate fund-raising unit (generally, two or more individuals, the majority of whose time is spent on fund-raising) or an outside fund-raising consultant. Once you have determined a figure for your exempt purpose expenditures, you simply apply the following formulae to them to yield the two lobbying expenditure limits:

**In calculating your lobbying limits, note that the grass roots limit is one quarter of the total limit, regardless of how much your organization actually spends on direct lobbying.**

- A. Total Lobbying Expenditures Limit =
  - 20% of the first \$500,000 of exempt purpose expenditures +
  - 15% of the next \$500,000 of exempt purpose expenditures +
  - 10% of the third \$500,000 of exempt purpose expenditures +
  - 5% of the remaining exempt purpose expenditures.

In no case may the total lobbying expenditures limit be greater than \$1 million.

- B. Grass Roots Lobbying Expenditures Limit = 25% of A

In calculating your specific lobbying limits, note that the grass roots limit is one quarter of the total lobbying limit, regardless of how much your organization actually spends on direct lobbying. So, if an organization’s total limit is \$100,000, its grass roots limit is \$25,000, even if the organization spends no money at all on direct lobbying. A chart calculating lobbying expenditure limits for various levels of exempt purposes expenditures is located in Appendix C.

#### Example:

Suppose that DARE has no separate fund-raising unit. DARE’s 2010 expenditures are as follows:

**Form 5768** Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation (Under Section 501(h) of the Internal Revenue Code)

For IRS Use Only

Name of organization: \_\_\_\_\_ Employer identification number: \_\_\_\_\_

Number and street (or P.O. box no., if mail is not delivered to street address): \_\_\_\_\_ Room/suite: \_\_\_\_\_

City, town, or post office, and state: \_\_\_\_\_ ZIP + 4: \_\_\_\_\_

**1 Election**—As an eligible organization, we hereby elect to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending \_\_\_\_\_ and all subsequent tax years until revoked. (Month, day, and year)

**Note:** This election must be signed and postmarked within the first taxable year to which it applies.

**2 Revocation**—As an eligible organization, we hereby revoke our election to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending \_\_\_\_\_. (Month, day, and year)

**Note:** This revocation must be signed and postmarked before the first day of the tax year to which it applies.

Under penalties of perjury, I declare that I am authorized to make this (check applicable box)  election  revocation on behalf of the above named organization.

(Signature of officer or trustee) \_\_\_\_\_ (Type or print name and title) \_\_\_\_\_ (Date) \_\_\_\_\_

**General Instructions**

Section references are to the Internal Revenue Code.

Section 501(c)(3) states that an organization exempt under that section will lose its tax-exempt status and its qualification to receive deductible charitable contributions if a substantial part of its activities are carried on to influence legislation. Section 501(h), however, permits certain eligible section 501(c)(3) organizations to elect to make limited expenditures to influence legislation. An organization making the election will, however, be subject to an excise tax under section 4911 if it spends more than the amounts permitted by that section. Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period. For any tax year in which an election under section 501(h) is in effect, an electing organization must report the actual and permitted amounts of its lobbying expenditures and grass roots expenditures (as defined in section 4911(c)) on its annual return required under section 6033. See Part II-A of Schedule C (Form 990 or Form 990-EZ). Each electing member of an affiliated group must report these amounts for both itself and the affiliated group as a whole.

To make or revoke the election, enter the ending date of the tax year to which the election or revocation applies in item 1 or 2, as applicable, and sign and date the form in the spaces provided.

**Eligible organizations.** A section 501(c)(3) organization is permitted to make the election if it is not a disqualified organization (see below) and is described in:

- Section 170(b)(1)(A)(i) (relating to educational institutions),
- Section 170(b)(1)(A)(ii) (relating to hospitals and medical research organizations),
- Section 170(b)(1)(A)(v) (relating to organizations supporting government schools),
- Section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),
- Section 505(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or
- Section 505(a)(3) (relating to organizations supporting certain types of public charities other than those section 509(a)(3) organizations that support section 501(c)(4), (5), or (6) organizations).

**Disqualified organizations.** The following types of organizations are not permitted to make the election:

- Section 170(b)(1)(A)(i) organizations (relating to churches),
- An integrated auxiliary of a church or of a convention or association of churches, or
- A member of an affiliated group of organizations if one or more members of such group is described in a or b of this paragraph.

**Affiliated organizations.** Organizations are members of an affiliated group of organizations only if (1) the governing instrument of one such organization requires it to be bound by the decisions of the other organization on legislative issues, or (2) the governing board of one such organization includes persons (i) who are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and (ii) who, by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.

For more details, see section 4911 and section 501(h).

**Note.** A private foundation (including a private operating foundation) is not an eligible organization.

**Where to file.** Mail Form 5768 to the Department of the Treasury, Internal Revenue Service Center, Ogden, UT 84201-0027.

<b>DARE's 2010 Expenditures</b>	
Research Activities:	\$270,000*
Educational Programs:	\$210,000*
Controlled Grants for Exempt Purposes:	\$ 30,000*
Lobbying Activities:	\$122,000*
DARE Quarterly:	
generating advertising:	\$ 6,000
UBIT: <sup>1</sup>	\$ 4,000
all other expenses:	\$ 17,000*
Adopt-A-Dragon Program:	\$ 10,000*
In-House Fund-Raising Expenses:	\$ 5,000*
Outside Fund-Raising Consultant:	\$ 3,000
Overhead Allocable to EPE: <sup>2</sup>	\$120,000*
Non-EPE Overhead:	\$ 30,000
TOTAL EXPENDITURES	\$827,000
TOTAL EPE: <sup>3</sup>	\$784,000
<p><sup>1</sup> Unrelated Business Income Tax.</p> <p><sup>2</sup> Exempt Purpose Expenditures. Note that you must allocate a reasonable portion of overhead expenses to correspond to your other nonexempt purpose expenditures.</p> <p><sup>3</sup> Exempt purpose expenditures are marked with an asterisk (*); all other expenditures are nonexempt purpose expenditures.</p>	
<p><b>Calculations to determine DARE's lobbying limits:</b></p> <p>Given the above figures, DARE would have a total lobbying limit of :</p> <p>20% of 500,000 + 15% of 284,000 = \$142,600</p> <p>and a grass roots lobbying limit of : 25% of 142,600 = \$35,650.</p>	

### What Happens If You Exceed Your Limits?

If an electing charity exceeds its expenditure limits for any given year, it will be required to pay an excise tax of one quarter of the excess expenditures. If the charity exceeds *both* its total lobbying expenditures limit and its grass roots lobbying expenditures limit, it will be required to pay one quarter of whichever excess amount is greater.

*Example:*

Taking DARE's lobbying limits as calculated in the last section, suppose that DARE spends \$173,000 on lobbying expenses in 2010, \$30,000 of which are expenses for grass roots lobbying. Then DARE owes 25 percent of \$30,400 (the excess), or \$7,600, in excise taxes.

### Planning Tip

In order to monitor your organization's lobbying expenditures adequately, you should examine your proposed budget at the beginning of each taxable year, analyze your budgeted expenses to determine your projected exempt purpose expenditures, and then apply the limits calculations to arrive at projected dollar limits for your lobbying expenditures. Based on your projected expenditures and limits, you should then keep accurate records regarding your actual exempt purpose and lobbying expenditures, and periodically compare those figures to your projections for the year. If you keep records in this manner, you will be able to make adjustments to your projections as the year progresses and thereby avoid any unforeseen excesses and consequent taxes at year's end.

A charity that violates the expenditure limits *only* risks losing its exemption if it exceeds either lobbying limit (total or gross roots) by more than 50 percent, generally calculated using a four-year moving average. Charities whose exemptions are revoked are also subject to the excise tax on their excess lobbying expenditures.

#### Example:

The following chart illustrates a calculation of the excise tax and provides information needed to determine the four-year average as applied to DARE's lobbying activities between 2007 and 2010. For purposes of this example, assume that DARE's first taxable year as a 501(c)(3) occurred in 1980 and that DARE had *no* gross roots lobbying activities between 2007 and 2010.

DARE Four-Year Moving Average 2007–2010				
Year <sup>1</sup>	Actual EPE	Total Lobbying Limit <sup>2</sup>	Actual Lobbying Expenses	Excise Tax Due
2007	\$700,000	\$130,000 [A]	\$170,000 [E]	25% x [E-A] = \$10,000
2008	\$500,000	\$100,000 [B]	\$120,000 [F]	25% x [F-B] = \$5,000
2009	\$800,000	\$145,000 [C]	\$150,000 [G]	25% x [G-C] = \$1,250
2010	\$750,000	\$137,500 [D]	\$100,000 [H]	H < D therefore, no tax due

<sup>1</sup> The moving average calculation is applied by analyzing figures for any taxable year in which the expenditure test is in effect (the "determination year") and the three preceding years ("base years"), provided that the organization's first taxable year as a 501(c)(3) does not count as either a determination or a base year.

<sup>2</sup> Termed the "Lobbying Nontaxable Amount."

### Calculations to determine if exempt status is jeopardized:

150% of Total 4-Year Limit = 150% of [A+B+C+D] = \$768,750

Total Lobbying Expenses for 4 Years = E+F+G+H = \$540,000

Total Actual Expenses < 150% Total Limits (\$540,000 < \$768,750), therefore, no loss of exemption.

**Planning Tip**

Just as yearly budgeting and monitoring of lobbying expenditures can help you to avoid excessive lobbying expenditures and the resulting excise tax, the four-year moving average enables you to budget and monitor your lobbying activities from year to year. In addition, you can use the average to correct excesses in past years by budgeting less lobbying in the future.

## II. Legislation and Lobbying: Basic Rules and Exceptions

In general, lobbying consists of communications that are intended to influence specific legislation. Therefore, it is important to develop an understanding of what constitutes legislation before approaching the question of what is and what is not lobbying.

### A. What Is Legislation?

The regulations define legislation as action by a legislative body, including the “introduction, amendment, enactment, defeat or repeal of Acts, bills, resolutions, or similar items.” Legislation includes actions by Congress, a state legislature, a similar local legislative body, or any actions by the general public in a referendum question, initiative petition, or proposed constitutional amendment. In addition, the regulations include Senate confirmation of executive and judicial branch nominees and proposed treaties requiring Senate approval (from the time that the President’s representative begins to negotiate its position with respect to the parties to that proposed treaty) as legislation.

**In general, lobbying consists of communications that are intended to influence specific legislation.**

Judicial, executive and administrative bodies (which include special purpose bodies like school and zoning boards) are *not* legislative bodies. Consequently, a charity will generally not engage in lobbying communications if it urges an executive or administrative body to do something.

*Examples:*

DARE *would* be acting with regard to specific legislation if it:

1. contacted members of Congress in support of full appropriations for the Interior Department’s Dragon Conservation Fund; or
2. communicated with state legislators in favor of a bill that would restrict the development of coastal wetlands throughout the state.

NOTE: While DARE in the two examples above is acting with regard to specific legislation, further application of the regulations is necessary to determine whether DARE is engaging in lobbying (*see* “What is Lobbying?” p. 12).

However, DARE *would not* be acting with regard to specific legislation if it:

1. wrote to President Bush urging him to issue an executive order directing customs officials to seize contraband dragon products at the border; or
2. urged a local zoning board to prohibit commercial zoning of coastal wetlands, the dragon’s natural habitat.

The regulations further define the term “**specific legislation**” as *both* legislation that has been introduced in a legislative body and a specific legislative proposal a charity supports or opposes. In situations where the general public acts as the legislature (i.e., referendum, ballot initiative and constitutional amendment procedures), a proposal becomes specific legislation as soon as the first petition is circulated among voters in order to gather the signatures necessary to put the measure on the ballot.

*Examples:*

- 1) A bill, such as H.R. 1234, “The Dragon Protection Act of 2010,” is an example of legislation that has already been introduced.

- 2) California enacts the “California Save the Dragon Act,” a comprehensive series of measures designed to preserve the natural habitat of the dragon. If DARE urges the Florida legislature to pass a similar bill, DARE has referred to specific legislation.

## B. What is Lobbying?

The regulations divide lobbying communications into two kinds—direct and grass roots.

### Direct Lobbying

A **direct lobbying communication** is one which is made to either: a legislator; an employee of a legislative body; or any other government employee who may participate in the formulation of the legislation (but only if the principal purpose of the communication is to influence legislation); and

- refers to a specific piece of legislation;
- and expresses a view on that legislation.

A description of a bill may be sufficient to refer to specific legislation, regardless of whether the description includes the bill’s name or number.

It is also considered direct lobbying when an organization asks its members to contact legislators in support of or in opposition to legislation. In addition, attempts to influence the public on referenda and ballot initiatives are also considered direct lobbying.

*Examples:*

The following communications would be considered *direct* lobbying:

- 1) a meeting between DARE’s legislative director and a Congresswoman’s staff member in which the legislative director makes clear DARE’s support for the Dragon Protection Act (H.R.1234);
- 2) a letter from DARE to its members asking them to contact their legislators in support of H.R. 1234 (see “Membership Communications,” p. 21); and
- 3) a television advertisement urging citizens to vote in favor of an initiative on the state ballot to create a “Dragon Awareness Day.”

However, it is *not* lobbying under the regulations if:

- 4) DARE’s legislative director asks a Congresswoman to urge the Fish and Wildlife Service to add the North American Dragon to the endangered species list.

### Grass Roots Lobbying

A grass roots **lobbying communication** is an attempt to influence specific legislation by encouraging the public to contact legislators about that legislation. In order to constitute grass roots lobbying, a communication must:

- refer to specific legislation;
- reflect a view on that specific legislation; *and*
- encourage the recipient of the communication to take lobbying action with respect to the specific legislation.

### Grass Roots Lobbying Call to Action

The regulations specify that a **grass roots lobbying call to action** must either:

**A grass roots lobbying communication is an attempt to influence specific legislation by encouraging the public to contact legislators.**

**The regulations divide lobbying communications into two kinds—direct and grass roots.**

- state that the recipient should contact a legislator or other relevant government employee for purposes of influencing the legislation;
- state the address, telephone number or similar information regarding a legislator or legislative body employee;
- provide a petition, post card or similar means for the recipient to contact a legislator or legislative body employee; *or*
- specifically identify a legislator or legislators who will vote on the legislation as being: opposed to or undecided about the organization’s view on the legislation; the recipient’s legislator(s); or a member of a legislative (sub)committee which will vote on the legislation. Identifying the sponsor(s) of a piece of legislation does *not* constitute a grass roots lobbying call to action.

Under the regulations, methods 1, 2 and 3 above are deemed to be “*direct*” encouragement, while method 4 is deemed to be “*indirect*.” As discussed in the section entitled “What is Not Lobbying” (p. 15), this distinction plays a significant role in determining when a communication will qualify for an exception from the lobbying rules as “nonpartisan analysis, study, or research.” The distinction also affects how communications made primarily to an organization’s members are treated under the regulations (*see* p. 21) and how expenses for these communications may be allocated (*see* p. 39).

*Examples:*

Assume DARE undertakes a door-to-door canvassing campaign. The campaign *would* include grass roots lobbying if canvassers:

- 1) described the Dragon Protection Act pending before Congress;
- 2) described DARE’s efforts to get the bill passed; and
- 3) asked their listeners to sign a petition in favor of the bill that would be sent to Congressional representatives (*direct* encouragement) or told listeners that their Congressperson had not decided how to vote on the bill (*indirect* encouragement).

However, the campaign *would not* be considered grass roots lobbying (or lobbying at all) if canvassers:

- 1) described the Dragon Protection Act;
- 2) described DARE’s efforts to get the bill passed; and
- 3) asked for a contribution to help DARE in these efforts.

NOTE: Some mass media advertisements can be treated as grass roots lobbying even though they do not contain a grass roots lobbying call to action (*see* “Paid Mass Media Advertisements,” p. 23).

## C. What is Not Lobbying: The Four Basic Exceptions

The regulations define four principal categories of exceptions to the definitions of direct and grass roots lobbying communications. As you review the following materials on the basic exceptions, you should keep in mind that ultimately, you are trying to determine which expenditures count toward your lobbying expenditure limits. The expenditures of any particular communication will include *all* costs of preparation and distribution, such as researching, drafting, reviewing, copying, publishing, mailing, and allocable portions of employee compensation and other overhead expenses. A more in-depth discussion of allocating and recording lobbying expenditures follows in Part V of this Guide.

### Nonpartisan Analysis, Study, or Research

#### What Qualifies for the Exception?

A communication which refers to and reflects a view on specific legislation is nevertheless not lobbying if it constitutes **nonpartisan analysis, study, or research**. In order to qualify for this exception, the communication must meet two tests, a “content test” and a “distribution test.” While nonpartisan analysis, study or research may take a particular viewpoint, the content test requires that it must also provide a sufficiently full and fair exposition of the underlying facts to enable a member of the general public to form an independent opinion or conclusion about the subject. To satisfy the distribution test, the communication must be made available to the general public, a segment of the general public, or to governmental bodies or employees. It may be distributed, in part, to members of Congress so long as it is widely disseminated and not limited to people who are only interested in one side of the relevant issue.

**In order to qualify for the nonpartisan analysis, study or research exception, a communication must meet two tests.**

#### Planning Tip

This exception provides you with an opportunity to disseminate truly educational materials which both refer to and reflect a view on legislation, if you prepare the materials carefully. With regard to distribution, you should analyze how similar materials are normally disseminated in order to gauge how widely a specific communication should be distributed. Note that it is not sufficient for an organization to simply make the materials available at its offices to qualify for the nonpartisan analysis, study, or research exception.

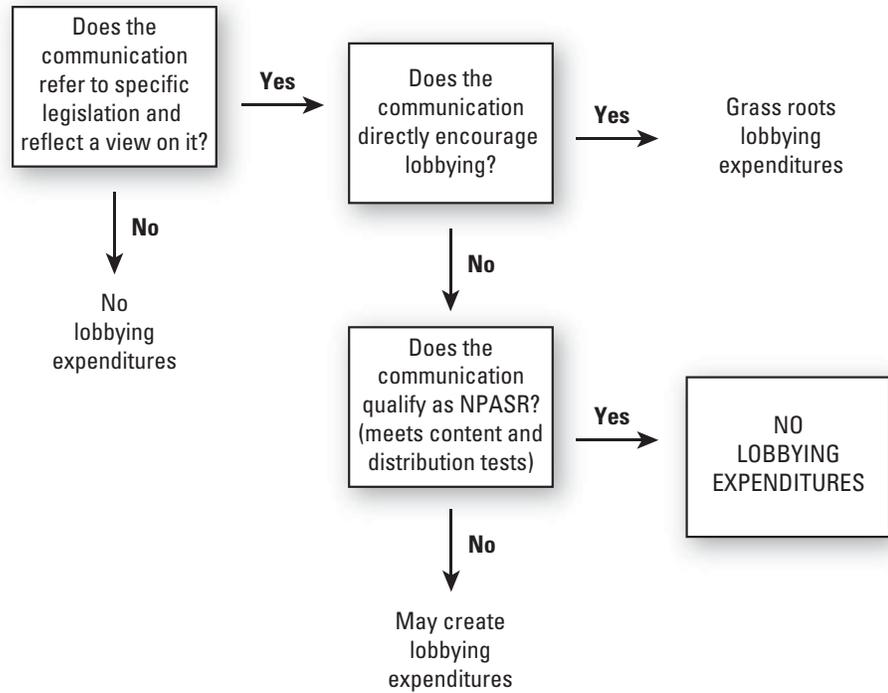
Examples of nonpartisan analysis, study, or research might be found in speeches, legislative testimony, reports, and booklets, while mass media communications (e.g., television, radio, and newspaper advertisements) and so-called “fact sheets” are unlikely to present a sufficiently detailed and complex discussion of the topic to qualify under this exception.

In addition, the regulations clarify that a communication *cannot* fall within this exception if it:

- refers to specific legislation; reflects a view on the legislation; *and*
- directly encourages the communication’s recipient to take action through methods 1, 2, or 3 discussed above in the section “Grass Roots Lobbying Call to Action” (see p. 13).

However, if instead of *directly* encouraging recipients to take action, a communication meets the content and distribution tests described above and *indirectly* encourages recipients to take action (through method 4 above), it will fall within the nonpartisan analysis, study, or research exception. Finally, the subsequent use rule discussed in Part III of this Guide may apply to nonpartisan analysis, study, or research in certain limited circumstances. For more information on this rule, see p. 27.

## Rules Related to Nonpartisan Analysis, Study, or Research



### Examples:

Assume DARE publishes a 50-page booklet describing its research and findings on the mating habits of the North American Dragon. This research reveals that female dragons lay their eggs on the beach during the summer months and then bury the eggs in the sand to protect them until they hatch. According to DARE scientists, however, only one percent of these eggs hatch each year; the rest are crushed by beach buggies, jeeps, and other all-terrain vehicles. Furthermore, the study projects that the dragon will be extinct within 10 years if all-terrain vehicles are not banned from the beaches where dragons hatch. The booklet also describes the results of conflicting research on the dragon's mating and egg-laying habits.

The booklet then goes on to: 1) describe H.R. 1234, the Dragon Protection Act, a provision of which would prohibit the use of all-terrain vehicles on beaches where dragons have been known to hatch; and 2) list the names of those legislators who have pledged support for the bill and those who have vowed to defeat it (*indirect* encouragement).

DARE distributes this free booklet in the usual manner: to its own members; members of the press; the scientific community; legislators; and to other wildlife groups as well. It sells the booklet for a nominal price to: local libraries; college and university biology departments; book stores in coastal areas; and to anyone else who requests it.

In this form, the booklet *would* qualify for the nonpartisan analysis, study, or research exception. However, the booklet *would not* qualify for this exception if it:

- 1) were distributed only to DARE's members and to other wildlife organizations; or
- 2) asked readers to contact their Congressional representatives in support of H.R. 1234 (*direct* encouragement) instead of merely listing names of Congressional representatives (*indirect* encouragement).

## Examinations and Discussions of Broad Social, Economic, and Similar Problems

**Examinations and discussions of broad social economic, and similar problems** are also excluded from the definitions of lobbying communications. To fall within this exception, communications that address the public, members of legislative bodies, or governmental employees on general topics which are also the subject of specific legislation must not refer to specific legislation or *directly* encourage the recipients to take action.

### Examples:

If DARE sent its executive director to participate in a roundtable discussion with Congressional representatives, developers and representatives from other environmental groups on the economic aspects of balancing development with the preservation of endangered species, the related expenses would qualify for the examinations and discussions of broad social, economic, and similar problems exception.

## Requests for Technical Advice or Assistance

**Requests for technical advice or assistance** make up the third exception to the definitions of lobbying communications. In order to meet this exception, a communication must be in response to a *written* request by a legislative body or a legislative committee or subcommittee and must be made available to *all* members of the requesting body. The regulations make it quite clear that information provided in response to the request (oral or written) of a particular legislator, acting on his or her own, is insufficient to meet this exception.

### Examples:

- 1) DARE *would* engage in *direct lobbying* if it responded to a request from Representative Hartovgold, the sponsor of the Dragon Protection Act, for DARE's opinion on what protective measures should be drafted into the bill.
- 2) DARE *would not* engage in lobbying if it testified on the potential effects of the bill at the written request of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment.

## "Self-Defense" Communications

Finally, communications concerning "**self-defense**" by an organization are not direct lobbying communications. To qualify under this fourth exception, a communication must be with a legislative body regarding possible actions of that body which could affect the organization's existence, powers, duties, tax-exempt status, or the deductibility of contributions to the organization. So long as the subject matter of the communication is limited to these specific areas, an organization may communicate with legislative bodies, their staff or even their individual members, and may also make expenditures to initiate legislation dealing with these specific topics. Coalitions composed primarily of charities and members of affiliated groups of charities may use this self-defense exception on behalf of their members or affiliates as well as their own organization. However, this exception *does not* apply to any grass roots lobbying communications.

### Examples

- 1) Assume there is a bill pending in Congress that would make contributions to organizations dedicated solely to protecting a single species nondeductible. DARE *would not* engage in lobbying if it urged legislators to vote against this bill.
- 2) A bill pending in Congress would raise the bulk mailing postage rates for nonprofits if it were enacted. DARE *would* engage in lobbying if it urged legislators to vote against the bill because this bill is not threatening to DARE's existence but would simply increase its mailing costs.

**Examples of nonpartisan analysis, study, or research might be found in speeches, legislative testimony, reports, and booklets.**

# III. Special Lobbying Rules

The regulations provide special rules for four specific kinds of communications. Those special circumstances are as follows:

## A. Membership Communications

Certain communications between an organization and its members are treated differently from communications with nonmembers. Generally, an individual is considered to be a member of an organization if he or she contributes more than a nominal amount of time or money to that organization. Those of you familiar with the definition of members in other contexts (e.g., Federal Election Campaign Act) should note that this definition is more inclusive. In the case of national organizations which receive substantial support from their state and local units, the Service determined in private rulings that members include those units, as well as their paid and volunteer staffs; agents; officers; and board, committee, and individual members.

**Generally, an individual is considered to be a member of an organization if he or she contributes more than a nominal amount of time or money to that organization.**

The lobbying regulations address membership communications in several situations:

- 1) Communications made primarily to members (i.e., communications whose recipients are comprised of more than 50 percent members) which refer to and reflect a view on specific legislation but do not directly encourage members to engage in either direct or grass roots lobbying *do not* create lobbying expenditures.

*Example:*

Assuming that 75 percent of the recipients of DARE Quarterly are DARE members and 25 percent are nonmembers (including libraries, universities, and other organizations), an article in DARE Quarterly that discusses the Dragon Protection Act, states DARE's position on the bill, and describes DARE's efforts to get the bill passed *would not* be considered a lobbying communication and the costs associated with it *would not* be lobbying expenditures.

- 2) Communications made primarily to members which refer to and reflect a view on specific legislation and do not encourage members to engage in grass roots lobbying but do encourage members to engage in direct lobbying create *direct lobbying expenditures*.

*Example:*

If the same article asks DARE members to contact their Congressional representatives in favor of the bill, the costs associated with the article would be considered *direct lobbying expenditures*.

- 3) Communications made primarily to members which refer to and reflect a view on specific legislation and encourage members to engage in grass roots lobbying create *grass roots lobbying expenditures*.

*Example:*

If the article asks members to urge their friends and neighbors to contact their Congressional representatives in favor of the bill, the article's costs would be *grass roots lobbying expenditures*.

Communications containing both direct and grass roots lobbying to members and to a combination of members and nonmembers are subject to the regulations' allocation rules discussed in Part V of this Guide.

## B. Referenda and Initiatives

Where a communication refers to a matter that is the subject of a referendum, ballot initiative, or similar procedure, the general public in the location where the election will

occur is considered to be the relevant legislative body. As a result, attempts to influence public opinion on referenda and ballot initiatives are considered *direct* lobbying, rather than grass roots. You should recall from our discussion in Part II that a referendum or ballot initiative becomes a specific legislative proposal from the time the first petitions are circulated to obtain signatures to put the measure on the ballot.

*Example:*

A canvassing campaign urging voters to support a state ballot initiative that would ban the use of all-terrain vehicles on the beaches where dragons often hatch would be *direct*, not grass roots, lobbying.

NOTE: All nonmember communications concerning specific referenda or ballot initiatives (other than those that qualify as nonpartisan analysis, study or research) that simply *refer to* and *reflect a view on* a specific referendum or initiative and do not encourage recipients to take action will nevertheless be considered lobbying. This is because the call to action, a necessary element of grass roots lobbying, is *not* required for direct lobbying.

*Example:*

During the canvassing campaign, canvassers distribute a flyer which says: “Question Two asks voters whether all-terrain vehicles should be banned from beaches where dragons often hatch. DARE believes that such a ban will help protect dragons from extinction.”

The expenses DARE incurs in publishing the flyer referring to the initiative and reflecting DARE’s support for it would constitute lobbying expenditures, even though the flyer does not encourage readers to take any sort of action on the initiative.

The special rule governing membership communications presents interesting opportunities for advocacy groups working on ballot initiatives or referenda. Under this rule, a membership communication which refers to and reflects a view on legislation *does not* count as lobbying *even* if it asks members:

- to sign or circulate petitions necessary to place an initiative on the ballot; or
- to vote for or against an initiative.

*Example:*

An article in DARE Quarterly that advocates on behalf of the initiative, describes only its advantages, and even asks members to vote for the initiative would not be considered lobbying. However, the same article would be considered direct lobbying if it asked members to urge nonmembers to vote in support of the initiative.

### **C. Paid Mass Media Advertisements**

One of the regulations’ most controversial provisions is a presumption that a charity’s paid mass media (*i.e.*, commercial television, radio, magazine, newspaper, etc.) advertisement about highly publicized legislation, which does not otherwise constitute grass roots lobbying, is a grass roots lobbying communication when the advertisement:

- appears within two weeks of a vote on the legislation by either a legislative body or a committee, but not a subcommittee;
- reflects a view on the general subject of the legislation; *and*
- either: a) refers to the highly publicized legislation, or b) encourages members of the general public to contact members of the legislature about the *general subject of the legislation*.

**Attempts to influence public opinion on referenda and ballot initiatives are considered direct lobbying, rather than grass roots.**

The organization may be able to rebut this presumption, if, for example, it can show that the timing of the ad was unrelated to the upcoming legislative vote.

Television, radio, billboards, and general circulation newspapers and magazines are forms of mass media for purposes of this rule. In order for the legislation to be “highly publicized,” there must be both frequent media coverage within two weeks of the vote *and* the general purposes, terms or pendency of the legislation must be known to a significant segment of the general public in the area where the ad appears.

Charities commenting on the regulations in draft form objected strenuously but unsuccessfully to the two-week rule, noting that it is virtually impossible for an organization to know at the time it places an advertisement whether a legislative vote will be taken within two weeks after the advertisement actually runs. This fact makes it difficult to predict when a mass media advertisement about highly publicized legislation will be subject to the mass media presumption. Therefore, charities must take special care when planning mass media advertising campaigns on issues that are the subject of highly publicized legislation.

**An organization may be able to rebut the mass media presumption, if, for example, it can show that the timing of the ad was unrelated to the upcoming legislative vote.**

#### Planning Tip

Unless you are willing to risk having your expenditures for this type of advertising campaign count towards your grass roots lobbying limit, you should consider structuring the campaign not as a single advertisement, but rather as a series of ads run in your regular course of business whose timing is unrelated to specific votes on the highly publicized legislation. In addition, you may wish to draw up a contract or other written documentation at the outset of the campaign to document that your advertisements are part of such a series.

Where you plan a paid mass media ad because you have reason to believe that you will be outside the two-week rule, it may be advisable to document why you think the vote will not occur within two weeks. Such documentation could help you later rebut the presumption, if your estimates are wrong.

Finally, you can still write op-ed pieces, hold press conferences, and conduct direct mail campaigns without triggering the special mass media presumption. Where you are unsure about the timing of a vote and do not want to incur grass roots lobbying expenditures, these other communications may offer you a solution.

#### Example:

As the time for a Congressional vote on the highly publicized Dragon Protection Act draws near, DARE decides that it would like to run an ad in the Sunday *New York Times* regarding the protection of the dragon. DARE also plans to use the opportunity to educate readers about its general program and goals as well as to solicit new members and contributions. Realizing that the ad may cause DARE to incur large grass roots expenditures, the executive director asks a staff member to prepare different versions of the ad for analysis of the lobbying content. A copy of the draft ad is reprinted on the next page.

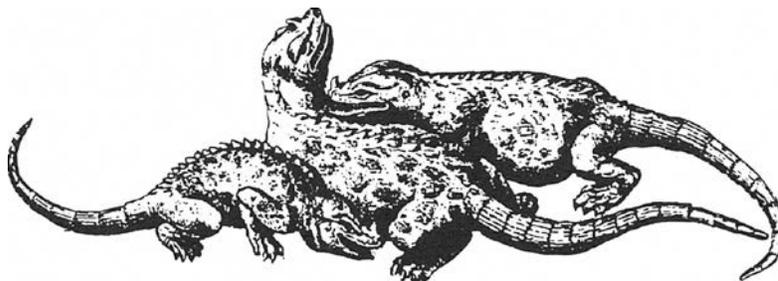
In reviewing the ad, you should consider the statements marked “A,” “B,” and “C” in the top half of the ad to be different versions of the ad. The chart below explains the lobbying content of the different versions according to how much time occurs between the running of the ad and the actual legislative vote. As the chart illustrates, the language used in these ads merits close attention. Charities that can estimate the timing of legislative votes and/or can draft ads carefully will not need to fear this special mass media rule.

Applying the rules discussed above, statement “A” may reflect a view but it *does not* refer to specific legislation or urge readers to call legislators on the general subject. Statement “B” both reflects a view on the general subject of the legislation and urges readers to call their legislators about the general subject. Statement “C” both refers to highly publicized legislation and reflects a view on the general subject.

Note that under the allocation rules discussed in Part V of this Guide, one half of the costs of the ad (for the bottom half of the ad) could clearly be allocated to non-lobbying expenditures.

# WITHOUT YOUR HELP

## The North American Dragon will be extinct within the next 10 years!



**A** HUNDREDS OF BABY DRAGONS ARE DYING EACH YEAR, CRUSHED UNDER THE WHEELS OF ALL-TERRAIN VEHICLES!

**B** DARE believes that dragons should be protected. We urge you to call on your legislators to help protect dragons from extinction

**C** DARE supports the Dragon Protection Act currently pending in Congress

The Dragon Lover’s Association for Research and Education (DARE) is a public charity dedicated to educating the general public about the endangered North American Dragon. DARE also operates the Adopt-A-Dragon Program to foster protection of individual members of the species.

YES! I want to save the dragons by becoming a member of DARE! Enclosed is my contribution of:

\$100  \$50  \$35  \$ \_\_\_\_\_

Please send me more information about:

- DARE’s Adopt-A-Dragon Program
- Volunteer Opportunities
- DARE’s Research and Educational Work

Name \_\_\_\_\_

Street \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_

Analysis of DARE's Paid Mass Media Advertisement				
When Does Ad Run?	Statement A Only	Statement B Only	Statement C Only	Statements B and C Together
16 days before the legislative vote	no lobbying	no lobbying	no lobbying	grass roots lobbying
12 days before the legislative vote	no lobbying	grass roots lobbying	grass roots lobbying	grass roots lobbying

#### D. Subsequent Use in Lobbying

The regulations provide that in certain very narrowly defined circumstances, the subsequent grass roots lobbying use of materials which originally contained no lobbying may cause the original expenses of the materials to be treated as grass roots lobbying expenditures. Although it is very important for public charities to understand when this rule will apply, remember that the application is quite limited.

##### Scope of Rule

The subsequent use rule only applies to “advocacy communications or research materials” that are later used in grass roots lobbying. “Advocacy communications or research materials,” including nonpartisan analysis, study, or research (*see p. 15*), must:

- refer to specific legislation;
- reflect a view on the legislation; and
- not directly encourage grass roots lobbying.

If such materials are later used with direct encouragement of grass roots lobbying, the subsequent use rule may apply.

##### Two Safe Harbors

Within the already limited scope to which the subsequent use rule may apply, the regulations define two distinct safe harbors for advocacy communications or research. Those safe harbors relate to the primary purpose of the original materials and the timing of the subsequent use.

Under the primary purpose safe harbor, the subsequent use rule does not apply to advocacy communications or research materials if the organization can demonstrate that the primary purpose of the original materials was a non-lobbying purpose. Where the organization makes a substantial distribution of the materials in their non-lobbying form either prior to or contemporaneous with the lobbying distribution, the IRS presumes a non-lobbying primary purpose. In the case of nonpartisan analysis, study, or research, whether the distribution is substantial depends on the particular facts and circumstances, including normal distribution patterns of similar materials. In the case of other advocacy communications or research materials, the nonlobbying distribution *must be at least as extensive* as the lobbying distribution.

The second safe harbor in the subsequent use rule depends on the amount of time between when the organization paid the original expenses and when the subsequent use occurred. All expenses paid more than six months before the subsequent use are protected from the rule's application.

Examples:

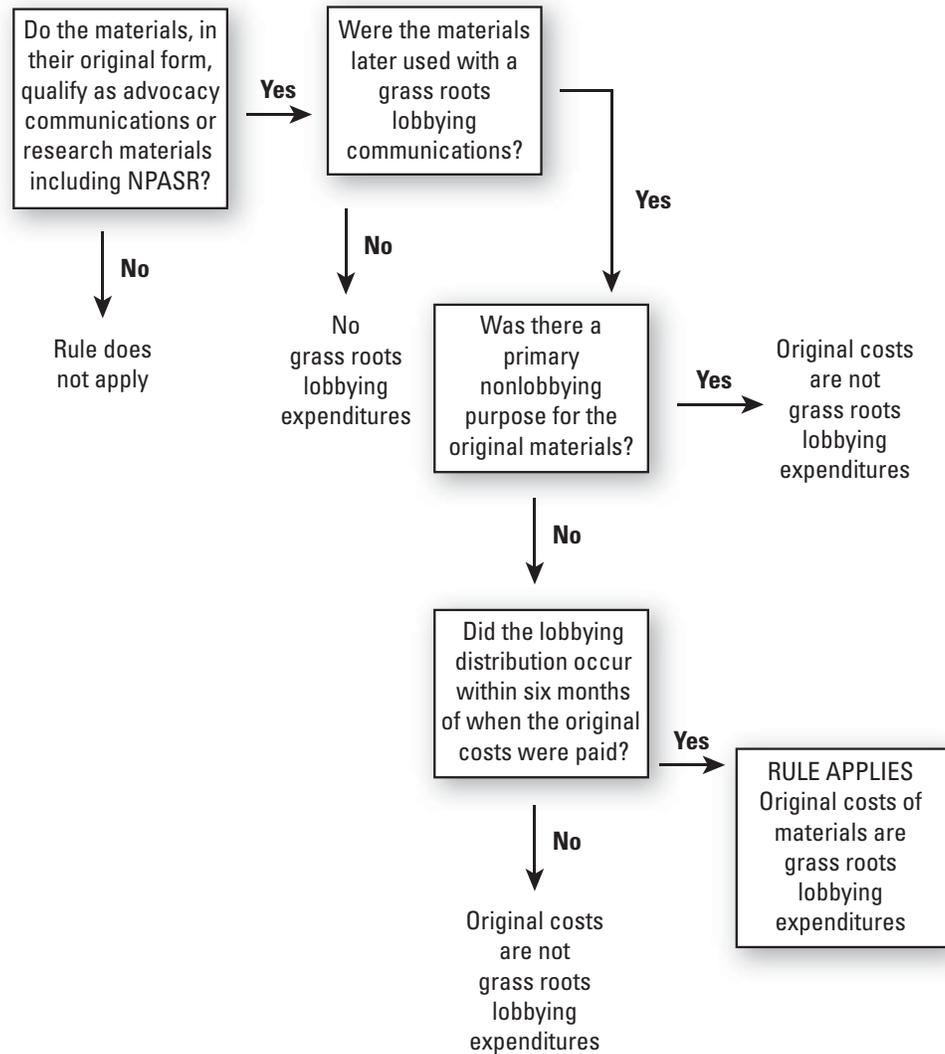
- 1) A DARE researcher prepares a memo for the executive director regarding the economics of selling dragon products in other countries. The memo neither refers to nor reflects a view on legislation. If the executive director later mails the memo to nonmembers and asks them to contact their Senators in support of a bill criminalizing dragon product importation, the subsequent use rule does not apply to the original expenses of creating the memo.
- 2) DARE has its research clerk prepare an extensive internal memorandum covering scientific research regarding the dragon's mating habits. The memo refers to and reflects a view on H.R.1234 (the Dragon Protection Act) but does not directly encourage grass roots lobbying. DARE distributes the memo in its original form to 10,000 nonmembers. At the same time, DARE sends the memo to 5,000 other nonmembers with a cover letter asking them to "call Congressman Dunebuggy and urge him to vote for H.R. 1234" (*direct* encouragement of grass roots lobbying).

DARE's substantial nonlobbying distribution demonstrates a primary nonlobbying purpose. Therefore, the subsequent use rule will not apply to the original expenses of creating the memo.

- 3) Assume DARE pays all the expenses relating to the research memo described above in January of 2010, but only 500 nonmembers receive the memo without the grass roots lobbying cover letter. If the grass roots lobbying use of the memo does not occur until August of 2010, the subsequent use rule does not apply, even though the nonlobbying distribution was not substantial.

**The subsequent use rule only applies to "advocacy" communications or research material that are later used in grass roots lobbying.**

## When Does Subsequent Grass Roots Lobbying Use Require Initial Costs to be Counted as Grass Roots Lobbying Expenditures?



### Subsequent Lobbying Use by Another Organization

The regulations also specify that if the later lobbying use is by an organization unrelated (e.g., no interlocking boards of directors or shared staff) to the organization that prepared the materials, the organization preparing the materials will not be charged with lobbying expenditures unless there is clear and convincing evidence that it intended the materials to be used for lobbying. To meet the “clear and convincing” evidence standard, there must be evidence of cooperation or collusion between two unrelated organizations. While the regulations do not address subsequent use by a related advocacy organization, they suggest that this may constitute a trap for the unwary.

### **Planning Tip**

You should be most concerned about the subsequent use rule where your organization prepares nonpartisan analysis, study, or research or other advocacy materials and allows them to be used for grass roots lobbying by a related 501(c)(4) social welfare organization. In such cases, you should carefully evaluate the materials, their distribution, and their primary purpose in order to avoid large unintentional grass roots lobbying expenditures.

## IV. Relationships Among Organizations

### A. Treatment of Affiliated Organizations

The affiliation rules are designed to prevent abuse—in this case, electing organizations attempting to avoid the sliding percentages of the expenditure limits by creating related organizations.

In order to analyze an organization's lobbying expenditure limits and how it is expending them, you will also need to consider whether it is an **"affiliated"** organization under the regulations. In making this determination, it is important to realize that in a colloquial sense, one may already consider an organization to be affiliated with another, but it may not be "affiliated" in the legal sense of these regulations.

#### When are Two (c)(3)s "Affiliated"?

Two charities are affiliated for purposes of the regulations if one of them can control the other's action on legislative issues either by reason of interlocking directors on their respective boards of directors or by reason of specific provisions in the governing instruments of one organization (usually the Articles of Incorporation and/or the bylaws) requiring that organization to follow another organization's directives on legislative matters. In private letter rulings, the Service determined that a national organization and its local divisions were not affiliated despite the fact that they were eligible for a group exemption because the national exercised a significant amount of direction and control over the affiliates. The analysis of whether an organization is an affiliated organization is further complicated by the fact that the regulations apply not only to two or more (c)(3)s that are clearly affiliated with each other but also to two separate and distinct (c)(3)s that are nonetheless each affiliated with a common non(c)(3) such as a (c)(4).

#### Example:

If DARE's bylaws include the following provision: "DARE will be absolutely bound in all matters regarding legislative action by the position of the National Organization for Dragons (NOD)," then DARE and NOD are affiliated, even if NOD is a nonelecting public charity. Because they are affiliated, the two organizations will have to calculate their lobbying expenditures and limits on an aggregate basis. If, however, there is no such provision in DARE's bylaws and the two organizations have no interlocking board members, but DARE's board meets and formally votes to adopt NOD's position with regard to a pending piece of national legislation on protected dragon habitats, then DARE and NOD are not affiliated for purposes of the regulations.

#### Effect of Affiliation

The regulations treat affiliated organizations as a single organization for purposes of the lobbying expenditure limits. As a result, the affiliated organizations' exempt purpose expenditures, lobbying expenditure limits, actual lobbying expenses, and four-year moving averages are calculated on an aggregate basis. If the affiliated group incurs any tax liability because it exceeds the group's lobbying limits, all *electing* members of the group are proportionately liable for the tax.

#### Example:

DARE and NOD are affiliated by reason of the bylaw provision discussed in the previous example. If, for 2010, DARE has exempt purpose expenditures of \$630,000 and NOD has exempt purpose expenditures of \$1.2 million, their aggregate lobbying expenditure limits for Fiscal Year 2010 are calculated as follows:

**It is important to realize that in a colloquial sense, one may already consider an organization to be affiliated with another, but it may not be "affiliated" in the legal sense of these regulations.**

**Aggregate Total Exempt Purpose Expenditures =**  
[\$630,000] + [\$1,200,000] = \$1,830,000

**Aggregate Total Lobbying Limit =**  
[\$100,000] + [15% (\$500,000)] + [10% (\$500,000)] + [5% (\$330,000)] = \$241,500

**Aggregate Grass Roots Lobbying Limit =**  
25% (\$241,500) = \$60,375

### Planning Tip

The affiliation rules are of special concern to national organizations with local chapters or local affiliates. If a review of your bylaws and board structures suggests you are affiliated with other organizations, you should evaluate making changes to avoid affiliation. If affiliation is unavoidable and the organizations operate on different fiscal years, you should consider changing to an identical fiscal year.

## B. Transfers to Noncharities That Lobby

The transfer rules are designed to prevent 501(c)(3) organizations from circumventing the lobbying expenditure limits by transferring money to a non 501(c)(3) organization to do the lobbying. In general, if a (c)(3) makes a transfer to a non(c)(3) that lobbies, the regulations treat the transfer as a lobbying expenditure unless it fits within certain protected categories.

### What Transfers are Not Lobbying Expenditures?

The regulations set out three situations where transfers are clearly *not* lobbying expenditures. First, the term “**transfer**” is limited to situations where a charity receives less than market value in return for the transfer. Therefore, it is clear that charities will not incur lobbying expenditures in transactions where they pay fair market value for goods or services. Second, the regulations protect transfers by charities that routinely offer goods or services to the general public at less than the fair market value if they also offer these goods and services to lobbying organizations at the same price at which they are offered to the public. Third, the regulations specify that where an organization makes a “controlled” grant (limiting the transfer’s use to a specific nonlobbying project of the transferee with proper documentation of that control), it will not be treated as a lobbying expenditure.

If an organization makes a transfer to a noncharity that lobbies and the transaction does not fall within one of these three categories, then the **IRS** will treat the transfer as a lobbying expenditure by the organization.

### Planning Tip

Whenever you grant money to a noncharity, you should ascertain whether the noncharity engages in lobbying activities. If it does lobby, then you should take steps to create a controlled grant to it for nonlobbying purposes unless you are willing to have the grant count as a lobbying expenditure by your own organization. Adequate creation of the controlled grant will require that you document the control element (e.g., a signed grant agreement in which the grantee promises that it will not use any of the grant proceeds for any lobbying purposes and agrees to provide appropriate reports).

In addition, you should be aware of the potential breadth of the transfer rule. For example, the **rule** could apply to payments for tickets to a dinner benefiting a noncharity which lobbies or to membership dues payments to a noncharity which lobbies, unless you receive fair market value in return for your payments.

# V. Recording and Accounting For Lobbying Activities

## A. Maintaining Adequate Records

As a public charity you must already provide information about your lobbying expenses when you file your annual Form 990 (see p. 5) and providing such information necessarily implies keeping records on your lobbying expenses. Moreover, the new regulations explicitly require that electing public charities keep certain records on lobbying.

### Required Records

The regulations specify that you must generate records for each taxable year, including documentation of your total exempt purpose expenditures, total lobbying expenditures, total grass roots lobbying expenditures, and any payments made to other organizations or individuals earmarked for lobbying or treated as lobbying expenditures because of the transfer rules (see Form 990, Schedule C, p. 5 and Appendix A). In addition to these records, you should generally keep in mind that you will need to maintain sufficient records to analyze your lobbying expenditures and apply the allocation rules.

In developing a sufficient record-keeping system, you should consult with your bookkeeper, accountant, and when questions arise, your attorney. Although your particular system will vary with the size, needs, capabilities, and activities of your organization, you should design it both to meet the legal recordkeeping requirements and to facilitate planning use.

### Suggestions for Creating a System

Although this Guide does not provide you with any comprehensive advice concerning a proper record-keeping system, several ideas may prove helpful to you. At the outset, even small organizations should consider appointing a single individual to become the resident authority on the lobbying regulations. This lobbying monitor should act as a clearinghouse for all projects which may include some component of either grass roots or direct lobbying activities. In addition to evaluating records at the beginning of a project, the lobbying monitor should maintain file copies of all written lobbying communications for future analysis and work closely with the bookkeeper and accountant. Together this team should be responsible for identifying lobbying activities, monitoring current record-keeping practices, and, where necessary, developing additional records to be kept.

The actual records that you need to keep will vary with the nature of your organization, but several kinds of records have proven helpful to advocacy organizations in the past. In order to determine allocable employee compensation and general overhead, many organizations use timesheets like the sample reproduced in the margin and in Appendix D. Timesheets require individual employees to keep written records of how much time they spend on particular projects and what exactly they do during that time. The extent to which you can effectively use timesheets will again vary according to your organization. The lobbying monitor might decide what specific projects time records are to be used for and simply require employees to describe what they did. Such records would later have to be analyzed to segregate lobbying and nonlobbying time.

Another helpful type of record is the costs **log**. The basic idea here is to require employees to write down costs for certain items, identifying the particular project associated with that cost. The records are easily maintained by alerting all employees to their recording responsibility and then physically placing the log in the area where the costs are generated. For example, separate logs might be kept to monitor postage, copying, fax, and messenger services. Again, you could use the lobbying monitor to identify those projects which must be logged and to oversee the operation of the records.

**You should consider appointing a single individual to become the resident authority on the lobbying regulations.**

Adoption of a proper system, however, is only the first step in maintaining adequate records. Equally importantly, you need to ensure that all employees (and, in some instances, volunteers) are aware of and fulfilling their individual responsibilities in the records system. If adequate records are being maintained, you will be able to monitor your lobbying expenditures so as to avoid excise tax payments or possible loss of exemption.

## **B. Allocating Expenditures**

**If adequate records are being maintained, you will be able to monitor your lobbying expenditures so as to avoid excise tax payments or possible loss of exemption.**

### **Determining Costs of Lobbying Expenditures**

Once you have determined whether a particular communication contains a lobbying message and if so, what kind (*i.e.*, direct or grass roots), you also need to determine which expenditures related to that communication are lobbying expenditures. Where a communication is devoted solely to either grass roots or direct lobbying, all of the related expenditures must be attributed to the appropriate lobbying expenditures. This includes all costs of preparing and distributing the communication, such as research, drafting, reviewing, copying, publishing, mailing, and allocable portions of employee compensation and other overhead expenses.

### **Allocation of Costs for Mixed Purpose Expenditures**

Many communications have more than one purpose. For example, a communication which includes lobbying might also solicit funds for an organization, or a membership communication might contain both direct and grass roots lobbying. These are mixed purpose communications, and the regulations provide complicated rules for allocating the costs of such communications among their various functions. The applicable rules depend generally on the interplay of two sets of factors: how you classify the message (direct lobbying, grass roots lobbying, nonlobbying or a mixture); and how you classify the audience (members, nonmembers or both).

### **Classifying the Audience**

For purposes of the rest of the allocation discussion it is important to distinguish three classes of audiences or recipients of the subject communication. Those groups are as follows:

- A) Primarily nonmembers-an audience is made up of primarily nonmembers when less than 50 percent of the recipients of the subject communication are members of the organization (*i.e.*, paying dues or contributing more than nominal time or money to the charity).
- B) Primarily members-an audience is made up of primarily members if more than 50 percent but less than 100 percent of the recipients are members of the organization. The balance of the recipients are further divided into nonmember subscribers (who subscribe to publications by the organization) and nonmember others (the balance of the nonmembers).
- C) Completely members-an audience falling into this category is usually comprised solely of the organization's members but may also include up to 15 percent nonmember subscribers.

### **Allocating Between Lobbying And Nonlobbying Purposes**

Lobbying communications made primarily to nonmembers (A) must include all the costs attributable to those nonlobbying parts of the communication that are on the same specific subject as the legislation. Generally, you may consider portions of the same communication to be on the same specific subject if they discuss activities or issues which would be directly affected

by the legislation in question. General fund-raising solicitations and background information about the organization are typically considered to be on a different subject and would therefore be allocated to the nonlobbying expenditures of the particular communication.

In contrast, the costs of lobbying communications made primarily or only to members (B and C) must be allocated on a “reasonable” basis between nonlobbying and lobbying. Although little guidance is offered in the regulations with regard to what constitutes reasonable allocation, clearly an allocation of lobbying expenditures which includes only the particular sentence containing the call to action would not be reasonable allocation. By comparison to the same specific subject standard which applies to primarily nonmembership communications, the reasonable allocation standard may allow an organization to allocate more costs to nonlobbying purposes, such as public education or communications urging an administrative agency to act.

Allocation Summary #1			
<b>Allocation Between Lobbying And Nonlobbying Purposes</b>	Audience		
	A Primarily Nonmembers	B Primarily Members	C Completely Members
	<p>All costs of materials on “same specific subject” as the legislation are included as lobbying expenditures</p> <hr/> <p>General fundraising appeals and background information are considered to be a “different subject”</p>	<p>Charity may make a “reasonable” allocation of costs between the nonlobbying and lobbying purposes.</p>	

### Allocating Mixed Lobbying Communications

Once you have determined the proper cost allocation between lobbying and nonlobbying purposes in a particular communication, you must examine whether the communication also mixes grass roots and direct lobbying. Mixtures of direct and grass roots lobbying may occur literally through combinations of different lobbying statements (e.g., “Call your Senator! Then, ask your neighbor to call her Senator!”), through a single statement addressed to different categories of recipients (e.g., “Attention members and nonmembers: please call your Senator!”), or through combinations of both.

As you will see in the following discussion of the regulations for allocating mixed lobbying communications, the law generally treats as grass roots expenditures all expenses for a mixed communication containing both direct and grass roots lobbying. Therefore, it is particularly important for electing public charities to be able to determine whether their communications contain such mixed lobbying messages.

The regulations provide that the expenditures for primarily nonmember communications (A) which include both direct and grass roots lobbying messages should be allocated to grass roots lobbying expenditures, except to the extent that the organization can demonstrate that the communication is made primarily for direct lobbying purposes. If the organization can make a sufficient showing of a direct lobbying primary purpose, however, then the reasonable allocation rule applies. If not, the harsh general rule for mixed messages applies.

**The law generally treats as grass roots expenditures all expenses for a mixed communication containing both direct and grass roots lobbying.**

Two types of communications directed primarily to members (B) frequently contain both direct and grass roots lobbying and, therefore, require allocation. First, there is the question of how to allocate written communications that directly encourage grass roots lobbying (e.g., “Tell your friends and neighbors to call their Congresswoman and urge her to vote for this bill!”) and also encourage direct lobbying. In these cases, the regulations provide that *all* of the lobbying expenses of the communication must be allocated to *grass roots expenditures*. Note, however, that you may still have a valid nonlobbying allocation with respect to other parts of the communication.

Second, there is the question of how to allocate written communications that *directly* encourage direct lobbying (e.g., “Call your Congressman and tell him to vote for this bill!”) but do not directly encourage grass roots lobbying. (NOTE: To determine whether encouragement is direct or not, you should apply the same guidelines as discussed earlier in “Grass Roots Lobbying Call to Action” under Part II.) In such cases, the following formulae apply:

$$\text{Total Lobbying Expenditures} = [\text{costs of preparing materials that directly encourage direct lobbying}] + [\text{mechanical and distribution costs attributable to the lineage devoted to the materials}]$$

$$\text{Grass Roots Expenditures} = [\text{Total Lobbying Expenditures}] \times [\% \text{ of nonmember subscribers if greater than } 15\% + \% \text{ of nonmember others}]$$

$$\text{Direct Lobbying Expenditures} = [\text{Total Lobbying Expenditures}] - [\text{Grass Roots Expenditures}]$$

In the case of mixed lobbying communications made only to members (C) which *directly* encourage grass roots lobbying (e.g., “Call your representative and urge him to vote for this bill, then tell your friends and neighbors to call their representatives and urge them to vote for this bill!”), the regulations require that all related expenses be allocated to grass roots lobbying expenditures. Again, the grass roots allocation applies regardless of whether the communication also encourages direct lobbying.

Sample Time Sheet										
Activity	Date									Total Hours
General and Administrative										
Fund-Raising										
Adopt-A-Dragon										
Research										
Education										
Lobbying—Direct										
Lobbying—Grass Roots										
Invited Testimony										
Nonlobbying Communications With Administrative Agencies										
Media										
DARE Quarterly:										
Editorial										
Advertising										
LEAVE:										
Overtime/Comptime										
Vacation										
Holiday										
Personal Leave										
Sick Leave										
Leave Without Pay										
TOTAL HOURS:										

Allocation Summary #2			
<b>Allocation Between Direct and Grass Roots Lobbying Purposes</b>	Audience		
	<b>A Primarily Nonmembers</b>	<b>B Primarily Members</b>	<b>C Completely Members</b>
	All related costs are allocated to grass roots lobbying expenditures, unless you can show that primary purpose of communication was direct lobbyings	If a written communication directly encourages grass roots lobbying, all costs must be allocated to grass roots expenditures	If a communication directly encourages grass roots lobbying, all costs are allocated to grass roots expenditures
	If a written communication directly encourages direct lobbying, costs are proportionally allocated to direct and grass roots expenditures on the basis of members and nonmembers		

Examples:

**Nonmember Allocation Example**

DARE mails an eight-page booklet to 10,000 nonmembers which contains the following messages in it:

- a) a one-page article summarizing recent federal efforts to stop people from hunting dragons (preparation cost \$200);
- b) a four-page article concerning a new study on egg-laying habits of the dragon (preparation cost \$500);
- c) a one-page description of provisions of H.R. 1234 (the Dragon Protection Act), which would ban all-terrain vehicles from beaches where dragons lay their eggs, and a statement urging readers to call Congressman Dunebuggy who opposes the bill and try to change his mind (Production cost \$600); and
- d) a two-page description of DARE's basic goals and activities with a tear-out sheet to return to DARE with a monetary contribution (production cost \$150).

### Planning Tip

In light of the harsh rules regarding allocation of expenses for nonmember communications containing both lobbying and nonlobbying and for most communications containing grass roots and direct lobbying messages, electing public charities should carefully review expensive programs such as direct mail campaigns and mass media expenditures.

In addition, it may be advisable in some cases to separate communications involving direct and grass roots messages so as to avoid either the affirmative burden of demonstrating a primary direct lobbying purpose or the over-allocation of direct lobbying expenditures to the category of grass roots expenditures. For example, organizations which typically send out legislative alerts to members may now want to delete grass roots lobbying messages or mail the legislative alerts as a separate communication from other messages containing direct lobbying. In addition, you should note that you can still mail a one-page general fund-raising solicitation letter in an envelope together with a one-page grass roots communication and allocate one-half of the expenditures each to nonlobbying and grass roots lobbying.

As a practical matter, large direct mail campaigns and mass media ads containing grass roots communications could potentially expend or even exceed an organization's grass roots lobbying limit if they are not carefully monitored. Given this possibility, organizations which currently engage in such practices may want to analyze their communications for cost-saving measures, such as consolidating similar mailings, simplifying production, and running mass media ads as part of a series rather than independently.

The production, mailing, and allocable overhead costs of the entire project (except for the preparation costs given above) total \$10,000. Including everything, the total expenditures for the project are \$11,450.

Of the eight-page booklet, three pages (a and d above) should be allocated to nonlobbying expenses as follows:

$$\begin{aligned} \text{costs of (a) + costs of (d) = nonlobbying expenditures} \\ [(1/8 \times \$10,000) + \$200] + [(2/8 \times \$10,000) + \$150] = \$4,100 \end{aligned}$$

Of the eight-page booklet, five pages (b and c above which are on the same specific subject) should be allocated to grass roots lobbying expenditures as follows:

$$\begin{aligned} \text{costs of (b) + costs of (c) = grass roots expenditures} \\ [(4/8 \times \$10,000) + \$500] + [(1/8 \times \$10,000) + \$600] = \$7,350 \end{aligned}$$

Note that if DARE sends the booklet only to DARE members instead of to nonmembers, the lobbying expenses are a direct lobbying expenditure and can be allocated on a reasonable basis.

### Mixed Recipient Allocation Example

DARE sends a one page flyer to 10,000 people, at a total cost of \$10,000. Of the recipients, 7000 are members and 3000 are nonmember subscribers. The top half of the flyer briefly describes **H.R. 1234**, names several key members of Congress and identifies them as opposed to the bill, and states that DARE advocates the adoption of the Dragon Protection Act. The bottom half of the flyer says, "Call these representatives and urge them to vote in favor of **H.R. 1234**."

“Call these representatives” is a mixed message which constitutes *direct* lobbying with respect to the member recipients and *grass roots lobbying* with respect to the nonmember recipients. Therefore, the related expenditures are proportionately allocated as follows:

$$\begin{aligned} \text{Direct Lobbying} &= \text{percentage of members} \times \text{related expenditures} \\ &= 70\% \times \$10,000 \\ &= \$7,000 \end{aligned}$$

$$\begin{aligned} \text{Grass Roots Lobbying} &= \text{percentage of nonmembers} \times \text{related expenditures} \\ &= 30\% \times \$10,000 \\ &= \$3,000 \end{aligned}$$

Suppose instead that the bottom half of the same DARE flyer is divided into equal quarters which say, “Call these representatives and urge them to vote in favor of **H.R. 1234**” and, “Tell your friends and neighbors to call their representatives and urge them to vote in favor of H.R. 1234,” respectively. In this case, all of the \$10,000 in costs must be allocated to grass roots expenditures because of the grass roots lobbying message, regardless of the inclusion of the direct lobbying message.

## VI. Seeking Funding from Private Foundations

Historically, private foundations have been cautious in funding advocacy charities, but the new regulations clearly indicate that it is legally permissible for private foundations to make such grants. This cautious attitude is probably the result of the Internal Revenue Code's general rule that a private foundation's expenditures for lobbying activities are subject to a strict tax, and such expenditures could conceivably include certain grants to lobbying charities.

The new lobbying regulations, however, clearly reaffirm the permissibility of foundations making grants to lobbying charities and, in fact, provide considerable guidance to both grant-seeking charities and private foundations as to when a foundation's grant to a lobbying charity is and is not a lobbying expenditure by the foundation.

### A. Earmarking Prohibited

When a private foundation makes a grant to a public charity, it must not “**earmark**” the grant for lobbying, or the grant will be treated as a lobbying expenditure by the foundation. A grant by a private foundation is earmarked if it is given pursuant to an agreement, oral or written, that the grant will be used for specific purpose—in particular, lobbying purposes. In addition, the regulations provide that:

- foundation knowledge of grantee lobbying does not render a grant earmarked for lobbying; and
- since specific project grants (discussed below) are by definition earmarked for specific purposes, foundation grants for such projects must be allocable to nonlobbying activities or they will be deemed earmarked for lobbying.

### B. General Support Grants

Grants made to public charities for their general charitable purposes without any restrictions (e.g., for program or locale) are commonly referred to as “**general support grants**.” The regulations clarify that private foundations may make general support grants to charities that are currently lobbying, have lobbied in the past, have elected to follow the section 501(h) expenditure test or even use the general support grant from the foundation for lobbying purposes. Such grants are not considered taxable expenditures by the private foundation as long as they are not earmarked for lobbying. Unlike special project grants, the regulations do not require a private foundation to seek information about a charity's lobbying budget when the charity applies for a general support grant.

### C. Specific Project Grants

**Specific project grants** are not clearly defined in the regulations but are commonly understood as those grants for which the grantee does not have the discretion to spend the funds on another project, even one in the same broad geographic or programmatic area. As to such specific project grants, the regulations impose an additional requirement beyond the prohibition on earmarking. In particular, the amount of the grant (together with any other grants by the same foundation for the same specific project in the same year) cannot exceed the amount the grantee has budgeted for the nonlobbying portion of the project.

For purposes of evaluating the grantee's budget for a specific project, the regulations further provide that a private foundation is entitled to rely on budget information provided to the foundation by the grantee (e.g., a statement signed by the grantee's treasurer and certifying that the proposed budget for the specific project is as follows). If, however, the foundation has reason

to doubt the grantee's information or reasonably should doubt the grantee's information, then the foundation may not rely on the information.

*Example:*

DARE wants to conduct a study project regarding the egg-laying habits of dragons along the coast of Maine. For this specific project, DARE prepares a budget with total expenditures of \$100,000. Of the \$100,000, DARE anticipates \$70,000 in expenditures for the actual field study, report preparation, administrative, and overhead costs. DARE budgets the balance of \$30,000 for lobbying expenditures to be made as DARE uses its research to lobby the Maine legislature for stricter coastal zoning laws to enhance protection of dragons.

In order to fund the project, DARE applies for and receives the following specific project grants:

- \$30,000 from the Lobster Foundation
- \$10,000 from the Angel Family Foundation
- \$20,000 from the Save the Turtles Foundation
- \$20,000 from the Johnny Paper Foundation

In making the applications to these foundations, DARE provides each with a copy of DARE's proposed budget, signed and sworn to by DARE's treasurer. None of the foundations has any reason to doubt this information, and all of them make the requested grants to DARE.

To complete the funding of the project, DARE uses \$20,000 it received earlier in the year as a general support grant from the Beaches Foundation.

None of these foundation grants will create any taxable lobbying expenditures by the respective foundations. In addition, note that this specific project may properly budget 30 percent of its expenditures for lobbying, as long as DARE's overall expenditures are in line with the lobbying limits.

### **Planning Tip**

In applying for private foundation grants, you should keep in mind two general points. First, a foundation may make a general support grant to a charity that lobbies without creating a taxable expenditure for the foundation. Second, if you seek a specific project grant from a private foundation, you should be prepared to provide the foundation with projections of both your lobbying and nonlobbying budgets with regard to the specific project.

## **Conclusion**

Although working through the lobbying regulations can be a confusing task at times, we believe that the regulations provide answers to most of the basic questions that electing public charities will ask when examining their own lobbying activities. This Guide attempts to summarize those answers, but as is often the case with summaries, you should not consider this information to be comprehensive. Rather, you should use the Guide to enhance your own understanding of the relevant law and to supplement the advice of your attorney.

A working understanding of the regulations will enable you to advocate to the fullest extent permitted by law. In evaluating your own organization and its lobbying activities, therefore, we hope that you will view the regulations not merely as a technical challenge but as an opportunity to increase the overall effectiveness of your advocacy efforts.

# Appendix A

**SCHEDULE C**  
**(Form 990 or 990-EZ)**

## Political Campaign and Lobbying Activities

OMB No. 1545-0047

2010

Open to Public Inspection

**For Organizations Exempt From Income Tax Under section 501(c) and section 527**

▶ **Complete if the organization is described below.** ▶ **Attach to Form 990 or Form 990-EZ.**  
▶ **See separate instructions.**

Department of the Treasury  
Internal Revenue Service

**If the organization answered "Yes," to Form 990, Part IV, line 3, or Form 990-EZ, Part V, line 46 (Political Campaign Activities), then**

- Section 501(c)(3) organizations: Complete Parts I-A and B. Do not complete Part I-C.
- Section 501(c) (other than section 501(c)(3)) organizations: Complete Parts I-A and C below. Do not complete Part I-B.
- Section 527 organizations: Complete Part I-A only.

**If the organization answered "Yes," to Form 990, Part IV, line 4, or Form 990-EZ, Part VI, line 47 (Lobbying Activities), then**

- Section 501(c)(3) organizations that have filed Form 5768 (election under section 501(h)): Complete Part II-A. Do not complete Part II-B.
- Section 501(c)(3) organizations that have NOT filed Form 5768 (election under section 501(h)): Complete Part II-B. Do not complete Part II-A.

**If the organization answered "Yes," to Form 990, Part IV, line 5 (Proxy Tax) or Form 990-EZ, Part V, line 35a (Proxy Tax), then**

- Section 501(c)(4), (5), or (6) organizations: Complete Part III.

Name of organization	Employer identification number
----------------------	--------------------------------

**Part I-A Complete if the organization is exempt under section 501(c) or is a section 527 organization.**

- 1 Provide a description of the organization's direct and indirect political campaign activities in Part IV.
- 2 Political expenditures . . . . . ▶ \$ \_\_\_\_\_
- 3 Volunteer hours . . . . . \_\_\_\_\_

**Part I-B Complete if the organization is exempt under section 501(c)(3).**

- 1 Enter the amount of any excise tax incurred by the organization under section 4955 . . . . . ▶ \$ \_\_\_\_\_
- 2 Enter the amount of any excise tax incurred by organization managers under section 4955 . . . . . ▶ \$ \_\_\_\_\_
- 3 If the organization incurred a section 4955 tax, did it file Form 4720 for this year? . . . . .  Yes  No
- 4a Was a correction made? . . . . .  Yes  No
- b If "Yes," describe in Part IV.

**Part I-C Complete if the organization is exempt under section 501(c), except section 501(c)(3).**

- 1 Enter the amount directly expended by the filing organization for section 527 exempt function activities . . . . . ▶ \$ \_\_\_\_\_
- 2 Enter the amount of the filing organization's funds contributed to other organizations for section 527 exempt function activities . . . . . ▶ \$ \_\_\_\_\_
- 3 Total exempt function expenditures. Add lines 1 and 2. Enter here and on Form 1120-POL, line 17b . . . . . ▶ \$ \_\_\_\_\_
- 4 Did the filing organization file **Form 1120-POL** for this year? . . . . .  Yes  No
- 5 Enter the names, addresses and employer identification number (EIN) of all section 527 political organizations to which the filing organization made payments. For each organization listed, enter the amount paid from the filing organization's funds. Also enter the amount of political contributions received that were promptly and directly delivered to a separate political organization, such as a separate segregated fund or a political action committee (PAC). If additional space is needed, provide information in Part IV.

(a) Name	(b) Address	(c) EIN	(d) Amount paid from filing organization's funds. If none, enter -0-.	(e) Amount of political contributions received and promptly and directly delivered to a separate political organization. If none, enter -0-.
(1)	_____	_____	_____	_____
(2)	_____	_____	_____	_____
(3)	_____	_____	_____	_____
(4)	_____	_____	_____	_____
(5)	_____	_____	_____	_____
(6)	_____	_____	_____	_____

**Part II-A Complete if the organization is exempt under section 501(c)(3) and filed Form 5768 (election under section 501(h)).**

- A** Check  if the filing organization belongs to an affiliated group.  
**B** Check  if the filing organization checked box A and "limited control" provisions apply.

<b>Limits on Lobbying Expenditures</b> (The term "expenditures" means amounts paid or incurred.)		(a) Filing organization's totals	(b) Affiliated group totals												
<b>1a</b>	Total lobbying expenditures to influence public opinion (grass roots lobbying) . . . . .														
<b>b</b>	Total lobbying expenditures to influence a legislative body (direct lobbying) . . . . .														
<b>c</b>	Total lobbying expenditures (add lines 1a and 1b) . . . . .														
<b>d</b>	Other exempt purpose expenditures . . . . .														
<b>e</b>	Total exempt purpose expenditures (add lines 1c and 1d) . . . . .														
<b>f</b>	Lobbying nontaxable amount. Enter the amount from the following table in both columns.														
<table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">If the amount on line 1e, column (a) or (b) is:</th> <th style="text-align: left;">The lobbying nontaxable amount is:</th> </tr> </thead> <tbody> <tr> <td>Not over \$500,000</td> <td>20% of the amount on line 1e.</td> </tr> <tr> <td>Over \$500,000 but not over \$1,000,000</td> <td>\$100,000 plus 15% of the excess over \$500,000.</td> </tr> <tr> <td>Over \$1,000,000 but not over \$1,500,000</td> <td>\$175,000 plus 10% of the excess over \$1,000,000.</td> </tr> <tr> <td>Over \$1,500,000 but not over \$17,000,000</td> <td>\$225,000 plus 5% of the excess over \$1,500,000.</td> </tr> <tr> <td>Over \$17,000,000</td> <td>\$1,000,000.</td> </tr> </tbody> </table>		If the amount on line 1e, column (a) or (b) is:	The lobbying nontaxable amount is:	Not over \$500,000	20% of the amount on line 1e.	Over \$500,000 but not over \$1,000,000	\$100,000 plus 15% of the excess over \$500,000.	Over \$1,000,000 but not over \$1,500,000	\$175,000 plus 10% of the excess over \$1,000,000.	Over \$1,500,000 but not over \$17,000,000	\$225,000 plus 5% of the excess over \$1,500,000.	Over \$17,000,000	\$1,000,000.		
If the amount on line 1e, column (a) or (b) is:	The lobbying nontaxable amount is:														
Not over \$500,000	20% of the amount on line 1e.														
Over \$500,000 but not over \$1,000,000	\$100,000 plus 15% of the excess over \$500,000.														
Over \$1,000,000 but not over \$1,500,000	\$175,000 plus 10% of the excess over \$1,000,000.														
Over \$1,500,000 but not over \$17,000,000	\$225,000 plus 5% of the excess over \$1,500,000.														
Over \$17,000,000	\$1,000,000.														
<b>g</b>	Grassroots nontaxable amount (enter 25% of line 1f) . . . . .														
<b>h</b>	Subtract line 1g from line 1a. If zero or less, enter -0- . . . . .														
<b>i</b>	Subtract line 1f from line 1c. If zero or less, enter -0- . . . . .														
<b>j</b>	If there is an amount other than zero on either line 1h or line 1i, did the organization file Form 4720 reporting section 4911 tax for this year? . . . . .		<input type="checkbox"/> Yes <input type="checkbox"/> No												

**4-Year Averaging Period Under Section 501(h)**  
 (Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the instructions for lines 2a through 2f on page 4.)

<b>Lobbying Expenditures During 4-Year Averaging Period</b>					
Calendar year (or fiscal year beginning in)	(a) 2007	(b) 2008	(c) 2009	(d) 2010	(e) Total
<b>2a</b> Lobbying nontaxable amount					
<b>b</b> Lobbying ceiling amount (150% of line 2a, column (e))					
<b>c</b> Total lobbying expenditures					
<b>d</b> Grassroots nontaxable amount					
<b>e</b> Grassroots ceiling amount (150% of line 2d, column (e))					
<b>f</b> Grassroots lobbying expenditures					

**Part II-B Complete if the organization is exempt under section 501(c)(3) and has NOT filed Form 5768 (election under section 501(h)).**

	(a)		(b)
	Yes	No	Amount
<b>1</b> During the year, did the filing organization attempt to influence foreign, national, state or local legislation, including any attempt to influence public opinion on a legislative matter or referendum, through the use of:			
<b>a</b> Volunteers?			
<b>b</b> Paid staff or management (include compensation in expenses reported on lines 1c through 1i)?			
<b>c</b> Media advertisements?			
<b>d</b> Mailings to members, legislators, or the public?			
<b>e</b> Publications, or published or broadcast statements?			
<b>f</b> Grants to other organizations for lobbying purposes?			
<b>g</b> Direct contact with legislators, their staffs, government officials, or a legislative body?			
<b>h</b> Rallies, demonstrations, seminars, conventions, speeches, lectures, or any similar means?			
<b>i</b> Other activities? If "Yes," describe in Part IV			
<b>j</b> Total. Add lines 1c through 1i			
<b>2a</b> Did the activities in line 1 cause the organization to be not described in section 501(c)(3)?			
<b>b</b> If "Yes," enter the amount of any tax incurred under section 4912			
<b>c</b> If "Yes," enter the amount of any tax incurred by organization managers under section 4912			
<b>d</b> If the filing organization incurred a section 4912 tax, did it file Form 4720 for this year?			

**Part III-A Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6).**

	Yes	No
<b>1</b> Were substantially all (90% or more) dues received nondeductible by members?	<b>1</b>	
<b>2</b> Did the organization make only in-house lobbying expenditures of \$2,000 or less?	<b>2</b>	
<b>3</b> Did the organization agree to carryover lobbying and political expenditures from the prior year?	<b>3</b>	

**Part III-B Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6) if BOTH Part III-A, lines 1 and 2 are answered "No" OR if Part III-A, line 3 is answered "Yes."**

<b>1</b> Dues, assessments and similar amounts from members	<b>1</b>	
<b>2</b> Section 162(e) nondeductible lobbying and political expenditures ( <b>do not include amounts of political expenses for which the section 527(f) tax was paid</b> ).		
<b>a</b> Current year	<b>2a</b>	
<b>b</b> Carryover from last year	<b>2b</b>	
<b>c</b> Total	<b>2c</b>	
<b>3</b> Aggregate amount reported in section 6033(e)(1)(A) notices of nondeductible section 162(e) dues	<b>3</b>	
<b>4</b> If notices were sent and the amount on line 2c exceeds the amount on line 3, what portion of the excess does the organization agree to carryover to the reasonable estimate of nondeductible lobbying and political expenditure next year?	<b>4</b>	
<b>5</b> Taxable amount of lobbying and political expenditures (see instructions)	<b>5</b>	

**Part IV Supplemental Information**

Complete this part to provide the descriptions required for Part I-A, line 1; Part I-B, line 4; Part I-C, line 5; and Part II-B, line 1i. Also, complete this part for any additional information.

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# Appendix B

Form **5768**

(Rev. September 2009)

Department of the Treasury  
Internal Revenue Service

## Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation

(Under Section 501(h) of the Internal Revenue Code)

For IRS  
Use Only ►

Name of organization	Employer identification number :
Number and street (or P.O. box no., if mail is not delivered to street address)	Room/suite
City, town or post office, and state	ZIP + 4

**1 Election**—As an eligible organization, we hereby elect to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending ..... and all subsequent tax years until revoked.  
(Month, day, and year)

**Note:** This election must be signed and postmarked within the first taxable year to which it applies.

**2 Revocation**—As an eligible organization, we hereby revoke our election to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending .....  
(Month, day, and year)

**Note:** This revocation must be signed and postmarked before the first day of the tax year to which it applies.

Under penalties of perjury, I declare that I am authorized to make this (check applicable box) ►  election  revocation on behalf of the above named organization.

(Signature of officer or trustee)	(Type or print name and title)	(Date)
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### General Instructions

Section references are to the Internal Revenue Code.

Section 501(c)(3) states that an organization exempt under that section will lose its tax-exempt status and its qualification to receive deductible charitable contributions if a substantial part of its activities are carried on to influence legislation. Section 501(h), however, permits certain eligible section 501(c)(3) organizations to elect to make limited expenditures to influence legislation. An organization making the election will, however, be subject to an excise tax under section 4911 if it spends more than the amounts permitted by that section. Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period. For any tax year in which an election under section 501(h) is in effect, an electing organization must report the actual and permitted amounts of its lobbying expenditures and grass roots expenditures (as defined in section 4911(c)) on its annual return required under section 6033. See Part II-A of Schedule C (Form 990 or Form 990-EZ). Each electing member of an affiliated group must report these amounts for both itself and the affiliated group as a whole.

To make or revoke the election, enter the ending date of the tax year to which the election or revocation applies in item **1** or **2**, as applicable, and sign and date the form in the spaces provided.

**Eligible organizations.** A section 501(c)(3) organization is permitted to make the election if it is not a disqualified organization (see below) and is described in:

1. Section 170(b)(1)(A)(ii) (relating to educational institutions),
2. Section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),
3. Section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),
4. Section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),
5. Section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or
6. Section 509(a)(3) (relating to organizations supporting certain types of public charities other than those section 509(a)(3) organizations that support section 501(c)(4), (5), or (6) organizations).

**Disqualified organizations.** The following types of organizations are not permitted to make the election:

- a. Section 170(b)(1)(A)(i) organizations (relating to churches),

- b. An integrated auxiliary of a church or of a convention or association of churches, or
- c. A member of an affiliated group of organizations if one or more members of such group is described in a or b of this paragraph.

**Affiliated organizations.** Organizations are members of an affiliated group of organizations only if (1) the governing instrument of one such organization requires it to be bound by the decisions of the other organization on legislative issues, or (2) the governing board of one such organization includes persons (i) who are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and (ii) who, by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.

For more details, see section 4911 and section 501(h).

**Note.** A private foundation (including a private operating foundation) is not an eligible organization.

**Where to file.** Mail Form 5768 to the Department of the Treasury, Internal Revenue Service Center, Ogden, UT 84201-0027.

# Appendix C

Sample Lobbying Expenditure Limits		
Exempt Purpose Expenditures	Total Lobbying Limit	Grass Roots Lobbying
\$ 100,000.00	\$ 20,000.00	\$ 5,000.00
350,000.00	70,000.00	17,500.00
500,000.00	100,000.00	25,000.00
575,000.00	111,250.00	27,812.50
650,000.00	122,500.00	30,625.00
800,000.00	145,000.00	36,250.00
1,000,000.00	175,000.00	43,750.00
1,100,000.00	185,000.00	46,250.00
1,325,000.00	207,500.00	51,875.00
1,475,000.00	222,500.00	55,625.00
1,550,000.00	227,500.00	56,875.00
1,800,000.00	240,000.00	60,000.00
2,000,000.00	250,000.00	62,500.00

# Appendix D

Sample Time Sheet											
Activity	Date										Total Hours
General and Administrative											
Fund-Raising											
Adopt-A-Dragon											
Research											
Education											
Lobbying—Direct											
Lobbying—Grass Roots											
Invited Testimony											
Nonlobbying Communications With Administrative Agencies											
Media											
DARE Quarterly:											
Editorial											
Advertising											
LEAVE:											
Overtime/Comptime											
Vacation											
Holiday											
Personal Leave											
Sick Leave											
Leave Without Pay											
TOTAL HOURS:											





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[www.afj.org](http://www.afj.org)  
[advocacy@afj.org](mailto:advocacy@afj.org)  
Toll free: 866-675-6229

11 Dupont Circle, NW  
2nd Floor  
Washington, DC 20036  
Phone: 202-822-6070

1611 Telegraph Avenue  
Suite 1006  
Oakland, CA 94612  
Phone: 510-444-6070