

Transition Advocacy

Is It Lobbying?

The Law

In general, lobbying involves efforts to influence specific legislation. For 501(c)(3) public charities operating under the [insubstantial part test](#), any advocacy that argues for or against legislation qualifies as lobbying and should be counted against the organization's lobbying limit. If, however, a public charity has made the [501\(h\) election](#) to maximize its lobbying limits, the definition of lobbying is slightly different. Under the 501(h) expenditure test, speaking to a legislator and expressing a view about specific legislation is more specifically defined as direct lobbying. Communications with the general public that express a view on specific legislation and contain a call to action are counted as grassroots lobbying for 501(h) electors.

In the transition team advocacy context, the most important factors to determine if you are engaged in direct lobbying under the 501(h) expenditure test are (1) whether the person you are speaking to is a legislator and (2) if what you are talking about is considered specific legislation. 501(h) electors need to be doing both at the same time for their work to be considered direct lobbying under the law.

STEP 1: AM I SPEAKING WITH A LEGISLATOR?

Whether you're taking a meeting or writing an email, the person you're communicating with matters. Legislators include the members of federal, state, and local legislative bodies plus their staff. Sometimes high-ranking executive branch officials count as legislators, but whether they count or not depends on if they are crafting the legislation you're talking about. So in that case, the subject matter is the determining factor. Members of special purpose boards like zoning commissions and school boards are not legislators, even if they are elected and wield a great deal of power.

Legislators	Not Legislators
✓ Members of Congress	✗ Non-elected experts on transition team staff
✓ State Senator-elect	✗ Executive branch agency staff
✓ Chief of Staff to a County Commissioner	✗ Chief of Staff to a school board chair
✓ President-elect, if the subject is legislation they may submit to Congress	✗ Governor-elect if the subject is on enforcement of law or any subject that is not legislation to be submitted to the state legislature

If the person you are speaking to is a legislator, continue to step two. If the person is **not** a legislator, your transition team advocacy is **not lobbying**.

STEP 2: AM I TALKING ABOUT SPECIFIC LEGISLATION?

Specific legislation is usually an active piece of legislation, a draft bill, or a specific policy proposal that can only be achieved through legislation. The first two categories are the easiest to determine because they are either submitted to the legislative body, or the bill is being formatted and drafted in a way that makes its status as legislation clear. Specific policy proposals can be written down, but they can also come up in conversation organically. Those are the ones that can be trickiest to spot. However, this is a more narrow definition than it might seem at first blush. Things that are not legislation include changing or adding regulations, altering the enforcement of existing laws, or decisions on submitting executive orders.

Legislation	Not Legislation
✓ A named bill before Congress (HR1, SB233)	✗ New executive orders to overturn those of a previous administration
✓ A draft of a bill to reform voting procedures statewide	✗ New regulation restricting fracking on state lands pursuant to existing state clean water laws
✓ Urging the President-elect to submit a supplemental budget to Congress that appropriates \$2,000/person monthly until the country falls to safe levels of COVID infections	✗ A proposal to the President-elect to exercise his powers under the Defense Production Act to increase production of personal protective equipment for first responders and hospitals
✓ A general conversation about ways to protect future elections turns to supporting new block grants to states to adopt specific best practices in voting procedures	✗ A general conversation about ways to protect future elections
✓ Advocating the U.S. sign onto a new climate change treaty	✗ A general conversation about climate change turning to the role of the private sector to develop new greener technologies

If you have determined the person you are communicating with is a legislator in step one, and that you are talking about specific legislation in step two, you are probably lobbying unless you act within one of the lobbying exceptions. For more on those, see Bolder Advocacy’s [Being a Player](#).

Continued ↪

WHAT ABOUT NOMINATIONS?

Advocating for specific nominees to legislative-confirmed positions before the chief executive who makes the nomination, or the legislators that vote to confirm or deny the nomination, is generally considered lobbying. In the transition team context, things get a little fuzzier because we don't have specific guidance from the IRS. We can safely say that advocating for any nomination that doesn't require legislative approval is never lobbying. However, it's likely to be considered lobbying to offer a proposed nominee to the President-elect if that position requires Senate approval. It would also be lobbying if your organization went over the list with transition team staff members that were in charge of that nomination or executive branch agency portfolio.

Conclusion

It's probably safe to say that the vast majority of advocacy an organization does with transition teams will not be lobbying, so 501(c)(3) public charities face no restrictions on the amount they can do. However, as noted above, if an organization is speaking with a team member who is a legislator and the subject is specific legislation, the activity should be tracked as lobbying and reported to the IRS at the end of that tax year. Some of this can be trickier to determine at the margins, so if you aren't sure, know that you can contact Bolder Advocacy at 866-NP-LOBBY or advocacy@afj.org and our team of experts can help guide you.

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