The Self-Defense Exception to Lobbying

The Internal Revenue Code limits the amount of lobbying that public charities may engage in and imposes a prohibitive tax on any lobbying expenditures made by private foundations. However, private foundations and public charities that have elected the 501(h) expenditure test may use a narrow "self-defense" exception to the lobbying definitions to communicate directly with lawmakers about their support or opposition to certain types of legislation without counting the related expenses as lobbying expenditures.[1]

For more information on when public charities can lobby and what types of advocacy private foundations can engage in, check out Bolder Advocacy's trainings and resource library.

When Does the Self-Defense Exception Apply?

To qualify, the communication must include the following two elements:[2]

1. | It is a communication with a legislative body.

This includes a communication with an entire legislative body, a committee or subcommittee of a legislative body, an individual legislator, or a legislator's staff. It also includes a communication with an executive branch official involved in the legislative process if the communication is limited to the topics described in the second element below. Communications with members of the public are not covered by this exception.

2. | It concerns a decision of that legislative body, such as the passage of legislation, which might affect the organization's:

- **Existence,**
- **Powers or duties,**
- **Tax-exempt status, and/or**
- **Deductibility of contributions to the organization**

Examples

Likely Covered by the Self-Defense Exception:

- At a congressional committee hearing, a 501(c)(3) organization testifies against a federal bill that would establish new grounds for revoking the tax exemption of 501(c)(3)s.[3]
- In a meeting with a state senator, a 501(c)(3) organization asks the state senator to oppose a state bill that would require the organization to make certain amendments to its governing document.[4]
- In a letter to members of Congress, a 501(c)(3) organization expresses the organization's support for a federal bill that would increase the tax deductibility of contributions to 501(c)(3)s.[5]

Likely Not Covered by the Self-Defense Exception:

- In a letter to members of the public, a 501(c)(3) organization expresses support for a federal bill that would increase the tax deductibility of contributions to 501(c)(3)s and asks the letter's recipients to call members of Congress.

  This is not a communication with a legislative body.[6]

- In an email to members of the state legislature's appropriations committee, a 501(c)(3) organization asks committee members to support a state budget bill that includes funding for the organization's programs.

  Although it may impact the scope of the organization's future activities, this bill would likely not affect the organization's existence, powers or duties, tax-exempt status, or the deductibility of contributions to the organization.[7]

Key Takeaways

- The self-defense exception only covers lobbying communications directed to legislators considering legislation that may impact the organization's existence, powers or duties, tax-exempt status, or the deductibility of contributions to the organization.
- The self-defense exception never applies to grassroots lobbying communications.
- Because the IRS interprets this exception narrowly, 501(c)(3) organizations, and private foundations in particular, should proceed cautiously and seek legal counsel before relying on it.

1: The Internal Revenue Service (IRS) has not issued precedential guidance confirming whether the self-defense exception applies to public charities that have not elected the 501(h) expenditure test. However, two IRS General Counsel Memoranda suggest it would apply to non-electing public charities. G.C.M. 34289 (May 8, 1970); G.C.M. 36127 (Jan. 2, 1975); see also *Haswell v. United States,* 500 F.2d 1133, 1141-44 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975) (using the Internal Revenue Code (I.R.C.) section 4945 regulations on the legislative activities of private foundations to clarify what constitutes lobbying for public charities); Judith E. Kindell & John Francis Reilly, *Lobbying Issues,* in Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 1997 277 note 20 (1996) (discussing G.C.M. 34289 (May 8, 1970) and G.C.M. 36127).

2: I.R.C. §§ **4911(d)(2)(c)**, **4945(e)**; Treas. Reg. §§ **56.4911-2(c)(4)**, **53.4945-2(d)(3)**.

3: I.R.C. §§ **4911(d)(2)(c)**, **4945(e)**; Treas. Reg. §§ **53.4945-2(d)(3)(ii) "Example 1"**, **56.4911-2(c)(4)(v)**

4: I.R.C. §§ **4911(d)(2)(c)**, **4945(e)**; Treas. Reg. §§ **53.4945-2(d)(3)(ii) "Example 2"**, **56.4911-2(c)(4)(v)**

5: I.R.C. §§ **4911(d)(2)(c)**, **4945(e)**; Treas. Reg. §§ **56.4911-2(c)(4)**, **53.4945-2(d)(3)**.

6: I.R.C. §§ **4911(d)(2)(c)**, **4945(e)**; Treas. Reg. §§ **53.4945-2(d)(3)**, **56.4911-2(c)(4)**.

7: I.R.C. §§ **4911(d)(2)(c)**, **4945(e)**; Treas. Reg. §§ **53.4945-2(d)(3)(ii) "Example 4"**, **56.4911-2(c)(4)(v)**.