The "Subsequent Use" Rule

When Must Non-Lobbying Materials Be Retroactively Counted as Grassroots Lobbying?

When a 501(c)(3) public charity that has elected **the 501(h) expenditure test** creates non-lobbying communications or research materials and later uses them in a **grassroots lobbying** communication, the staff time and any other costs to create the materials may need to be retroactively counted as grassroots lobbying expenditures as well. This "subsequent use" rule only applies in certain narrowly defined circumstances.

Although the subsequent use rule's application is quite limited, 501(h)-electing public charities should consider its potential application when making plans to repurpose non-lobbying communications or research materials — such as educational materials that meet the **nonpartisan analysis, study, or research exception** — for subsequent grassroots lobbying. When and why the original materials were created may impact whether the associated costs must be counted as grassroots lobbying expenditures.

WHEN MUST NON-LOBBYING MATERIALS BE RETROACTIVELY COUNTED AS LOBBYING?

The costs to create the non-lobbying materials will need to be retroactively counted as grassroots lobbying expenditures if all four of the following elements are met:

1. **The materials meet the definition of "advocacy communications or research materials."**

   "Advocacy communications or research materials" is defined as any communications or research materials that:

   - Express a view about specific legislation, and
   - Do *not* include one of the three types of *direct* calls to action, which are:
     - Telling the recipient to contact a legislator or their staff (or any other government employee participating in the formulation of the legislation if the principal purpose of that communication is to influence legislation);

- Providing the address, telephone number, email address, or other contact information for a legislator or their staff (or any other government employee participating in the formulation of the legislation if the principal purpose of that communication is to influence legislation); or

- Providing a petition, email generator, or other mechanism for the recipient to contact a legislator or their staff (or any other government employee participating in the formulation of the legislation if the principal purpose of that communication is to influence legislation).[1]

Communications that fall within the **nonpartisan analysis, study or research exception** count as advocacy communications or research materials. Any other reports, fact sheets, videos, or images that (a) refer to and express a view about specific legislation and (b) do not include a direct call to action also count as advocacy communications or research materials.

2. **The materials were subsequently used in a grassroots lobbying communication containing one of the three types of direct calls to action (listed above in "1").**[2]

3. **The organization did not have a non-lobbying primary purpose for creating the materials.**[3]

If the primary purpose of creating the materials was a non-lobbying purpose, the subsequent use rule does not apply. This is called the "primary purpose" safe harbor.

SUBSTANTIAL NON-LOBBYING DISTRIBUTION

The organization is considered to have a non-lobbying primary purpose if the organization made a substantial distribution of the materials in their non-lobbying form either before or at the same time as the grassroots lobbying distribution.[4]

For nonpartisan analysis, study, or research materials, whether the non-lobbying distribution is considered substantial is determined by the specific facts and circumstances, including how the organization and similar organizations typically distribute similar materials.[5]

For all other advocacy communications or research materials, the non-lobbying distribution will not be considered substantial unless it is at least as extensive as that of the grassroots lobbying distribution.[6]

INSUBSTANTIAL NON-LOBBYING DISTRIBUTION

If the distribution of the advocacy communications or research materials in their non-lobbying form is not substantial, the IRS will consider all the facts and circumstances to determine whether the organization had a non-lobbying primary purpose.[7]

Particularly relevant facts include:

- The extent of non-lobbying distribution versus the grassroots lobbying distribution;
- Whether the grassroots lobbying was by the organization that initially created the materials, a related organization, or an unrelated organization (e.g., no interlocking boards of directors or shared staff); and
- If an unrelated organization uses the materials for grassroots lobbying, the IRS will conclude that the primary purpose was non-lobbying, unless evidence shows cooperation or agreement between the two unrelated organizations to use the materials for lobbying.[8]

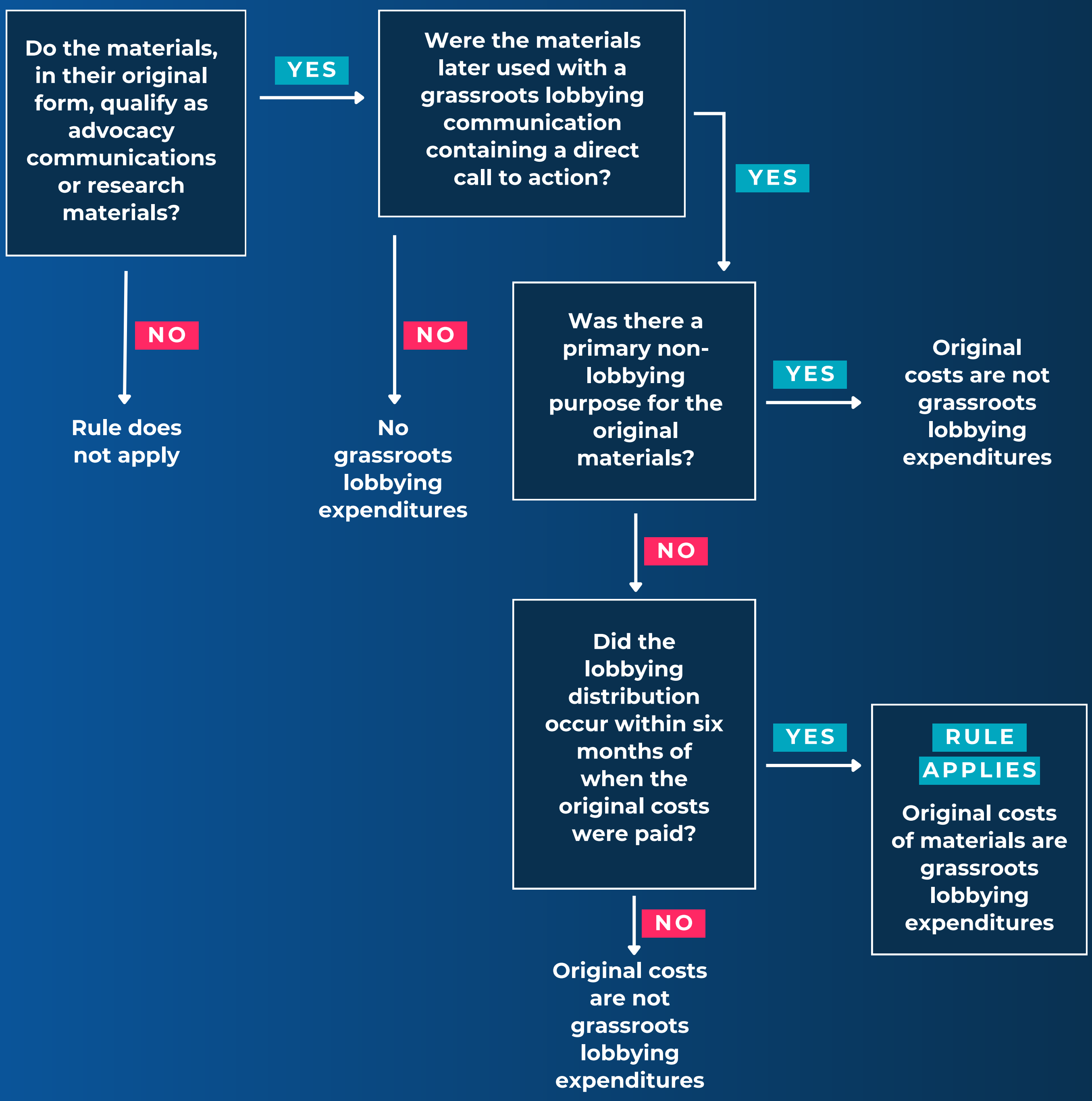
4. The expenditures for the non-lobbying materials were paid *less than* six months before the non-lobbying materials were first used in a grassroots lobbying communication containing one of the three types of direct calls to action.[9]

If at least six months have elapsed between when the expenditures for the non-lobbying materials were made and when they were subsequently used in a grassroots lobbying communication, the subsequent use rule does not apply. This is called the “timing of subsequent use” safe harbor. Under this safe harbor, organizations can avoid having to reclassify non-lobbying expenditures as grassroots lobbying expenditures by waiting six months or more before using them in subsequent grassroots lobbying communications.

If all four of the above elements are present, then the subsequent use rule requires the organization to retroactively count the costs of creating and distributing the non-lobbying materials as grassroots lobbying expenditures.[10] This would include the **staff time** spent preparing and distributing the materials; any other direct costs (e.g., payments to consultants to draft the report and for printing); and the portion of overhead expenses attributable to the materials.

The flowchart below provides a method to assess whether these elements have been met.

When Does Subsequent Grassroots Lobbying Use Require Initial Costs to be Counted as Grassroots Lobbying Expenditures?



EXAMPLES

Example A

An immigrants' rights organization creates a report on the economic impact of comprehensive immigration reform and distributes it to 50 people. The report expresses a view about an immigration bill that Congress is considering, but it does not include a direct call to action. Two months later, the organization emails the report to 10,000 people with a message urging them to ask their senators to support the bill. All expenditures related to preparing the report were paid less than six months before the email was sent.

The report meets the definition of "advocacy communications or research materials" and it was used in a grassroots lobbying communication containing a direct call to action. Because the expenditures were paid less than six months before the email was sent, the "timing of subsequent use" safe harbor does not apply. Under the "primary purpose" safe harbor, the non-lobbying distribution of the report would not be considered substantial because it is far less extensive than its lobbying distribution.

In this case, the report's primary purpose is determined by considering all relevant facts and circumstances. The report's relatively minimal non-lobbying distribution, combined with the fact that the same organization prepared and distributed it for grassroots lobbying, establishes that there is no primary non-lobbying purpose. Consequently, all expenditures (including staff time) related to preparing the report would need to be retroactively counted as grassroots lobbying expenditures.[11]

EXAMPLES

Example B

An immigrants' rights organization creates a report on the economic impact of comprehensive immigration reform and distributes it to 50 people. The report expresses a view about an immigration bill that Congress is considering, but it does not include a direct call to action. The costs of the report are paid over the two-month period of January and February. Between January 1 and 31, the organization pays $1,000 for the report. In February, the organization pays $500 for the report. In August, the organization emails the report to 10,000 people with a message urging them to ask their senators to support the bill.

The report meets the definition of "advocacy communications or research materials," it was used in a grassroots lobbying communication containing a direct call to action, and it does not have a primary non-lobbying purpose (as discussed in Example A). However, the "timing of subsequent use" safe harbor applies to the $1,000 paid for the report between January 1 and 31. This is because these expenditures were made more than six months before the report. Therefore, only the $500 paid for the report in February would need to be retroactively counted as a grassroots lobbying expenditure.[12]

Example C

An immigrants' rights organization creates and distributes a report on the economic impact of comprehensive immigration reform. The report expresses a view about an immigration bill that Congress is considering but does not include a direct call to action. The following week, the organization emails the report to several senators with a message urging them to support the bill.

The organization's email to senators is a direct lobbying communication, not a grassroots lobbying communication. Therefore, the subsequent use rule does not apply in these circumstances. The subsequent use rule never applies when non-lobbying materials are subsequently used for direct lobbying.

ADDITIONAL RESOURCES

For more information about the lobbying definitions and limits that apply to 501(c)(3) public charities, see our full-length ***Being A Player* guide**.

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1. **Treas. Reg. § 56.4911-2(b)(2)(v)(B)**.
2. **Treas. Reg. § 56.4911-2(b)(2)(v)(C)**.
3. *Id*.
4. **Treas. Reg. § 56.4911-2(b)(2)(v)(E)**.
5. *Id*.
6. **Treas. Reg. § 56.4911-2(b)(2)(v)(F)**.
7. **Treas. Reg. § 56.4911-2(b)(2)(v)(G)**
8. *Id*.
9. **Treas. Reg. § 56.4911-2(b)(2)(v)(D)**.
10. **Treas. Reg. § 56.4911-2(b)(2)(v)**.
11. *See* **Treas. Reg. § 56.4911-2(b)(2)(v)(H) "Example 1."**
12. See **Treas. Reg. § 56.4911-2(b)(2)(v)(H) "Example 2."**