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The 1976 Lobby Law and 1990 IRS Regulations: An Overview

In 1976, Congress passed landmark legislation that clarified and greatly expanded the extent to which nonprofits could lobby without jeopardizing their tax-exempt status. That legislation, Section 1307 of Public Law 94-455, recognized lobbying as an entirely proper function of nonprofits and ended the uncertainty about lobbying by groups that are tax-exempt under Section 501(c)(3) of the Internal Revenue Code.²

It took a full 14 years for the Internal Revenue Service to issue final regulations under the 1976 lobby law, but the regulations were worth the wait. While the last four years included some stormy debate between nonprofits and the IRS regarding earlier proposed regulations, the final version, issued on August 31, 1990, is faithful to the 1976 law, which greatly extended the lobbying rights of nonprofits. There is clear consensus in the nonprofit community that the regulations provide a framework that will prove to be both flexible and workable for nonprofits' efforts on legislation. In every critical area, the regulations reflect responsiveness to (although not complete acceptance of) the criticisms and suggestions offered by nonprofits during the long process that led to the final outcome.

² Public Law 94-455 resulted in Internal Revenue Code Sections 4911 and 501(h). Section 4911 includes information on how much can be spent on lobbying. Section 501(h) provides information on electing to come under the provisions of PL 94-455.

In understanding the 1976 lobby law, it helps to know that lobbying, for a nonprofit electing to come under the law, is only the expenditure of money by the organization for the purpose of attempting to influence legislation. Where there is no expenditure by the organization for lobbying, there is no lobbying by the organization. Therefore, lobbying by a volunteer for a nonprofit is not counted as a lobbying expenditure to the organization and is *not* lobbying. If, however, the volunteer is reimbursed by the nonprofit for out-of-pocket expenditures, then the reimbursed funds do count as a lobbying expenditure. But it's important to keep in mind the point that *lobbying occurs only when there is an expenditure of funds* for an activity that meets the other criteria for lobbying.

It is also helpful in understanding the 1976 law to recognize that the law defines two kinds of lobbying: direct lobbying and grassroots lobbying. To oversimplify, the term *direct lobbying* means communications that your organization has about legislation (1) with legislators or government officials who participate in the formulation of legislation and (2) with its own members. Direct lobbying would include visiting a congressperson about a bill and being in touch with your organization's members and urging them to contact legislators. The term *grassroots lobbying* refers to any attempt to influence legislation through an attempt to affect the opinion of the general public. The ceiling for a nonprofit's spending on grassroots lobbying is one-fourth of the total allowable lobbying expenditures.

Sometimes groups confuse urging their members to lobby with grassroots lobbying of the general public. They

mistakenly think that contacting their members, who may number hundreds of thousands, to urge them in turn to contact members of the legislature constitutes grassroots lobbying, simply because those members are at the grassroots level. Only when an organization is trying to reach beyond its members to get action from the general public does grassroots lobbying occur.

The following information on the 1976 law is fairly detailed, but don't be discouraged by all the detail. Keep in mind that the provisions of the law are very liberal. They provide all the lobbying latitude that 99 out of 100 groups will ever need. The details included here will help provide the assurance you may need that many of your activities in the legislative arena are not lobbying under the 1976 lobby law.

Virtually all of the information that follows in this chapter is drawn from materials written for INDEPENDENT SECTOR by Walter B. Slocombe formerly of Caplin & Drysdale, Washington, D.C. It is an overview of the lobbying latitude permitted to 501(c)(3) organizations under the 1976 law and regulations.

Nonprofit Lobbying:
An Overview

What Groups Are Affected?

The regulations are effective for an organization's first tax year that begins after their publication, which took place on August 31, 1990. Nonprofits that have elected to come under the 1976 lobby law need to familiarize themselves with the regulations, so that they will know what activities will and will not count against the statutory limits, and so that they can correctly calculate the amounts they treat

as spending for lobbying.

Private foundations are affected. This is because the regulations (1) elaborate the standards that foundations must meet to comply with the general ban on lobbying by private foundations and (2) establish guidelines for grants by private foundations to nonprofits that elect to come under the law.

Nonprofits that have any degree of involvement in public policy issues also have an interest in the regulations, even if they have not elected to be covered by them. This interest arises partly because nonprofits need to decide whether to make that election, and partly because, although the regulations nominally apply to nonprofits only if they have so elected, the standards set forth in the regulations may affect the application of the old "substantiality" standard, to which nonelecting nonprofits will remain subject.

How Does the Tax Law Regulate Public Charities' Lobbying?

The general rule of Section 501(c)(3), to which all organizations exempt under that provision are subject unless they elect to come under the 1976 lobby law, is that "no substantial part" of their activities may be that of attempting to influence legislation. Although the provision has been in the IRS code since 1934 and has occasionally been applied by the courts, there has never been a clear definition of the point at which lobbying becomes substantial or, indeed, of what activities related to public policy and to controversial subjects constitute attempts to influence legislation. In particular, the IRS position is that spending, as a share of budget, is far from the sole measure of

whether a nonelecting group's lobbying is substantial; such factors as absolute amount spent, impact, public prominence, and unpaid volunteer work also enter into the determination.

To clarify and liberalize the rules for lobbying by nonprofits, Section 501(h) and 4911 were added to the code in 1976, as a result of the enactment of the 1976 lobby law. In outline, the provisions permit most nonprofits (but not churches, their integrated auxiliaries, or a convention or association of churches) to elect to have their legislative efforts governed by the specific rules of Sections 501(h) and 4911, instead of the vague "substantiality" standard. To that end, the 1976 legislation both sets financial limits for lobbying activities and defines the activities that count against those limits.

What Are the Main Elements of the 1976 Law?

—Exclusions from Lobbying.

Critical to the 1976 law are the provisions declaring that many expenditures that have some relationship to public policy and legislative issues are not treated as lobbying and so are permitted without limit. For example:

1. Contacts with executive branch employees or legislators in support of or opposition to proposed regulations is not considered lobbying. So, if your nonprofit is trying to get a regulation changed it may contact both members of the executive branch as well as legislators to urge support for your position on the regulation and the action is not considered lobbying.
2. Lobbying by volunteers is considered a lobbying expenditure only to the extent that the nonprofit incurs

expenses associated with the volunteers' lobbying. For example, volunteers working for a nonprofit could organize a huge rally of volunteers at the state capitol to lobby on an issue and the only expenses related to the rally paid by the nonprofit would count as a lobbying expenditure.

3. A nonprofit's communications to its members on legislation—even if it takes a position on the legislation—is not lobbying so long as the nonprofit doesn't directly encourage its members or others to lobby. For example, a group could send out a public affairs bulletin to its members, take a position on legislation in the bulletin, and it would not count as lobbying if the nonprofit didn't ask its members to take action on the measure.
4. A nonprofit's response to written requests from a legislative body (not just a single legislator) for technical advice on pending legislation is not considered lobbying. So, if requested in writing a group could provide testimony on legislation, take a position in the testimony on that legislation, and it would not be considered lobbying.
5. So-called self-defense activity—that is, lobbying legislators (but not the general public) on matters that may affect the organization's own existence, powers, tax exempt status, and similar matters would not be lobbying. For example, lobbying in opposition to proposals in Congress to curtail nonprofit lobbying, or lobbying in support of a charitable tax deduction for nonitemizers,

would not be a lobbying expenditure. It would become lobbying only if you asked for support from the general public.

[Lobbying for programs in the organization's field, (e.g., health, welfare, environment, education, etc.) however, is not self-defense lobbying. For example, an organization that is fighting to cure cancer could not consider working for increased appropriations for cancer research to be self-defense lobbying.]

6. Making available the results of “nonpartisan analysis, study, or research” on a legislative issue that presents a sufficiently full and fair exposition of the pertinent facts to enable the audience to form an independent opinion, would not be considered lobbying. The regulations make clear that such research and analysis need not be “neutral” or “objective” to fall within this “nonpartisan” exclusion. The exclusion is available to research and analysis that take direct positions on the merits of legislation, as long as the organization presents facts fully and fairly, makes the material generally available, and does not include a direct call to the reader to contact legislators. This exception is particularly important because many nonprofits that engage in public policy do conduct significant amounts of nonpartisan analysis, study, and research on legislation.

7. A nonprofit's discussion of broad social, economic, and similar policy issues whose resolution would require legislation—even if specific legislation on the matter is pending—is not considered lobbying so long as the discussion does not address the merits of specific legislation. For example, a session at a nonprofit's annual meeting regarding the importance of enacting child welfare legislation, would not be lobbying so long as the organization is not addressing merits of specific child welfare legislation pending in the legislature. Representatives of the organizations would even talk directly to legislators on the broad issue of child welfare, so long as there is no reference to specific legislation on that issue.

8. It's not grassroots lobbying if a nonprofit urges the public, through the media or other means, to vote for or against a ballot initiative or referendum. (It's direct lobbying, not grassroots, because the public in this situation becomes the legislature. Lobbying the public through the media is therefore considered a direct lobbying expenditure, not a grassroots expenditure. This is an advantage because nonprofits are permitted to spend more on direct lobbying than on grassroots lobbying.)

From the foregoing, it is very clear that there are many activities related to legislation that do not count toward lobbying expenditure limits.

—Permitted Levels of Spending for Lobbying. The second key element of the 1976 law is that it unequivocally declares that activities that do constitute active lobbying are permitted, provided only that they fall within the spending ceilings established by the law. The spending ceilings are based on percentages of the nonprofit’s budget for the year, beginning at 20 percent of the first \$500,000 and ending at 5 percent of expenditures over \$1.5 million. (Strictly speaking, the base is the nonprofit’s exempt-purpose expenditures, which include all payments for the organization’s programs and exempt purposes but exclude costs of investment management, unrelated businesses, and certain fund-raising costs.) There is an overall maximum ceiling of \$1 million a year. The effect of the sliding-scale ceilings is that an organization reaches the maximum permissible ceiling when its exempt-purpose expenditures reach \$17 million.

Expenditures for grassroots lobbying—that is, attempting “to influence legislation through an attempt

to affect the opinions of the general public or any segment thereof”—are limited to one-quarter of the overall ceiling, as already stated. Amounts spent on lobbying in excess of that level must be for direct lobbying—that is, for communications made directly to legislators and their staffs and to executive-branch officials who participate in the formulation of legislation. (As previously described, communications with an organization’s members that urge them to contact legislators are also treated as direct, rather than grassroots, lobbying. The total and grassroots ceilings at various exempt-purpose expenditure levels are shown in Table 3.) Since the amount that may be spent on grassroots lobbying is limited to one-quarter of the overall lobbying limit, if an organization’s total lobbying limit is \$100,000, then it may spend the full \$100,000 on direct lobbying or it may spend up to \$25,000 on grassroots lobbying and the rest on direct lobbying. Even if it chooses to spend nothing on direct lobbying, it will still be limited to \$25,000 on grassroots lobbying.

Table 3. Lobbying Ceilings under the 1976 Lobby Law

| Exempt-Purpose Expenditures | Total Lobbying Expenditures | Amount of Total Allowable for Grassroots Lobbying |
|------------------------------|---|---|
| Up to \$500,000 | 20% of exempt-purpose expenditures | One-quarter |
| \$500,000 – \$1 million | \$100,000 + 15% of excess over \$500,000 | \$25,000 + 3.75% of excess over \$500,000 |
| \$1 million – \$1.5 million | \$175,000 + 10% of excess over \$1 million | \$43,750 + 2.5% of excess over \$1 million |
| \$1.5 million – \$17 million | \$225,000 + 5% of excess over \$1.5 million | \$56,250 + 1.25% of excess over \$1.5 million |
| Over \$17 million | \$1 million | \$250,000 |

—Flexible Sanctions. A third important element of the 1976 legislation was the establishment of a new and more flexible system of sanctions, to replace the “death sentence” of loss of exemption as the principal sanction for violation of the “substantiality” standard. (Since 1976, Congress has added additional sanctions, beyond loss of exemption, for non-electing organizations that violate that standard—a 5 percent excise tax on excessive lobbying spending, and a similar tax on managers who willfully and unreasonably agree to lobbying expenditures, knowing that these are likely to cause loss of exemption.) The initial sanction for nonprofits under the 1976 law that spend more than either the overall or the grassroots limit is a 25 percent excise tax on the lobbying spending in any year in excess of the ceiling. (If both ceilings are exceeded, the tax is on the greater of the two excess amounts.) Loss of exemption is an available sanction only if spending normally exceeds 150 percent of either the overall or the grassroots limit, generally determined by aggregating both spending and limits over a four-year period.

What Spending Counts Against the Limits?

There is considerable uncertainty about what activity counts against the “substantiality” standard, but the standard, under the 1976 lobby law, is strictly financial. The only factor that must be taken into account is the cost of communications for direct or grassroots lobbying, including the cost of preparing the communication (such as staff time, facilities, and allocable overhead).

—Elements Required for a Lobbying Communication. To be a direct lobbying communication, and therefore to count against the direct lobbying limits, a communication must refer to specific legislation and reflect a point of view on its merits. “Specific legislation” includes a specific measure that has not yet been introduced but does not include general concepts for solving problems that have not yet been reduced to legislative proposals.

To be a grassroots lobbying communication, subject to the lower ceiling, in most cases, a communication must, apart from referring to specific legislation and reflecting a view on it, encourage recipients to contact legislators. Under the regulations, such a call to action exists only when the material directly tells its audience to contact legislators; provides a legislator’s address, phone number, or similar information; provides a petition, postcard, or other prepared message to be sent to the legislator; or identifies one or more legislators as opposing the organization’s views, being undecided, being recipients’ representative(s), or being a member of the committee that will consider the legislation.

Under these rules, a nonprofit (except in the narrow case of “highly publicized legislation,” to be discussed) can make any public statement it likes about a legislative issue, without having the costs counted against its grassroots lobbying limit—as long as it avoids calls to action. The broad freedom that this rule gives nonprofits to discuss issues freely, as long as they forego calls to action, is shown by an example in the regulations. It concerns a mass-media advertisement that the IRS says would not normally be considered

grassroots lobbying, because it lacks such a call. The sample advertisement reads as follows: “The State Assembly is considering a bill to make gun ownership illegal. This outrageous legislation would violate your constitutional rights and the rights of other law abiding citizens. If this legislation is passed, you and your family will be criminals if you want to exercise your right to protect yourselves.”

—Special Rule for Paid Mass-Media Messages Close to Votes on “Famous” Bills. There is one exception to the rule stating that a public communication about legislation must include a call to action in order to be considered lobbying. The regulations eliminate the “call to action” requirement in a narrowly defined set of cases involving mass-media advertising just before a vote on certain legislation that has elicited a high degree of public awareness. These regulations apply—and communications can be considered grassroots lobbying, even without a call to the public to communicate with legislators about the legislation—only when all the following conditions are met:

1. The legislation in question has received so much publicity that its pendency or its general terms, purpose, or effect are known to a significant element of the general public, not just to the particular interest groups directly affected. The degree of publicity given the legislation is a factor here, but there must not only be publicity; there must also be general public knowledge about the particular legislation.

2. The nonprofit has bought paid advertising in the mass media (meaning television, radio, billboards, or general-circulation newspapers and magazines). Direct mail and the organization’s own media outlets are not considered paid media, except for radio and television broadcasting by the organization itself and organization-published periodicals that have a circulation of 100,000, more than half of which is outside the organization’s membership.
3. The advertising appears within two weeks before a vote will be taken in a full house or full committee (not just a subcommittee).
4. The advertisement either
 - a. refers directly to the legislation (as in the gun control ad above) but does not include a call to action, as defined under the general standards,³ or
 - b. states a view on the general subject of the legislation and urges the public to communicate with legislators about that subject. (To carry on the handgun example, such an ad might say, “Let your state assemblyman know you want to protect your right to keep and bear arms”—without referring directly to the pending bill.)

Even when all these conditions are present, the organization can avoid counting the ad as a lobbying cost if it can show that it has customarily run such ads without regard to the timing of legislation, or that the particular ad’s timing was unrelated to the upcoming

³ If the ad includes a call to action, it is grassroots lobbying without the special “mass media” rules.

legislative action (as may be the case when television ads are bought under conditions that allow the station to determine when they run). This special rule for ads on highly publicized and well-known legislation affect few if any activities that are not directly and consciously aimed at legislative results. Even in those cases, of course, the activity is permitted within financial ceilings.

—Special Rule for Referenda, Initiatives, and Similar Procedures. In general, legislative messages aimed at the public as a whole are grassroots lobbying if they meet the “call to action” standard. The final regulations, however, recognize that in the case of referenda, initiatives, and similar procedures, the public is itself the legislature. Accordingly, communications to the public that refer to such measures and that take a stand on them are treated as direct lobbying of a legislature—subject only to the higher ceiling. The effect of these rules is that communications (newspaper ads, for example) that refer to a ballot measure and reflect a view on it are direct lobbying, whether or not they explicitly tell people how to vote.

This rule gives nonprofits important flexibility to be active in referendum efforts, which would have been impractical if they had been forced to count against the lower grassroots lobbying limits.

When Does Later Use of Materials in Lobbying Cause Their Costs to Be Counted as Lobbying?

The costs of a lobbying communication include the costs of the staff and facilities needed to prepare it, not just the costs of paper and ink or videotape. An issue of concern to many groups, especially those doing research on public policy issues, has been the possibility that research costs might be treated as costs of preparing to lobby, if the published results of the research were later referred to and used in lobbying. The final regulations on this so-called “subsequent use” issue should greatly ease organizations’ concerns that their lobbying spending will be boosted unexpectedly because materials they have prepared are later used in lobbying—whether the use is by the organization itself, by a related organization, or by a third party. This is because costs of materials that are not themselves used for lobbying need to be counted as lobbying-support costs (on the basis of their later use in lobbying) *only* in cases in which all of the following conditions exist:

1. The materials both refer to and reflect a view on specific legislation. (They do not, however, in their initial format, include a call to action. If the materials do include such a call, their public circulation would itself be grassroots lobbying.) Materials—such as raw research data—that do not meet this test are entirely outside the “subsequent use” rules.
2. The lobbying use occurs within six months of payment for the materials. Therefore, lobbying use more than six months after a research project is complete cannot affect the

organization's lobbying costs. In any case, only the most recent six months of spending potentially represents a lobbying cost. There is no risk that, because of some lobbying use of research results more than six months after a project is finished, years of accumulated research spending will be treated as lobbying costs.

3. The organization fails to make a substantial nonlobbying distribution of the materials before the lobbying use. If the materials are "nonpartisan, analysis, study, or research," a nonlobbying distribution qualifies as "substantial" (and therefore excludes all the costs from lobbying treatment) if it conforms to the normal distribution pattern for similar materials, as followed by that organization and similar ones. For other materials, the nonlobbying distribution must be at least as extensive as the lobbying distribution. This rule means that, by seeing that research-and-analysis materials that take positions on legislation are first distributed to the public in normal ways, an organization can prevent their costs from being treated as lobbying costs, even if the materials are later used in lobbying by the organization itself or by an affiliate.
4. The organization's primary purpose in creating the materials was to use them in lobbying rather than for some nonlobbying goal. When the lobbying use is by an unrelated organization, not only must there be

clear and convincing evidence of such a lobbying purpose but that evidence must also include evidence of collusion and cooperation with the organization using the material for lobbying.

For private foundations making grants to nonprofits that spend the money on materials later used in lobbying, there is another layer of protection. Even if the grantee violates the "subsequent use" rules, the grantor foundation can be taxed on the grant as a lobbying expenditure only if the private foundation had a primary lobbying purpose in making the grant or if the grantmaking foundation knew or should reasonably have known of the grantee's lobbying purpose.

The cumulative effect of these safeguards is that a research organization can readily avoid any risk of unexpected lobbying expenses. Only costs that are less than six months old can be at issue. Even in theory, the problem can arise only in the case of material that takes a position on specific legislation. Even for such materials, there is a safe harbor for distributions that follow the normal patterns of dissemination. In any event, an organization can avoid having costs for materials later used in lobbying treated as grassroots lobbying cost if the primary purpose of incurring the cost was a nonlobbying objective. If the later use is by an unrelated organization, there must be clear and convincing evidence that the organization developed the research for the purpose of lobbying.

Does Electing to Be Governed by the New Regulations Complicate Receiving Grants from Foundations?

Private foundations may not elect to come under the 1976 law, and they remain absolutely prohibited from making expenditures for lobbying purposes. Therefore, some foundations have been concerned about their ability to make grants to nonprofits that explicitly adopt programs of lobbying by electing to come under the 1976 lobby law, and some nonprofits have worried that making an election under the 1976 law will scare off foundation funders.

The regulations—codifying and even liberalizing long-established IRS policy—meet these concerns by setting up a highly protective system for grants by private foundations to nonprofits that elect to come under the 1976 law. Under these rules, a foundation may make without tax liability a general-purpose grant to a nonprofit that lobbies, whether or not the nonprofit has elected. A private foundation may also make a grant to support a specific project that includes lobbying, as long as its own grant is less than the amount budgeted for the nonlobbying parts of the project. For example, if a specific project has a \$200,000 budget, of which \$20,000 is to be spent for lobbying, a private foundation can give the project up to \$180,000 because that is the part of the project budget allocated to nonlobbying uses. The fact that other private foundations have already made grants for the project need not be taken into account in considering how much a private foundation can give. Of course, the foundation cannot earmark its funds for lobbying, nor can a foundation

support research in a case where the foundation itself has a primary lobbying purpose and where the results are used in violation of the “subsequent use” rules.

The regulations make clear that a foundation can rely on statements by the prospective grantee regarding how much the project will spend on lobbying, unless the foundation knows or has reason to know that the statements are false. The regulations also make clear that as long as the granting foundation complies with these standards when it makes the grant, it will not be held to have made a taxable lobbying expenditure if the nonprofit violates the assurances it gave when seeking the grant.

When Will a Nonprofit’s Transfers to a Lobbying Organization Be Counted as Lobbying Expenditures?

If a nonprofit pays another organization or an individual to do lobbying for it, the payment counts against its direct or grassroots lobbying ceiling according to the character of the work done. The regulations also seek to prevent evasion of the limits by nonprofits that provide funds to other organizations not subject to the Section 501(c)(3) lobbying limits—such as presumably a related organization exempt under Section 501(c)(4)—to increase the resources available for the recipient’s lobbying efforts. In such a case, the funds transferred are deemed to have been paid for grassroots lobbying, to the extent of the transferee’s grassroots lobbying expenditures, with any remaining amount treated as having been paid for direct lobbying, to the extent of the transferee’s direct lobbying expenditures.

This rule is subject to some very important qualifications, however. There is no lobbying expenditure when a nonprofit makes a grant to a nonprofit and the grant's use is expressly limited to a specific educational or otherwise nonprofit purpose and when records demonstrate that use. The regulations also make clear that the rule does not apply when the nonprofit is getting fair market value for the money it transfers. Thus, if a 501(c)(3) organization pays rent at fair market value to a 501(c)(4) group, or if the 501(c)(3) group pays to a 501(c)(4) group its proper portion of the costs of a shared employee, the rule does not apply, because the 501(c)(3) group is getting full value from the 501(c)(4) group.

These transfer rules protect nonprofits that engage in normal and legitimate transactions with related (or unrelated) entities. Such nonprofits need only follow the substantive and accounting procedures that are required in any case for general tax purposes, without regard to the special lobbying provisions.

How Are Expenditures That Have Both Lobbying and Nonlobbying Purposes Treated?

Sometimes a nonprofit wants to distribute a communication that has both lobbying and nonlobbying messages, such as a mass mailing that calls for readers to contact legislators about pending legislation and also asks them for contributions to the organization. In general, the regulations permit allocation between the lobbying and nonlobbying aspects of such mixed-purpose communications; but, to reflect the special solicitude that is extended to communications with members,

treatment of such communications is more generous.

The details are beyond the scope of this overview, but the general situation is as follows. First, costs of communications with members may be allocated, as between lobbying and any other bona fide nonlobbying purpose (education, fund raising, or advocacy on nonlegislative issues), on any reasonable basis. An attempt to allocate to lobbying only the particular words actually urging legislative action—and not the material explaining the legislative issue and the organization's position—will be rejected as unreasonable. Second, costs for part-lobbying communications to nonmembers (including even the membership share, if the communications go primarily to nonmembers) can be allocated to nonlobbying purposes only to the extent they do not address the "same specific subject" as the legislative message in the communication. The same specific subject is rather broadly defined to include activities that would be affected by legislation addressed elsewhere in the message, as well as the background and consequences of the legislation and activities affected by it. Nevertheless, fund raising and providing general information about the organization are not treated as being on the same specific subject as a legislative message. Therefore, that share of costs attributable to those goals would not be a lobbying expenditure. Allocation of costs away from lobbying is also permitted for the parts of a communication that are discussions of distinct aspects of a broad problem, one feature of which would be affected by the legislation addressed elsewhere in the communication.

Organizations that have extensive and expensive direct-mail operations aimed at current contributors (who are members) and prospects (who are not) will need to review their mailings, to ensure that they do not inadvertently make large grassroots lobbying expenditures. Similarly, groups that routinely send legislative alerts to nonmembers may want to make them distinct publications, rather than combining them with general communications.

When Are Several Nonprofits Treated on an Aggregate Basis?

In general, ceiling determinations and lobbying expenditure calculations are made on a separate basis for each legally distinct 501(c)(3) organization. Only if two or more organizations are subject to common control through interlocking majorities on their boards (or to common control by a third organization), or if one organization is required by its governing instrument to follow the legislative decisions of another, are the organizations aggregated under a single ceiling, with aggregate computations of expenditures. The requirement to follow legislative decisions must be express and not merely implied.

For Further Information

The preceding analysis is intended to give interested volunteers and staff members an overview, in lay language, of the 1976 lobby law. No guide, however, can adequately substitute for official information. Those wishing to make their own analyses will find the following additional sources to be of value:

- U.S. Internal Revenue Code of 1986, as amended, especially Sections 501(a), 501(c)(3), 501(h), and 4911.

- Public Law no. 94-455, The Tax Reform Act of 1976, approved October 4, 1976 (specifically, Section 1307, "Lobbying by Public Charities").
- House Report no. 94-1210, "Influencing Legislation by Public Charities," June 2, 1976, to accompany H.R. 13500. (H.R. 13500 became Section 1307 of PL 94-455.)
- Senate Report no. 94-938, Part 2, supplemental report on additional amendment to H.R. 10612, July 20, 1976. (H.R. 10612 became PL 94-455.)
- House Report no. 94-1515, conference report on H.R. 10612, September 13, 1976.
- "Final Regulations on Lobbying by Public Charities and Private Foundations." *Federal Register*, Aug. 31, 1990, p. 35579.

Election Procedure for Nonprofits

The process for electing to come under the 1976 lobby law (PL 94-455) is very simple. Those eligible to so elect are nonprofits exempt from taxation by Section 501(c)(3) of the Internal Revenue Code. The legislation does not apply to churches, their integrated auxiliaries, or a convention or association of churches. Private foundations also are not eligible, although they may make grants to nonprofits that do elect.

If a nonprofit does not elect to take advantage of the generous lobbying provisions under the 1976 lobby law, it remains subject to the vague "insubstantial" rule that has been in the tax code since 1934. Under that

provision, if a nonprofit engages in more than insubstantial lobbying, it loses its Section 501(c)(3) status and its right to receive tax-deductible charitable contributions. Unfortunately, insubstantial has never been defined under the law, with the result that nonprofits that do lobby but have not elected to come under the 1976 law cannot be certain how much lobbying they may conduct without jeopardizing their tax-exempt status. Many nonprofits have followed the questionable guideline that the expenditure of 5 percent of their total annual expenditures on lobbying is not substantial and is therefore within the law. They have assumed that 5 percent of their *expenditures* is permissible because of a 1955 Sixth Circuit Court of Appeals ruling to the effect that attempts to influence legislation that constitute 5 percent of total *activities* are not substantial.

There is good reason to doubt that the “5 percent test” should be relied on. It was called into question by a 1972 ruling, which rejected a percentage test in determining what constituted substantial lobbying. In that case, the Tenth Circuit Court of Appeals supported a “facts and circumstances” test instead of a percentage test. In a 1974 ruling, the Claims Court stated that a percentage test was deemed inappropriate for determining whether lobbying activities are substantial. It was found that an exempt organization enjoying considerable prestige and influence could be considered as having a substantial impact on the legislative process, solely on the basis of making a single official position statement—an activity that would be considered

negligible if measured according to a percentage standard of time expended. It is clearly in the interest of every nonprofit that lobbies more than a nominal amount to consider electing to come under the provisions of the 1976 law.

The law makes the process for electing very easy. A nonprofit’s governing body—that is, its executive committee, board of directors, other representatives, or total membership, according to the constitution or bylaws of the particular nonprofit—may elect to have the organization come under the law. An authorized officer or trustee signs the one-page Internal Revenue Service Form 5768 and checks the box marked “Election.” (A copy of IRS Form 5768 is in Resource E.) Regardless of the actual date of election, the nonprofit is considered to have come under the provisions of the law as of the start of the tax year during which it files the election.

The nonprofit automatically continues under the provisions of the 1976 law unless it chooses to revoke that election. It can do that by having its governing body vote on revocation and having an authorized officer or trustee sign another Form 5768. The revocation becomes effective at the start of the tax year that follows the date of the revocation. In other words, revocation can only be prospective.

A new nonprofit may elect to come under the lobby law even before it is determined to be eligible by the IRS. It simply submits Form 5768 at the time it submits its “Application for Recognition of Exemption” (Form 1023). Offices and addresses for obtaining IRS Form 5768 are listed in Resource E. The nonprofit’s employer identification number, which is requested at the top of the form, is listed

on the nonprofit's "Employer Quarterly Federal Tax Return" (Form 941).

One final important note: Some nonprofits have been reluctant to come under the 1976 lobby law, for fear that taking this action will serve as a "red flag" to the IRS and prompt an audit of lobbying activities. Fortunately, this is not the case. The IRS, in an October 7, 1988, letter to attorneys representing INDEPENDENT SECTOR, made clear that it does not plan to single out nonprofit organizations that elect to come under the provisions of the 1976 law. (Earlier, the IRS had furnished each IRS region with a listing of organizations that had elected to come under the 1976 law, and that action had raised fears among some nonprofits that the IRS planned to target for audit the lobbying activities of those nonprofits that had elected.) In the letter, the IRS representative said,

As I stated above, our intent has been, and continues to be, one of encouragement [of nonprofit organizations] to make the election. Accordingly, I am taking steps to see that the IR Manual provision on this is revised. I have instructed that the IR Manual clarify that the filing of an election is a neutral factor for audit selection purposes. This change should eliminate the perception and concerns expressed in your letter."

In compliance with that promise, the Internal Revenue Manual now states, "Experience also suggests that organizations that have made the election

[under the 1976 lobby law] are usually in compliance with the restrictions on legislative activities, so they do not appear to justify an effort to examine solely on this issue."

When Congress was debating the 1976 lobby law, before its enactment, there was clear evidence that Congress fully intended the law to encourage nonprofits to lobby and not to discourage them by singling them out for audit. These facts should reassure nonprofit groups that they will not be targeted for lobbying audits if they elect to be covered under the 1976 law.