

Using the Section 501(h) Lobbying Definitions

Allen Mattison
Trister, Ross, Schadler & Gold, PLLC
amattison@tristerross.com • 202-839-4488

Nonprofit organizations that are tax-exempt as Internal Revenue Code section 501(c)(3) public charities may engage in some lobbying, but not too much. How much is too much? The IRS gives public charities two ways to measure their lobbying activity: The Insubstantial Part Test, and the Section 501(h) Expenditure Test. The default is that an organization's lobbying will be measured under the Insubstantial Part Test. This test does not clearly define what counts as "lobbying," nor how much is too much.

For many organizations, the Section 501(h) Expenditure Test is a better choice. It provides five benefits over the Insubstantial Part Test:

1. Certainty about what is and what isn't lobbying;
2. Certainty about how much money the organization may spend on lobbying;
3. Ability to spend more money on lobbying;
4. Ability to categorize significant amounts of legislative advocacy as "non-lobbying"; and
5. Consistency with the restrictions private foundations impose on their grants.

Charities with under \$20 million in annual spending should consider whether the Section 501(h) Expenditure Test will benefit their organization. It can also be useful for certain large nonprofits.

More information regarding the Section 501(h) Expenditure Test is available from the Alliance for Justice at www.tinyurl.com/AFJ501h, or call me.

To determine whether an organization has elected to use the Section 501(h) Expenditure Test:

- A. Review the organization's IRS application for 501(c)(3) status, filed using IRS Form 1023, and see if the organization included IRS Form 5768; or
- B. Review the organization's most recent IRS Form 990. If the organization filled out Schedule C, Part II-A, it uses the Section 501(h) Expenditure Test; if it filled out Schedule C, Part II-B, it uses the Insubstantial Part Test; if it did not fill out Schedule C, it either uses the Insubstantial Part Test or the accountant made a mistake.

To elect to use the Section 501(h) Expenditure Test, an organization must file IRS Form 5768 (www.tinyurl.com/IRS5768), a very simple, short form. Fill out line 1, and check the box for "election." Filing will be retroactive to the start of the organization's tax year. Be sure to tell your accountant, so they fill out Form 990 Schedule C, Part II-A.

This overview is intended to summarize aspects of the IRS treatment of communications by section 501(c)(3) organizations. It is not intended as a comprehensive summary, nor is it intended to provide legal advice. Consult a lawyer, as the IRS treatment depends on an organization's particular facts and circumstances.