



Confirmation of Federal Judges and Executive Branch Nominees

What Your Nonprofit Needs To Know

501(c)(3) public charities are legally allowed to influence the Senate confirmation of federal judicial and executive branch nominees.

The Internal Revenue Service (“IRS”) has recognized that influencing the confirmation of federal judges is exactly like influencing any other legislative vote through lobbying. “Because the Senate’s action of advice and consent on a judicial nomination is an action with respect to a resolution or similar item, the Senate’s confirmation vote constitutes a vote on legislation.” (Notice 88-76, 1988-2 C.B. 392.)

Likewise, Senate actions to confirm cabinet level nominations are also considered legislative actions. Attempts by a 501(c)(3) public charity to influence the confirmation of executive branch nominees would similarly fall under the IRS definition of lobbying.

It is important to remember that 501(c)(3) public charities can lobby within the generous limits allowed by law. Because influencing judicial and cabinet level confirmations are clearly lobbying activities, consideration of the general lobbying rules can maximize your lobbying efforts on these nominations.

Remember These Key Points

- ▶ The Internal Revenue Code offers two ways for 501(c)(3) public charities to measure lobbying activities: (1) the “insubstantial part test,” which is the default standard for all public charities or (2) the “501(h) expenditure test,” which a public charity must affirmatively elect as its lobbying standard.
- ▶ Electing to measure your organization’s lobbying using the 501(h) expenditure test can amplify your lobbying activity.
 - Under the 501(h) expenditure test, only actual lobbying expenditures count against the organization’s lobbying limits— that means cost-free activities, such as volunteered time or donated materials, do not count against the organization’s lobbying limits.
 - The 501(h) expenditure test provides a clear dollar limit on the amount of money an electing 501(c)(3) can spend on lobbying. Each public charity’s lobbying limits will depend on the size of the organization’s budget, but the 501(h) expenditure test formula usually provides much higher lobbying dollar limits than the default insubstantial part test – for most organizations, as much as 20% of the budget can be used for lobbying activities.

- An organization that measures its lobbying under the 501(h) test may spend up to one-quarter of its overall lobbying limit on “grassroots” lobbying (urging the general public to communicate the organization’s position on the nominee to their U.S. Senators) or it may spend up to the entire amount on “direct” lobbying (telling the Senators or their staff to support or oppose a nominee or urging the organization’s members to do so).
 - A 501(c)(3) may choose to measure its lobbying under the 501(h) expenditure test by filing a one-time simple form—Form IRS 5768.
- ▶ If the 501(c)(3) has not chosen to measure its lobbying under the 501(h) expenditure test, it may still lobby on judicial and executive branch nominations and other issues as long as its lobbying activities do not become a “substantial” part of the 501(c)(3)’s overall activities (the default “insubstantial part test”).
- ▶ If your organization wants to engage in more lobbying than is permitted for 501(c)(3)s, consider creating an affiliated 501(c)(4) organization. 501(c)(4)s can engage in an unlimited amount of lobbying, including judicial and executive branch nominations.

More details about public charity lobbying activities and the 501(h) expenditure test can be found in *Being A Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities*, available from the Alliance for Justice. The Alliance also offers *Worry-Free Lobbying for Nonprofits: How To Use the 501(h) Election to Maximize Effectiveness*, available to download for free from our website at www.allianceforjustice.org.

For additional information, please feel free to contact the Alliance for Justice. The Alliance publishes plain-language guides on nonprofit advocacy topics, offers educational workshops on the laws governing the advocacy of nonprofits, and provides technical assistance for nonprofits engaging in advocacy.



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