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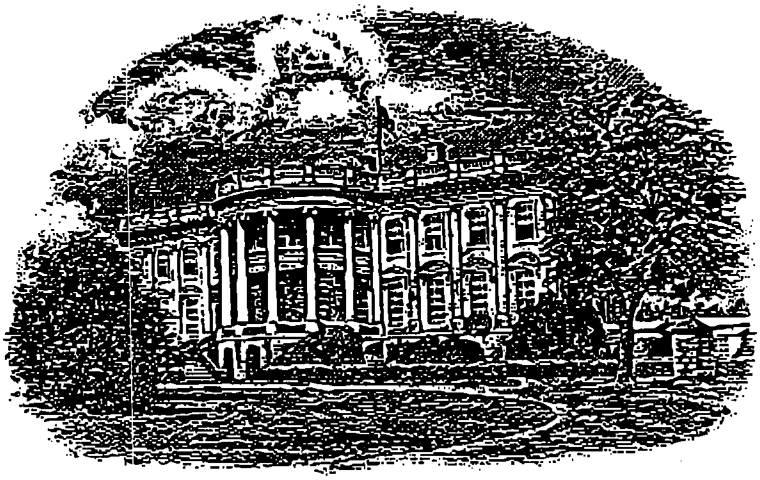

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Lobbying rules under the Internal Revenue Code

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Lobbying

Section 501(c)(3) organizations

In general.–The Internal Revenue Code rules governing lobbying by charitable organizations described in section 501(c)(3) can be viewed as creating three separate regimes. There is a separate set of rules for private foundations under section 4945. In addition, with respect to public charities, the Code differentiates between public charities that affirmatively elect to be subject to special rules under sections 501(h) and 4911 (commonly referred to as "electing public charities") and all other public charities that do not make this election (commonly referred to as "non-electing public charities").[38] In general, the operation of the lobbying restrictions does not depend on whether the lobbying activities of a charity are intended to further its charitable purposes (with an exception for so-called "self-defense direct lobbying" described below).[39] However, whether or not public policy discussions (even if technically not lobbying) are intended to benefit a large segment of the population or a charitable class, as opposed to the private interests of a limited group of individuals, [may be [redacted] relevant to the determination whether the activity satisfies the section 501(c)(3) requirement that the organization be "operated exclusively" for charitable or other exempt purposes or, instead, whether the organization serves substantial non-exempt purposes inconsistent with section 501(c)(3) status. (This issue is commonly referred to as the "private benefit" test.)[40]

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nonetheless entitled to an exemption under Rev. Proc. 98-19 if: (a) more than 90 percent of all annual dues (or similar amounts) are received from persons who each pay annual dues of $75 or less (provided that the organization is not described in section 501(c)(6)); (b) more than 90 percent of all annual dues are received from charities, governmental entities, or tax-exempt organizations which themselves are exempt from the section 6033(e) rules; or (c) the organization maintains records (and notifies the IRS) that 90 percent or more of the annual dues paid to the organization are not deductible to its members, without regard to any political campaign or lobbying expenditures made by the organization.

[38] See generally Hopkins, Bruce R., Charity, Advocacy, and the Law, 130-235 (1992).

[39] See Haswell v. United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974)("The applicability of the influencing legislation clause is not affected by the selfish and unselfish motives and interests of the organization, and it applies to all organizations whether they represent private interests or the interests of the public."); Kindell and Reilly, "Lobbying Issues," Continuing Professional Education Exempt Organizations Technical Instruction Program for FY 1997 (published by Department of the Treasury, Internal Revenue Service)(hereafter cited as "1997 IRS CPE Text") at 272 (no distinction between "good" and "bad" legislation).

[40] See American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989)(because the operational test under sec. 501(c)(3) "examines the actual purpose for the organization's activities and not the nature of the activities or the organization's statement of purpose," the court looked beyond the four corners of the organization's charter to discover "the actual objects motivating the organization" and found that political campaign school had a partisan purpose and the secondary benefit to the Republican entities and candidates was more than incidental);

Limitation on lobbying activities

Section 501(c)(3) expressly provides that an organization is not entitled to tax-exempt status under that section unless "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation" (commonly referred to as "lobbying").[41] Thus, public charities may engage in some lobbying activities, provided that such activities are not substantial, without losing their tax-exempt status and generally without being subject to tax.[42] In contrast, private foundations are subject to the restriction that lobbying activities--even if insubstantial so as not to jeopardize the foundation's tax-exempt status--may result in the foundation being subject to penalty excise taxes, unless one of the statutory exceptions contained in section 4945(e) (such as for nonpartisan analysis or self-defense lobbying) apply.

Definition of "lobbying" and "action" organizations

There is no statutory definition under section 501(c)(3) of "propaganda, or otherwise attempting, to influence legislation."[43] However, Treasury regulations provide that an organization is an "action" organization not entitled to tax-exempt status under section 501(c)(3)

The Fund for the Study of Economic Growth and Tax Reform v. Internal Revenue Service, civil action no. 97-0747 (D.C. Dist.)(Feb. 24, 1998)(taking into account "overt partisan statements" of creators of the organization and finding that the organization did not qualify for sec. 501(c)(3) status because it supported a "one-sided political agenda" and, thus, engaged in substantial non-exempt activities). See also Better Business Bureau v. United States, 326 U.S. 279 (1945)(holding that regardless of the number of activities that educated business persons and the general public, organization was not entitled to tax-exempt status as "educational" entity because its "activities are largely animated by a commercial purpose" and "are directed fundamentally to ends other than that of education"); Callaway Family Association, Inc. v. Commissioner, 71 T.C. 340 (1978)(organization found to have engaged in substantial nonexempt activities serving private interests by conducting genealogical research focusing on the Callaway family and by urging family members to join by asserting that the organization was "for you, about you"); **Christian Manner International v. Commissioner, 71 T.C. 661, 669 (1979)("actual purpose" of organization was commercial publication of its president's books and to provide him an "outlet for the exposition of his theories").**

[41] See Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983)(holding that restrictions on lobbying activities of charitable organizations are constitutionally valid).

[42] Treasury Regulation sec. 1.501(c)(3)-1(c)(3)(ii) provides: "An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation."

[43] As discussed infra, there is a statutory definition of "influencing legislation" under section 4911(d) for public charities that make an election under section 501(h) to have their lobbying efforts judged against a sliding-scale, numeric standard.

due to its lobbying activities if a substantial part of the organization's activities is (1) contacting, or urging the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (2) advocating the adoption or rejection of legislation. Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(ii). Thus, attempts to influence legislation under section 501(c)(3) include directly contacting members of a legislative body (and their staffs) to propose, support, or oppose legislation (so-called "direct lobbying"), and also include urging the public to contact legislative bodies, or otherwise attempting to influence public opinion, with respect to legislation (so-called "grass roots lobbying"). Except as specifically provided for in Treasury regulations (described below), the IRS takes the position that whether a particular communication constitutes an attempt to influence legislation generally is determined on the basis of the facts and circumstances surrounding the communication in question.[44]

For purposes of section 501(c)(3), the term "legislation" includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.[45] "Action" by the Congress or by a State legislature or local council refers to introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items.[46] Contacting executive branch officials generally is not considered lobbying for purposes of section 501(c)(3), unless the charity requests that the executive branch official support or oppose legislation to be considered by a legislative body.[47] Legislation need not actually be formally introduced if a specific legislative proposal is being advocated.[48]

Discussions of broad social or public policy issues (without advocating a specific legislative proposal) generally do not constitute attempts to influence legislation for purposes of

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[44] See 1997 IRS CPE Text at 273.

[45] Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(ii). The IRS has stated that the section 501(c)(3) prohibition on substantial lobbying activities applies to attempts to influence legislation of a foreign country. See Rev. Rul. 73-440, 1973-2 C.B. 177; 1997 IRS CPE Text at 272.

[46] See Notice 88-76, 1988-2 C.B. 392. Actions taken by a legislative body with respect to confirmation of a nominee for a public office (e.g., Federal judges) are included within the term "legislation" for section 501(c)(3) purposes, and also may be "exempt function" activities for purposes of the section 527(f) tax. See Announcement 88-114, 1988-37 I.R.B. 26 (Sept. 12, 1988), 1993 IRS CPE Text at 448, footnote 8 (stating that IRS has made no final determination on the sec. 527 issue), and the discussion below of section 527(f)).

[47] See Rev. Rul. 67-293, 1967-2 C.B. 185; 1997 IRS CPE Text at 277.

[48] See <u>Christian Echoes National Ministry, Inc. v. United States</u>, 470 F.2d 1175 (10th Cir. 1972)(urging public to contact legislators to support prayer in school and oppose foreign aid constituted attempts to influence legislation).

section 501(c)(3).[49] However, even if a public discussion of broad social or policy issues does not constitute an attempt to influence legislation for purposes of section 501(c)(3), there is still a separate issue of whether the discussion is educational (or furthers some other charitable purpose).[50] Thus, if an organization conducts substantial public discussions or disseminates materials concerning broad social or policy issues in a manner that does not further an educational or other exempt purpose, then such activity could jeopardize the organization's tax-exempt status under section 501(c)(3), not because the organization has engaged in substantial lobbying, but rather because it has engaged in substantial activities that do not further an exempt purpose.[51]

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[49] See Rev. Rul. 66-256, 1966-2 C.B. 210 (discussion of broad social issues does not count against lobbying limit under sec. 501(c)(3)). A parallel rule for private foundations also exempts from the definition of "lobbying" discussions of broad social, economic, and similar problems, even if the problems are of a type with which the government would be expected to deal ultimately. See Treas. Reg. sec. 53.4945-2(d)(4). Moreover, as discussed further below, regulations promulgated under section 4911 provide a similar exception for discussions of broad social and policy issues by public charities making the section 501(h) election, with special rules for certain mass media advertising. See Treas. Reg. secs. 56.4911-2(c)(2) and 56.4911-2(b)(5). Likewise, regulations promulgated under section 162 provide that expenditures for institutional or "good will" advertising--including advertising which keeps the taxpayers name before the public and which presents views on economic, financial, social, or other subjects of a general nature--generally are deductible as trade or business expenses rather than being viewed as attempts to influence legislation, provided that such expenditures are related to patronage the taxpayer might reasonably expect in the future. Treas. Reg. sec. 1.162-20(a)(2).

[50] See, e.g., The Nationalist Movement v. Commissioner, 102 T.C. 558 (1994), aff'd 37 F.3d 216 (5th Cir. 1994)(publication of materials advocating social and political change was not "educational" activity under sec. 501(c)(3) because presentation of viewpoints was unsupported by facts, made substantial use of inflammatory and disparaging terms, and expressed conclusions based on emotions rather than objective evaluation); Rev. Proc. 86-43, 1986-2 C.B. 729 (which describes the so-called "methodology test" for judging whether advocacy of a particular viewpoint is considered "educational" under sec. 501(c)(3), see footnote 82 supra). Also, compare National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983)(denial of tax-exempt status to organization that published newsletter promoting racial hatred and violence against minority groups was upheld because the newsletter "cannot reasonably be considered intellectual exposition" and, thus, no possibility that it could be found to be "educational within any reasonable interpretation of the term") with Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980)(holding that Treasury regulation that defined "educational" activity as requiring a "full and fair exposition" was unconstitutionally vague and susceptible to discriminatory enforcement).

[51] See Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, at 411, footnote 7 (discussing implications of making sec. 501(h) election). See also footnote 40 supra (regarding private benefit issues).

Despite this general rule for discussions of broad social issues, Treasury Regulation section 1.501(c)(3)-1(c)(3)(iv) provides for a separate, distinct test under which an organization is treated as an "action organization"--and, thus, not entitled to sec. 501(c)(3) status--if it has the following two characteristics: (1) its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (2) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered. In essence, the "action" organization test of Treasury Regulation section 1.501(c)(3)-1(c)(3)(iv) allows substantial lobbying to be found due to the nature of the organization and its aims.[52]

Exceptions for non-electing public charities

Even when a communication refers to a specific legislative proposal (or the organization's primary objective may be attained only by passage or defeat of legislation), the dissemination of nonpartisan analysis or research with respect to a legislative proposal (or the organization's primary objective), while not advocating legislative action, is not considered lobbying for purposes of section 501(c)(3). See, e.g., Rev. Rul. 64-195, 1964-2 C.B. 138 (organization conducted nonpartisan analysis of a proposed constitutional amendment and disseminated materials to the public, but did not advocate approval or disapproval of the amendment); Rev. Rul. 70-79, 1970-1 C.B. 127 (some of the policies formulated by the organization could be carried out only through legislation, but organization was entitled to (c)(3) status due to the educational nature of activities and because it did not make any specific legislative recommendations).[53] Likewise, responding to a governmental request for testimony is

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[52] See The Fund for the Study of Economic Growth and Tax Reform v. Internal Revenue Service, civil action no. 97-0747 (D.C. Dist.)(Feb. 24, 1998)(finding that two-part test for "action" organization was satisfied because organization conceded that the only way of achieving its policies was through legislative reform, and because press reports and other evidence indicated that the organization "actively engaged in advocacy and furthering a particular political agenda"); Rev. Rul. 62-71, 1962-1 C.B. 85 (research and publications of organization, considered alone, may be educational, but section 501(c)(3) status was not available because the organization was primarily involved not only in teaching but in advocating the adoption of a doctrine that could be effective only by enactment of legislation); Roberts Dairy Co. v. Commissioner, 195 F.2d 948 (8th Cir. 1952); 1997 IRS CPE Text at 276.

[53] See also 1997 IRS CPE Text at 274. As discussed infra, a slightly different rule may apply with the nonpartisan analysis exceptions under sections 4911 and 4945, where nonpartisan analysis of a legislative proposal is allowed to advocate a particular position or viewpoint, without being treated as lobbying, provided that the communication does not "directly encourage" the recipient to take action within the meaning of Treas. Reg. sec. 56.4911-2(b)(2)(iii)(A)-(C). It remains unclear how the nonpartisan analysis exception for non-electing public charities compares to the nonpartisan analysis exception under sections 4911 and 4945.

not treated as a lobbying activity. **See, e.g., Rev. Rul. 70-449, 1970-2 C.B. 112 (providing technical advice).**[54] In addition, advocacy by a charity with respect to legislation that could affect the powers or existence of the organization itself (so-called "self-defense lobbying") generally is considered to be exempt from the section 501(c)(3) lobbying restriction.[55]

Attribution

Similar to questions that arise with respect to the political campaign prohibition under section 501(c)(3) (discussed previously), when an individual affiliated with a charity makes a lobbying communication, the question arises whether the lobbying should be viewed as an activity of the individual acting in his or her private capacity or whether the activity should be attributed to the charity.[56] In general, resolution of this issue depends on whether the lobbying activities are within the scope of the individual's authority to act as an agent for the organization (or, if not, whether the organization implicitly ratified the individuals acts).[57] The lobbying activities of a section 501(c)(4) organization will not be attributed to an affiliated charity, so long as the entities are separately incorporated, the records show legally distinct entities, and there are fair-market-value reimbursements for any shared facilities or services.[58] However, because the lobbying restriction is not absolute under section 501(c)(3), a charity may provide some support to lobbying efforts undertaken by another entity, provided that the provision of such support

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See Hopkins, Bruce R., Charity, Advocacy, and the Law, at 168 (1992)(inadvisable to borrow to heavily from sec. 4911 rules for nonpartisan analysis when judging activities of non-electing public charities); Galston, supra at 1344-45, footnote 263 (noting that more generous nonpartisan analysis exception under secs. 4911 and 4945 may eventually be applied to non-electing public charities).

[54] **[Here also, it is not clear whether the exception for nonelecting public charities is as broad as the technical advice exception for electing public charities under section 4911, which (as discussed later on) does not require that presentation of advice or assistance to a governmental body satisfy the requirements for nonpartisan analysis. See Treas. Reg. sec. 56.4911-2(c)(3).]**

[55] Although there is no precedential ruling from the IRS with respect to self-defense lobbying by a non-electing public charity seeking to protect the organization's own existence or powers under the law (see 1997 CPE at 277, footnote 20), the IRS recognized the self-defense exception in GCM 34289 (May 8, 1970) prior to the enactment of section 501(h). See also Galston at 1284, footnote 40. For the counterpart "self-defense" exceptions for public charities making the 501(h) election, see section 4911(d)(2)(C) and Treas. Reg. sec. 56-4911-2(c); for the counterpart "self-defense" exception for private foundations, see section 4945(e) and Treas. Reg. sec. 53-4945-2(d).

[56] See footnote 14 supra.

[57] **See PLR 9507020 (date?)**; 1997 IRS CPE Text at 277-78.

[58] See footnote 15 supra.

(along with any lobbying activities directly conducted by the charity) does not violate the "substantial part" test (or, 501(h) expenditure limits, if elected by the charity).

Determination of substantiality

In addition to the definitional question of whether a communication constitutes "lobbying" for purposes of section 501(c)(3), there is a second issue of whether the level of an organization's lobbying activities is "substantial." Except for public charities that make the section 501(h) election (as discussed below), there is no bright-line, mechanical rule for determining whether lobbying activities are substantial relative to the organization's other activities. Rather, the particular facts and circumstances surrounding all activities of the organization (including volunteer time) must be examined. In particular, an arithmetical percentage test (e.g., looking at the percentage of the budget, or employee's time, spent on lobbying) while relevant, has been held not determinative.[59] When Congress enacted section 501(h), it was specifically provided in section 501(h)(7) that the determination of whether the lobbying of a non-electing charity is "substantial" is not affected by the numeric tests provided for by sections 501(h) and 4911 (described below).

Lobbying rules for electing public charities

Section 501(h) election

Certain public charities may elect under section 501(h) to have the amount of permitted lobbying expenditures measured under the statutory, arithmetical tests set forth in sections 501(h) and section 4911.[60] The arithmetical tests provide an alternative to the imprecise, facts-and-circumstances test of substantiality that otherwise applies to section 501(c)(3) organizations. For a public charity making the section 501(h) election, the allowable amount of lobbying expenditures that can be made for any tax year is determined under a sliding-scale formula. Specifically, the allowable amount of all lobbying (i.e., direct and grass roots lobbying

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[59] See, e.g., Haswell v. United States, 500 F.2d 1133 (Ct Cl. 1974); Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972); 1997 IRS CPE Text at 279-280 (factors to be considered are percentage of budget, amount of volunteer time, and continuous or intermittent nature of lobbying, and the extent of supporting activities; a 5 percent safe-harbor has at times been applied as a general rule of thumb, and lobbying activities that exceed roughly 16-20 percent of total activities are generally considered substantial). See also Galston, "Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities," 71 Texas L. Rev. 1269, 1279-1280 (1993).

[60] Public charities eligible to make the section 501(h) election include educational institutions, hospitals, and organizations receiving a certain proportion of support from the general public, but not churches and certain church-related entities (secs. 501(h)(4) and (5)). Churches were made ineligible for the section 501(h) election at their own request. See Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 1976-3 C.B. (vol. 2) at 419-420.

combined) is limited to the sum of (a) 20 percent of the first $500,000 of the organization's exempt purpose expenditures[61] for the year, plus (b) 15 percent of the next $500,000 of such expenditures, plus (c) 10 percent of the third $500,000 of such expenditures, plus (d) 5 percent of any additional such expenditures. In no event, however, can the allowable amount of lobbying for an organization making the section 501(h) election exceed $1 million for any year.[62] Grass roots lobbying is subject to a separate limitation, equal to 25 percent of the overall permissible lobbying amount (sec. 4911(c)(4)).[63] In order to prevent organizations from avoiding the dollar limitations of section 501(h) by dividing themselves into technically separate but related entities, section 4911(f) treats certain affiliated organizations under common control as one organization for purpose of applying the section 501(h) arithmetical tests.[64]

If the lobbying expenditures (for either all lobbying or grass roots lobbying in particular) of an organization making the section 501(h) election exceed the allowable amounts under section 4911, then an excise tax penalty is imposed on the organization equal to 25 percent of the excess lobbying expenditures (sec. 4911(a)). Imposition of this excise tax penalty under section 4911 may, in some cases, effectively operate as an intermediate sanction short of revocation of the organization's tax-exempt status. However, if the electing organization's lobbying expenditures (for either all lobbying and grass roots lobbying in particular) normally are more than 150 percent of the allowable amounts, then not only will the organization be subject to the excise tax penalties under section 4911, but the organization will lose its tax-exempt status (secs. 501(h)(1) and 501(h)(2)(B)).[65]

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[61] For this purpose, "exempt purpose expenditures" are defined as expenditures to accomplish the organization's exempt purposes, including properly allocable salary payments, overhead, an allowance for depreciation on a straight-line basis, and all lobbying expenditures, but not including fundraising costs and certain capital expenditures. Section 4911(e)(1); Treas. Reg. sec. 56.4911-4.

[62] Section 4911(c)(2).

[63] In contrast to the arithmetical test for organizations making the section 501(h) election, the substantial part test for non-electing organizations does not focus solely on expenditures made by the organization and it makes no distinction between direct and grass roots lobbying. See 1997 CPE Text at 301; Galston, "Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities," 71 Texas L. Rev. 1269, 1280 (1993)(discussing advantages and disadvantages of sec. 501(h) election for organizations that engage in more grass roots lobbying than direct lobbying or that rely on volunteers for their lobbying).

[64] See Treas. Reg. sec. 56.4911-7.

[65] The determination of whether an organization's lobbying expenditures normally exceed 150 percent of the allowable amounts generally is made by comparing the sum of the organization's lobbying expenditures for the determination year and the three preceding years to the sum of the allowable lobbying amounts for those years (Treas. Reg. sec. 1.501(h)-3(b)).

Definition of lobbying under section 4911

For purposes of the section 501(h) arithmetical test, lobbying expenditures are defined as "expenditures for the purpose of influencing legislation (as defined in section 4911(d))."[66] Section 4911(d), in turn, defines the term "influencing legislation" as --

> (A) any attempt to influence any legislation[67] through an attempt to affect the opinions of the general public or any segment thereof [i.e., "grass roots lobbying communications"], and
>
> (B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation [i.e., "direct lobbying communications"].[68]

However, section 4911(d)(2) specifically excludes from the definition of "influencing legislation" the following activities:

> (A) making available the results of nonpartisan analysis, study, or research;
>
> (B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a

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[66] In theory, the definition of "expenditures for the purpose of influencing legislation" under section 4911 applies only to public charities that have made the section 501(h) election. In practice, however, the definitions and exceptions of section 4911(d)--as well as the parallel rules under section 4945(e)--are generally viewed as codifying existing law and practice for determining whether "lobbying" has been undertaken by any organization described in section 501(c)(3). See, e.g., GCM 39694 (Jan. 21, 1988)(administration of Code is best effectuated by uniform application of lobbying rules for all charities); GCM 34289 (May 5, 1970); S.Rep. No. 91-552, 91 Cong., 1st Sess. 48-49 (1969); Haswell v. United States, 500 F.2d 1133, 1147 (Ct. Cl. 1974). **[See also BNA Portfolio at A-52 (and authorities cited therein).]**

[67] "Legislation" includes action by legislative bodies but does not include action by "executive, judicial, or administrative bodies." Treas. Reg. sec. 56.4911-2(d)(3). The term "administrative bodies" includes school boards, housing authorities, sewer and water districts, zoning boards, and other similar Federal, State, or local special purpose bodies, whether elective or appointive. Treas. Reg. sec. 56.4911-2(d)(4).

[68] Lobbying with respect to a referendum or ballot initiative subject to a vote by the general public (unless it comes within the nonpartisan analysis exception) is considered "direct lobbying," based on the rationale that, in this context, members of the general public are functioning as legislators. See Treas. Reg. sec. 56.4911-2(b)(1)(iii).

governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;

(C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization (i.e., "self-defense direct lobbying");

(D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications which (1) directly encourage members to contact a legislative body in an attempt to influence legislation, or (2) directly encourage members to urge persons other than members to attempt to affect the opinions of the general public or to contact a legislative body in an attempt to influence legislation; and

(E) any communication with a government official or employee, other than --

> (I) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or
>
> (ii) a communication the principal purpose of which is to influence legislation.

With respect to communications with legislators and government officials, Treasury regulations provide a two-part test for determining if such a communication by an organization making the section 501(h) election constitutes a "direct lobbying communication." Under this two-part test, a communication with a legislator or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation (provided that the principal purpose of the communication is to influence legislation), will be treated as a "direct lobbying communication" under section 4911 only if the communication both (1) refers to "specific legislation" (meaning legislation that has already been introduced in a legislative body or a specific legislative proposal that the organization either supports or opposes[69]), and (2)

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[69] "Specific legislation" may be identified by its formal name, by a widely used term in connection with the legislation, or even by its content or effect. See 1997 CPE Text at 296-297.

reflects a view on such legislation.[70]

With respect to communications with the general public, Treasury regulations provide a three-part test for determining whether such a communication by an organization making the section 501(h) election constitutes a "grass roots lobbying communication." Under this three-part test, a communication with the general public will be treated as a "grass roots lobbying communication" under section 4911 only if the communication: (1) refers to specific legislation; (2) reflects a view on such legislation; and (3) encourages the recipient to take action with respect to the legislation (referred to as a "call to action" requirement) in at least one of four specifically enumerated ways.[71] In this regard, the first two requirements for "grass roots lobbying communications" generally are interpreted in the same manner as under the two-part test for "direct lobbying" (with an exception described below for certain mass media advertising that is presumed to refer to specific legislation). With respect to the third requirement--i.e., a "call to action"--this requirement is satisfied only if the communication (a) states that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee (provided that the principal purpose of urging contact with such official or employee is to influence legislation), (b) states the address, telephone number, or similar information of a legislator or employee of a legislative body, (c) provides for a petition, tear-off postcard, or similar material for the recipient to communicate with any legislative or government official, or (d) specifically identifies one or more legislators who will vote on the legislation as: opposing the organization's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation.[72] To be considered a "call to action" a communication must satisfy at least one of

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[70] Treas. Reg. sec. 56.4911-2(b)(1)(ii). The Treasury regulations do not specifically define the term "reflects a view." Instead, the regulations contain examples which are somewhat conclusory. One example refers to a "position letter" sent to Congress "to gain support" for specific legislation--which thus constitutes a "direct lobbying communication"--while another example refers to a paper discussing a State's environmental problems but which "does not reflect a view." See Treas. Reg. sec. 56.4911-2(b)(4)(I)(examples (1) and (3)).

[71] Treas. Reg. sec. 56.4911-2(b)(2)(ii).

[72] Treas. Reg. Sec. 56.4911-2(b)(2)(iii). Merely naming the main sponsor(s) of the legislation for purposes of identifying the legislation will not constitute a "call to action." Id. A communication that merely identifies one or more legislators who will vote on the legislation as supporting the communication's view (as opposed to identifying legislators as opposing the communication's view, or as being undecided with respect to the legislation, or as being the recipient's representative in the legislature) is not a "grass roots lobbying communication" as long as the communication does not include one of the four specific types of "calls to action." See Treas. Reg. sec. 56.4911-2(b)(4)(ii)(A), Example (7); Hopkins, Bruce R., Charity, Advocacy, and the Law at 145 (1992).

these four specific tests enumerated in the Treasury regulations.[73] Thus, except in the case of certain mass media advertisements (as described in the following paragraph), no matter how clearly an organization identifies a specific legislative proposal or comments on the merits of that legislation when it communicates with the general public, the absence of a "call to action" means that the communication is not a "grass roots lobbying communication" for purposes of section 4911.[74]

Mass media advertisements

Under a special rule contained in the section 4911 regulations, certain mass media advertisements that otherwise do not satisfy the three-part test for a "grass roots lobbying communication" may nevertheless be treated as "grass roots lobbying communications." Under this special rule, if, within two weeks before a vote by a legislative body or committee (but not subcommittee) on "highly publicized"[75] legislation, a paid advertisement appears in the mass media (i.e., television, radio, billboards and certain general circulation newspapers and magazines[76]), then such an advertisement will be presumed to be a "grass roots lobbying communication" if it (1) reflects a view on the general subject of such legislation, and (2) either (a) refers to the highly publicized legislation or (b) encourages the public to communicate with legislators on the general subject of such legislation. Treas. Reg. sec. 56.4911-2(b)(5).[77] This presumption may be rebutted if the organization demonstrates that the advertisement is a type of mass media communication regularly made by the organization (without regard to the timing of the legislation) or that the timing of the advertisement was unrelated to the upcoming legislative action. If a mass media advertisement falls outside the special rule of Treasury regulation sec.

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[73] See 1997 CPE Text at 300-301 (an exhortation to the public to "oppose" a particular legislative proposal is not, by itself, a "call to action" under sec. 4911).

[74] See 1997 CPE Text at 298-299.

[75] Treas. Reg. sec. 56.4911-2(b)(5)(iii)(C) provides that "highly publicized" means frequent coverage on television and radio, and in general circulation newspapers, during the two weeks preceding the vote by the legislative body or committee. However, the regulation goes on to state that, even where legislation receives frequent coverage, it is "highly publicized" only if "the pendency of the legislation or the legislation's general terms, purpose, or effect are known to a significant segment of the general public (as opposed to the particular interest groups directly affected) in the area in which the paid mass media advertisement appears." Id.

[76] Where an electing organization is itself a mass media publisher or broadcaster, all portions of that organization's mass media publications or broadcasts are treated as paid advertisements in the mass media, except those specific portions that are advertisements paid for by another person. Treas. Reg. sec. 56.4911-2(b)(5)(iii)(B).

[77] See 1997 CPE Text at 308-09 (noting that presumption does not apply if an advertisement appears even one day more than two weeks before a vote; nor does the presumption apply if public pressure from an advertising campaign results in a scheduled vote being canceled).

56.4911-2(b)(5), or if the special rule applies but the presumption is rebutted, then the general three-part test applies for determining whether the advertisement constitutes a "grass roots lobbying communication."

Discussions of broad social issues

Consistent with the definitions of "direct lobbying communications" and "grass roots lobbying communications" under section 4911, Treasury regulations provide that "[e]xaminations and discussions of broad social, economic, and similar problems are neither direct lobbying communications under section 56.4911-2(b)(1) nor grass roots lobbying communications under section 56.4911-2(b)(2) even if the problems are of the type with which government would be expected to deal ultimately." Treas. Reg. sec. 56.4911-2(c)(2).[78] Consequently, lobbying communications do not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as such discussion does not address itself to the merits of a specific legislative proposal and so long as such discussion does not directly encourage recipients to take action with respect to legislation. Id.[79] This treatment of discussions of broad social and policy issues is implicit in the two-part definition of "direct lobbying" and the general three-part definition of "grass roots lobbying," because both definitions require that the communication in question "reflects a view" on a specific legislative proposal (and the general definition of "grass roots lobbying communication" under section 4911 further requires that there be a specific "call to action").[80] Moreover, if a mass media advertisement appearing within two weeks of a vote reflects a view on a general social or policy issue that also is the subject of highly publicized legislation, then the advertisement could be presumed to be a grass roots lobbying communication only if the advertisement also refers to

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78 The counterpart regulation for private foundations is Treas. Reg. sec. 53.4945-2(d)(4).

79 For example, Treas. Reg. sec. 56.4911-2(b)(4)(ii)(a), example (4), points out that an organization could encourage members of the public to send their legislators a coupon to "support a drug free America" without referring to any specific legislation, and this would not be treated as a "grass roots lobbying communication" under the general three-part test. However, if such a communication appeared in a paid mass media advertisement within two weeks of a vote on highly publicized legislation concerning drug abuse, then such a communication potentially could be presumed to be a "grass roots lobbying communication" under Treas. Reg. sec. 56.4911-2(b)(5).

80 See 1997 CPE Text at 306, footnote 37 (noting that the exception in the sec. 4911 regulations for discussion of broad social problems was included to provide parity with a pre-existing exception under sec. 4945, but, as a substantive matter, the exception is "superfluous" given the definitions of lobbying communications in the sec. 4911 regulations). See also McGovern, Accettura, and Skelly, "The Revised Lobbying Regulations--A Difficult Balance," Tax Notes (Dec. 26, 1988)("the revised definition of grass roots lobbing will reduce or eliminate the need for organizations to depend upon the exception for discussion of broad social, economic, and similar problems.")

specific legislation or encourages the public to communicate with legislators on the general social or policy issue. Thus, if there is neither a reference to specific legislation nor a mass media "call to action" regarding the general social or policy issue that is also the subject of legislation that is voted on within two weeks, then the public discussion of broad social or policy issues is not a lobbying communication under section 4911.[81]

Statutory exceptions under section 4911

Even if a communication by an organization meets the definition of a "direct lobbying" or "grass roots lobbying" communication under the general rules described above, the communication nonetheless may be exempt if one of the five statutory exceptions of section 4911(d)(2) apply. The first of these statutory exceptions is "making available the results of nonpartisan analysis, study, or research" (sec. 4911(d)(2)(A)). With respect to this exception, Treasury Regulation section 56.4911-2(c)(1)(ii) provides that the term "nonpartisan analysis, study, or research" means "an independent and objective exposition of a particular subject matter, including any activity that is 'educational' within the meaning of [Treasury Regulation] section 1.501(c)(3)-1(d)(3)."[82] Treasury Regulation section 56.4911-2(c)(1)(ii) goes on to

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[81] As discussed previously, whether or not the discussion is conducted in a manner that furthers an educational or other exempt purpose (or violates the private benefit test) is a separate question. See footnotes 40 and 50 supra.

[82] Treas. Reg. sec. 1.501(c)(3)-1(d)(3) provides that "an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." In Rev. Rul. 86-43, 1986-2 C.B. 729--which was issued to address the vagueness concerns identified in the Big Mama Rag decision, see footnote 50 supra--the IRS indicated that the focus of the IRS in applying Treas. Reg. sec. 1.501(c)(3)-1(d)(3) is not upon the viewpoint or position advocated, but rather upon the method used by the organization to communicate its viewpoint. Rev. Proc. 86-43 indicates that the method used by the organization "will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process." Further, Rev. Proc. 86-43 indicates that the presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its views is not educational: (1) the presentation of viewpoints unsupported by facts is a significant portion of the organization's communications; (2) the facts that purport to support the viewpoints or positions are distorted; (3) the organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations; and (4) the approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter. However, Rev. Proc. 86-43 goes on to provide that, even if one or more of the above four factors are present, the IRS will look to all facts and circumstances to determine whether an organization nonetheless may be considered "educational." An examination of the factors listed in Rev. Proc. 86-43 is commonly

provide: "Thus, 'nonpartisan analysis, study, or research' may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. The mere presentation of unsupported opinion, however, does not qualify as 'nonpartisan analysis, study, or research.'"[83]

Treasury Regulations provide that nonpartisan analysis that reflects a view on specific legislation is not within the section 4911(d)(2)(A) exception if the communication "directly encourages" the recipient to take action—meaning that the communication expressly states that the recipient should contact a legislative or government official or employee, includes the address, telephone number or similar information of a such official or employee, or includes a petition tear-off postcard, or similar material for the recipient to send to such an official or employee. However, nonpartisan analysis within the section 4911(d)(2)(A) exception is allowed to include a limited (or implicit) "call to action" that specifically identifies one or more legislators who will vote on the legislation as (1) opposing the organization's views with respect to the legislation, (2) being undecided with respect to the legislation, (3) being the recipient's representative in the legislature, or (4) being a member of the legislative committee or subcommittee that will consider the legislation.[84]

Under section 4911(d)(2)(A), an organization may choose any suitable means, including oral or written presentations or disseminations to the news media, to distribute its nonpartisan analysis or research. However, communications may not be limited to, or be directed toward, persons who are interested solely in one side of a particular issue (Treas. Reg. sec. 56.4911-2(c)(1)).[85]

The four additional statutory exceptions provided for by section 4911(d)(2) include (1)

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referred to as the "methodology test." See The Nationalist Movement v. Commissioner, 102 T.C. 558 (1994)(upholding constitutionality of methodology test).

[83] As discussed in more detail infra, it is not clear whether the IRS intends to use the arguably stricter "full and fair exposition" test with respect to advocacy involving legislation, or whether satisfying the "methodology" test of Rev. Proc. 86-43 (which can be viewed as a subset of the "full and fair exposition" test) would suffice, even if both sides of the debate on a legislative issue are not presented. It is also questionable whether use of the "full and fair exposition" test (without the overlay provided by the "methodology" test) for judging advocacy with respect to legislation test would be constitutionally permissible in view of the Big Mama Rag decision (see footnote 50 supra). Compare The Nationalist Movement v. Commissioner, 102 T.C. at ___, footnote 17 (doubtful whether IRS could require presentation of opposing views) with The Fund for the Study of Economic Growth and Tax Reform v. Internal Revenue Service (where the court found that the organization did not conduct nonpartisan analysis, but the court did not refer to either the "full and fair exposition" test or the "methodology" test).

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[84] Treas. Reg. secs. 56.4911-2(b)(2)(iii) and 56.4911-2(c)(1)(vi).

[85] See 1997 IRS CPE text at 302-03.

providing technical advice or assistance upon written request from a governmental body[86], (2) so-called self-defense direct lobbying--that is, communications with a legislative body with respect to a possible decision by the body which might affect the existence of the organization, its powers and duties, or its tax-exempt status, or the deduction of contributions to the organization[87], (3) communications between an organization and its bona fide members, provided that the communication does not directly encourage the members to contact legislators or to urge nonmembers to influence legislation[88], and (4) communications with government officials or employees, provided that the communication is not a direct lobbying communication with a member or employee of a legislative body and, in the case of other government officials, does not have the principal purpose of influencing legislation.[89]

Cost allocations.--In addition to defining direct and grass roots lobbying communications and the five statutory exceptions, Treasury regulations issued under section 4911 provide detailed guidance for allocating particular expenditures to lobbying communications. In general, public charities making the section 501(h) election are required to treat as lobbying expenditures all direct costs of producing the communication, as well as an allocable share of overhead

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[86] Under this exception, the request for assistance or advice must be made in the name of the requesting governmental body, committee, or subdivision rather than an individual member thereof; and the response to such request must be made available to every member of the requesting body, committee, or subdivision. Treasury regulations further provide that because such assistance or advice may be given only at the express request of a governmental body, the oral or written presentation of such assistance or advice need not qualify as nonpartisan analysis, study or research. The offering of opinions or recommendations will ordinarily qualify under this exception only if such opinions or recommendations are specifically requested by the governmental body or are directly related to the materials so requested. See Treas. Reg. secs. 56.4911-2(c)(3) and 53.4945-2(d)(2).

[87] See Treas. Reg. secs. 56.4911-2(c)(4) and 53.4945-2(d)(3); 1997 IRS CPE Text at 307-08.

[88] Treas. Reg. sec. 56.4911-5. For purposes of this exception, the term "directly encourage" has the same meaning as for the nonpartisan analysis exception. See Treas. Reg. sec. 56.4911-5(f)(6)); 1997 CPE Text at 314-17. A communication between an organization and a member of the organization which directly encourages the member to engage in direct lobbying of a member of employee of a legislative body is considered a direct lobbying communication (unless the self-defense exception applies). See section 4911(d)(3)(A); Treas. Reg. sec. 56.4911-5(f)(6)(B).

[89] When a communication is with government official or employee who is not a member of (or employed by) a legislative body, then the costs of the communications are taken into account under section 4911 only if the principal purpose of the communication is to influence legislation. See Joint Committee on Taxation, General Explanation of Tax Reform Act of 1976, at 410.

costs.[90] In addition, rules are provided for so-called "mixed purpose" expenditures and for allocating costs when non-lobbying materials (e.g., nonpartisan analysis) subsequently are used by an organization as part of a grass roots lobbying campaign.[91]

Penalties applicable to private foundations-For purposes of determining whether a private foundation should have its exemption revoked, the substantial part test under section 501(c)(3) continues to apply.[92] As a separate issue, private foundations and their managers are potentially subject to excise taxes under section 4945[93] if any expenditures are made for either direct or grass roots lobbying. Lobbying activities may be subject to tax under section 4945 even in cases where such activities are not substantial relative to the private foundation's other activities.[94] For purposes of section 4945, lobbying is defined in a manner similar to the definition under section 4911(d). Specifically, as under section 4911(d)(2), the section 4945 penalty excise taxes do not apply to (a) making available the results of nonpartisan analysis, study, or research, (b) providing technical advice to a governmental body in response to a written request, or (c) direct lobbying of a legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation (sec. 4945(e)).[95]

Penalties applicable to public charities-- For public charities making the section 501(h) election, there is an intermediate sanction of an excise tax penalty that may be imposed in cases where an organization exceeds the so-called "lobbying nontaxable amount" (or "grass roots nontaxable amount") but the organization does not normally exceed the numeric limits by more

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[90] Treas. Reg. sec. 56.4911-3(a)(1).

[91] Treas Reg. secs. 56.4911-2(b)(2)(v) and 56.4911-3(a)(2); 1997 IRS CPE Text at 304-06. See also Hopkins, Bruce R. Charity, Advocacy, and the Law at 155-57 (1992).

[92] Joint Committee on Internal Revenue Taxation, General Explanation of the Tax Reform Act of 1969, H.R. 13270, 91st Cong., 1st Sess., at 49, footnote 21.

[93] The section 4945 penalty regime for private foundation and their managers is described in footnote [23] supra.

[94] **[See S. Rep. No. 552, 91st Cong., 1st Sess, 51 (1969).]** Although the section 4945 excise tax conceptually could be viewed by private foundations as a "cost of doing business" in situations where the foundation wants to engage in insubstantial lobbying (without meeting one of the statutory exceptions), private foundations generally have not adopted this view. See Galston, supra at 1278, footnote 21. In theory, a willful and flagrant lobbying expenditure that leads to imposition of a penalty excise tax under section 4945 also could lead to termination of a private foundation's tax-exempt status due to the operation of section 507(a)(2) (see footnote [24] supra), even though the lobbying activity might not be "substantial" under section 501(c)(3).

[95] In contrast to section 4911(d)(2), there is no explicit exception under section 4945(e) for membership communications, because private foundations generally do not have members.

than 150 percent.[96] In such cases where the electing public charity does not normally exceed the lobbying nontaxable amount by more than 150 percent, an excess tax penalty may be imposed under section 4911, but the charity's tax-exempt status may not be revoked due to the lobbying activity. In contrast, for non-electing public charities, there is no excise tax penalty that can be imposed as an intermediate sanction (i.e., in lieu of revocation of the organization's tax exempt status) due to the charity's lobbying activities. In 1987, Congress enacted section 4912, which provides for the imposition of penalty excise taxes due to improper lobbying expenditures made by a non-electing public charity (other than a church). However, the section 4912 excise taxes may be imposed only if the charity ceases to qualify for tax-exempt status under section 501(c)(3) due to its substantial lobbying activities.[97] Section 4912 imposes on such a disqualified organization an excise tax equal to five percent of the amount of lobbying expenditures incurred during the year in which the organization has ceased to qualify under section 501(c)(3) due to making lobbying expenditures. Organization managers who, without reasonable cause, agree to make lobbying expenditures knowing that they are likely to result in revocation of the organization's tax-exempt status under section 501(c)(3) also are subject to an excise tax equal to five percent of such lobbying expenditures.

A section 501(c)(3) organization also may be subject to an excise tax under section 527(f) (discussed in greater detail below) if the organization engages in activity which is "exempt function" activity under section 527 -- broadly meaning attempts to influence the selection of any individual to public office -- even though such activity is not prohibited political campaign intervention under section 501(c)(3) (e.g., attempts by section 501(c)(3) organizations to influence appointments to nonelected public office, such as Supreme Court appointments).[98]

There is no rule preventing an organization that loses its tax-exempt status under section 501(c)(3) because it engages in substantial lobbying (or normally exceeds the section 501(h) ceiling) from applying for restoration of its section 501(c)(3) status in a subsequent taxable year, at which time the organization will again be subject to the lobbying limitation.[99] However, section 504(a)(2)(A) provides that a charitable organization (other than a church) that loses its tax-exempt status under section 501(c)(3) because of excessive lobbying activities may not attempt to thereafter escape the lobbying limitation by being treated as a tax-exempt social welfare organization under section 501(c)(4).

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[96] Section 501(h)(1).

[97] See H. Rept. 100-495, 100th Cong., 1st Sess., Conference Report to Accompany H.R. 3545, at 1023 (1987).

[98] See Announcement 88-114, 1988-37 I.R.B. 26 (Sept. 12, 1988)(proposing that attempts to influence confirmation of a federal judicial nominee, or other nominee to a nonelective public office, constitute an "exempt function" under sec. 527(e)(2), and soliciting comments from the public on this issue). But see 1993 IRS CPE Text at 448, footnote 8 (no final determination has been made of this issue).

[99] See Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, at 414.

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H.L.C.

106TH CONGRESS
2D SESSION

H. R. ____

IN THE HOUSE OF REPRESENTATIVES

Mrs. LOWEY introduced the following bill; which was referred to the Committee on ______________

A BILL

To prohibit the application of certain restrictive eligibility requirements to foreign nongovernmental organizations and multilateral organizations with respect to the provision of assistance under part I of the Foreign Assistance Act of 1961.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

The Congress finds the following:

(1) Freedom of speech is a fundamental American value. The ability to exercise the right to free speech, which includes the right to engage in advo-

cacy regarding the laws and policies that affect United States citizens, is essential to a thriving democracy and is protected under the United States Constitution.

(2) To disqualify or otherwise penalize United States-based nongovernmental organizations concerning their eligibility for grants or contracts from the United States Government on the basis of their participation in public policy debates with their own funds would be antithetical to American values and would violate the United States Constitution.

(3) The promotion of democracy is a principal goal of United States foreign policy and critical to achieving sustainable development. It is enhanced through the encouragement of democratic institutions and the promotion of an independent and politically active civil society in developing countries.

(4) Conditioning eligibility for United States development and humanitarian assistance upon the willingness of a foreign nongovernmental organization to sacrifice its right to participate in the democratic process regarding the laws and policies affecting its own citizens, with its own funds and within its own country, directly undermines a key goal of United States foreign policy.

(5) Restrictions on the eligibility for United States assistance of foreign nongovernmental organizations that use their own funds to provide health services that are legal in their own country constitute an affront to the notion of respect for national sovereignty. When these services are also legal in the United States, such restrictions constitute an unacceptable [redacted] double standard.

SEC. 2. ASSISTANCE FOR FOREIGN NONGOVERNMENTAL ORGANIZATIONS AND MULTILATERAL ORGANIZATIONS UNDER PART I OF THE FOREIGN ASSISTANCE ACT OF 1961.

Notwithstanding any other provision of law, in determining eligibility for assistance authorized under part I of the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.), foreign nongovernmental organizations and multilateral organizations—

(1) shall not be subject to restrictions relating to the use of non-United States Government funds for advocacy or lobbying activities that are more stringent than such restrictions that apply to United States nongovernmental organizations seeking assistance under part I of such Act, including restrictions that prohibit the ability of such nongovernmental organizations and multilateral organizations to engage

in lawful activities or efforts to alter the laws or governmental policies of their own country or any other country; and

(2) shall not be ineligible for such assistance solely on the basis of health services provided by such organizations with non-United States Government funds if such services do not violate the laws of the country in which they are being provided and would not violate United States Federal law if provided in the United States.

Bill: the second formulation we are considering is:

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(1) shall not be subject to restrictions relating to the use of non-USG funds for advocacy or lobbying activities that are more stringent than such restrictions that apply to private, U.S. entities seeking grants or contracts from the United States Government, including restrictions . . . . .

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AN[D] FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

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Number of pages (Including this page): 6

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UNFPA is still in as of this time.

FOREIGN ORGANIZATIONS THAT PERFORM OR PROMOTE ABORTION OVERSEAS; ~~FORCED ABORTION IN THE PEOPLE'S REPUBLIC OF CHINA~~

SEC. 592. (a) Section 104 of the Foreign Assistance Act of 1961 is amended by adding at the end the following new subsection:

"(h) RESTRICTION ON ASSISTANCE TO FOREIGN ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTIONS.—

"(1) PERFORMANCE OF ABORTIONS.—

"(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be made available for any foreign private, nongovernmental, or multilateral organization until the organization certifies that it will not, during the period for which the funds are made available, perform abortions in any foreign country, except where the life of the mother would be endangered if the pregnancy were carried to term or in cases of forcible rape or incest.

"(B) Subparagraph (A) may not be construed to apply to the treatment of injuries or illnesses caused by legal or illegal abortions or to assistance provided directly to the government of a country.

"(2) LOBBYING ACTIVITIES.—(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be made available for any foreign private, nongovernmental, or multilateral organization until the organization certifies that it will not, during the period for which the funds are made available, violate the laws of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited, or engage in any activity or effort to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited.

"(B) Subparagraph (A) shall not apply to activities in opposition to coercive abortion or involuntary sterilization.

"(3) APPLICATION TO FOREIGN ORGANIZATIONS.—The prohibitions of this subsection apply to funds made available to a foreign organization either directly or as a subcontractor or subgrantee, and the certifications required by paragraphs (1) and (2) apply to activities in which the organization engages either directly or through a subcontractor or subgrantee.".

(b) Section 301 of the Foreign Assistance Act of 1961 is amended by adding at the end the following new subsection:

"(i) LIMITATION RELATING TO FORCED ABORTIONS IN THE PEOPLE'S REPUBLIC OF CHINA.—Notwithstanding section 614 of this Act or any other provision of law, no funds may be made available for the United Nations Population Fund (UNFPA) in any fiscal year unless the President certifies that—

"(1) UNFPA has terminated all activities in the People's Republic of China, and the United States has received assurances that UNFPA will conduct no such activities during the fiscal year for which the funds are to be made available; or

"(2) during the 12 months preceding such certification there have been no abortions as the result of coercion associated with the family planning policies of the national government or other governmental entities within the People's Republic of China.

As used in this section, the term 'coercion' includes physical duress or abuse, destruction or confiscation of property, ~~loss of means of livelihood, or severe psychological pressure.~~

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new

(1) The President may waive the provisions of section 104(h)(1) of the Foreign Assistance Act of 1961, as amended, pertaining to population assistance to foreign organizations that perform abortions in foreign countries, for any fiscal year: *Provided,* That if the President exercises the waiver provided by this subsection for any fiscal year, not to exceed $356,000,000 may be made available for population planning activities or other population assistance for such fiscal year: *Provided further,* That the limitation in the previous proviso includes all funds for programs and activities designed to control fertility or to reduce or delay childbirths or pregnancies, irrespective of the heading under which such funds are made available.

INTERNATIONAL MONETARY PROGRAMS

LOANS TO INTERNATIONAL MONETARY FUND

SEC. 593. For loans to the International Monetary Fund under the New Arrangements to Borrow, the dollar equivalent of 2,462,000,000 Special Drawing Rights, to remain available until expended; in addition, up to the dollar equivalent of 4,250,000,000 Special Drawing Rights previously appropriated by the Act of November 30, 1983 (Public Law 98–181), and the Act of October 23, 1962 (Public Law 87–872), for the General Arrangements to Borrow, may also be used for the New Arrangements to

Borrow. Notwithstanding any other provision of law, none of the funds appropriated under this heading may be made available until the relevant Committees of Congress have reviewed the new arrangements for borrowing by the International Monetary Fund provided for under this heading and authorizing legislation for such borrowing has been enacted.

Fax Cover Sheet
Office of Congressman John Porter
10th District, Illinois

2373 Rayburn House Office Building
Washington, D.C. 20515

(202) 225-4835
Fax: (202) 225-0837

Date: 11 / 7 / 97 Total Number of Pages Including This Sheet: 2

To: Martha Foley

Office/Organization: White House

Fax Number: ( ) 456-6220

From: X Rob Bradner ___ Maureen Browne ___ Lynn Caperton

___ Kelley Currie ___ Julie DeBolt ___ Katharine Fisher

___ Amanda Kastello ___ Spencer Perlman ___ David Sander

Comments/Notes: pop language

Please call (202) 225-4835 if you have any trouble with this transmission or if you did not receive all of the pages indicated above.

Memorandum
Fr: John Porter
Re: Problems/Needed Alterations to Smith Language/Foreign Operations

As written, the Smith "compromise" language is not acceptable. Changes would be needed as follows:

1. Draft the language as a one year limitation, not as permanent law.

2. House recedes to Senate on total population funding level -- $435 not $385.

3. Provide an additional waiver for Section 104(h)(2) establishing that President may waive only if he determines that this will not promote abortion as a method of family planning.

4. Provide for a $25 million reduction in funds in the event the President exercises an (h)(1) waiver and an additional $25 million reduction in the event the President exercises an (h)(2) waiver.

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

WASHINGTON, DC 20510-4502

TO: Martha Foley

FROM: Rieser

Office of Senator Patrick Leahy

Phone: (202) 224-7284
Fax: (202) 228-0249

DATE: 11/10

Number of pages (Including this page): 2

FAX #: 456-2271

Here's what I've proposed today. Tim

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FEDERAL BUILDING, ROOM 338, MONTPELIER 802/229-0569
OR DIAL TOLL FREE 1-800/642-3193
SENATOR_LEAHY@LEAHY.SENATE.GOV

PRINTED ON RECYCLED PAPER

1. Delay disbursement of international population assistance funds until Feb. 15, 1998.

2. Require a vote on the Mexico City language under expedited procedures by Feb. 1, 1998. The specific Mexico City language to be voted on is written into the amendment.

3. Require that if Mexico City is passed by both House and Senate but then vetoed by the President, population assistance funds are capped at $385 million (House level) and disbursement of those funds is on a quarterly basis during fiscal year 1998.

4. If Mexico City is defeated, population assistance funds are capped at $410 million (half-way between House and Senate).

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

UNCLASSIFIED

FAX TRANSMITTAL SHEET

Number of pages + cover

FROM: MARA RUDMAN

TELEPHONE: 202-456-9171

FAX NUMBER: 202-456-9170

	TO	PHONE	FAX NUMBER
1.	Martha Foley	6-2271	
2.			
3.			
4.			
5.			
6.			

Also – if you can send that email question to Al I'd appreciate. I'll hold off on asking him about it until I hear from you. Thanks – M.

NOTE: This paper reflects Helms' staff characterization of final hours of deal making/breaking on Mexico City in Nov 1997.

SENSITIVE

Senior Leadership staffers, who have first-hand knowledge, briefed us about the Leadership-White House negotiations on "Mexico City" in the waning hours of the session. Here's the Republican proposal rejected by the White House:

1) The prohibition on funding grantees that do abortions overseas contains a presidential waiver. When the waiver is exercised, the amount appropriated for population control falls from $385,000,000 to $356,000,000. <u>ACCEPTED BY THE WHITE HOUSE.</u>

2) No waiver was provided for the prohibition on grantees lobbying or otherwise attempting to influence foreign governments to change their laws on abortion. <u>REJECTED BY THE WHITE HOUSE.</u>

3) No grantee can be involved with a coercive population control program, even if the grantee doesn't engage in coercion. This is "UNFPA out of China" language & is likely moot since the administration insists that UNFPA is, in fact, out of China. <u>ACCEPTED BY THE WHITE HOUSE.</u>

The bottom line is that the <u>White House</u> was unreasonable & sacrificed up to 20 Republican votes for fast track, $926,000,000 UN dues (including $107,000,000 debt forgiveness), $3,500,000,000 for the IMF, & State Department reorganization authority so that A.I.D. population control grantees would be free to lobby foreign governments to liberalize their abortion laws.

Here are several points to keep in mind:

- Speaker Gingrich (whose top priority was fast track, <u>not</u> abortion) negotiated this with the White House. In other words, the issue was taken out of Chris Smith's hands -- nevertheless the White House was so unbending that even Gingrich could not accept their position.

- The Leadership proposal was so reasonable that Senators Stevens & Specter (both staunchly pro-abortion) signed off on it.

- The anti-lobbying language rejected by the White House is virtually the same as your amendment offered to the FY95 foreign aid appropriations bill (rejected 42-58).

U:\04REPT\1998\CONF\SEC592

FOREIGN ORGANIZATIONS THAT PERFORM OR PROMOTE ABORTION OVERSEAS ~~[illegible]~~

SEC. 592. (a) Section 104 of the Foreign Assistance Act of 1961 is amended by adding at the end the following new subsection:

"(h) RESTRICTION ON ASSISTANCE TO FOREIGN ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTIONS.—

"(1) PERFORMANCE OF ABORTIONS.

"(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be made available for any foreign private, nongovernmental, or multilateral organization until the organization certifies that it will not, during the period for which the funds are made available, perform abortions in any foreign country, except where the life of the mother would be endangered if the pregnancy were carried to term or in cases of forcible rape or incest.

"(B) Subparagraph (A) may not be construed to apply to the treatment of injuries or illnesses caused by legal or illegal abortions or

(INSERT 128B) (1 of 5 pages)

to assistance provided directly to the government of a country.

"(2) LOBBYING ACTIVITIES.—(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be made available for any foreign private, nongovernmental, or multilateral organization until the organization certifies that it will not, during the period for which the funds are made available, violate the laws of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited, or engage in any activity or effort to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited.

"(B) Subparagraph (A) shall not apply to activities in opposition to coercive abortion or involuntary sterilization.

"(3) APPLICATION TO FOREIGN ORGANIZATIONS. The prohibitions of this subsection apply to funds made available to a foreign organization either directly or as a subcontractor or subgrantee, and the certifications required by paragraphs (1) and (2) apply to activities in which the organization engages either directly or through a subcontractor or subgrantee.".

~~(b) Section 301 of the Foreign Assistance Act of 1961 is amended by adding at the end the following new subsection:~~

"(i) LIMITATION RELATING TO FORCED ABORTIONS IN THE PEOPLE'S REPUBLIC OF CHINA.—Notwithstanding section 614 of this Act or any other provision of law, no funds may be made available for the United Nations Population Fund (UNFPA) in any fiscal year unless the President certifies that—

"(1) UNFPA has terminated all activities in the People's Republic of China, and the United States has received assurances that UNFPA will conduct no such activities during the fiscal year for which the funds are to be made available; or

"(2) during the 12 months preceding such certification there have been no abortions as the result of coercion associated with the family planning policies of the national government or other governmental entities within the People's Republic of China.

As used in this section, the term 'coercion' includes physical duress or abuse, destruction or confiscation of prop-

Ignore This XX out. This page is valid.

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~~ery, loss of means of livelihood, or severe psychological pressure.~~

b (d) The President may waive the provisions of section 104(h)(1) of the Foreign Assistance Act of 1961, as amended, pertaining to population assistance to foreign organizations that perform abortions in foreign countries, for any fiscal year: *Provided,* That if the President exercises the waiver provided by this subsection for any fiscal year, not to exceed $356,000,000 may be made available for population planning activities or other population assistance for such fiscal year: *Provided further,* That the limitation in the previous proviso includes all funds for programs and activities designed to control fertility or to reduce or delay childbirths or pregnancies, irrespective of the heading under which such funds are made available.

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United States Department of State

Washington, D.C. 20520

Bureau of Legislative Affairs (H)

Fax

To: Martha Foley

From: Barbara Larkin

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Pages: (including cover sheet)

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Re:

CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

• Comments:

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FAX TO
MARTHA FOLEY
456-2271

The Alan Guttmacher Institute
New York and Washington

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FACSIMILE TRANSMISSION

Date: January 30, 1998
To: Barbara Larkin/Meg Donovan
From: Susan Cohen
Fax #: 647-2762
Number of pages (including cover sheet): # 5

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COMMENTS:

Barbara and Meg,

Please take a look at these two ideas for compromise Mexico City gag rule language that are based on the same idea. The idea is to highlight that what we want to preserve is the ability of foreign NGOs to engage in activities that are legal in their own countries – not to mention legal in the US. I think it would help put the onus back on the Smith camp to have them say that this is not enough, that they want to punish NGOs for operating within their own country laws and for engaging in "advocacy" that is protected speech here and has been successfully defended here when under attack by Rep Istook in 1995.

Also, I've included a "think piece" our coalition has drafted to help highlight the point we've all been making for some time about the important principal at stake in the gag rule fight. That this fight is about more than a $400 million program, and it is about more than abortion politics.

I'll be interested in your reactions.

URGENT

Draft Mexico City Gag Rule Compromise Language, 1/29/98

No funds appropriated for population planning activities may be made available for any foreign private nongovernmental organization unless the organization certifies that it is in compliance:

1. with local country law or policies concerning the circumstances under which abortion is permitted, regulated or prohibited, and;

2. with local country law or policies pertaining to efforts to engage in any activity or effort to alter local law or governmental policy concerning the circumstances under which abortion is permitted, regulated or prohibited.

GAG RULE ALTERNATIVE LANGUAGE

Provided further, That, notwithstanding any other provision of law or of this Act, none of the funds appropriated for population planning activities or other population assistance may be made available to any foreign private, nongovernmental organization until the organization certifies that it will not, during the period for which the funds are made available, violate <u>both</u> the laws <u>and governmental policies</u> of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited, or engage in any activity or effort to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated or prohibited <u>in violation of applicable national laws prohibiting or restricting citizen participation in the political [public policy] process in that country</u>.

Note: Draft language is based on an appropriations language version of the "lobbying activities" section of the Smith global gag rule amendment.

- Pro-family planning language added is indicated by <u>underlined</u> text.
- Possible alternative wording is indicated by [brackets].

1/28/98

The "Mexico City Gag Rule" Policy: Anti-democratic, Imperialist and Un-American

The defenders of the Mexico City Gag Rule maintain it is simply an antiabortion policy. In fact, it is much more than that. It is antithetical to the most basic American values: free speech, access to the political process, and, in the words of our own Constitution, "to petition the government for a redress of grievances." As such, it would also undermine a fundamental tenet of U.S. foreign policy: encouraging democracy and popular participation, especially through nongovernmental organizations (NGOs).

The Mexico City policy, whose leading proponent is Rep. Chris Smith (R-NJ), is a "Gag Rule" because it is intended to silence foreign NGOs concerning the worldwide debate over abortion. In order to remain eligible for much-needed U.S. family planning program assistance, these NGOs would have to agree not to use *their own funds* to communicate with their *own* governments within their *own* borders on the subject of abortion. Often referred to as a "lobby ban," the policy reaches far beyond what is considered lobbying under U.S. law. Specifically, according to proposed report language offered by Republican congressional leaders in November 1997, the Gag Rule would disqualify a foreign NGO from U.S. family planning aid if the NGO is represented at any workshops or conferences or prepares or distributes any materials where "alleged defects in abortion laws" may be among the principal themes.

Anti-democratic

The United States considers the promotion of democracy a key foreign policy goal as an end in itself and because it reflects core American values. Democratic societies share such characteristics as: respect for human and civil rights, peaceful competition for political power, free and fair elections, respect for the rule of law, accountable government and *an environment that encourages political participation, relying heavily on individual citizens and private-sector organizations.*

Under the Smith-sponsored Gag Rule, however, a foreign NGO's eligibility for U.S. funds would be conditioned on its willingness to be silent concerning a legitimate public policy debate in its own country – a debate that, for better or worse, thrives in the United States. Stifling the public debate – regardless of the subject – would directly undermine the widely-supported effort to promote democracy and, specifically, to empower NGOs. Further, it would have a disproportionate impact on women and fledgling women's organizations, which traditionally have had little or no voice in policy debates in developing countries.

Imperialistic

The charge has been made that the Gag Rule is necessary to ensure that the United States does not impose a "pro-abortion mentality" on other cultures abroad. It is current law, however, that supports the role of indigenous NGOs and respects the sovereignty of foreign countries to determine for themselves 1) whether to allow or prohibit abortion services and 2) the nature and scope of their own public policy debates. It is the Gag Rule, by contrast, that represents the ultimate in cultural imperialism, since it would have the U.S. government dictate to foreign NGOs what they may or may not debate, what conferences they may attend, and what materials they may develop.

Un-American

Our American democratic tradition is based on the principles of self-determination, pluralism and participation. For this reason, in 1996 Congress rejected the "Istook amendment," which would have prevented private, nonprofit organizations in the U.S. that receive federal grants or contracts from spending their private funds to participate in U.S. public policy debates. Imposition of the Mexico City Gag Rule, then, would be tantamount to exporting a policy that would be intolerable in our own country.

1/29/98

The Alan Guttmacher Institute
New York and Washington

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FACSIMILE TRANSMISSION

Date: February 3, 1998
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COMMENTS:

Hi Martha,

Since I gather I will be seeing you later today at the State Dept, I wanted to share with you some materials our coalition has developed re: Mexico City gag rule issue.

The first is a "think piece" that we are using to try to recruit some "democracy" and/or anti-Istook groups to the cause – in order to change the focus of the debate. The second two are drafts of an idea for language that flows from our belief that honing in on the "gag rule" aspect of this issue may help move it off abortion politics, which in turn may make it possible to win over some of the few converts we will need to outvote Smith.

I'll be very interested in your reactions and further discussing these ideas with you, either at today's meeting or another time soon.

Susan