Kevin P. Martin & Associates, P.C.

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Not-for-Profit Client Alert

May 2010

Lobbying

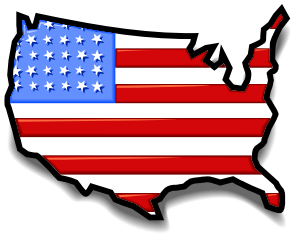
Is your organization's exempt status at risk?

If your organization is exempt under 501(c)(3) and is engaging in lobbying activities without a lobbying election in place under Section 501(h), it may be.

A 501(c)(3) organization is permitted to engage in lobbying activities, provided that they are not a substantial part of the organization's activities. An election made under Section 501(h) provides a safe-harbor for allowable lobbying expenses. Absent this election, there is no safe-harbor, and whether or not the lobbying activities engaged in are considered to be a substantial part of the organization's activities is based on the facts and circumstances. Although it was once considered to be "safe" to have no more than 5% of an organization's expenditures toward lobbying, the courts have ruled that there is no set percentage that would be considered to cross the line into substantial activities.

An important distinction to be made in this area is between lobbying and advocacy. There are two types of lobbying: Direct Lobbying and Grassroots Lobbying. For an activity to be considered Direct Lobbying it must have three elements. The organization is attempting to influence legislation when the communication: (1) is directed to a legislator or employee of a legislative body, (2) refers to specific legislation, and (3) reflects a view on that legislation. For an activity to be considered Grassroots Lobbying, it must have four elements. Grassroots Lobbying occurs when the communication: (1) is directed to the general public, (2) refers to specific legislation, (3) reflects a view on the legislation and (4) it encourages recipients to take action about the specific legislation. If an activity does not have the three elements required to be considered Direct Lobbying or the four elements required to be considered Grassroots Lobbying, then it would not be considered lobbying and would fall into advocacy.

In the absence of a safe-harbor being available for non-electing organizations, if the organization is engaging in lobbying activities, it may be advantageous to make a Section 501(h) election. The Section 501(h) election would provide a safe-harbor of permitted total annual lobbying expense of 20% of the first $500,000 of exempt purpose expenditures plus 15% of the



next $500,000, plus 10% of the next $500,000, plus 5% of any remaining expenditures with total permitted lobbying expenses capped at $1,000,000. Permitted grassroots lobbying would be 25% of the calculated permitted lobbying expenses. Any amount of lobbying expenses over the safe-harbor amount would be subject to a 25% excise tax. In addition there is a four-year averaging test which determines if lobbying expenses have exceeded a ceiling amount which would then result in loss of exempt status. This ceiling amount is calculated at 150% of the permitted annual lobbying expenses.

The lobbying election under Section 501(h) is made on Form 5768 and is effective for the year that it is filed and for all subsequent years until revoked. Please contact us if you would like additional information or our assistance in filing a Section 501(h) election.

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Inside this issue:

"Ten people who speak make more noise than ten thousand who are silent."

Napoleon Bonaparte

Lobbying

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Glossary of Terms

Influencing legislation for purposes of the lobbying expense election means:

1. any attempt to influence any legislation by attempting to affect the opinions of the general public or any segment of it ("*grass roots lobbying*,"); and
2. any attempt to influence any legislation by communicating 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 ("*direct lobbying*,").

Direct Lobbying—An organization is attempting to "influence legislation" when communication:

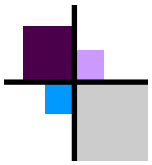
1. is directed to a legislator or employee of a legislative body
2. refers to specific legislation
3. reflects a view on that legislation

Grass Roots Lobbying—A grass roots lobbying occurs when the communication:

1. is directed to the general public
2. refers to specific legislation
3. reflects a view on the legislation and
4. encourages the recipient to take action with respect to the legislation

Activities that are not lobbying

1. meeting with a legislator to discuss social problems, without mentioning a specific proposal
2. providing a legislator with educational materials about a specific piece of legislation, without calling for specific action on the legislation
3. responding to a request from a legislative committee for information about a specific piece of legislation
4. tracking activities of legislators, including votes, positions taken, contributions accepted,
5. talking to the media
6. advocating for better enforcement of existing laws
7. conducting public education campaigns
8. producing and disseminating research reports or studies that provide nonpartisan analysis on policy issues, including specific legislative issues
9. advocating the enactment and enforcement of private or voluntary policies (e.g. alcohol purchases restrictions in stadiums)
10. sending a newsletter to your own members providing info about a specific piece of legislation, but not a specific call to action (e.g. a request to call or write to legislators)



American Recovery & Reinvestment Act Funds (ARRA) - Update

American Recovery and Reinvestment Act Funds expended have significantly increased this year and will potentially have an impact on year end audits. In response to the requirements under ARRA funding, it is critical to be aware of the most recent guidance available in order to comply with these requirements. The 2010 OMB Circular A-133 compliance supplement is currently not yet available to assist in providing this guidance.

Under ARRA, there are new CFDA numbers for new programs. Some ARRA funding will continue to be provided under existing CFDA numbers.

Programs with expenditures of ARRA awards cannot be considered low-risk in most cases. This may impact major program determination and the amount of compliance testing necessary during the audit.

It is required that recipients (and sub recipients) separately track ARRA funds from the time they are received. Expenditures of ARRA funds must be reported separately on the Schedule of Expenditures of Federal Awards (SEFA) utilizing the prefix "ARRA-" (Item 9d of Part III on the SF-SAC). It is currently expected that the Data Collection Form will be changed within the next few months in order to account for ARRA reporting requirements.

Pass-through entities are required to separately identify to each sub-recipient and document at the time of the sub-award the following: (a) the Federal Award number; (b) the CFDA number; and (c) the amount of ARRA funds. Sub-recipients are required to include this information on their SEFA.

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American Recovery & Reinvestment Act Funds (ARRA) - Update

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In accordance with the Office of Management and Budget's Memorandum (M-10-14) issued on March 22, 2010, Federal Agencies are not to grant extension requests to grantees for fiscal years 2009 through 2011. This is due to the importance of the Single Audits and the reliance of Federal Agencies on the audit results to monitor the accountability of ARRA programs.

Also, in accordance with the OMB Memorandum M-10-14, in order to be considered a low-risk auditee in the current year, the prior two years audits must have met the requirements of OMB Circular A-133 including report submission to the Federal Audit Clearinghouse (FAC) by the due date.

Under the Terms and Conditions of the Recovery Act Programs (Federal Assistance Awards), when loan or grant recipients are required to submit an annual financial report, the federal agencies are required to ensure that the report is timely submitted. The federal agency is also required to review the program timely in order to verify the recipient's compliance with the reporting requirements, monitor the recipient's spending pattern and identify risk areas for the recipient. If a recipient is considered to be "at-risk", the federal agency is required to consider immediate steps to correct the deficiencies and weaknesses, including not renewing the grants or terminating the current contract.

The OMB has instructed the Offices of Inspector General (OIGs) to perform quality control reviews to ensure that Single Audits are properly performed and improper payments and other noncompliance are fully reported. OIGs will perform follow-up reviews of Single Audit quality with emphasis on Recovery Act awards and report the results. Also, beginning with audits of fiscal years ending September 30, 2009, all Single Audit reports filed with the Federal Audit Clearinghouse (FAC) will be made publicly available on the Internet.

Each federal department and agency websites receiving ARRA funds have established their own Recovery Act web pages on their existing websites which will assist in providing guidance as it becomes available. Most state websites also have established web pages to provide information about ARRA funds.

> *"The recipients uses of all funds are transparent to the public, and the public benefits of these funds are reported clearly, accurately and in a timely manner."*
>
> *OMB Memorandum M-09-10*

For further information or questions regarding any topics in this alert, email:
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