

Nonprofit Organizations and Legislative Lobbying

Nonprofit organizations serving low-income communities in New York are affected by the legislative process in multiple ways. The work of nonprofit organizations can be enhanced or complicated by legislation and regulatory action that directly impacts their program services. Their missions can be advanced or thwarted by legislative or administrative agency action that assists the beneficiaries of their services or makes their lives more precarious. Their financial health and even continued existence can depend upon government funding contracts to provide services.

Those implications operate at every level of government for nonprofit organizations in New York. Their tax exempt status may be placed at risk by the extent of their involvement in the legislative arena. Lobbying in Congress may require registration and reporting of that activity. Lobbying in the state legislature or City Council may trigger separate registration and disclosure obligations under the state or city lobbying laws. Their lobbying activity may also have implications under campaign finance laws, to the extent that individuals who lobby are also active in the political process.

This document provides an introduction to the many ways that legislative advocacy by nonprofit organizations is regulated at the federal, state, and city level. It is intended for use by nonprofit managers and by attorneys who represent them, but may not be familiar with this complex area. This document does not attempt to exhaustively cover all of the particulars in this complex and changing area of the law. Rather, it is intended only as an introduction, and, as always, attorneys and nonprofit managers are encouraged to contact Lawyers Alliance to speak with any questions that you have about any legal issue affecting nonprofits in New York.

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Introduction

1. What is lobbying?

Lobbying is an attempt to influence legislation. Regardless of whether an organization describes its activities as advocacy, community education or legislative policy, if it is trying to influence legislation – meaning supporting or opposing proposed or existing legislation, the organization should familiarize itself with applicable lobbying regulations.

How “legislation” is defined depends on which body of regulations applies. The federal government, New York State and New York City have each enacted statutes and regulations that govern lobbying activity, and what counts as lobbying is different for each regulatory body.

2. Can a nonprofit organization lobby?

Yes! Nonprofit organizations, including nonprofits with 501(c)(3) tax exempt status, may engage in lobbying – but the amount of permissible lobbying varies depending on its tax exempt status. Organizations with 501(c)(3) status are subject to the most restrictive regulations on how much lobbying activity in which they can engage. Other types of tax exempt organizations can engage in as much lobbying as is necessary or desirable to accomplish their tax exempt purpose. In order to ensure that its advocacy efforts are as effective as possible without jeopardizing its tax exempt status, 501(c)(3) organizations in particular should become very familiar with how much lobbying is permissible under IRS rules.

3. What bodies regulate lobbying by nonprofits?

The IRS limits how much lobbying 501(c)(3) organizations may engage in.

The other applicable regulatory bodies do not limit how much lobbying an organization may engage in, but do require that lobbying activity be reported under certain circumstances. The Federal Lobbying Disclosure Act requires disclosure of federal lobbying activity, the New York State Lobbying Act requires disclosure of lobbying activity within New York State (including municipal and county level activity), and the New York City Lobbying Act requires disclosure of lobbying activity within New York City.

Internal Revenue Code Lobbying Regulation

4. What is the IRC definition of lobbying?

The IRC defines lobbying as supporting or opposing the passage of legislation. The lobbying work may be done directly by employees of an organization in contact with legislators (direct

lobbying), or by encouraging people outside the organization to contact legislators (grassroots lobbying). It is important to understand what counts as legislation for IRC purposes:

- Legislation includes actions by Congress, state legislative bodies, local legislative authorities, as well as public votes in regard to referenda, ballot initiatives, and constitutional amendments.¹
- Legislation includes confirmation of a federal judicial nominee by the U.S. Senate, as "resolutions" or "similar items."²
- Legislation includes proposals for the enactment or amendment of international law.³
- Legislation *excludes* administrative rulemaking or other action, executive action not subject to federal or state legislative approval, local actions by special bodies such as zoning or school boards.

The legislation in question must be specific. For example, a policy stance of eliminating hunger would not count as lobbying unless the organization was support or opposing specific laws that would have impact on hunger. However, that specific legislation could be proposed by the organization itself.

In addition, there are a number of exceptions to the definition of lobbying. See question 11 below.

5. What restrictions are placed on 501(c)(3) organizations?

Organizations with 501(c)(3) status are prohibited from engaging in lobbying activity that would constitute a “substantial part” of its activities.⁴ If the IRS determines that the organization has engaged in a substantial part lobbying, the organization may be subject to excise taxes, or it lose its tax exempt status altogether. Practically, a 501(c)(3) organization has a choice between two alternatives for determining whether it is engaged in a substantial part lobbying.

First, if no action is taken, the organization will be subject to a facts and circumstances test. Under the facts and circumstances test, the IRS will look at the overall activities of the organization⁵, and may take in to account resources other than financial expenditures. Case law is not entirely clear on what factors the IRS will consider, and the result is a lack of clarity for nonprofit organizations. Importantly, the consequence of an IRS determination that an organization is engaged in substantial part lobbying under the facts and circumstances test is the loss of tax exempt status.

Alternatively, a 501(c)(3) organization (other than churches and private foundations) may chose to take the 501(h) election. Under the 501(h), the organization’s lobbying activity level is judged solely upon its lobbying expenditures.⁶ The amount of lobbying that the organization can engage in is dependent on the organization’s exempt purposes budget:

| Exempt Purpose Expenditures | Total Lobbying Allowance under 501(h) |
|------------------------------------|--|
| up to \$500,000 | <u>20%</u> (\$100,000 max) |
| \$500,000 - \$1 million | \$100,000 plus <u>15%</u> of excess over \$500,000 |
| \$1 million - \$1.5 million | \$175,000 plus <u>10%</u> of excess over \$1 million |
| \$1.5 million - \$17 million | \$225,000 plus <u>5%</u> of excess over \$1.5 million |
| Above \$17 million | \$1,000,000 |

Note that that an organization's total exempt purpose expenditures do not include the cost of operating a separate fundraising unit, or any amounts transferred to affiliate organizations.⁷ Additionally, under the 501(h) election, grassroots lobbying is limited to 25% of the organization's total lobbying allowance.

6. What happens if an 501(c)(3) organization exceeds lobbying limits?

If an organization has not taken the 501(h) election and the IRS determines that it has engaged in a substantial part lobbying, it will lose its tax exempt status, and may not reapply for tax exempt status as a 501(c)(4) organization.

If an organization has taken the 501(h) election and exceeds its lobbying expenditures allowance, it will owe the IRS excise taxes of 25% of the amount by which it exceed the allowance. If the organization exceeds its allowance by an average of 150% over a four year period, even an electing organization risks revocation of its tax exempt status.

7. Should a 501(c)(3) organization engaged in lobbying always take the 501(h) election?

In most cases, yes. The 501(h) election offers a clear and reliable way to calculate how much an organization can spend on lobbying before its tax exempt status is jeopardized, and no additional risk of IRS audit of lobbying activity has been reported.

8. How are the IRS rules for 501(c)(4) organizations different?

The IRS does not limit how much lobbying a 501(c)(4) social welfare organization can engage in, so long as the lobbying activity is in furtherance of the 501(c)(4)'s tax exempt purpose. However, keep in mind that a 501(c)(4) organization is not eligible to receive tax deductible donations, and cannot engage in partisan political activity as its primary purpose.

9. What is the difference between grassroots and direct lobbying, and why does it matter?

It is important to understand the difference between grassroots and direct lobbying because the IRC limits on grassroots lobbying are lower than the overall lobbying limits, even for organizations that have taken the 501(h) election. Grassroots lobbying is limited to 25% of the total lobbying allowance for an organization.

Direct lobbying occurs when an individual designated and compensated by the organization attempts to influence legislation. In order for activity to count as direct lobbying, there must be (a) specific legislation (pending or proposed legislation) and (b) the organization must take a stand in support of or opposition to that specific legislation.

Grassroots lobbying occurs when an organization encourages others to influence legislation. In order for activity to count as grassroots lobbying, there must be (a) specific legislation (pending or proposed legislation), (b) the organization must take a stand in support of or opposition to that specific legislation, and (c) the activity must include a “call to action,” meaning the organization is explicitly asking the public to contact legislators in order to influence the legislation or implicitly encouraging them to do so by providing legislators’ names and/or contact information. All three criteria must be met. For example, simply educating the public on the impact of proposed legislation will not count as grassroots lobbying unless the organization also asks the public to contact their legislators in an attempt to influence the legislation.

10. Are there special rules for membership organizations?

Yes, with respect to grassroots vs. direct lobbying in particular. Lobbying activities involving individuals who are bona fide members of an organization will be counted as direct lobbying expenses rather than grassroots lobbying expenses.⁸ This is especially helpful for organizations that come close to meeting the cap on grassroots lobbying, but not overall lobbying limitations. In order for an individual to qualify a bona fide member of an organization, he or she must be an active participant in the organization’s activities, and will not be considered to be member if the individual has simply signed up for the organization’s email newsletter.

11. Are there exceptions to what must be counted as lobbying activity for IRS purposes?

Yes. In many cases, it is helpful to keep in mind the definition of lobbying: for an activity to count as lobbying, specific legislation must be identified, and the organization must take a stand in support of or opposition to that legislation. For grassroots lobbying to occur, there must also be a call to action. If the activity in question does not meet these requirements, it is likely that lobbying has not occurred. Below are examples of activity which are explicitly exempted from the IRS definition of lobbying:

- *Nonpartisan analysis, study or research:* In order for an organization’s work to be exempted from the lobbying definition, the analysis must be full and fair, and allow the public to make a decision on its own about whether to support or oppose the legislation. In addition, the work must be made available to a cross section of the

population (i.e., posted on your website) or to a nonpartisan cross section of the applicable legislative body.⁹

- ❑ *Technical assistance to a governmental body:* If a governmental or legislative body asks an organization to testify or provide information on a particular subject, that work will not count as lobbying provided the organization receives a written invitation to provide input. A request from a single legislator will not qualify for this exemption.¹⁰
- ❑ *Self defense exception:* An organization can lobby on legislation that would affect the existence of the organization, and this activity will not be counted towards its lobbying limits. For example, a charter school could lobby without limitation if a law were proposed that would disallow charter schools. Simply lobbying on budgetary issues is unlikely to qualify for this self defense exception to lobbying.¹¹

The remaining exemptions set forth by the IRS are helpful as clarifications, but it would be clear that these activities are not lobbying based simply on the IRS definition of lobbying outlined above:

- ❑ *Non-legislative communications with governmental officials:* Many nonprofits do and should interact with government agencies and officials, and those lines of communications should not be stifled. If the topic of the communication is not legislative in nature, or if the organization does not take a position on the legislation, these interactions are not lobbying.¹²
- ❑ *Communications with members that do not include a call to action:* An organization can inform its members about specific or proposed legislation, and take position on that legislation. That activity is not lobbying unless it also includes a call to action.¹³
- ❑ *Communication on issues:* Examinations of broad social, economic or similar problems are not lobbying, even if they are directed toward the general public, if there is no call to action.¹⁴

12. How are an organization's lobbying activities reported to the IRS?

The only place an organization's lobbying activities are reported to the IRS are on Schedule C of the Form 990 filed annually by tax exempt organizations with over \$50,000 in revenue. Organizations that have made the 501(h) election are required to provide only the monetary value of their activities, while organizations that have not taken the election must provide more information about the activities themselves.¹⁵

Organizations engaged in lobbying should implement consistent and reliable means of collecting information about its lobbying expenses, both in order to comply with the 990 disclosure requirements and to facilitate accurate reporting to the federal, state and city regulatory bodies described below. The organization should maintain employee time records, receipts for expenses and other documentation that would be helpful in supporting the organization's statements regarding lobbying activity.

Federal Lobbying Disclosure Act Regulations

13. Who must register and report under the Lobbying Disclosure Act?

The Lobbying Disclosure Act (“LDA”) covers lobbying at the federal level only; state and city level lobbying are not reported under the LDA. Only organizations that meet the following thresholds are required to register and report their lobbying activity under the LDA:

- i. the organization’s lobbyist has made at least two legislative contacts and has spent at least 20% of his or her time on lobbying activity in a quarterly period; and
- ii. the organization employing the lobbying individual spent at least \$11,500 on lobbying during that quarterly period.

If both of these criteria are not met, the organization does not need to register and report under the LDA, even if it engages lobbying at the federal level.

14. What must be reported under the LDA?

Assuming the thresholds above are met, attempting to influence legislation at the federal level must be reported if lobbying is directed at any of the following:

Executive Branch:

- *President*
- *Vice President*
- *Officers and employees of the Executive Office*
- *Any official serving in an Executive Level I through V position*
- *Any member of the uniformed services serving at grade O-7 or above*
- *Schedule C Employees*

Legislative Branch:

- *a member of congress*
- *an elected officer of either the House or the Senate*
- *an employee who works for a legislator, committee, or working of the legislature*

Lobbying includes contacting these individuals in order to influence legislation, and “any efforts in support of such contacts, including preparation or planning activities, research and other background work that is intended, at the time of its preparation, for use in contacts and coordination with the lobbying activities of others.”¹⁶

15. How does the IRS definition of lobbying interact with the LDA definition of lobbying?

The IRS definition of lobbying is much broader than the LDA definition of lobbying. Under Section 15 the LDA, 501(c)(3) organizations have the option of reporting their lobbying activity as defined by the IRS. This means that the organization would not have to differentiate between the two definitions (and would therefore simply record keeping), but it would in essence be over reporting under the LDA.

16. What is the registration process for LDA lobbying reports?

Registration is required within 45 days of meeting the LDA registration thresholds, and must be filed electronically using proscribed software.¹⁷ Quarterly reports describing the organization’s lobbying activity are due within 20 days after the end of each quarter beginning in January, April, July and October.

New York State and City Lobbying Regulations

17. How are City and State lobbying regulations different than IRS regulations on lobbying?

Two main differences stand out. First, neither NYC nor NYS lobbying regulations limit how much lobbying an organization (or any other person or entity) may engage in. Instead, each requires disclosure of lobbying activity once expenditure thresholds are met. For New York State, that threshold is \$5,000 during a calendar year, and for New York City, the threshold is \$2,000 in a calendar year.

Second, under both NYC and NYS laws, the definition of lobbying is broader. In particular, the definition of “legislation” includes administrative rules “having the force and effect of law.” The result is that much more of an organization’s advocacy work may be reportable to NYC and NYS, even though that activity will not count towards the organization’s IRS lobbying limits.

18. Does NYC and NYS lobbying activity need to be counted towards an organization’s IRC limit on lobbying?

Not necessarily. Because the IRC definition of lobbying does not include influencing administrative rule-making but NYS and NYC lobbying definitions do, not all of the lobbying activity that must be reported to NYS and NYC will count towards the IRC limits on lobbying.

If an organization anticipates coming close to the IRC limits on lobbying, it will be important to track whether NYS and NYC level activity needs to be counted for IRC purposes, and it is therefore important that all staff understand the differences between the definitions of lobbying.

19. What must be reported to NYS?

An organization must report all lobbying activity involving legislation within NYS, including municipal or county level lobbying. Federal level lobbying activity should not be included, and does not count towards the \$5,000 threshold.

Under the NYS Lobbying Act, lobbying is defined as attempting to influence: ¹⁸

- i. The passage or defeat of any legislation by either house of the state legislature; or
- ii. The approval or disapproval of any legislation by the governor; or
- iii. The adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by any state agency; or
- iv. The passage or defeat of any local law, ordinance or regulation by any municipality or subdivision thereof; or
- v. The adoption or rejection of any rule or regulation having the force and effect of a local law, ordinance or regulation or any rate making proceeding by municipality or subdivision thereof.
- vi. Any determination by a public official or by an officer or employee of the unified court system, or by a person or entity working in cooperation with a or by a person or entity working in cooperation with a public official or unified court system related to a governmental procurement.
- vi. The adoption, issuance, rescission, modification of any terms or rejection of any gubernatorial executive order or an executive order issued by the chief executive officer of a municipality (*e.g.*, NYC's Mayor).
- vii. Approval, disapproval, implementation of any State agreement or action relating to Class II gaming.

20. What must be reported to NYC?

Only work on NYC level legislation must be reported to NYC. State and federal level lobbying activity should not be included, and costs connected to state and federal lobbying do not count towards the \$2,000 threshold.

Under the NYC Lobbying Act, lobbying is defined as attempting to influence:¹⁹

- i. The passage or defeat of any local law or resolution by the city council;
- ii. The approval or disapproval of any local law or resolution by the mayor;
- iii. Any determination made by an elected city official or an officer or employee of the city with respect to the procurement of goods, services, or construction;
- iv. Zoning or land use determinations by the mayor, city council, city planning commission, a borough president, a borough board or community board;

- v. Determinations as to the disposition or lease of real property by the city or with respect to a franchise concession or revocable consent;
- vi. The adoption, amendment or rejection of any agency rule having the force of law;
- vii. The outcome of any ratemaking proceeding before a city agency; or
- viii. Any determination of a board or commission.

21. What exactly counts as influencing legislation? Do planning and preparation sessions for lobbying need to be reported?

In general, any work the organization does with the goal of influencing legislation should be reported. This includes planning and strategy sessions and coordination meetings. It also includes work drafting legislation that does not yet exist.

However, advocacy planning that does not involve specific or proposed legislation is not lobbying. For example, a meeting of coalition members to decide which policies to focus on for the year would not be lobbying until those policies are identified and the decision is made that the policy changes require legislative solutions. Keep in mind that under the NYS and NYC definitions of legislation, agency level rules and regulations are considered legislation.

22. What if only part of a meeting or other activity involves lobbying?

Only that portion of a meeting or activity that is aimed at influencing legislation needs to be reported. However, differentiating between the different portions of a particular meeting will require careful record keeping, as the organization should be able to justify the split between lobbying and non-lobbying activities by referring to its records.

23. What are the exceptions to the City/State definitions of lobbying?

Unlike the IRS, neither the State nor the City have issued guidance outlining the exceptions to lobbying for City and/or State purposes. The NYS Lobbying Act provides for (and NYC recognizes) an exception for requests for information from legislative bodies (not individual legislators).²⁰ However, the activity will be considered lobbying if:

- i. The informant volunteered more information than was sought in the request;
- ii. The informant provided requested information in a manner that clearly attempted to influence the passage or defeat of legislation, rules, or regulations;
- iii. The informant instigated the request from the government official; or

- iv. The informant “otherwise engaged in lobbying” on the subject matter in question.

When considering other activities that may or may not be defined as lobbying, keep in mind that in order for an activity be defined as lobbying, it must refer to specific legislation (including proposed legislation), and it must take a stand in opposition to or support of that legislation. If that activity is grassroots lobbying, it must also include a call to action: a request that the audience contact the relevant legislators to voice support or opposition to the legislation.²¹

24. Does an organization’s lobbying with volunteers need to be reported? What about board members?

In general, volunteer time does not need to be reported. All of the regulatory bodies monitor the expenditures related lobbying, and because volunteers are uncompensated, in most cases the organization will incur no reportable expenses.

However, there is an exception for board members of the organization that lobby at the city level, even if those activities are uncompensated. Because the City Clerk views board members as being designated as lobbyists by the organization by virtue of their official role, board members activities must be reported if the organization is already registered. If the organization is not registered as a lobbyist, board member activities need not be reported.²²

25. Do appearances at public hearings count as lobbying?

In most cases, testifying (and the preparation time for that testimony) would not be reported as lobbying activity under both the New York State and New York City lobbying laws because “persons who participate as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency with respect to all participation by such persons which is part of the public record thereof and all preparation by such persons for such participation” is excluded from the definition of lobbying under both statutes.

26. Is every interaction with an elected official considered lobbying?

No. Remember that in order for an activity to count as lobbying, there must be specific or proposed legislation, and an attempt to support or oppose that legislation. Many nonprofit organizations work with government staff on a regular basis when carrying NYS or NYC contracts, and by necessity interact with government or elected officials on a regular basis. Those interactions only become lobbying if the organization is seeking to influence legislation.

27. How do the lobbying regulations affect requests for member item money?

Because member items are designated in City and State budgets, and the budget is a piece of legislation, attempting to influence the disbursement or award of member item money should be reported as lobbying.

28. How should an organization report an “advocacy day” at City Hall or in Albany?

Because the goal of an “advocacy day” usually includes influencing legislation, the expense of sponsoring such a day (staff time, buses and/or food for volunteers) should be reported as lobbying. However, assuming an organization does not compensate volunteers, volunteer time does not need to be reported.

However, to the extent the advocacy day has other goals, a portion of the expense may be allocated to something other than lobbying. For example, if children are involved, and the trip is also intended to serve an educational purpose (i.e., includes a tour of City Hall and a lecture on how laws are passed), some of the cost of the advocacy day may be allocated to educational activities rather than lobbying if the children are not asked to contact their legislators in order to influence legislation.

If the expense of an advocacy day is problematic because the organization is running up against the IRS limits on how much it may spend on grassroots lobbying, the organization should consider whether participants in the advocacy day are members for IRS purposes (and therefore expenses related to those members activities are direct rather than grassroots expenses).

29. What is the registration process for NYC and NYS lobbying compliance?

If an organization anticipates that it will meet or exceed the thresholds for registration at the State and/or City levels, it should register and report its lobbying activity:

- NYS (\$5,000 calendar year threshold): Registration and reporting must be done online with the New York Joint Commission on Public Ethics (<http://www.jcope.ny.gov>).
- NYC (\$2,000 calendar year threshold): Registration and reporting must be done online with the City Clerk (http://www.cityclerk.nyc.gov/html/lobbying/lobbying_bureau.shtml)

For each reporting system, an organization that employs the lobbyists itself must register as a client (requiring 6 month reports at the NYS level and annual filings at NYC level) and as lobbyist (both NYS and NYC require bi-monthly reports).

Please note: there is no minimum threshold for reporting lobbying activity under the NYS or NYC lobbying laws once an organization is registered. Even if no lobbying has occurred during a reporting period, a report MUST be filed.

30. What are the consequences of being a registered lobbyist?

Disclosure of Personal Information

Both the NYS and NYC make lobbying reports available online, so a registered lobbyist under either system will be publically identified as such. In addition, home address and spouses must be listed, although this information is not public. Unemancipated children must also be listed on the NYC registration forms if those children are making campaign contributions.

NYC Campaign Contributions Limited

For NYC registered lobbyists, additional restrictions relating to campaign financing are applicable. Lobbyists' contributions to NYC political campaigns are not matched, and are subject to lower contribution limits than other individuals. In addition, lobbyists are prohibited from giving gifts to NYC officials.²³

NYC Political Fundraising and Paid Political Consulting Must be Reported

Political fundraising and paid political consulting must be reported for all individuals who are registered as lobbyists. Political fundraising is defined as "solicitation or collection of contributions of a candidate" in NYC, and would include house parties and sending emails to encourage others to donate to a candidate.²⁴ Political consulting is only reportable if the lobbyist receives compensation. These activities must be reported even if they are completely separate from the individual's role as an employee of the organization.

31. Do lobbying activities of family members living in the same household need to be reported?

Although the spouse of a registered lobbyist is listed for purposes of registration, that spouse's lobbying activity (if any) does not need to be reported. However, if the spouse's partner or unemancipated children engage in political fundraising or in paid political consulting, that activity must be reported.

32. Can an organization that has registered as a lobbyist invite public officials to attend fundraising events at no cost?

The general rule is that lobbyists may not gift anything to public officials under the NYC Conflict of Interest Rules. However, there are exceptions for *de minimus* gifts. Complementary tickets to an organization's events are permissible.

Similarly, NYS prohibits gifts from lobbyists to elected officials but permits contributions of tickets to charitable events.²⁵

33. Do appearances at public rallies count as lobbying?

Public rallies may count as lobbying activity if an organization uses the rally to conduct grassroots lobbying (i.e., encouraging the public to take action in support of or opposition to a piece of legislation). If those criteria are not met, and there is no direct contact with the legislators at the rally, the rally will not count as lobbying.

34. How should an organization track its lobbying activity?

In order to file timely reports, an organization should put in to place a system that captures the lobbying activity of all employees, and these records must be turned in to the person who will be filing the reports with enough lead time before the deadline (March 15, May 15, July 15, September 15, November 15, and January 15 for NYC and NYS lobbyist reports) for that person to process and input the necessary information.

While the records of the organization need not be detailed time sheets, the records should be an accurate reflection of the organization's activities, and should include the following:

- Subject, including bill number if applicable
- Target, including specific individuals (i.e. council members at the NYC level) if applicable
- Time spent
- Additional expenses (i.e., printing or volunteer transportation costs)
- Level of legislation (i.e., federal, state or local)
- Grassroots or direct lobbying

For organizations reporting under multiple systems (IRS, NYS and/or NYC), records should also reflect whether the activity is lobbying for IRS purposes (i.e., administrative rulemaking that is NOT considered lobbying for IRS purposes but must be reported for NYS and NYS purposes).

35. What are the penalties for noncompliance with City and State lobbying regulations?

The most common penalty for noncompliance applies to organizations that have registered under the NYC lobbying laws, but have failed to file reports, or have filed late. The City Clerk automatically imposes a penalty of either \$10/day (for first time filers) or \$25/day (for any late filing after the initial filing) for any missing or late report, and those penalties are not negotiable. NYS has a similar penalty for late filings, although the penalties may be reduced in some instances for newly registered organizations or those with reasonable explanations for the late filings.

In most cases, the single most important factor for avoiding penalties is the timely filing of reports. However, NYC can impose penalties of up to \$30,000 and NYS can impose penalties of up to \$50,000 for knowing and willful violations of the applicable lobbying statute.²⁶

36. What if a lobbying report needs to be changed?

In general, there is no penalty for amending a lobbying report if an organization realizes that changes need to be made. However, it is possible that penalties could be assessed in instances in which a willful violation of the lobbying laws has occurred.

NYS Procurement Lobbying Regulations

37. What is procurement lobbying, and why does it matter?

Procurement lobbying is lobbying for the award of government contracts for goods or services. It is important to be aware of when procurement lobbying occurs because NYS imposes special restrictions on procurement lobbying.

The NYS procurement lobbying laws impose a restricted period during which no lobbying is permissible. The restricted period begins once the earliest written notice or advertisement of an RFP or any other method of soliciting a response is issued by a NYS agency. Lobbying, or attempting to influence the award of the contract, is absolutely prohibited during this restricted period until the contract is awarded. Failure to comply with the restriction can result in penalties up to \$50,000 and a ban on lobbying activity in NYS.²⁷

The procurement lobbying rules do not ban responses to RFPs or officially sanctioned means of communications such (i.e., bidders conferences or questions submitted to a designated forum).

38. Do the procurement lobbying regulations apply to NYC lobbying?

No. The procurement rules in the New York State lobbying law apply only to NYS funding. The New York City lobbying law requires reporting on NYC procurement activity, but does not contain detailed rules on procurement lobbying like those found in the state law.

39. What are the reporting requirements for NYS procurement lobbying?

Any registered lobbyist that anticipates spending \$5,000/year in the pursuit of NYS solicitations, award or administration of a grant, loan, or agreement involving the disbursement of public monies in excess of \$15,000 must file a NYS Lobbyist Disbursement of Public Monies Report.²⁸ This is a separate reporting requirement from the NYS client and lobbyist reports described above. Also, unlike the client and lobbyist reports, this report only needs to be filed in periods when procurement lobbying as occurred.

NYC Campaign Finance Rules and Nonprofits

40. What regulations apply to ballot initiative work?

Although the IRS definition of lobbying includes ballot initiative work, neither the NYS nor the NYC definitions of lobbying require reporting of lobbying activity for ballot initiatives. However, in 2012 the NYC Campaign Finance Board implemented regulations applicable to organizations seeking to influence ballot proposals as well as 501(c)(4) (and other all entities

other than 501(c)(3) organizations) making independent expenditures to influence NYC elections.

41. Which organizations must report ballot-related activity?

Both 501(c)(3) and 501(c)(4) organizations are required to report ballot related independent expenditures for two specific types of spending: express advocacy communications, which contain phrases that can have no reasonable meaning other than to advocate for or against a ballot proposal; and electioneering communications, which refer to a ballot proposal within 30 days of a primary election or within 60 days of a general election.

In addition, 504(c)(3) organizations must report expenses intended to influence a NYC election, even if the candidate in question has not “authorized, requested, suggested, fostered or cooperated” in the expenditure.

42. What are the reporting requirements for independent expenditures?

If an organization spends \$1,000 or more to influence an election (501(c)(4)s only) or a ballot initiative (both 501(c)(4)s and 501(c)(3)s) in NYC, that organization must:

- ❑ Report all expenditures of \$100 or more to the CFB and the public.
- ❑ Clearly label certain communications as “paid for by” the organization or individual.
- ❑ Disclose all contributions from other organizations and contributions \$1,000 or more from individuals, once cumulative spending reaches \$5,000.

Reports must be filed electronically with the Campaign Finance Board, and only in election years. Reports are due approximately every two months during elections, and more frequently just before and after an election.²⁹

Lobbying Reporting Schedule

IRS:

Form 990: Lobbying activity must be reported annually on Schedule C

Federal Lobbying Disclosure Act:

Registration: Within 45 days of when thresholds are met (see question XX above)

Quarterly Activity: April 20
July 20
October 20
January 20

Contribution Reports: July 30
January 30

NYS Lobbying Act:

Registration: January 1, or when lobbying expenditures are anticipated to reach \$5,000 for the calendar year

Client Report: July 15
January 15

Lobbyist Report: March 15
May 15
July 15
September 15
November 15
January 15

Disbursement of Public Monies Reports: Only in periods where procurement lobbying has occurred -
March 15
May 15
July 15
September 15
November 15
January 15

NYC Lobbying Act:

Registration: January 15, or when lobbying expenditures are anticipated to reach \$2,000 for the calendar year

Client Report: January 15

Lobbyist Report: March 15
May 15
July 15
September 15
November 15
January 15

Political Fundraising and Consulting Report: Only in periods when registered lobbyists have engaged in political fundraising or paid political consulting -
March 15
May 15
July 15
September 15
November 15
January 15

Helpful websites:

IRS Nonprofit Lobbying Publication

<http://www.irs.gov/pub/irs-tege/eotopicp97.pdf>

Guidelines to the Federal Lobbying Disclosure Act:

http://lobbyingdisclosure.house.gov/amended_lda_guide.html

NYS Guidelines for Lobbyists

http://www.jcope.ny.gov/forms/lob/lob_online.html

NYC Lobbying Law

<http://www.cityclerk.nyc.gov/html/lobbying/law.shtml>

NYC Campaign Finance Independent Expenditures Guidelines

<http://www.nyccfb.info/PDF/rulemaking/Independent-Expenditures-Guidance.pdf>

NYC Conflict of Interest Board

<http://www.nyc.gov/html/conflicts/html/home/home.shtml>

Alliance for Justice – General and State by State Lobbying Information

<http://bolderadvocacy.org/navigate-the-rules>

¹ IIRC§ 4911(e)(2); Treas. Reg. §53.4945-2(d)(2)(iii)(defining the term for purposes of the "expenditure" test); Treas. reg. §1.501(c)(3) - 1(c)(3)(ii) (defining the term for purposes of the "substantial part" test).

² IRC §4911(e)(2); Treas. Reg. §56.4911-2(b)(4)(ii)(B).

³ See Rev. Rul. 73-440, 1973-2 C.B. 177.

⁴ In considering amendments adding the expenditure test, one Congressional Committee reported, "Many believe that the standards as to the permissible level of activities under present law are too vague and thereby tend to encourage subjective and selective enforcement." S. Rep. No. 94-938 (Part 2), 94th Cong., 2d Sess. (1976), at 80.

⁵ *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972); *cert. denied* 414 U.S. 864 (1973); *but see Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955)(Five per cent of an organization's "time and effort" devoted to lobbying did not constitute a substantial part of its activities).

⁶ IRC §501(h).

⁷ IRC §4911 (e)(1)(C); Treas. Reg. §56.4911-4(c).

⁸ IRC §4911 (d)(3).

⁹ IRC §4911(d)(2)(A); Treas. Reg. §56.4911-2(c)(1). However, the expense of preparing materials subsequently used in lobbying activities will not be counted if the primary purpose of the materials was not for lobbying *or* the expenditures were paid more than six months before the subsequent use. In those instances where the subsequent lobbying use is by an independent organization, there must also be "clear and convincing evidence" of collusion between the two groups to prepare and disseminate the materials for lobbying purposes or the expenditures incurred in preparation will not be counted as lobbying expenditures. Treas. Reg. §56.4911-2(b)(2)(v).

¹⁰ IRC §4911(d)(2)(B); Treas. Reg. §56.4911-2(c)(3).

¹¹ IRC §4911(d)(2)(C); Treas. Reg. §56.4911-2(c)(4).

¹² IRC §4911(d)(2)(E).

¹³ IRC §4911(d)(2)(D). The communication would be considered direct lobbying or grass roots lobbying depending upon which of the latter two requirements were not satisfied. Treas. Reg. §56.4911(c) and (d). Generally, an individual is considered to be a bona fide member if he or she contributes more than a nominal amount of time or money to the organization, and communications "primarily" to those members would include communications of which at least 50% are directed to members. *See* Treas. Reg. §56.4911-5(f)(1)-(4).

¹⁴ Treas. Reg. §56.4911-2(c)(2).

¹⁵ <http://www.irs.gov/pub/irs-pdf/f990sc.pdf>

¹⁶ Definition of "Lobbying Activities." *See* http://lobbyingdisclosure.house.gov/amended_lda_guide.html.

¹⁷ <http://lobbyingdisclosure.house.gov/software.asp>

¹⁸ Ch. 1040 of the Laws of 1981, as amended by Ch. 946 of the Laws of 1983 and Ch. 937 of the Laws of 1997; Legislative Law Ch. 32 of the Consolidated Laws of New York, Article 1, §§1-15.

¹⁹ NYC Admin. Code Title 3, §3-211 *et seq.*

²⁰ NY State Temporary Commission on Lobbying, Op. 22 (1979).

²¹ NY State Temporary Commission on Lobbying, Op. 21 (1979); Op. 27 (1979); Op. 36 (1982); Op. 39 (1997); Op. 43 (2000); Op. 44 (2000); *See also Hip Hop Summit Action Network, et al v. NY Temporary State Commission on Lobbying, et al* (03 CIV 5553, SDNY)(pending litigation challenging the application of the lobbying act to public rallies on First Amendment grounds).

²² NYC Clerk Advisory Opinion 2012-1. <http://www.cityclerk.nyc.gov/html/lobbying/2012-1.shtml>

²³ NYC Campaign Finance Law §3-702(3), available at <http://www.nycctfb.info/act-program/CFACT.htm#716>

²⁴ NYC Lobbying Law § 3-216.1 Fundraising and political consulting reports.

²⁵ NYS Lobbying Law 1-c(j)(1).

²⁶ [Cite to NYS and NYC penalties statute]

²⁷ For NY Attorney General guidance on procurement lobbying, *see*

http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/budget_fiscal/PROCUREMENT-LOBBYING-FORM.pdf.

²⁸ NYS Lobbyist Disbursement of Public Monies Report, available at <http://www.jcope.ny.gov/forms/lob/pdf/PublicMoniesREVISED.pdf>

²⁹ http://www.nycctfb.info/act-program/independent_expenditures.aspx

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