

Worry-Free Lobbying For Nonprofits

How To Use The 501(h) Election To Maximize Effectiveness



A Handbook for Funders and Grantees Published by the Alliance for Justice

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Eleven Dupont Circle, NW, 2nd Floor, Washington, DC 20036
Tel: (202) 822-6070 Fax: (202) 822-6068
E-mail: alliance@afj.org Website: www.allianceforjustice.org

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A Publication of the Alliance for Justice

The Alliance for Justice is a 501(c)(3) public charity that works to advance the cause of justice for all Americans, to strengthen the ability of public interest organizations to influence public policy, and to foster the next generation of advocates.

We are based in Washington, DC, but the 60 advocacy organizations which constitute the membership of our association are located throughout the country.

We created the Foundation Advocacy Initiative and the Nonprofit Advocacy Project in order to urge public charities and the foundations that support them to take advantage of the clear and generous provisions in federal law which encourage their investment in the development of informed social policy.

We wrote this brochure to stimulate the interest of foundations and public charities to explore how lobbying can be conducted legally and effectively via the 501(h) election. Specifically, we urge the public charities reading this material to investigate the 501(h) election further, and if appropriate, to make it. We urge foundations to distribute copies of it to their grantees and to other funders.

We want to eliminate the widespread misconceptions about relevant rules that have kept many foundations from supporting public policy work by public charities, and which have similarly restricted the legitimate policy activities of those charities. We look forward to your inquiries with pleasure and are prepared to provide you with a body of excellent, relevant, reliable work, including workshops and presentations, to support your exploration.

Susan Hoechstetter, Alliance for Justice Foundation Advocacy Director, and John Pomeranz, Alliance Nonprofit Advocacy Director, developed this guide. The efforts of the rest of the staff at the Alliance were also essential to the project.

Our entire library of plain language legal guides is available. They are described in the publications order form on page 13. While all of them are useful, we particularly recommend “Being A Player,” “Myth v. Fact,” and “Seize the Initiative” to organizations that are interested in more information about the law governing public charities and lobbying.

NAN ARON
President

The 501(h) Election

This is the step which 501(c)(3) organizations take to tell the Internal Revenue Service they want to take advantage of the clear definitions and generous limits on lobbying that were added to the Internal Revenue Code in 1976. These rules are sometimes called “the expenditure test.” Only organizations which make the election can benefit. Those which do not must abide by the older, less clear, and less generous limits. Eligible organizations which make the election do so without changing their 501(c)(3) status.

Making the election is simply a matter of filing Form 5768, “Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation.” The single-page form calls for the organization’s name, address, and first tax year to which it wants the election to apply. It requires only the signature of an authorized officer, usually the president or treasurer. A copy of the form is reproduced on page 10 and may also be downloaded from the IRS website www.irs.gov.

The election can be revoked at any time and can be easily reinstated, as well.

Lobbying Is Legitimate, Encouraged, and Protected

Congress has stated that influencing legislation is an appropriate and legitimate activity for charitable organizations. In 1976, it passed legislation giving public charities the right to lobby up to defined percentages of their annual expenditures. Section 501(h) and its companion, Section 4911, also enacted that year, set specific dollar limits on the amount electing public charities may spend to influence legislation, without incurring penalty taxes or losing their exempt status. Those limits are substantially in excess of the very small percentages to which many 501(c)(3) organizations, absent definite guidance, now limit themselves.

The Treasury Department supported Congress’ decision as a way to encourage more lobbying by 501(c)(3) organizations:

“The [pre-1976] law deprives legislatures of the views of organizations having substantial expertise and, at times, results in the presentation of only one side of a dispute. [The 501(h) bill] promotes balance in the presentation of conflicting views and eases the burdens of administration of section 501(c)(3). Treasury supports enactment of 501(h).”

The Internal Revenue Service has provided clear guidelines and regulations for the lobbying activities of public charities and for foundations making grants to public charities that lobby. In its 1990 final regulations governing public charities electing under Section 501(h), the IRS ruled that private foundations could support public charities that lobby, under certain conditions, and it described those conditions clearly.

More recently, IRS Exempt Organizations Division Director Marcus Owens advised charities to take advantage of the Section 501(h) lobbying election, saying it “provides a bit of insurance against an audit.” Private sector legal support for 501(h) election is strong. An open letter from 17 distinguished tax practitioners published in a major national legal journal, *Tax Notes*, said, in part:

“...we are convinced that making the election will serve the interests of the great majority of eligible 501(c)(3) organizations that engage even remotely in efforts to influence legislation or public opinion or in other activities touching on public policy.”

The entire open letter is reproduced on page 12.

The American Law Institute and the American Bar Association noted in recent education materials for the ABA Section on Taxation:

“By electing [501(h)], a charity avoids the uncertainties and potentially draconian penalties that accompany the ‘substantial part’ [pre-1976 law]restriction.”

Foundation Support Is Key For Lobbying Success

No one disputes the general concept that good laws are essential to good public policies, nor the idea that public charities are often the most appropriate organizations to educate and inform public policy makers.

The problem arises when foundations which support public charities prohibit their grantees from using their grants to lobby. In fact, under IRS rules, no such prohibition is legally required if the grantee is a public charity. Generally, the foundation is prohibited only from designating or earmarking grants for lobbying purposes.

Misconceptions about what is permitted and what is not have the unfortunate effect of dampening progress toward public policies that work, by preventing public charities from doing what they are most suitable to do—representing constituencies that have a limited voice in the policy process. Simultaneously, the funders are frustrating their own missions by making it impossible for grantees to maximize the effectiveness of their grants.

The misconceptions are not universal, however. Hundreds of public charities have elected 501(h) status in order to lobby legally, and scores of foundations support them in that election. Here are just a few.

The Joyce Foundation’s bottom line goal is to improve public policy in areas ranging from environmental protection to gun violence prevention. Here is what Lawrence Hansen, Vice President, says about grantee activism:

“We expect our grantees to have points of view on the critical issues they care about—and, to that end, to engage in legitimate policy research, education, and advocacy activities. And for that reason, the 501(h) election offers nonprofits, such as Joyce supports, with attractive, generous and perfectly legal opportunities for influencing policy outcomes. Unfortunately, this option is not as widely understood or as frequently exercised as it should be; that’s something we need to change.”

Anna Faith Jones, President of the Boston Foundation and current Chair of the Board of the Council on Foundations, says:

“For us, it’s a basic democratic principle. People who are affected by public policies ought to be involved in designing them and making them work.”

Gara LaMarche, Director of U.S. Programs, Open Society Institute says:

“The mission of the Open Society Institute is to promote the development of open societies around the world. Fortunately, U.S. law encourages citizen participation in public policy through rules like the 501(h) election which provide nonprofits with a means to bring their diverse voices to the public debate. By encouraging more public charities to make use of this provision, we can help to continually strengthen this society’s democracy and, at the same time, help by example to influence the development of civil society in other countries.”

Emmett D. Carson, President of the Minneapolis Foundation, in commenting on the accomplishments of the Minnesota Council of Nonprofits, an electing public charity, in moving families from welfare to work, notes:

“It is not enough to support the service delivery arm of hard-working nonprofit organizations. You’ve got to do more, and you’ve got to recognize that educating public policy makers is crucial to your success.”

Lobbying Is Limited by the IRS, But the Limits Are Far More Generous Under the 501(h) Election

Public charities that wish to engage in lobbying may do so legally. They must choose, however, one of two standards by which their compliance with the Internal Revenue Code is measured.

The oldest and best known is the “insubstantial part test,” which, since 1934, has required that “no substantial part of a charity’s activities... be carrying on propaganda or otherwise attempting to influence legislation.”

“Substantial” is not further defined and, since charities which exceeded this vague

standard risked losing their exemptions, many arbitrarily limited themselves to a tiny amount of lobbying. And many still do.

The other standard is the “section 501(h) expenditure test.” Starting in 1976, it set specific dollar limits, calculated as a percentage of a charity’s total exempt purpose expenditures, on the amount it may spend to influence legislation without losing its exempt status or incurring penalty taxes. Exempt purpose expenditures are typically the organization’s budget minus some fundraising and capital costs.

The total lobbying expenditures limits under the 501(h) test are:

- **20% of the first \$500,000 of exempt purpose expenditures, plus**
- **15% of the next \$500,000 of exempt purpose expenditures, plus**
- **10% of the next \$500,000 of exempt purpose expenditures, plus**
- **5% of the remaining exempt purpose expenditures up to a total cap of \$1 million**

As you can see, only organizations with exempt purpose expenditures in excess of \$17 million will reach the \$1 million cap. Not only is the 501(h) expenditure test clear and easy to calculate, it provides other significant benefits over the “insubstantial part test:”

- **No limit on lobbying activities that do not require expenditures, such as unreimbursed activities conducted by bona fide volunteers (not true for non-electing charities)**
- **Clear definitions of various kinds of lobbying communications, enabling electing charities to control whether they are lobbying or not (no authoritative guidance has been issued by the IRS on these definitions for non-electing charities)**
- **Higher lobbying dollar limits and fewer items which count toward the exhaustion of those limits (unlike the miniscule and artificial restrictions adopted by some non-electing charities)**
- **Less likely to lose exemption because the IRS may only revoke exempt status from electing organizations that exceed their lobbying limits by at least 50% averaged over a four-year period (a non-electing group could lose its exemption for a single year’s excessive lobbying)**
- **No personal penalty for individual managers of an electing charity that exceeds its lobbying expenditures limits (not so for those in non-electing charities)**

Churches and their affiliates are not allowed to make the 501(h) election, although they may lobby under the insubstantial part test.

Lobbying Defined and Described

Lobbying consists of communications that are intended to influence specific legislation. Legislation is action by a legislative body including the “introduction, amendment, enactment, defeat or repeal of Acts, bills, resolutions, or similar items.”

Legislative bodies are Congress, state and local legislatures, and the general public in referenda, initiatives, or proposed constitutional amendments. Typically, they are not judicial, executive and administrative bodies such as school and zoning boards.

For electing public charities, lobbying communications are of two kinds—direct and grass roots.

Generally, a **direct lobbying** communication is one made to either a legislator, an employee of a legislative body, or any other government employee who may participate in the formulation of the legislation. It must refer to a specific piece of legislation and express a view on it.

Generally, a **grass roots** lobbying communication is an attempt to influence specific legislation by encouraging the public, other than the organization’s members, to contact legislators about that legislation. It must refer to specific legislation, reflect a view on it and encourage the recipient to take lobbying action on it.

There are separate expenditure limits for each. **Grass roots** lobbying expenditures are limited to 25% of the organization’s total lobbying limit as calculated using the formula on page 5. Even if the electing charity spends very little or nothing on direct lobbying, it may still spend up to 25% of its limit for overall lobbying on grass roots lobbying.

For **direct lobbying**, there are four principal exceptions to these definitions. Any communication that meets one of these exceptions does not count as lobbying:

- 1. Nonpartisan analysis, study or research that presents all sides of an issue**
- 2. Responses to written requests for assistance from committees or other legislative bodies**
- 3. Challenges to or support for legislative proposals that would change the organization’s rights or its right to exist**
- 4. Examinations and discussions of broad social, economic, and similar problems**

Knowing the definitions and the exceptions is critical for a public charity which wishes to fully exercise its right to lobby while remaining within the limits of the Internal Revenue Code and acting prudently with the limited resources at its command.

Lobbying by Electing Charities and Funding by Private and Community Foundations are Entirely Compatible

The final regulations issued by the Internal Revenue Service in 1990 concerning the lobbying activities of electing charities clearly reaffirm that it is legally permissible for private foundations to make grants to 501(c)(3) organizations that lobby.

The traditionally cautious attitude of private foundations toward charities that do advocacy work is probably the result of the Internal Revenue Code's general rule that a private foundation's expenditures for lobbying activities are subject to a penalty tax and such expenditures could conceivably include certain grants to lobbying charities.

The regulations provide considerable guidance both to grant-seeking charities and private foundations as to when a foundation's grant to a lobbying charity is and is not a lobbying expenditure by the foundation.

Three principal points to keep in mind are:

- 1. Private foundations must not earmark (designate) or direct a grant to a public charity for lobbying. However, foundation knowledge that a grantee engages in lobbying does not mean that a grant is earmarked for lobbying.**
- 2. Private foundations may make *general support grants* to charities whether or not the charities are currently lobbying, have lobbied in the past, have made the 501(h) election, or even use the grant for lobbying purposes. The grants will not be taxable expenditures by the foundation as long as they are not earmarked for lobbying. The regulations do not require a private foundation to seek information about a charity's lobbying budget when the charity applies for a general support grant.**
- 3. Private foundations can give *specific project grants* to fund projects that include lobbying, so long as an individual foundation's total grants for the same project and year do not exceed the amount the grantee had budgeted for the non-lobbying portion of the project. In making this determination, foundations may rely upon the budgets provided by grantees.**

Community foundations can make the same type of grants which are made by private foundations, but community foundations can also make grants that are specifically earmarked for lobbying. To the degree a community foundation funds lobbying, however, it will have to treat the grant as a lobbying expenditure of its own, with the same system of limits that apply to other 501(c)(3) public charities.

Nine Frequently Asked Questions About the 501(h) Election

1. What is 501(h)?

501(h) is a section of the Internal Revenue Code that outlines one of two tests for measuring an eligible 501(c)(3) organization's lobbying expenditures. Sometimes called the "expenditure test" or the "20% rule," 501(h) was enacted in 1976 to clarify the much-criticized "insubstantial part" test that the IRS has used since 1934. 501(h) establishes specific dollar limits that are calculated as a percentage of a charity's total exempt purpose expenditures (tax-exempt budget). Under 501(h), a charity may use up to 20% of the first \$500,000 of its exempt purpose expenditures to lobby. For organizations with larger budgets, this dollar amount increases, on a sliding scale, to a maximum of \$1 million.

2. Why should a 501(c)(3) elect 501(h) status?

- a) Because 501(h) provides more generous lobbying limits than the "insubstantial part test."
- b) Because the 501(h) test is clear and easy to calculate.
- c) Because there are clear definitions of various kinds of lobbying communications.
- d) Because volunteer and other efforts that do not cost the organization money will not count toward the exhaustion of the lobbying limits.
- e) Because an electing charity cannot lose its exemption for a single year's excessive expenditures, while a non-electing charity can.
- f) Because there is no personal penalty for individual managers of an electing charity which exceeds its lobbying expenditure limits.

3. How does a 501(c)(3) charity elect 501(h) status?

Completing the single page form, IRS Form 5768 "Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation," does the job. It requires only the organization's name, address, and the first tax year to which the election will apply. A copy of Form 5768 is on page 10.

4. Will foundations suffer consequences if their grantees exceed lobbying limits?

No. Foundations will not be penalized for grantees that make the election and exceed their lobbying limits.

5. Under 501(h), what is lobbying?

Briefly, lobbying consists of communications that are intended to influence specific legislation. For electing charities, there are two kinds of lobbying communications – direct and grass roots. They are distinguished mostly by whether the organization is acting on its own behalf or asking

members of the public to speak out. More detailed information can be found on pages 6-7 along with applicable exceptions and expenditure limits.

6. How much can a charity spend on lobbying under 501(h)?

As noted in the answer to Question 1, up to 20% of the first \$500,000 of its exempt purpose budget can be spent on direct and grass roots lobbying combined. Grass roots lobbying expenditures are capped at one quarter of the organization's overall combined lobbying limit, regardless of how much it actually spends on direct lobbying. Thus, an organization with a \$100,000 exempt purpose budget can spend up to \$20,000 on direct and grass roots lobbying combined, but no more than \$5,000 on grass roots lobbying. See pages 4 and 5 for more details.

7. Will election of 501(h) status increase the likelihood of an IRS audit?

Absolutely not. IRS Exempt Organizations Division Director Marcus Owens says: "Some concern has been expressed that making the election under section 501(h) will increase the possibility that a charitable organization will be examined by the Internal Revenue Service. I can state emphatically that is not the case." See also page 12 for the comments of a number of distinguished tax practitioners on the topic.

8. Will our paperwork increase if we elect 501(h) status?

No. In fact, it may diminish. All public charities, regardless of status, with receipts greater than \$25,000 file Form 990. If your organization lobbies, you also already complete Schedule A of Form 990. This will not change with 501(h) election, but you will no longer need to track and report volunteer lobbying activities and, with the clear definitions of lobbying activities provided by 501(h), you will be more confident about the expenditures which must be reported.

9. What about losing a tax exemption for excessive lobbying expenditures under 501(h)?

Only electing organizations that exceed their limits over a 4-year period run the risk of losing their tax exemption. The IRS considers an electing charity's lobbying expenditures as a moving average over a four-year period, while a non-electing group could lose its exemption for a single year's excessive expenditures.

LOBBYING RULES FOR ELECTING AND NONELECTING CHARITIES

	Electing Charity	Nonelecting Charity
Lobbying Limits	20% of first \$500,000 of “exempt purpose expenditures” and decreasing percentages after that, up to \$1 million cap	Less than a “substantial” part of activities; IRS employs subjective “balancing” test*
Volunteer and other Cost-free Activities	Do not count against limits on lobbying	Count in determining “substantial”
Lobbying Definition	Defined, with specific exclusions for invited testimony; nonpartisan analysis, study & research; self defense	Not defined, no specific exclusions in statute or regulations
Excessive Lobbying Penalty for Organization	25% excise tax on <u>excess</u> over limits in any year	5% excise tax on all lobbying expenses if substantial lobbying results in revocation
Excessive Lobbying Penalty for Organization’s Officers/Directors	No specific liability	5% if “substantial” lobbying willfully or unreasonably authorized
Revocation of Tax Status	If lobbying exceeds 150% of limits generally over 4 years	If “substantial” lobbying in any <u>one</u> year
Recordkeeping	Must document all lobbying <u>expenses</u> , both grassroots and direct	Must document all lobbying <u>activities and expenses</u>
Tax Form 990A	Numbers only are required: grassroots and overall lobbying expenditures and percentages of “exempt purpose expenditures” that these expenditures comprise	Detailed description of the legislative activities and a classified schedule of the expenses paid or incurred
Audit Exposure	No difference, whether electing or nonelecting	

*The factors the IRS will “balance” in determining if lobbying is “substantial” include the importance of lobbying activities to the organization’s objectives and circumstances, the organization’s expenditures on lobbying activities, and the organization’s overall level of spending and activity.

AN OPEN LETTER TO ELIGIBLE CHARITIES REGARDING THE 501(H) ELECTION.

Set forth below is a May 6, 1991 statement from 17 distinguished tax practitioners advocating that most eligible charities make the lobbying election under section 501(h) of the Internal Revenue Code. (For prior coverage of the lobbying debate, see Tax Notes, Feb. 25, 1991, p. 825.)

Now that the Internal Revenue Service has issued final regulations for the lobbying activities of public charities electing under Section 501(h) of the Internal Revenue Code of 1986, the attorneys listed below call upon all tax advisers for public charities to review with their clients the merits of making this election. Understanding that the decision whether to elect should only be made after a careful review of its implications, we are convinced that making the election will serve the interests of the great majority of eligible 501(c)(3) organizations that engage even remotely in efforts to influence legislation or public opinion or in other activities touching on public policy.

Public charities that do not elect remain subject to the archaic and dangerously subjective "substantial part" test added to the code in 1934. More objective rules apply to those making the election, both as to what constitutes lobbying and the amount of legislative activity they may conduct.

Groups that elect can be assured, for example, that they need not treat as lobbying their research activities, their defense of their own tax status, or their public messages that do not urge action on specific legislation. Moreover, they are afforded favorable treatment for communications with their members on legislative issues, and they need not take into account volunteer efforts when computing lobbying costs. Non-electing organizations have no such certainty that these favorable definitions will apply.

Groups that do not elect have no clear definition of what makes lobbying "substantial"; groups that do elect are permitted specific lobbying expense ceilings. Those electing risk their exemption only if they exceed a lobbying limit by over 50 percent on a four-year rolling average (instead of the annual testing applied to non-electing charities). The officers, directors and trustees of non-electing charities can, in some circumstances, be subject to personal penalty taxes under section 4912 if their charities' lobbying is found to be "substantial." The managers of electing organizations never face that risk.

Contrary to popular impression, electing does not mean more recordkeeping and IRS reporting. All public charities, whether or not they elect, are required to report their total spending on lobbying. Non-electing charities will also be required to describe their lobbying in detail.

We particularly disagree with those who, while recognizing the benefits, decline to elect because of a vague concern that present or future administrations may target electing groups for audit. Internal Revenue Service officials have repeatedly denied that election has—or will have—any such effect.

Furthermore, if an organization is targeted for audit because of its views, the specific rules that go with election, in virtually all cases, will protect it better than the uncertainties of the "substantial part" test. Indeed, the Internal Revenue Manual suggests the Service is more likely to pursue non-electing groups for their lobbying activities.

Our purpose is to ensure that all affected charities and their tax advisers consider making the section 501(h) election. We understand that some groups, based upon their particular situations, may decide to forego making the election. In each case, however, this should be a conscious decision based upon a thorough analysis of the organization's situation, not the result of unreasonable fears or of inertia built up over the past 15 years, when the rules to be applied to electing groups were uncertain.

Given the important opportunity to bring themselves within such favorable rules, eligible public charities and their advisers should review their decision whether to elect in the light of current realities.

Thomas Asher
Asher & Associates
Washington, D.C.

Mortimer Caplin
Caplin & Drysdale
Washington, D.C.

Milton Cerny
Caplin & Drysdale
Washington, D.C.

Sheldon Cohen
Morgan, Lewis & Bockius
Washington, D.C.

Edward Coleman
Webster, Chamberlain & Bean
Washington, D.C.

Prof. Harvey Dale
New York University
School of Law
New York, N.Y.

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Webster, Chamberlain & Bean
Washington, D.C.

Marion R. Fremont-Smith
Choate, Hall & Stewart
Boston, Mass.

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Washington, D.C.

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Howard, Rice,
Nemerovski, Canady,
Robertson & Salk
San Francisco, Calif.

Mark McConaghy
Price Waterhouse
Washington, D.C.

William Olson
Gilman, Olson & Pangia
Washington, D.C.

D. Michael Repass
Price Waterhouse
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Caplin & Drysdale
Washington, D.C.

Sue Stern Stewart
Nixon, Hargrave,
Devans & Doyle
Rochester, N.Y.

Thomas Troyer
Caplin & Drysdale
Washington, D.C.

Mark Weinberg
Weinburg & Jacobs
Rockville, MD

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- _____ 1. **The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and PACs** (1998) 53 pages. \$25. Managing more than one type of exempt organization can expand activists' influence on the policy process. *The Connection* explains the advantages and issues to be considered in establishing each of the different types of organizations.
- _____ 2. **Being A Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities** (1995) 57 pages. \$15. This primer provides a plain-language roadmap of IRS lobbying regulations.
- _____ 3. **The Rules of the Game: An Election Year Guide for Nonprofit Organizations** (1996) 52 pages. \$20. A user-friendly guide that reviews federal tax and election law which govern nonprofits in an election year and explains the right (and wrong) ways to organize specific voter education activities.
- _____ 4. **Seize the Initiative** (1996) 60 pages. \$20. More and more citizen groups are using initiatives and referenda to advance their issues. The guide answers frequently asked questions by nonprofit organizations about their work on ballot measures.
- _____ 5. **Myth v. Fact: Foundation Support of Advocacy** (1995) 26 pages. \$20. The report dispels the myths associated with funding advocacy organizations and offers a full range of advocacy activities that foundations can support.
- _____ 6. **Foundations and Ballot Measures: A Legal Guide** (1998) 24 pages. \$10. This guide helps foundations navigate the federal rules regarding both support of public charities that engage in ballot measure campaigns and the role of foundations themselves may play in supporting or opposing ballot measures.
- _____ 7. **Regulation of Advocacy Activities of Nonprofits that Receive Federal Grants** (1996) 12 pages. No charge. This document summarizes the applicable federal regulations and Internal Revenue Code provisions. It is designed to encourage and enhance nonprofit participation in matters of public policy.
- _____ 8. **E-Advocacy for Nonprofits: The Law of Lobbying and Election-Related Activity on the Net** (2000) 69 pages. \$25. This guide comprehensively addresses the laws governing Internet advocacy, from voter education web sites to e-mail action alerts.

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