



## Lobbying Memorandum

Effective February 2012 (last reviewed by Wilson Sonsini in March 2014)

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### Summary of Lobbying Restrictions for 501(c)(3) Tax-exempt Organizations

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#### 1. Background.

Creative Commons Corporation (“Creative Commons” or “CC”) is a nonprofit organization exempt from U.S. federal income taxation under Section 501(c)(3) of the Code<sup>1</sup> (a “501(c)(3) organization”). In order to preserve its tax-exempt status, it is important that all employees and agents of CC acting on its behalf understand what the lobbying restrictions are, why they are important, and how to comply with internal and external restrictions on activities in which CC can engage under the Code.

#### 2. Lobbying Limitations on 501(c)(3) Organizations Generally.

The Code does not prohibit a 501(c)(3) organization from lobbying, but rather limits the level of lobbying activity in which the organization may engage. Generally, 501(c)(3) organizations are prohibited from devoting a “substantial part” of their activities to lobbying. If a 501(c)(3) organization elects to be governed by the expenditure test set forth in Section 501(h) (the “Test”), the determination of whether a “substantial part” of the organization’s activities constitute lobbying is based on the percentage of the organization’s expenditures that are made for lobbying purposes. As of 2009, Creative Commons is subject to the Test, so it cannot spend more than a specified portion of its total lobbying expenditures without jeopardizing its tax-exempt status. More on these limits, below.

#### 3. What is Lobbying?

Lobbying is any activity that attempts to influence legislation, both inside and outside of the United States. Legislation is defined to include any action by Congress, a state legislature, a local council, a public referendum, a ballot initiative, or any similar activity (including action relating to a foreign law). Legislation generally does not include actions by the President or other members of the Executive Branch, governors, judges or members of the judiciary, or any administrative agency (e.g., the Food and Drug Administration).

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<sup>1</sup> All section references hereunder are to the Internal Revenue Code of 1986, as amended (the “Code”).

Lobbying is divided into two categories: (1) direct and (2) grass roots. Direct lobbying is any attempt to influence specific legislation (which includes specific legislative proposals, whether or not they have been introduced in the legislature) by communicating views on the legislation to a legislator, an employee of the legislator, or any government official or employee who may participate in the formulation of the legislation. Grass roots lobbying is any attempt to influence legislation by urging the public to take action on specific legislation. To constitute grass roots lobbying, a communication must (1) refer to specific legislation, (2) reflect a view on such legislation, and (3) encourage the recipient of the communication to take action with respect to the legislation.

Specific exceptions to lobbying:

- 1) Making available the results of nonpartisan analysis, study, or research.
- 2) Providing technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision.
- 3) Appearances before, or communications to, any legislative body with respect to a possible decision of such body that might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization (so-called “self-defense exception”); and
- 4) Any communication with a government official or employee who is *not* a member or employee of a legislative body, where the principal purpose is *not* to influence legislation.
- 5) Examinations and discussions of broad social, economic, and similar problems, so long as the discussion does not address itself to the merits of a specific legislative proposal and so long as the discussion does not directly encourage recipients to take action with respect to any legislation.

**See also: Examples of Lobbying and Nonlobbying Activities (Table 1)**

**Six Simple Rules (Exhibit 1)**

**Common Misperceptions Relating to 501(c)(3) Organizations (Exhibit 2)**

#### **4. Permissible Expenditures and Limits.**

The Test establishes different limits on amounts that can be spent on lobbying activities depending on the type of lobbying undertaken – direct lobbying or grass roots lobbying. Grass roots expenditures are a subset of lobbying expenditures. Section 501(h) limits allowable lobbying and grass roots expenditures to a percentage of the expenditures of the organization paid or incurred to accomplish such organization’s charitable purposes (“Exempt Purpose Expenditures”). Exempt Purpose Expenditures include employee salaries, administrative overhead, general expenses, and

lobbying expenditures. Excluded from Exempt Purpose Expenditures are expenditures that are not paid or incurred to accomplish the organization’s charitable purposes, transfers from the organization to a non-501(c)(3) organization that does not engage in lobbying, and transfers between certain affiliate organizations.

Lobbying expenditures are limited to 20% of the Exempt Purpose Expenditures up to \$500,000 plus 15% of the Exempt Purpose Expenditures between \$500,000 and \$1,000,000, 10% of the Exempt Purpose Expenditures between \$1,000,000 and \$1,500,000, and 5% of the Exempt Purpose Expenditures over \$1,500,000, but in all cases lobbying expenditures are capped at \$1,000,000. Grass roots expenditures are capped at 25% of the allowable lobbying expenditures.

Example 1: A nonprofit that has made the 501(h) election and that has an exempt purpose budget of \$500,000 would have an overall lobbying limit of \$100,000 and a grassroots lobbying limit of \$25,000.

Example 2: nonprofit that has made the 501(h) election and that has an exempt purpose budget of \$3M would have an overall lobbying limit of \$300,000 and a grass roots lobbying limit of \$75,000.

**Total Annual Budget: 3,000,000**

Budget Tier	% Permissible	Lobbying Limit
First \$500,000	20%	100,000
Next \$500,000	15%	75,000
Next \$500,000	10%	50,000
Remaining Budget	5%	75,000
<b>Overall Lobbying Limit</b>		<b>300,000</b>
<b>Grassroots Lobbying Limit (25%)</b>		<b>75,000</b>

1,500,000 (remaining budget for lobby limit calculation)

**5. Recordkeeping and Compliance.**

Non profits that lobby are required to report lobbying activities or expenditures on their annual Form 990. CC must report (1) total Exempt Purpose Expenditures; (2) total lobbying expenditures; (3) the limit on lobbying expenditures under the Test; (4) total grass roots expenditures; and (5) the limit on grass roots lobbying expenditures under the Test. Creative Commons must also keep a detailed record of all of its lobbying expenditures, recorded separately as either direct or grass roots expenditures. Lobbying expenditures include amounts directly paid or incurred for lobbying (e.g., expenses paid for printing, mailing, reproducing, or distributing lobbying material), the portion of employee salary attributable to lobbying, out-of-pocket expenditure for lobbying, and the portion of administrative overhead and other general expenditures attributable to lobbying.

If an organization that has made a Section 501(h) election exceeds either the lobbying or grass roots threshold or both thresholds in a given taxable year, that organization will be subject to a 25% excise tax on the excess expenditures as applicable, and, if both are exceeded, the excise tax applies to whichever excess is greater. If the organization's lobbying or grass roots expenditures are greater than 150% of the applicable threshold, on average, over a four-year period, the organization will lose its tax-exempt status under Section 501(c)(3).

## **6. Reporting Obligations and Approval Process.**

Whenever possible, you should consult with the Legal Department and the Controller prior to engaging in lobbying. This allows the organization to make a determination about whether an activity is lobbying, and if so whether it is direct or grass roots in nature. This, in turn, allows Creative Commons to comply with its recordkeeping and reporting obligations, and helps CC keep track of lobbying expenditures relative to the applicable lobbying limits.

Before engaging in lobbying, please follow this process:

1. Fill out "Lobbying Request Form" (posted on Teamspace) and submit to the Legal Department.
2. If your lobbying activity is approved, you will receive a scanned version of the fully-executed Lobbying Request Form.
3. Upon completion of lobbying activity, print the Lobbying Request Form and complete the final section on page 2.
4. Complete a Reimbursement Form with original expense receipts and a tally of the total time spent on the lobbying activity (rounded to the nearest quarter hour). ***Ensure that you check the box marked "lobbying activity" for all expenses relating to lobbying and indicate the grant to which the lobbying activity relates (if applicable).***
5. Submit the completed Lobbying Request Form and Reimbursement Form to the Controller within two weeks of completion of the lobbying activity.

**Table 1**  
**Examples of Lobbying and Non Lobbying Activities**

<b>Lobbying Activities</b>	<b>Nonlobbying Activities</b>
<p>Receiving a call from a congressperson and, at the request of the congressperson, opining on the benefits and disadvantages of a pending bill</p>	<p>Receiving a call from a congressperson and, at the request of the congressperson, providing a technical explanation about licensing as it relates to a pending bill</p> <p align="center">or</p> <p>Receiving a call from a congressperson and, at the request of the congressperson, verifying that the language of a pending bill is clear and accurate</p>
<p>Discussing with a member of the Canadian parliament the importance of a bill that will provide laptops for students in the classroom</p> <p align="center">or</p> <p>Encouraging a member of the Canadian parliament to seek funding for an after-school computer instruction program</p>	<p>Discussing with a member of the Canadian parliament the importance of introducing students to technology in the classroom, so long as the discussion does not address the merits of a specific legislative proposal</p>
<p>Appearing before Congress, at the request of a single congressperson, to support or oppose a bill</p>	<p>Appearing before Congress, at the request of a Congressional panel in writing, to support or oppose a bill, so long as any opinions or recommendations given are directly related to the materials on which the panel requested testimony</p> <p align="center">or</p> <p>Appearing before Congress to defend the organization (e.g., opposing a proposal to curtail lobbying by tax-exempt organizations)</p>

<p>Publicly supporting a bill to increase federal spending on a school technology program, then meeting with members of Congress and encouraging them to support the global change (direct lobbying)</p>	<p>Publicly supporting a bill to increase federal spending on a school technology program without encouraging action by voters or talking with members or employees of Congress about the global change</p>
<p>Publicly opposing a bill which reduces state funding for education and then sending a letter to each of the organization's members that asks them to contact their congressperson and provides their congressperson's phone number (direct lobbying)</p>	<p>Publicly opposing a bill which reduces state funding for education and then sending a letter to each of the organization's members containing facts about the bill without encouraging the members to oppose the bill</p> <p style="text-align: center;">or</p> <p>Contacting members of the organization about a bill affecting the organization without directly encouraging members to support or oppose the bill</p>
<p>Publicly supporting or opposing a ballot initiative to be voted on by the general public (direct lobbying)</p>	<p>Publicly opposing broad social and economic problems that might relate to a ballot initiative without referring to the ballot initiative</p> <p style="text-align: center;">or</p> <p>Providing the public with nonpartisan analysis, study, or research relating to the ballot initiative</p>
<p>Posting a blog entry on a website asking readers to support a bill to expand technology education programs (grass roots lobbying)</p>	<p>Posting a blog entry on a website in support of a bill to expand technology education programs without asking the readers to take action or providing the contact information of a congressperson</p>
<p>Publicly supporting a bill, preparing sample letters which support the bill, and mailing the letters out to non-members asking them to write their congressperson in support of the bill (grass roots lobbying)</p>	<p>Publicly supporting a bill and mailing letters to the public containing information about the bill and the negative consequences that might result if the bill is passed</p>

## **Exhibit 1**

### **6 Simple Rules**

The following guidelines may be used to reduce the possibility that a communication will be characterized as lobbying:

1. Avoid references to specific legislation.
2. Refrain from taking positions that support, oppose, or seek to modify specific legislation (subject to limitations discussed above).
3. Do not encourage the public to contact a congressperson or provide the contact information of the congressperson in communications.
4. When contacted by a congressperson regarding specific legislation, limit the conversation to the explanation of a technical subject or the modification of language in the bill to improve clarity and accuracy: think education rather than persuasion.
5. When contacted by a congressperson regarding specific legislation, avoid evaluating or opining on the benefits or disadvantages of the legislation.
6. Always ask for permission before engaging in activities that you believe might constitute lobbying.

## Exhibit 2

### Common Misperceptions Relating to 501(c)(3) Organizations

- “Stating at the beginning of a conversation, ‘this is not lobbying,’ will prevent the conversation from being a lobbying activity.”

**A conversation will be characterized as lobbying if there is any actual or perceived attempt to influence legislation.**

- “Lobbying activities of our volunteers count for purposes of our lobbying limits.”

**Since Creative Commons has elected to be subject to the Test, it cannot spend more than a specified portion of its total expenditures on lobbying. Any amounts paid to volunteers, such as reimbursement of expenses, count toward our annual lobbying limit. Note, however, that *unreimbursed* expenses of volunteers do not count toward our annual lobbying limit. If no election has been filed, the activities of volunteers do count for purposes of determining whether an organization has complied with applicable limits on lobbying.**

- “The organization cannot be held responsible for its officers’, directors’ or other volunteers’ lobbying activities.”

**If a person affiliated with Creative Commons engages in lobbying activity, such lobbying activity may be attributed to Creative Commons. This determination would be made on a case by case basis. This may be particularly true for persons who are affiliated with many organizations and it is not clear on which organization’s behalf the person is lobbying. If a person’s lobbying activity is attributed to Creative Commons, then CC’s expenses allocable to that activity (e.g. a portion of an employee’s salary or expenses reimbursed to a volunteer) count toward our annual lobbying limit.**



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