



*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

## **DACA and Tax Exempt Charities**

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Many tax exempt charities are interested in presenting their views regarding the Deferred Action for Childhood Arrival policy, commonly referred to as "DACA." The policy, initially implemented by President Obama, permitted certain illegal immigrants who arrived in the United States as children to remain here and apply for work permits. President Trump has rescinded the policy but provided a six-month effective date for the change. Accordingly, Congress may pass legislation during this period to codify all or elements of DACA. For example, certain Senators have introduced the "Success Act" which would codify certain elements of DACA. This article will discuss the extent a charity may be involved in this policy issue without jeopardizing its tax-exempt status.

### **The Law**

Congress does permit a charity to engage in "lobbying" (attempts to influence legislation) provided such activity is not "substantial." Accordingly, a charity may, within certain limitations, "weigh in" on its view of pending legislation regarding DACA.

Lobbying is generally defined as any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of legislation. The Internal Revenue Code defines legislation as:

Any action with respect to acts, bills, resolutions or similar items by the Congress, any state legislative body, any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment or similar procedure.

Legislative bodies are defined as:

Congress, state legislatures or similar bodies excluding local councils (and similar governing bodies) and executive, judicial or administrative bodies.

Lobbying also includes "grassroots" indirect lobbying. Grassroots lobbying includes attempts to influence legislation by attempting to influence the opinion of the public with respect to legislation and encouraging the audience to take action with respect to the legislation. Any communication must refer to and reflect a view on the legislation.

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Note that DACA is an action taken by the Executive Branch, and not a legislative body, and therefore does not satisfy the Internal Revenue Code definition of “legislation.” Therefore, a charity could set forth its view regarding the DACA executive action and such view would not necessarily constitute lobbying provided the commentary did not take a position regarding any pending legislation, or include a “call to action” requesting that any person take action with respect to any pending legislation. A call to action includes, but is not limited to, statements encouraging the recipient to contact a legislator or other government official or employee who may participate in the formulation of legislation or specifically identifying one or more legislators who will vote on the legislation who oppose the charity's view, are undecided, are the recipient's representative in the legislature or on the committee that will consider the legislation.

### **Nonpartisan Analysis<sup>1</sup>**

A charity may also engage in nonpartisan analysis and such analysis does not constitute lobbying as defined in the Internal Revenue Code.

Nonpartisan analysis, study or research means an independent and objective exposition of a subject matter. Nonpartisan analysis study or research may advocate a position or viewpoint, if there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. Nonpartisan analysis that does advocate a position or viewpoint must present information on both sides of any legislative controversy and present a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion.

Accordingly, a charity desiring to provide its views on DACA legislation could craft a nonpartisan policy analysis that presents all points of view regarding DACA.

Nonpartisan analysis must not include any "call to action," as defined above,. Certain advertisements by charities may also constitute lobbying.

### **Mass Media Advertising**

A “mass media advertisement” may constitute lobbying if:

- (1) the advertisement appears in the mass media within two weeks before a vote by a legislative body or committee,
- (2) the legislation is highly publicized, and
- (3) such advertisement both reflects a view on the general subject of such legislation and either refers to the highly publicized legislation or encourages the public to communicate with legislators on such legislation.

However, an advertisement will not be treated as lobbying if the organization demonstrates (1) that the advertisement is a type of communication regularly made by

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<sup>1</sup> This exception to lobbying applies to organizations that make a 501(h) election which is described below.

such organization in the mass media without regard to the timing of legislation; or (2) that the timing of the advertisement was unrelated to such legislative action.

It is likely that any advertisement by a charity regarding DACA would satisfy the second and third prong of the foregoing test. Therefore, to avoid having such communication constitute lobbying, the charity must insure that the advertisement is not published within the two-week window referred to above.

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## **Compliance Alternatives**

Rather than attempting to “thread the needle” regarding any DACA-centric communication a charity may simply take the position that the communication will be classified as lobbying and make a Section 501(h) election. Following is a link to an article that discuss this election and the overall limitations applicable to lobbying by charities and other resources on lobbying for nonprofits:

<https://www.pbpatl.org/nonprofit-legal-alerts/nonprofits-and-lobbying/>. A charity may discover that the election provides sufficient opportunity to provide commentary and “lobby” regarding DACA without jeopardizing the charities tax exempt status.

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