Summary of the Comments
by the Section of Taxation
of the D.C. Bar Regarding
the Proposed Regulations
on Lobbying by Public Charities

The comments generally approve of the proposed regulations, which constitute a redrafting of prior proposed regulations and incorporate many changes recommended by the Section of Taxation in previous comments regarding the prior proposed regulations. However, these comments suggest five new changes and resubmit one change which the Internal Revenue Service has not yet adopted. The recommended changes are as follows:

1. Clarify the regulations to make clear that the lobbying restrictions do not apply to general proposals for legislation which have not been introduced or are not likely to be introduced in the near future.

2. Eliminate a rule which would automatically classify as lobbying any communication to the media on highly publicized legislation within two weeks of a vote on the legislation.

3. Modify a rule which would reclassify nonpartisan analysis as lobbying if any "direct call to action" was contained in the document.

4. Allow the self-defense exception to apply to any Section 501(c)(3) membership organization, even if its constituent member organizations are not exempt under Section 501(c)(3).

5. Eliminate a rule which would treat a Section 501(c)(3)'s purchases from non-Section 501(c)(3) organizations as lobbying expenditures.

6. Provide that an organization is eligible to make an election to have its exemption tested under Section 501(h) for all years that it has a tentative public charity status, even if such status is retroactively revoked for certain purposes.

Comments By The
Section of Taxation of the District of Columbia Bar
Regarding the Proposed Regulations on Lobbying
by Public Charities

## I. INTRODUCTION AND GENERAL COMMENTS.

The Section of Taxation of the District of Columbia Bar Association submits the following comments on the regulations (the "Proposed Regulations") proposed by the Internal Revenue Service on December 22, 1988 regarding lobbying by public charities.[1/] The comments have been approved by both the Section of Taxation's Steering Committee and its Tax Policy Committee.[2/] They were initially prepared by and reflect the individual views of the members of the Lobbying Regulations Task Force of the Section's Exempt Organization's Committee.[3/] It is hoped that these comments will be helpful to the Service in consideration of these important regulations.

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1/ The views expressed herein represent only those of the Taxation Section of the District of Columbia Bar and not those of the District of Columbia Bar or its Board of Governors. The Section of Taxation is comprised of approximately 1,200 members.

2/ The Tax Policy Committee is currently chaired by Donald C. Lubick, and its members are: Jane C. Bergner, Collette C. Goodman, Ellen A. Hennessy, Gerald A. Kafka, Stephen A. Nauheim, Celia Roady, Bradley M. Seltzer, Charles B. Temkin, Marian S. Block, Leonard J. Henzke, Jr., George P. Levendis, Patricia G. Lewis, Pamela F. Olson, Theodore D. Peyser, Jr., Joseph A. Rieser, Jr., Lawrence J. Ross and Reeves C. Westbrook.

3/ These members include: Leonard J. Henzke, Jr., Celia Roady, Gail M. Harmon, Susan E. Dorn, Susan A. Cobb and Jean Wright.

II. SPECIFIC COMMENTS ON PROPOSED REGULATIONS.

A. The Definition of "Specific Legislation," Prop. Reg. 56.4911-2(b)(1)(iii); Prop. Reg. 56.4911-2(e)(1); Prop. Reg. 53.4945-2(a)(1).

The Proposed Regulations provide that a communication will not constitute lobbying unless it "refers to specific legislation." However, this is defined to include not only "legislation that has already been introduced in a legislative body," but also "a specific legislative proposal that the organization either supports or opposes," even though no such legislative proposal has been formally introduced. The latter phrase is sufficiently broad so as to include within the definition of "specific legislation" many types of general communications or research products which deal with contemporary affairs which may ultimately be the subject of legislation, even though no such legislation is pending or imminent. In addition legislative "proposals" are frequently used by organizations as mere rhetorical devices, when there is no immediate possibility that the legislative proposal will ever be introduced. For example, organizations may call for a flat tax, or a return to Prohibition as a part of a program to educate the public about economic theory or the desirability of abstinence from alcohol. Both of these communications would be considered "specific legislative proposals" under the Proposed Regulations, although neither of them has any immediate possibility of introduction.

lesser standard to communications regarding imminent legislative matters that are so well-known that the public needs no encouragement to contact their legislators even in the absence of a direct exhortation to do so. However, for this rule to work fairly, charitable organizations would need to be able to determine at least two weeks in advance when a particular vote will be scheduled, so that they will be able to ensure whether a particular communication constitutes grass roots lobbying. This is simply not possible; indeed, it is common for legislative votes on highly publicized matters to be scheduled with as little as a few days notice, thus retroactively converting otherwise protected communications into grass roots lobbying. The Proposed Regulations should limit the application of the mass media rule to situations in which there has been a public announcement of a definite date for a vote, and the applicable time period should begin with the date of such public announcement.

C. The Nonpartisan Study, Analysis and Research Exception, Prop. Reg. 56.4911-2(c)(1)(vi); Prop. Reg. 53.4945-2(d)(1)(vi).

The Proposed Regulations treat as lobbying a communication that would otherwise be considered nonpartisan study, analysis and research if it includes a "direct" call to action. This provision has the effect of narrowing the availability of the nonpartisan study exception that has been present

ability of the self-defense exception. The Proposed Regulations should be revised to permit the self-defense exception to apply with respect to a Section 501(c)(3) membership organization, even if some of the members are not themselves exempt under Section 501(c)(3).

E. Certain Transfers to Non-Section 501(c)(3) Organizations that Lobby Treated as Lobbying Expenditures, Prop. Reg. 56.4911-2(d)(3).

The Proposed Regulations treat transfers from Section 501(c)(3) to non-Section 501(c)(3) organizations that lobby as lobbying expenditures, to the extent of the transferee's lobbying expenditures, unless the transfer is a "controlled grant" for a special project, held by the transferee in a special fund. This provision has the effect of classifying most purchases as lobbying expenditures. Presumably the purpose is to prevent Section 501(c)(3) organizations from attempting to disguise support for lobbying activities of non-Section 501(c)(3)'s as transfers for other purposes. However, under the Proposed Regulation, all payments by public charities to non-Section 501(c)(3) entities will be treated as lobbying activities by the public charity. There is simply no basis for such a blanket rule.

A newly created organization applying to the Internal Revenue Service for tax-exemption under Section 501(c)(3) may also apply for an advance ruling under either Section 509(a)(1) or (2) that it will be treated as a public charity during its advance ruling period. If, at the expiration of the advance ruling period the organization is deemed to be a private foundation, its characterization as such will be retroactive to the date of its organization, but only for purposes of Section 507(d) (private foundation termination tax) and Section 4940 (private foundation excise tax on net investment income). See Treas. Reg. §§1.170-A-9(e)(5)(iii)(b) and 1.509(a)-3(e)(2). In other words, if a newly created Section 501(c)(3) organization receives an advance ruling of public charity status but is later determined to be a private foundation, the existing regulations provide that the organization will be deemed a public charity for all purposes other than Sections 507(d) and 4940. The organization, therefore, will not be subject to Section 4945 excise tax with respect to taxable expenditures including lobbying expenditures (or the excise taxes imposed by Section 4941-4944) during the advance ruling period plus 90 days thereafter, even if in fact it is later determined to be a private foundation and has attempted to influence legislation.