



Using Advocacy to Support Your Mission: What Your Foundation Can and Can't Do, Can and Can't Fund

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Partisan Political Activity

- A 501(c)(3) may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”
- Absolute prohibition for public charities & private foundations
 - Violation can lead to revocation of tax exempt status (contrast with lobbying activity)



But 501(c)(3) Organizations Can ...

- Praise or criticize incumbents for actions while in office (only public charities can do this, & they must be careful during election season)
- Encourage civic engagement
 - Voter education: voter guides, candidate forums
 - Voter registration (but private foundations should consult attorney before making earmarked grants for voter registration)
 - Get out the vote
- Educate candidates
- Support and oppose ballot questions (subject to normal lobbying limits)



Civic Engagement & Racial Equity

BloombergBusinessweek ▼

Inside the Trump Bunker, With Days to Go

To compensate for this, Trump's campaign has devised another strategy, which, not surprisingly, is negative. Instead of expanding the electorate, Bannon and his team are trying to shrink it. "We have three major voter suppression operations under way," says a senior official. They're aimed at three groups Clinton needs to win overwhelmingly: idealistic white liberals, young women, and African Americans.

(Joshua Green & Sasha Issenberg, Business Week,
10/27/16)



Is It Lobbying?

- Doesn't matter what term you use to describe your work – *actions* matter
- You -- or your grantees -- may be lobbying if you're trying to
 - influence legislation
 - change agency rules
 - get government funding
 - and more
- This presentation will focus on IRS rules governing what public charities and private foundations can do – as well as what grants foundations can make to support advocacy



The Internal Revenue Code

An organization may be recognized as exempt from taxation under §501(c)(3) of the Internal Revenue Code if "no substantial part" of its activities consists of "carrying on propaganda or otherwise attempting to influence legislation."

Public charities have a *limit* on the amount of lobbying they can do.

Private foundations will be assessed excise taxes for any lobbying.



Internal Revenue Code: “Lobbying”

- Attempting to influence federal, state or local legislation, including:
 - judicial nominations and international treaties (if legislatively approved)
 - Ballot initiatives
- Does not include:
 - administrative rule making or other administrative advocacy
 - specialized bodies such as zoning and school boards



Direct vs. Grassroots Lobbying

- Direct: refers to specific legislation *and* takes a position on that legislation
- Grassroots: encourages others to take action by
 - (1) referring to specific legislation,
 - (2) taking a stand on that legislation, and
 - (3) including a “call to action” that explicitly or implicitly asks the recipient to contact legislators
- Note: communications with members urging them to take action is *direct*, not grassroots lobbying

Direct or Grassroots Lobbying?



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Action Alert: Stop Sessions

Friday, January 13, 2017



Trump's pick for Attorney General, [Senator Jeff Sessions](#), has proven himself to be the most dangerous ally of the anti-immigrant movement in Congress since his election in 1996. He has received awards from the anti-immigrant hate group FAIR and has invited members of anti-immigrant organizations to testify at Congressional hearings.



How Much Lobbying Can a Public Charity Conduct?

Public charities have a choice between two tests:

- Substantial part test

loss of tax exempt status if you exceed limits

- Expenditure test (501(h) election) – sliding scale based on total revenue

excise taxes if you exceed limits



Lobbying by Private Foundations

- Any amount paid or incurred by a private foundation to lobby is a taxable expenditure
 - Includes both direct and grassroots lobbying
- The tax on the private foundation will be 20% of the lobbying expenditure paid or incurred



Foundations as Advocates



Things That the IRS Does Not Count as Lobbying

- Nonpartisan analysis or research
unless you use it for grassroots lobbying within 6 months
- Technical assistance in response to a written request
from a government body, not an individual legislator
- “Self defense” advocacy -- to protect an organization’s tax-exempt status, deductibility of contributions, or existence
- Communication with legislator about subjects other than legislation
- Examination or discussion of broad social, economic, and similar problems
if no call to action is included
- Public charities Communication by a nonprofit with its members
if no call to action is included
- Private foundations Communication with government officials regarding a program jointly funded by the government and the private foundation.



Practical Tips

- Public presentations
 - Is it lobbying? Consider subject matter & audience
 - Professional role or personal capacity
- Social media
 - Medium or message?
 - Personal or office technology/accounts



Registration and Disclosure Laws

Private foundations may act as advocates within the exceptions to the Internal Revenue Code, but federal, state, or local registration and disclosure laws may require registration and reporting

- These statutes do not prohibit or limit lobbying activity, by private foundations or anyone else.
- Most common example: advocacy before administrative agencies.
- Public identification as a “lobbyist” may not be palatable to your foundation or its Board ...



Federal Lobbying Disclosure Act

Register and file semi-annual financial disclosure reports with the Secretary of the Senate and the Clerk of the House of Representatives if:

- Lobbying individual has made at least two federal legislative contacts and has spent at least 20% of his or her time on lobbying activity in a quarterly period; *and*
- Organization employing the lobbying individual spent at least \$12,500 on federal lobbying during that quarterly period.

Does not cover state, local, grass roots or administrative agency lobbying



New York State Lobbying Act

Applies to all lobbying organizations spending, and lobbyists receiving, \$5,000+ annually for lobbying

- Federal lobbying doesn't count
- Municipal lobbying (e.g., in NYC) is included



NYS – What Counts as Lobbying?

- Legislation (including the budget & member items)
- Executive orders
- Agency rules & regulations
- Procurement
- Approval, disapproval, implementation of any State agreement or action relating to Class II gaming.
- *Applies to grassroots (indirect) lobbying as well as direct*



New York City Lobbying Act

Applies to all lobbying organizations spending, and lobbyists receiving, \$5,000+ annually for lobbying

- Federal & State lobbying don't count



NYC – What Counts as Lobbying?

- “Lobbying” covers everything covered by NYS law, and also:
 - zoning, land use, disposition of City’s real property
 - determination of Board or Commission
 - agency decision to hold/timing of rate making proceeding
 - agenda of Board or Commission
 - calendaring or scope of City Council oversight hearing
 - decision by city elected official or employee to support/oppose a state or federal rule or regulation
- Must provide detailed registration information (but family information non-public)



Free & Clear

Things all nonprofits (even private foundations) can do that are not considered lobbying by the IRS, NYS or NYC:

- Urge the government to change how it enforces existing laws or regulations
- Respond to a request for information (including legislative testimony if you were specifically invited by the committee)
- Talk to a public official without an “ask” – even if you discuss legislation, rules or procurement
- Nonpartisan analysis or research (that you don’t use for grassroots lobbying within 6 months)
- Examination or discussion of broad social, economic, and similar problems (no call to action)



Grant Making in Support of Advocacy



A Limitation – Not a Prohibition

- “Earmarking” is taxable: designating that any part of a grant will be expended for lobbying makes that expenditure taxable
- Funds may be used for lobbying by grantees if not earmarked for that purpose



General Support Grants

- General Support grants are not earmarked for lobbying, even if the grantee is legislatively active
- Later use of grant funds for lobbying – not problematic
- Proposals and reports that include descriptions of lobbying activity -- not problematic



Specific Project Grants

- Grants to support projects that include a lobbying component are permissible
- Grant must be no larger than the non-lobbying expenditures projected in the project budget
- Multiple private foundations can support the project, even when that is the only philanthropic support obtained
- Use of grant funds for lobbying – not problematic (but watch the renewals)
- It's all about the project budget!



Watch the Grant Letter Language!

- Your grant letter is a contract that legally binds your grantees
- Language that requires that “no part of this grant shall be used for lobbying” *is not required by law* and unnecessarily restricts your grantees – and may undermine your grant’s effectiveness
- Instead, state that “no part of this grant is earmarked for lobbying”



Grants to 501(c)(4) Organizations: Process

- Private foundations *may* make grants to grantees not recognized under 501(c)(3) – including 501(c)(4)'s
- Must exercise “expenditure responsibility” to insure that the grant funds will be used for purposes that would qualify as 501(c)(3) exempt activities
- Process: conduct a “pre-grant inquiry” into the program and those who will carry it out
- Process: grant agreement must contain certain provisions that require the funds to be spent on (c)(3)-eligible activity
- Process: grant reporting must contain information to confirm that the funds were spent on (c)(3)-eligible activity



Grants to 501(c)(4) Organizations: Limitations

- Grant agreement must explicitly prohibit use of grant funds for lobbying activity as well as political activity
- Line between non-lobbying activity (e.g. education) and lobbying can be blurred
- Reputational concerns about working with (c)(4)'s ("dark money" controversy)
- State disclosure law may require (c)(4) grantees to publicly report your grant



NY State Donor Disclosure Law

- A 501(c)(4) organization will be required to disclose its donors if it spends at least \$15,000 on lobbying in NY in a 12-month period and the lobbying expenditures are at least 3% of the organization's budget
- A 501(c)(3) organization will be required to disclose donors contributing more than \$2,500 if the organization
 - contributes \$2,500 or more in funding or “in-kind” support
 - to a 501(c)(4) organization that
 - spends at least \$15,000 lobbying in NY in a 12-month period, and
 - the lobbying expenditures are at least 3% of the 501(c)(4)'s budget.
- Enforcement currently enjoined (*Citizens Union, et al v. Attorney General of the State of New York*)



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