



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

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Lawyers Alliance
***for* New York**

Connecting lawyers, nonprofits, and communities



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 PROHIBITION



The IRS Prohibition

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.”



Internal Revenue Code: “Lobbying”

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



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



Exceptions to Lobbying: Public Charities

- Nonpartisan analysis or research (unless you use it for grassroots lobbying within 6 months!)
- Technical assistance in response to a written request
- “Self defense” advocacy to protect an organization’s tax-exempt status, deductibility of contributions, or existence
- Communications with legislators about subjects other than legislation
- Examinations and discussions of broad social, economic, and similar problems (if no call to action is included)
- Communications by a nonprofit with its members (so long as there is no call to action)



Exceptions to Lobbying: Private Foundations

- Nonpartisan analysis or research
- Technical assistance in response to a written request
- “Self defense” advocacy to protect your foundation’s tax-exempt status, deductibility of contributions, or existence
- Communications with legislators about subjects other than legislation
- Examinations and discussions of broad social, economic, and similar problems
- Communications with government officials regarding a program jointly funded by the government and the private foundation.



How much lobbying can an exempt organization do?

501(c)3 organizations have a choice between two tests:

- Substantial part test (loss of tax exempt status if you exceed limits)
- Safe harbor through 501(h) election (excise taxes if you exceed limits)



Lobbying by Private Foundations

- Any amount paid or incurred by a private foundation to lobby is considered a taxable expenditure
- The tax on the private foundation will be 10% of the lobbying expenditure paid or incurred
- Includes both communications with government officials and attempts to affect the opinion of the general public with regard to specific pending or proposed legislation.



Foundations as Advocates



Things That Are Not Lobbying

- Talking to a public official without an “ask” – even if you discuss legislation, rules or procurement
- Participating in the public proceedings of a government agency
- Responding to a request for information (including legislative testimony if you were specifically invited by the committee)



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 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 \$24,500 on 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 enacted by state or local legislative bodies
- Approval or veto of legislation by the governor
- Executive orders
- Agency rules, regulations, and procurement
- Approval, disapproval, implementation of any State agreement or action relating to Class II gaming.



NYS – What Counts as Lobbying?

- Applies to grassroots (“indirect”) lobbying as well as direct lobbying



NYC Lobbying Act

- “Lobbying” defined slightly more broadly than NYS law
 - 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 state or federal rule or regulation
- Covers procurement lobbying as well as “issue” lobbying
- Covers administrative agency lobbying as well as legislative lobbying (any agency rule “having the force of law”)
- Detailed registration information (but family information non-public)



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

- GOS grants are not earmarked for lobbying, even if the grantee is legislatively active
- Later use of grant fund 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 foundations can support the project, even when 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”



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