



Lawyers Alliance for New York

Connecting lawyers, nonprofits, and communities

MEMORANDUM

TO: Friends of Lawyers Alliance

FROM: Sean Delany and Elizabeth Perez

RE: The Role of Private Foundation Grants in Legislative Advocacy

DATE: April 10, 2009

The advocacy work of nonprofit organizations has always been central to the missions of many organizations. In a time of draconian government budgets that threaten the very existence of many nonprofits, there has been a surge in legislative advocacy by organizations desperately seeking to preserve their programs and protect the communities that they serve.

This critical function of the nonprofit community is often needlessly stymied by unnecessary restrictions placed on public charities by the private foundations¹ upon which they are also dependent. In order to maximize the impact grant-making foundations have on their target communities through the work of the public charities they support, it is vitally important that foundations are familiar with the regulations applicable to foundation support for legislative advocacy, and do not unnecessarily shackle nonprofits that seek to preserve government support and otherwise advance their work.

Internal Revenue Code Restrictions

The Internal Revenue Code makes very clear that a private foundation itself cannot engage in lobbying of any sort, and also are limited in the financial support that can be provided to public charities for that purpose. Section 4945(d)-(e) of the Internal Revenue Code (IRC) imposes taxes on any amount paid “influence 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 the legislation.” This limitation includes both direct lobbying by communications with elected officials and “grass roots” lobbying, attempts to influence legislation by encouraging others to take action with regard to that legislation. The IRS has defined legislation to include action by legislative bodies at all levels of government. The consequences of violating this provision are a 10% tax on the lobbying expenditure

¹ Public charity grantmakers are not subject to the same rules as private foundation grantmakers. Public charities are permitted to engage in legislative lobbying if that involvement is not “substantial,” and thus may also make grants for that purpose, subject to limitations prescribed by the Internal Revenue Code. IRC §501(c)(3). References in this memo to “foundations” are to private foundations, not to public charity grantmakers.

paid or incurred, and the possibility of an additional tax of 2.5% on a manager of a private foundation who knowingly agrees to make a taxable expenditure.

Private Foundations May Support Legislative Advocacy by Public Charities

The limitation on grant support by private foundations for legislative advocacy is not as broad as its language would at first suggest. First, there are certain activities that the IRS has excluded from the definition of “lobbying communications.” These exceptions include (1) communications with government officials regarding a program jointly funded by the government and the private foundation; (2) nonpartisan analysis, study or research that is generally available to the public or to government officials; (3) technical assistance or advice provided to a governmental body or committee, in response to a written request from a representative of that body or committee; (4) communications with legislative bodies with regard to issues that may affect the foundations existence, its powers and duties, its tax exempt status, or the deductibility of donations to the foundation; and (5) Examinations and discussions of broad social, economic and similar issues, provided the discussions do not take a view of a particular legislation and do not encourage the recipients to advocate for or against the legislation.² These activities are permissible objects for private foundation grant making.

Beyond these specifically identified exceptions, the IRS has also interpreted the general limitation on grants for legislative advocacy to allow public charities to spend grant funds on legislative advocacy so long as the foundation and the grantee did not *earmark* those funds for the purpose of lobbying. Unless the funds are earmarked, the IRS will *not* make a presumption that the grant funds were intended to be used for lobbying purposes, even though the public charity actually does use some part of the funds in that manner. Because a foundation grant is “earmarked” only if there is an agreement between the foundation and the grantee that the funds will be used to support specific activities, the mere fact that the foundation *knows* the organization will be engaged in lobbying during the grant period does not constitute earmarking and will not cause a grant to be a prohibited lobbying expenditure for the grantor.

General Support Grants

A general support grant, no part of which is specifically designated for lobbying activities, may be expended on legislative advocacy. The IRS offers an example as guidance:

W, a private foundation, makes a general support grant to Z, a public charity... Z informs W that, as an insubstantial portion of its activities, Z attempts to influence the State legislature with regard to changes in the mental health laws. The use of the grant is not earmarked by W to be used in a manner that would violate 4942(d)(1). Even if the grant is subsequently devoted to by Z to its legislative activities, the grant by W is not a taxable expenditure under section 4945(d).³

Project Support

Even support by private foundations for specific projects that include a lobbying component can be permissible. A private foundation grant to a public charity for a special project that has a lobbying

² IRC §4945(e); Treas. Reg. §53.4945-2(a)(3); Treas. Reg. §53.4945-2(d)(4).

³ Treas. Reg. §53.4945-2(5)-(6).

component will not be deemed a lobbying expenditure by the private foundation so long as the amount of the grant from any one foundation for that project do not exceed the non-lobbying portion of the budget prepared for the project by the grantee public charity.⁴ Notwithstanding the general limitation on lobbying activity, this interpretation applies even in circumstances in which a project is supported only by multiple private foundation grants, and not by other sources, so long as no single private foundation's grant *must* have been applied to the lobbying component.

Grant Agreement Letters

Although the law clearly permits public charities to use private foundation support for legislative lobbying, many foundations unnecessarily place restrictions in grant agreements on the use of grant funds for that purpose. In the "boilerplate" contained in many standard grant agreements, private foundations often include clauses flatly prohibiting their grant recipients from engaging in "propaganda or lobbying," or similar language. The consequence of that practice is to limit by contract the use of grant funds for legislative advocacy.

Many public charity grantees, particularly smaller, community-based organizations, do not believe that they have the leverage to negotiate modifications in grant agreement letters. In this difficult funding environment, those grantees also cannot forego available sources of support rather than accept limitations on the use of the funds for legislative advocacy.

Rather than these outright restrictions on lobby activities, when making grants to private charities, private foundations should permit as much flexibility as is possible while at the same time protecting themselves from making any taxable expenditures. This can be accomplished by including a clause in general support grant agreement letters in which grantees acknowledge that "no grant funds have been earmarked for purposes of influencing legislation." For even greater protection for the grantmaker foundation with no loss of flexibility on the grantee's part, this language may be useful:

Funds Not Earmarked; Grantee Discretion. The Foundation is making this grant to support Grantee's charitable purposes generally, and Grantee may apply the grant funds toward those purposes as Grantee may decide. This grant is not earmarked for influencing legislation within the meaning of IRC Section 4945(e), and there has been no agreement, written or oral, to that effect between the Foundation and Grantee. Thus, any use of grant funds by Grantee for such activities constitutes a decision of Grantee that is wholly independent of the Foundation.

For grants supporting specific projects that include a lobbying component, it can be accomplished by requiring submission of a project budget confirming that the costs of the project *other than* the lobbying component are larger than the amount of the foundation's grant. In that case, the foundation may wish to consider the following language documenting its reliance on the project budget:

Lobbying; Reliance on Project Budget. The Foundation is relying on Grantee's representations, made in Grantee's grant request and proposed budget, as to the amount budgeted by Grantee for project activities that are **not** attempts to influence legislation. This grant is not earmarked for influencing legislation within the meaning of IRC Section 4945(e), and

⁴ See Treas. Reg. § 53.4945-2(a)(6)(ii)

the Foundation and Grantee have made no agreement, oral or written, to that effect. Thus, any use of grant funds by Grantee for such activities constitutes a decision of Grantee that is wholly independent of the Foundation.

Conclusion

In a time of unprecedented scarcity of resources for nonprofit programs, private foundations can better serve their own missions by reexamining grant making policies that can deter grantees from holding government accountable for its share of financial support for the sector. Restrictions in grant agreements that impose limits not required by the Internal Revenue Code may have the effect of undermining their grant making objectives. In order to be more effective grant makers and to encourage grantees to take their rightful places as a voice in the legislative process, it is now time for reconsideration of those self-imposed limitations.