

Restrictions on Lobbying Activities

Complying with Legal Restrictions on Lobbying Activities

I. Overview

Most grant applicants may themselves legally engage in a limited amount of lobbying. They may be unaware of the boundaries between lobbying and nonlobbying activities, however, and also may not realize that a private foundation, such as the Brainerd Foundation, is absolutely prohibited from supporting any lobbying activities. Grant applicants, particularly advocacy organizations, must be sensitive to these legal issues in soliciting private foundation support. This memorandum is intended as a guide to more effective grantwriting through greater awareness of the lobbying rules.

II. The Prohibition Against Private Foundation Lobbying

Every organization that is exempt from federal tax under Section 501(c)(3) of the Internal Revenue Code ("I.R.C.") is classified as either a "private foundation" or a "public charity." A public charity is generally an organization that normally receives substantial support from the general public, government agencies, or both. Grantmakers are generally (but not always) private foundations, while grant applicants are generally public charities.

The Brainerd Foundation is a private foundation, which means that it is subject to a number of legal limitations that do not apply to public charities. In particular, the Brainerd Foundation is absolutely prohibited from making any grant "to carry on propaganda, or otherwise to attempt, to influence legislation . . ." I.R.C. § 4945(d)(1). That proscription, commonly known as the "lobbying limitation," covers both "any attempt to influence any legislation through an attempt to affect the opinion of the general public . . ." ("grass roots" lobbying) and "any attempt to influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation . . ." ("direct lobbying"). I.R.C. § 4945(e).

A public charity, on the other hand, may engage in limited lobbying, so long as "no substantial part" of the organization's activities is "carrying on propaganda, or otherwise attempting, to influence legislation." I.R.C. § 501(c)(3). A public charity may, in order to avoid the vagueness and uncertainty of this "no substantial part" test, make an election under I.R.C. § 501(h) to become subject to specific dollar limitations on the amounts that it may spend on lobbying. (Lobbying on legislation is distinguished from campaigning for candidates for public office. All Section 501(c)(3) organizations, both public charities and private foundations, are prohibited from supporting or opposing political candidates.)

The Brainerd Foundation is legally barred from supporting any grantee's lobbying efforts, even though that grantee, as a public charity, is itself permitted to engage in a limited amount of lobbying. In order to observe this categorical rule, the Brainerd Foundation must assess each grant request to ensure that the program for which its support is sought involves only nonlobbying activities, and, if other elements of the prospective grantee's program involve lobbying, that adequate non-private foundation support is available to underwrite those activities. A grant application must therefore provide a comprehensive narrative description of the program for which funding is sought, with an explicit explanation of any aspect of the program that may involve communication with the general public or any legislative body or government official. Further, the grantee must furnish a projected budget or budgets for the period over which the proposed grant is to be expended, in sufficient detail to demonstrate that the proposed Brainerd Foundation grant, when combined with all other expected private foundation funding, will not exceed the total amount budgeted for nonlobbying activities.

III. What is "Legislation"?

A. Generally.

There is no general bright line rule that governs when a measure becomes "legislation" for purposes of the prohibition against attempts to influence legislation. The definition of "legislation" extends beyond introduced legislative measures to include any "specific legislative proposal that [an] organization either supports or opposes." Treas. Reg. § 56.4911-2(d)(1)(ii). In the case of a referendum, initiative, or other measure sought to be placed on the ballot for consideration by voters, a measure becomes "specific legislation" when the petition is first circulated among voters. The point at which a measure that is ultimately introduced before a legislative body becomes legislation is much less clear.

The imprecision of the definition of "legislation" can make effective grantmaking a hazardous enterprise. Many grant applicants conduct both activities that may be considered educational, nonlobbying activities, and those that will be deemed to be lobbying. Often these activities form a continuum, and it is difficult to say where one ends and the other begins. If the Brainerd Foundation were forced to draw the line between education and lobbying, failure to draw it properly could result in financial penalties and/or loss of tax-exempt status. Fortunately, the applicable Treasury regulations contain several safe-harbor exceptions to the definition that permit the knowledgeable grant applicant to structure a workable, nonlobbying proposal.

B. Safe Harbors.

- 1. Nonpartisan analysis, study or research.** The most expensive aspect of any advocacy program is the process by which public perceptions are changed or public awareness is created. If that process is educational, even though it advocates a particular position (including a position that might be the subject of contemporaneous legislative deliberation), the activity is protected. In order to fall within this exception, the nonpartisan analysis, study, or research must be "an independent and objective exposition," sufficient "to enable the public or an individual to form an independent opinion or conclusion." Treas. Reg. § 53.4945-2(d)(1)(ii). Provided that the educational effort is not directed towards persons interested solely in one side of a particular issue, the dissemination of nonpartisan analysis may take "any suitable" form, including dissemination through the print and electronic media. Treas. Reg. § 56.4911-2(c)(1)(iv).

Reliance on the "nonpartisan analysis" exception requires that the grant applicant describe in detail (a) the means by which the analysis, study, or research paper will be produced and (b) the method or methods by which the grantee will make available the results of its research. If the research or study is expected to be made available to the general public, the grantee should include an explicit representation that such dissemination will not constitute a "grass roots lobbying communication."

- 2. Technical Advice or Assistance.** An organization that has developed a particular expertise in a given area may be called upon to render technical advice or assistance to a legislative committee or subcommittee. Provided that the invitation to do so is issued in writing by the committee or subcommittee, rather than an individual member, the organization's response to that request will not constitute lobbying activity. Treas. Reg. § 53.4945-2(d)(2). A written response to a committee request must be made available to all members of the committee or subcommittee, and oral testimony will be deemed available to all members if offered at a scheduled committee meeting. This "technical assistance" protection applies even though the respondent offers opinions or recommendations on proposed legislation, provided that those opinions or recommendations are requested by the committee.

It is obviously difficult for a grantee, when framing a grant request, to anticipate the possibility of an invitation to render technical advice or assistance. In many cases, however, the grantee will have established its reputation in the area of its principal programmatic concern, and its grant proposal might sensibly include a "technical assistance" element, based on past experience and the likelihood of its research having a bearing on pending legislation.

- 3. Examinations and Discussions of Broad Social, Economic and Similar Problems.** The participation in, or sponsorship of, public discussion on issues of general concern will not rise to the level of "lobbying," provided that such discussion does not address the merits of a specific legislative proposal, and does not directly encourage participants to take action with respect to legislation. Treas. Reg. § 53.4945-2(d)(4). Even communications with members of legislative bodies or government employees is protected under this exception; for example, a Brainerd Foundation grantee could sponsor a seminar or forum for legislators and legislative staff, addressing the feasibility of various renewable energy resources, even though the legislature might be expected to deal eventually with proposals to subsidize the development of such resources.

Where a grantee anticipates being able to control the seminar or forum agenda, the "examination and discussion" exception is largely subsumed in the "nonpartisan analysis" exception described in paragraph (1) above. But where the grantee organization seeks to stimulate a divergence of opinion, as in the sponsorship of a conference on various aspects of energy policy featuring industry representatives, academics and legislators, this is an exceedingly useful safe harbor. So long as specific legislative proposals are not intended to be addressed, and attendees are not urged to support or defeat proposed legislation, the protection of this exception will be available.

- 4. Administrative Agencies.** "Legislation" includes action by the Congress, any state legislature, any local council, or similar legislative body, or by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure. It also includes treaty approvals and the confirmation of executive appointments. Treas. Reg. § 56.4911-2(d)(1) and (b)(4) Examples. It does not, however, include executive action, judicial processes, or the work of administrative agencies such as school boards, housing authorities, sewer and water districts, and zoning boards, whether elective or appointive.

Attempts to influence the actions of regulatory agencies are accordingly entirely protected, even where the agency is primarily concerned with promulgating regulations to effectuate legislative mandates. A grant applicant that intends to direct its efforts toward regulatory action should state the objectives of its project, describe the process by which it intends to influence the administering agency, and provide an explanation of how its objectives may be attained without resort to a legislative process.

IV. Effective Budget Presentation.

Where a prospective grantee intends to avoid lobbying activity entirely (as, for example, by sheltering its entire program under one or more of the exceptions set out above), it need not bifurcate its anticipated budget between lobbying and nonlobbying activities. If the grantee intends to engage in lobbying, however, it must demonstrate that its expected resources from non-private foundation sources are adequate to support its permissible lobbying activities. A private foundation grantor is permitted to rely upon the grantee's budget representations, unless, in light of all the facts and circumstances, it has reason to doubt the accuracy or reliability of those projections.

If a grantee anticipates that all, or substantially all, its revenue will be derived from private foundation grants, then it must be prepared to demonstrate that none of its activities will constitute lobbying. If, on the other hand, the grantee reasonably expects to receive non-private foundation support at least equal to the part of its budget that will be devoted to lobbying activities, the Brainerd Foundation will require (a) a breakdown of the projected budget between lobbying and non-lobbying programs, (b) a representation that grants anticipated to be received from private foundations will not exceed the nonlobbying amount, and (c) an explanation of the grantee's projection of non-private foundation revenues adequate to meet its lobbying budget.

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