



How Can Foundations Engage in Advocacy & Lobbying?

The new charities law passed by Congress in 2006 is a strong reminder of how legislators can quickly and powerfully affect philanthropy, and of how important it is for grantmakers to engage effectively with public officials to represent and protect the interests of the field. Grantmakers have historically tended to shy away from advocacy activities, in part because of the strict and sometimes confusing federal laws. But with the growing legislative scrutiny of the charitable sector likely to continue in the new congressional session and beyond, and with more funders getting involved in public policy work, it's worth reviewing the basics of how foundations can engage in advocacy work.

Why Should Foundations Engage in Advocacy?

Given all the lobbying restrictions on foundations, why should they even bother trying to become involved in advocacy and public policy work? There are several key reasons:

- **You have stories to tell.** Foundations have great stories to tell about the good work you and your grantees are doing to strengthen and improve the communities in a legislator's region, and you and your grantees can tell these stories better than anyone else. There is no more effective way to demonstrate to public officials the value and impact of philanthropy.
- **You can inform legislative actions.** Foundations have useful knowledge and information to share with legislators on what you've learned in tackling important social issues and problems, which can lead to more informed legislative decisions to address those issues and problems.

- **You are constituents.** Legislators are always most interested in speaking to their local constituents, much more so than representatives of national organizations or associations, and will pay most attention to what their constituents say. Foundations are particularly important constituents, given your funding and leadership roles in communities.
- **You can provide vital funding.** Even if your foundation does not engage directly in advocacy work, you can still provide critical funds to support nonprofits that are involved in lobbying and advocacy activity on behalf of the issues you care about.
- **You can help protect and strengthen the sector.** By engaging in lawful advocacy and public policy work, foundations can make an important contribution to ensuring a favorable legislative and regulatory environment for philanthropy, which can help foundations and communities for generations to come.

What Is Lobbying & Advocacy?

Lobbying is generally defined by federal tax law as any attempt to influence a piece of legislation. More specifically, lobbying is any communication to influence public officials or their staffs to support or oppose any bill that has been introduced, or any draft bill that may be introduced, in any legislative body, whether it's Congress, a state legislature or a city council. Private foundations that are found to be lobbying (aside from a few narrow exceptions described in the next section) can face serious fines and, in extreme cases, lose their tax exemption.

The strong lobbying restrictions on private foundations cover any type of "direct" or

“grassroots” lobbying. Although the technical definitions of these terms are extensive, in general you are considered to be engaged in **direct lobbying** if you communicate directly with a member or employee of a legislative body (or certain other government officials) and “refer to” and “reflect a view on” specific legislation. Private foundations are also prohibited from engaging in **grassroots lobbying**, which is any attempt to encourage others to contact their legislators to reflect a view or position on specific legislation.

Not all communication with legislators is considered lobbying. For example, you are not lobbying if your foundation meets with a congressperson to educate her about a broad social problem like the dangers of secondhand smoke. But you are lobbying if you meet with the congressperson to urge her to support a specific clean indoor-air bill.

Lobbying is one of many forms of **public policy engagement**, which is a broad term that generally refers to any activity intended to affect government actions. Another form of public policy engagement is **advocacy**, which covers a broad range of activities to push for changes in public policy, and these activities may or may not include lobbying.

According to Charity Lobbying in the Public Interest, almost all social change has started with non-lobbying advocacy but ended with major lobbying efforts. For example, the civil rights movement included sit-ins, marches and other forms of protest that were advocating for equal rights. Ultimately, that advocacy led to the enactment, through extensive lobbying, of the Civil Rights Act.

When Can Private Foundations Lobby?

Federal law includes a few narrow exceptions to the prohibition on private foundation lobbying:

- **Nonpartisan research.** If a private foundation, or one of its grantees, produces a

study on a pending policy matter, it may share the report with lawmakers or legislative bodies—even if the report advocates a particular viewpoint on proposed legislation—as long as there is a sufficiently complete and balanced discussion that would allow readers to form their own (and different) opinions or conclusions on the issue. This “nonpartisan analysis, study or research” must be made widely available and cannot be distributed selectively to people on one side of the issue.

- **Discussions of broad social problems.** A private foundation may engage in “examinations and discussions of broad social, economic and similar problems,” as long as the discussions do not address the merits of a specific legislative proposal and do not directly encourage recipients to take action with respect to any legislation.
- **Technical assistance.** A private foundation may provide testimony or other technical assistance—even explicit opinions on pending legislation—to governmental bodies like committees, if it is doing so in response to a written request by a committee (not by individual committee members) and the testimony or assistance is available to every member of that body or committee.
- **“Self-defense” lobbying.** A fairly narrow exception allows private foundations to communicate directly with legislators regarding proposed legislation that would affect the existence of the foundation, its powers and duties, its tax-exempt status, or the deductibility of contributions to the foundation. If a foundation met with legislators about the charitable provisions in the H.R. 4 bill, for example, that is considered self-defense lobbying.

There are a few other narrow lobbying exceptions for private foundations. For example, private foundations may present information to government officials about a

program that is, or may be, funded jointly by the foundation and the government, provided that the communications are limited to the program.

When Can Private Foundations Fund Lobbying?

Private foundations may fund the lobbying activities of nonprofits in two key ways: by making general support grants to organizations that lobby and by making grants for projects that involve lobbying, within certain restrictions:

- **Specific project grants:** A private foundation may make a grant designated for a specific project that involves some lobbying activity, as long as the amount of that grant, together with all of the foundation's other grants for the project in a given year, does not exceed the amount budgeted for the non-lobbying portion of the project. For example, if a project has a \$30,000 budget, of which \$10,000 is for lobbying activities and \$20,000 is for non-lobbying activities, a foundation's grant(s) for the project cannot exceed \$20,000. In making this determination, a foundation may rely in good faith on budget information provided by the grantee, unless the foundation has reason to doubt, or reasonably should doubt, that information.
- **General support grants:** A private foundation may make a general support grant to a public charity that lobbies, even if the charity is known to engage in some lobbying activities and is likely to use some of the grant for that purpose, as long as the grant is not "earmarked" to be used for lobbying. (A grant is **earmarked** if there is a written or oral agreement that the grant will be used for lobbying activity.) Unlike with specific project grants, the law does not require a foundation to seek information about a charity's lobbying budget when the charity applies for a general support grant.

Foundations often include boilerplate language in their grant agreements that prohibit a grantee from engaging in lobbying or other advocacy activities, but federal law does not require them to include such provisions in their grants to most public charities. Note that the Pension Protection Act of 2006 places restrictions on grants to most Type III and some Type I and II supporting organizations. Prior to making grants to these organizations for advocacy or other activities, consult legal counsel.

When Can Community Foundations Lobby?

Public charities, including community/public foundations, operate under lobbying laws and regulations that are much less restrictive than those for private foundations. A community/public foundation is allowed to lobby as long as "no substantial part" of its activities consist of lobbying, although this rule is somewhat subjective. The IRS and the courts have not provided a clear ruling about what constitutes a "substantial part," and the "substantial part" rule does not clearly define lobbying nor specify how much money a charity may spend on lobbying.

To take advantage of more objective rules on this matter, public charities (other than churches, certain church-related organizations and a narrow class of supporting organizations) may choose to be governed by the **lobbying expenditure test in Section 501(h)** of the Internal Revenue Code, which allows a charity to spend a specified portion of its budget for lobbying. In general, Section 501(h) states that an organization's total direct lobbying expenses for a given year may not exceed 20 percent of the first \$500,000 of its expenses, plus 15 percent of the second \$500,000, plus 10 percent of the third \$500,000, plus 5 percent of the remainder of expenses, subject to an overall \$1 million limit. In addition, grassroots lobbying expenditures may not exceed 25 percent of the organization's lobbying limit.

If a community/public foundation is active in public policy, many organizations advise the foundation to seriously consider “electing” to be treated under the expenditure test in Section 501(h) by filing the one-page **Form 5768**—the 501(h) election form—with the IRS. Among other advantages, the 501(h) rules give you a single, clear spending yardstick for lobbying—rather than the vague “no substantial part” test—a clear definition of lobbying, and fairly generous lobbying expenditure limits.

When Can Corporate Grantmakers Lobby?

Corporate foundations are subject to the same lobbying restrictions that apply to other private foundations, but the rules are different for lobbying by the company. The Council on Foundations¹ notes that there is no limit on the ability of a company to cite its foundation’s activities in communications with legislators, as a way to highlight its good corporate citizenship.

However, it would likely be considered self-dealing for a corporate foundation to make a grant as a *quid pro quo* for a legislator’s favorable vote on a bill that would affect the company’s financial prospects. Corporate foundations can still make grants that might benefit a legislator or a legislator’s district, but they should ensure that the grants fall within their mission and guidelines and are subject to

the same selection criteria and performance and reporting requirements as all other grants.

Corporate foundation employees are restricted in their ability to lobby public officials, the same as any private foundation employees. But employees of corporate giving programs are not subject to the same lobbying restrictions, and may communicate with public officials about legislation of interest to the company—subject to any limits imposed on lobbying by for-profit companies and any internal company guidelines. If employees perform more than one task for a company—managing a company foundation and doing community relations, for example—they may communicate with public officials about legislation, as long as they make these contacts in their non-foundation capacity. They should take care to not use the foundation’s stationery or other resources in these communications, and should track their time to make sure it is charged to the company and not the foundation.

Before You Get Started

Before you engage in any advocacy activity, be sure to seek expert legal and tax advice for your specific circumstances. You can also consult the following resources for more information:

- **Advocacy Funding: The Philanthropy of Changing Minds**, GrantCraft, www.grantcraft.org
- **Charity Lobbying in the Public Interest**, www.clpi.org
- **Foundation Advocacy**, Alliance for Justice, www.allianceforjustice.org/foundation
- **Why You Can Lobby**, Council on Foundations/Forum of Regional Associations of Grantmakers, www.foundationsonthehill.org/lobbying.htm

¹ Jane C. Nober, “Company Foundations and the Self-Dealing Rules” (Council on Foundations, 2002).

Q&A: Self-Defense Lobbying

Q: Can a private foundation discuss self-defense legislation, such as charitable reform, on a grantee site visit by a legislator?

A: The short answer is yes. However, if the foundation begins to encourage others—such as the grantee’s staff—to engage in efforts to influence the legislator on this legislation, or if the principal purpose of the visit is to facilitate a lobbying effort, the foundation may have crossed the line into grassroots lobbying, which is prohibited for private foundations. If you limit the goal of the site visit to educating the legislator about the work of the foundation and grantee, this will likely keep the foundation from crossing into the territory of impermissible lobbying activity.

Q: Can a private foundation discuss self-defense legislation with a candidate for public office?

A: No. In their discussions with candidates for public office, private foundations should avoid expressing their views on any legislation—even legislation that would be included in the self-defense exception to the lobbying rules. The self-defense exception only applies if a private foundation is communicating with *elected* legislators or their legislative staffs.

Source: Council on Foundations



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