

LOBBYING

What it is. What it is not. Can you do it?

By Michael J. Springer *

Updated by the Office of Support April 25, 2014

I. TWO DISTINCT and SEPARATE ISSUES in LOBBYING:

- a. The STRICT prohibition for using government funding to support lobbying activities of any kind (OMB Circulars); and
- b. The danger of losing a non-profit's tax-exempt status for conducting prohibited lobbying activities (Federal IRS Statutes and Regulations).
- c. EXAMPLE: A non-profit agency, or representative of a non-profit agency is NOT likely to lose its tax-exempt status for lobbying the Texas Department of State Health Services on the current ADAP issue since lobbying of government Bureaus is exempt in IRS regulations, BUT those activities CANNOT be conducted or supported with Ryan White Care funding because that is strictly prohibited by Federal OMB Regulations.

II. Regulations

- a. Internal Revenue Service (dealing with a non-profit's tax exempt status)
 - i. Internal Revenue Code Section 4911 defines lobbying as:
 1. Any attempt to influence any 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 legislation, or
 2. Any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segments thereof. [Known as grassroots lobbying.]
 - ii. IRS code 501(c)(3) regulations further state that a non-profit is regarded as attempting to "influence legislation" if it:
 1. Contacts or urges the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation, or
 2. Advocates the adoption or rejection of particular legislation.
 - iii. The IRS has adopted the following clarifying rules:
 1. Legislative bodies include the U.S. Congress, state legislatures, any local council, or similar governing bodies, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office), or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. It does not include actions by executive, judicial, or administrative bodies.
 2. Requests to an executive branch or regulatory agency to support or oppose legislation DO constitute lobbying, according to the IRS.
 3. The desirability of the legislation (such as protecting the environment, animals, or children, or other issues unquestionably serving the public good) does not legitimize lobbying for it.

4. Research and discussion to formulate a position on a legislative issue may or may not be considered lobbying.
 - iv. IRS Exclusions – the following are specifically excluded from the definition of “influencing legislation”:
 1. Making available the results of nonpartisan analysis, study, or research.
 2. Provision of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be.
 3. Appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization (self defense).
 4. Communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to them, unless the communication directly encourages the members to influence legislation.
 5. Routine communications with government officials or employees.
 - v. IRS Regulations DO allow non-profits to conduct limited lobbying activities with NON-governmental funding. HOWEVER, there are restrictions as to how much of the agency’s budget can be spent on lobbying activities (generally 5-15%).
 - vi. If an agency has dues-paying members, the portion of the dues used for lobbying activities is NOT deductible for IRS tax purposes.
- b. Federal OMB Circular a122 (dealing with using government funding for lobbying activities)
- i. Specifically prohibits using federal funding for the following activities:
 1. Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity;
 2. Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;
 3. Any attempt to influence:
 - a. The introduction of Federal or State legislation; or
 - b. the enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any Government official or employee in connection with a decision to sign or veto enrolled legislation;

4. Any attempt to influence:
 - a. The introduction of Federal or State legislation, or
 - b. The enactment or modification of any pending Federal or State legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign; or
 - c. Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.
- ii. Federal OMB Circular a122 exempts the following activities:
 1. Providing a technical and factual presentation of information on a topic directly related to the performance of a grant, contract or other agreement through hearing testimony, statements or letters to the Congress or a State legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body or subdivision, or a cognizant staff member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for travel, lodging or meals are unallowable unless incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing;
 2. Any lobbying made unallowable by subparagraph a(3) to influence State legislation in order to directly reduce the cost, or to avoid material impairment of the organization's authority to perform the grant, contract, or other agreement;
 3. Any activity specifically authorized by statute to be undertaken with funds from the grant, contract, or other agreement.

III. Grassroots Lobbying – contacting the general public or the masses

- a. Prohibitions against this type of lobbying are MORE restrictive than that of contacting government officials.
- b. IRS Regulations (1988 – Sections 501(h) and 4911) – last issued rules on lobbying:
 - i. Define grassroots lobbying to include communications that:
 1. Refer to “specific legislation” (including legislation that has already been introduced in a legislative body and a specific legislative proposal that the non-

- profit either supports or proposes),
 - 2. Reflects a view on such legislation, and
 - 3. Encourages the recipients of the communication to take action with respect to the legislation.
- c. Mass media communications (press releases, or advertisements, etc.) are considered lobbying even if they do not meet the three-part definition above. Such communications would be considered grassroots lobbying if it appears within two weeks of a vote on the legislation, reflects a view on the general subject of the legislation, and either: a) refers to the highly publicized legislation, or b) encourages members of the general public to contact members of the legislature about the general subject of the legislation.
- d. The requisite characteristic of a lobbying communication is that it urges the public to take action. "Taking action" is urged if one or more of the following elements are present:
- i. The communication states that the recipient should contact legislators, their employees, or other governmental representatives.
 - ii. The address, telephone number, or similar information facilitating contact is furnished on the notice, letter, or other form of communication.
 - iii. A petition, tear-off postcard, or the like is provided for the recipient to communicate views to the appropriate governmental party.
 - iv. One or more legislators who will vote on the legislation are specifically identified as opposing it or undecided, being the recipient's representative, or being a member of the committee considering the legislation.
- e. Member communications – communications with members of your non-profit organization:
- i. General rule is that member communications about legislation of direct interest to the organization and its members is NOT considered grassroots lobbying (presumably because the members are not the general public). HOWEVER, where the communication encourages members to contact the public and undertake grassroots lobby themselves, THEN this does constitute grassroots lobbying.
 - 1. Prospective members are NOT considered members.
 - 2. Contributors who are not formal members are NOT considered members for this exception.

IV. Summary

- a. If you are conducting lobbying activities as a member of a volunteer organization that is government funded (such as the Ryan White Planning Council), SAY that you are a volunteer for that organization in your communication, and make sure that you do not use ANY of that organizations government funded services to support your lobbying activities (telephone, computer, copy machine, postage, office space, stationery, etc.).
- b. Using meeting time that is funded by government funding to PLAN lobbying activities is probably considered lobbying.

- c. Remember, as a non-profit you can EDUCATE members of governmental organizations on issues, needs, etc., as long as you DO NOT mention specific legislation or how you want them to vote on specific legislation. The IRS broadly defines “education” as:
 - i. The instruction or training of the individual for the purpose of improving or developing his capabilities;
 - ii. The instruction of the public on subjects useful to the individual and beneficial to the community.
 - iii. Must present a sufficiently full and fair exposition of the pertinent facts as to permit the individual or the public to form an independent opinion or conclusion.
 - iv. It is NOT educational if any of the following are present:
 - 1. Presentation of viewpoints or positions unsupported by facts;
 - 2. The facts that purport to support the viewpoints or positions are distorted;
 - 3. The presentation makes substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
 - 4. The approach used in the organization’s presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.
- d. Remember that communications to the general public OR to organization members that encourage them to engage in lobbying activities constitutes lobbying.
- e. Furnishing the name, address, phone number, etc. of governmental officials to facilitate contact is generally considered lobbying.
- f. Lobbying as a private citizen IS allowable. Just be sure you DO NOT use government funded services, supplies, time, or agencies to support it.

NOTE: Even IF you are proven not guilty in a lobbying allegation, the investigation of such an allegation can be long, tedious and costly. It’s better to make sure that you DON’T DO IT!

NOTE: Even if you are not technically in violation of federal/state regulations, the **perception** of wrongdoing can be as damaging to an agency/individual as the actual violation of federal/state regulations!

*Summarized from:

- 1) *Tax and Financial Planning for Tax-Exempt Organizations: Forms, Checklists, Procedure*, (1990), John Wiley & Sons.
- 2) *OMB Circular a122*, paragraph 25, Revised May 10, 2004. www.whitehouse.gov/omb