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STRATEGIZER

Guidelines for Advocacy: Changing Policies & Laws to Create Safer Environments for Youth

CADCA®

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A Guide to Allowable Lobbying Activities for Nonprofit Organizations

INTRODUCTION:

The purpose of this Strategizer is to clarify what constitutes "lobbying" activities for nonprofit organizations and to what extent these organizations can participate in lobbying activities in particular and the legislative process in general.

Many people who work on public health issues such as substance abuse prevention find themselves frequently working on matters related to public policy and legislation. This makes good sense when you consider the impact public policies can have on the public's attitudes and behaviors related to public health matters.

It is not uncommon, however, for substance abuse prevention advocates to have little or no background or direct experience with the creation, regulation and maintenance of public policy. This can make people understandably skittish; especially when it comes to the legal restrictions on lobbying that the Internal Revenue Service places on nonprofit organizations.

Despite this skittishness, the fact is that many, if not most, public policy advocacy activities that nonprofit public health advocates engage in do not constitute lobbying. Even those activities that do constitute lobbying are not prohibited by law. While the IRS places limits on the amount of money that nonprofit organizations can spend on lobbying, the activities themselves are expressly allowed by law.

Public charities, or not-for-profit organizations, are granted a special exemption from tax liability under the Internal Revenue code, section 501(c)(3). This special status exempts these organizations from paying taxes on their income and allows them to receive contributions that are tax-deductible to the donor.

In exchange for these exemptions, organizations that qualify for IRS 501(c)(3) status must comply with certain rules and regulations, including limits on the amount of money they can spend on lobbying. **Again, it is important to note that these organizations are not prohibited from lobbying, they are only limited as to how much they can spend on lobbying.**

The intent of these rules is not to prohibit 501(c)(3) organizations from participating in public policy making, but merely to limit the amount of tax-free resources that can be invested in lobbying. The theory behind this limitation is that tax exemption constitutes a type of government subsidy and that government-subsidized organizations (i.e. organizations that are essentially funded by taxpayers) should be somewhat restricted in how they attempt to influence government policy.

WHAT IS LOBBYING?

Webster defines lobbyist as "a person, acting for a special interest group, who tries to influence the introduction of or voting on legislation or the decisions of government administrators." [1] Technically speaking, the definition of lobbying is much more narrow. There are many advocacy activities that are designed to influence public policy and public policy makers that do not meet the IRS's definition of lobbying.

Advocacy can mean many different things in a lot of different settings. Very broadly, advocacy includes all forms of persuasive communication. In that sense, advocacy can take place just about anywhere—anytime one person tries to talk someone else into anything. Advocacy can take place at the dinner table, in the office, in the courtroom, or in the Capitol.

But the IRS defines lobbying much more narrowly and specifically. There are two types of lobbying recognized by the IRS: direct lobbying and grassroots lobbying.

Direct Lobbying

The IRS defines direct lobbying as follows:

> "A direct lobbying communication is any attempt to influence any legislation through communication with:
>
> - Any member or employee of a legislative body; or
> - Any government official or employee (other than a member or employee of a legislative body) who may participate in the formulation of the legislation, but only if the principal purpose of the communication is to influence legislation.
>
> A communication with a legislator or governmental official will be treated as a direct lobbying communication if, but only if, the communication:
>
> - Refers to specific legislation…; and
> - Reflects a view on such legislation." [2]

In other words, direct lobbying is what you think of when you think of lobbying: direct, intentional advocacy directed toward a legislator, staffer or other government employee. Note the two required elements for the advocacy to be considered lobbying: the communication must refer to a specific piece of legislation *and* it must reflect a view on that legislation.

So, for example, it is not lobbying to sit in your Senator's office and discuss a specific piece of legislation, as long as you don't advocate a specific view on that legislation. Similarly, it is not considered lobbying to sit in that office and discuss your position on a policy issue or issues as long as the discussion is not about a specific bill.

It is also important to note that according to IRS regulations, lobbying only involves the legislative process. It does not include persuasive communication directed toward executive agencies, judicial or administrative bodies because these bodies are not involved in the legislative process.

Examples of "administrative bodies" include school boards, housing authorities, zoning boards, and Federal agencies such as the Federal Trade Commission or the Federal Communications Commission. Once a law is passed, it is not considered lobbying to influence the regulatory process.

Similarly, it is not lobbying to attempt to influence members of executive branches (including the President, governors, mayors and their staffs) as long as the communication is not intended to influence a specific piece of legislation. Contacts made with the executive branch about regulations do not constitute lobbying.

Grassroots Lobbying

When they hear "lobbying," most people picture direct lobbying: a lobbyist trying to influence a legislator one-on-one. Frequently, nonprofit advocacy groups spend relatively little effort in direct lobbying but much more time and resources on grassroots lobbying. Grassroots lobbying refers to the many types of indirect attempts to communicate with and influence legislators, such as communication aimed at legislators' constituents.

The IRS defines grassroots lobbying this way:

> "A grassroots lobbying communication is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.
>
> A communication is treated as a grassroots lobbying communication if, but only if, the communication:
>
> - Refers to specific legislation;
> - Reflects a view on such legislation; and
> - Encourages the recipient of the communication to take action with respect to such legislation."[3]

The requirements for a communication to be considered grassroots lobbying are similar to the requirements for direct lobbying with one important addition. As with direct lobbying, communication is not considered grassroots lobbying unless it refers to a specific piece of legislation and takes a view on that legislation. In addition, the communication must have a "call to action" directed toward the recipient.

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[1] Webster's New World Dictionary of American English, 1994, p. 793.
[2] Treas. Reg. Sections 56.4911-2(b)(1)
[3] Treas. Reg. Sections 65.4911(b)(2)

So under the IRS definition, it is not grassroots lobbying to send out a publication to discuss a particular piece of pending legislation and to take a particular view on that legislation, as long as you don't include a call to action, such as a request to call their congressman and urge them to vote for Bill XX. And it is not grassroots lobbying to send out a publication that discusses the importance of a particular policy, (such as lowering the acceptable blood alcohol content level) and include a call to action (such as a call to Congress) as long as a specific bill isn't mentioned.

The third element that defines grassroots lobbying – the call to action – has been carefully defined by the IRS. Specifically, the definition of "encouraging recipient to take action" includes:

- A call for the recipient to contact a legislator or legislative staffer or any other government employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact is to influence legislation.)
- The address, telephone number, or similar information of a legislator or a legislative staffer;
- A petition, tear-off postcard or similar material for the recipient to communicate with a legislator or legislative staffer;
- The identities of how particular legislators stand on the legislation, i.e. if they oppose it, support it or are undecided about it.[4]

For purposes of illustrating what constitutes grassroots lobbying, consider the hypothetical organization, Kansans Against Substance Abuse. KASA sends a publication to the general public focusing on the economics of alcohol consumption noting the inverse relationship between the cost of alcohol and the amount of alcohol consumed, concluding that higher alcohol prices create reduced alcohol-related problems. There is nothing about this publication that could be considered lobbying of any kind.

But what if the publication were to include statistics showing how alcohol consumption in several states dropped following increases in alcohol excise taxes and a copy of a specific proposal pending before the Kansas legislature to increase alcohol taxes in Kansas? Again, there would be no lobbying. Referring to a specific piece of legislation and following its progress is called legislative tracking. Many organizations that never engage in lobbying routinely engage in legislative tracking.

But now imagine that the publication, in addition to the tax analysis and copy of the pending bill, includes a specific endorsement for the bill pending for the legislature. Now we have lobbying, right? Wrong! There is still no call to action, so the publication doesn't qualify as grassroots or any other kind of lobbying.

But what if, in addition to KASA's endorsement of the bill, the publication includes the names, addresses and phone numbers of key members of the Kansas legislature and identifies which of them is currently uncommitted on the bill. Aha! Now all three elements necessary to meet the definition of grassroots lobbying are present: reference to a specific piece of legislation, an expressed point of view on that legislation and a call to a action (including the names and contact information for the legislators constitutes a call to action). Now the publication qualifies as grassroots lobbying. *Remember, even though this activity now constitutes lobbying it is still permitted by the IRS; the only restriction is on the amount of lobbying that takes place.*

LOBBYING WITH GOVERNMENT MONEY?

Nonprofit organizations need to keep an account of their lobbying activities for IRS reporting purposes but any entity that receives Federal funds needs to be aware of separate restrictions on that money. A provision of the U.S. Code known as the Byrd Amendment prohibits the use of Federal funds to lobby. Any matching money that the organization raises in order to obtain Federal funding comes under the same prohibition as the Federal money itself.

This prohibition was enacted under the theory that Federal money should not be used to lobby Congress in an attempt to insure a steady stream of Federal money.

The prohibition on lobbying activities under the Byrd Amendment is simpler – and broader – than the reporting requirements under IRS regulations for nonprofits. Quite simply, no one can engage in any direct or grassroots lobbying with Federal money. *Organizations that accept Federal money can lobby with other funds,* but they cannot use government funds to lobby Federal or state legislatures or executive branches.

If an organization is entirely funded by Federal money, it cannot engage in activities defined as lobbying at the Federal or state level. It should limit advocacy to those activities that are not included in the definition of lobbying. (See the list of such activities on Page 7.)

[4] Treas. Reg. Section 56.4911(b)(2)(iii)

How Much Lobbying Is Permitted?

The question for nonprofits is not if they can lobby but how much can they lobby.

Beginning in 1934, the IRS Code merely stated that "no substantial part of the activities of a charity's activities … [can] be carrying on propaganda, or otherwise attempting to influence legislation." [5]

The intent behind this legislation, which has come to be known as the "substantial part test," was not to prevent nonprofits from lobbying, but to limit the amount of tax-free resources that could be used to influence legislation.

The problem with the substantial part test is its ambiguity. The IRS does not define what constitutes "substantial" and, in fact, determinations of noncompliance are only made after the fact. So, while there are significant sanctions for noncompliance, including the loss of tax-exempt status, the substantial part test gives nonprofits little guidance as to how to comply. (The factors examined by the IRS to determine whether or not an organizations lobbying activities are "substantial" include the amount of money spent lobbying, the organization's goals and success in achieving them, public prominence, the impact of the organization's lobbying efforts and even the time and energy invested in legislative issues by the organization's board and individual volunteers.)

The impact of this vagueness was that, until 1976, many nonprofit organizations avoided all advocacy activities that might possibly be construed as lobbying. This had the undesirable effect of discouraging nonprofit organizations from providing input to the legislative process, something they had the right to do and could make a valuable contribution toward.

In 1976 Congress passed an alternative to the substantial part test as part of the 1976 Tax Reform Act. Section 501(h) of that act provided a basis for measuring lobbying activities, based solely on the amount of money an organization spends on lobbying activities. To qualify under the 501(h) expenditure test, nonprofits must simply file a short form (#5768) with the IRS.

Under the 501(h) expenditure test, nonprofit organizations can spend up to 20% of the first $500,000 of their tax-exempt expenditures on lobbying activities, plus 15% of the next $500,000, 10% of the next $500,000 and 5% of all remaining exempt expenditures up to a total annual limit of $1 million. The only other restriction is that of the total amount a nonprofit organization spends on lobbying activities, no more than 25% may be spent on grassroots lobbying.

It is important to note that the intent of Congress in clarifying the amount that nonprofits can spend on lobbying was to encourage greater participation by nonprofits in the legislative process. The 501(h) guidelines only count actual money spent on lobbying, not such difficult-to-quantify factors as volunteer time and the "impact" of a group's lobbying efforts. In fact, the 501(h) expenditure test places no restrictions on any activities that do not involve expenditures.

[5] Restrictions on Lobbying and Public Policy Advocacy by Government Contractors: The ASSIST Contract, (Revised), National Cancer Institute, July 23, 1997, p. 3.

Why Your Organization Should Elect to Qualify Under the 1976 Law

The right of citizens to petition their government is basic to our democratic way of life. The 1976 legislation shows that the Federal government clearly supports lobbying by nonprofits. The law provides wide latitude for lobbying, but only for organizations that elect to be covered by it. In most circumstances, nonprofits should become subject to this law, not only because it provides liberal limits on how much they can spend on lobbying, but also because it provides very clear and helpful definitions of what advocacy activities do not constitute lobbying. Some organizations have been reluctant to elect the 1976 law for fear that this action will change there 501(c)(3) status or serve as a "red flag" to the IRS and prompt an audit of the organization. Neither concern is justified. Electing to come under the 1976 law does not affect tax-exempt status. Further, the IRS has made it clear that far from singling out for audit organizations that elect, the reverse is true.

Allowable Lobbying Expenditures

Tax Exempt Income	Amount that can be spent on Lobbying
First $500,000	20% - $100,000
2nd $500,000	15% - $75,000
3rd $500,000	10% - $50,000
All income over the first $1.5 million	5% - up to a total of $1 million

Some coalitions come under the 501©(3) status of a larger organization. In that case, calculations of allowable lobbying expenditures are based on the budget and expenditures of the larger organization.

The penalties for exceeding allowable limits on lobbying were also clarified in the 1976 Tax Reform Act. Organizations that spend more than their allowable limits on lobbying must pay an excise tax of 25% of the excess expenditures. Only the organization, not its individual managers or board members, is held liable under the penalty. The tax-exempt status of the organization cannot be revoked unless it exceeds its allowable limits by at least 50% over a four-year period.

By clarifying the definition of lobbying, Congress effectively endorsed a wide range of nonlobbying advocacy activities and helped alleviate the fear of accidentally violating IRS regulation.

Remember that this Strategizer only addresses Federal restrictions and reporting requirements related to lobbying by nonprofits. Your coalition may have additional requirements. Of course, you need to be familiar with and comply with any relevant laws.

WHAT ACTIVITIES ARE NOT CONSIDERED LOBBYING?

The IRS recognizes that there are many legitimate activities that nonprofit organizations engage in that could be considered close to the line in terms of what is commonly understood to be lobbying. Therefore, they have specifically outlined the types of activities that are allowed under IRS regulations. These activities are discussed below.

- **Nonpartisan Analysis, Study or Research**
  Nonprofit organizations involved in substance abuse issues are often called on to translate the science of substance abuse—including the science behind policies designed to prevent or treat substance abuse—into a form that can be easily understood by the public, governmental employees or elected officials. The IRS does not consider this type of analysis to be lobbying and explicitly allows nonprofit organizations to engage in it without any limitations.

  Furthermore, nonpartisan analysis, study or research can support or oppose specific legislation "so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion." To avoid being labeled as partisan, the analysis should be prepared for a nonpartisan audience, e.g. the general public, a broad section of the public or a body of policymakers. It should not be targeted to those interested in only one side of the issue and should not encourage people to take action on legislation.

  For example, a nonprofit organization might prepare a report discussing the impact that an increase in alcohol taxes would have on alcohol consumption and on social problems related to alcohol consumption. Even if there was pending legislation to raise alcohol taxes, as long as the report was made generally available and only provided a full and fair presentation of the scientific basis for its conclusions, it would not be considered lobbying. The report would be considered lobbying only if it was presented as biased or unsupported by scientific evidence.

- **Discussions of Broad Social Problems**
  Examinations and discussions of broad social issues—such as the prevention of substance abuse—are not considered lobbying as long as they do not address specific legislative proposals. Even if representatives of a nonprofit organization sit down with a legislator in his or her office to talk about a specific policy issue, it is not considered lobbying unless they encourage action on a specific legislative proposal. Remember the requirements for lobbying: there

WHY YOU MAY WANT TO HOLD A BAKE SALE . . .

Some coalitions and other organizations that advocate for public health are entirely funded by Federal grants. Because of this fact, they may not lobby. If, however, they develop some source of private funding, even a very small amount, they can lobby. In fact, in that case, the government funds can be included in the calculation of the amount of money that can be spent on lobbying.

Suppose our Kansas organization, KASA, mentioned above, has a budget of $19,000, all of which comes from a Federal grant. None of this money can be spent on lobbying activities. If, however, through some sort of small fundraising activity, it obtains $1,000 in private donations, it can now spend up to the entire $1,000 on lobbying activities. ($1,000 would be, of course, well below the 20% limit on the $20,000 budget.) This enables the organization to participate in a whole host of important lobbying activities that would otherwise be disallowed.

Examples of Activities that are Not Lobbying

- Meeting with a legislator to talk about a social problem, without mentioning a specific legislative proposal.
- Providing a legislator with educational materials about a specific piece of legislation, without calling for specific action on the legislation.
- Responding to a written request from a legislative committee or subcommittee for information about a specific piece of legislation.
- A newsletter to your own membership providing information about a specific piece of legislation, your organization's position on the legislation and the names of legislators who support and oppose the legislation, but not a specific call to action (e.g. a request to call or write to legislators.)
- Tracking activities of legislators, including votes, positions taken, contributions accepted, etc.
- Producing and disseminating research reports or studies that provide nonpartisan analysis on policy issues, including specific legislative issues.
- Talking to the media about specific legislative proposals.
- Meeting with the executive branch (except to sign or veto a bill).
- Meeting with regulatory agencies at all levels (e.g. BATF, FDA, state health departments, etc.)
- Advocating for better enforcement of existing laws, e.g. those that control alcohol sales to minors.
- Advocating the enactment and enforcement of "private or voluntary policies, e.g. alcohol purchase restrictions in stadiums.
- Conducting public education campaigns to affect the opinions of the general public, e.g. a mass media educational campaign about the importance of not providing alcohol to minors.

must be a specific piece of legislation and a point of view expressed about that legislation.

- **Response to Requests**
  It is not unusual for policymakers and other government officials to turn to nonprofit organizations for information on particular topics. IRS regulations do not consider responses to those requests to be lobbying as long as the request is written; is made on behalf of a legislative committee or subcommittee, not simply from one member; and the information is made available to all members of the requesting body.

- **Self-defense Communications**
  Activities that organizations undertake to protect an aspect of their own existence or operations are considered self-defense communications and are not lobbying. Self-defense communications include activities that would otherwise be considered lobbying, but are allowable because they are about potential legislation that could threaten the organization's existence, powers, duties, tax-exempt status, or deductibility of contributions made to the organization. For example, if a nonprofit organization receives funding through the state government and there is a proposed piece of legislation that will eliminate this funding stream, the nonprofit can spend money on direct communications with legislators and their staffs, but only about this specific funding issue.

CONCLUSION

There is significant evidence that the most effective approaches to the prevention of alcohol and other substance abuse problems are those that seek to change the environment within which these problems take place.[6] It should not be a surprise that these approaches often involve advocating for legislative public policy changes.

While it is critically important to know, understand and abide by the rules that govern allowable behavior related to the advocacy of public policy, public health advocates should not be intimidated by these rules.

Very simply, lobbying can be one of the most effective public health strategies available. Not using this strategy because of fear based on lack of understanding of the law could unnecessarily restrict your effectiveness as a substance abuse prevention advocate. On the other hand, knowledge of the laws governing lobbying by nonprofits should allow nonprofit public health advocates to use this strategy effectively and legally. Doing so will create a healthier, safer environment for us all.

SUBSEQUENT USE IN LOBBYING

Sometimes reports that qualify as nonpartisan analysis, study or research or that address broad social issues are later used for lobbying. This can happen inadvertently if, for example, a lobbying organization used a report prepared by a non-lobbying nonprofit organization. It could also happen if a nonprofit organization was trying to deliberately circumvent IRS regulations.

If it is determined that the subsequent use of this information transforms them into lobbying materials, then their original cost must be accounted for as grassroots lobbying expenditures.

LOBBYING AT THE FEDERAL LEVEL?

Nonprofit organizations that do a significant amount of lobbying at the federal level should be aware of the requirements of the Lobbying Disclosure Act (LDA). The LDA requires any organization that spends more than $10,000 per year on lobbying at the Federal level, including lobbying a member of the U.S. Congress, President, Vice President, etc., to register with the Secretary of the Senate and the Clerk of the House of Representatives within 45 days of initial contact with these individuals. For additional information, please go to http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm and http://lobbyingdisclosure.house.gov/.

For Further Information . . .

More detailed discussion of many of these issues can be found in *The Nonprofit Lobbying Guide* by Bob Smucker, published by The Independent Sector, 1999. You may also consult their Web site at www.IndependentSector.org/

CADCA especially thanks Larry Ottinger, President of the Center for Lobbying in the Public Interest (CLPI), as well as Susan Kilbourne, Vice President and Training Director of CLPI, for their expert advice in reviewing and revising this document.

[6] See e.g., Stewart, K., "Strategies to Reduce Underage Alcohol Use: Typology and Brief Overview," U.S. Department of Justice, 1999.

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