READY REFERENCE PAGE

NO. 16
FOR YOUR FILE

Lobbying Rules Create Opportunity for Charities

There are many ways to advocate for public policy goals without going beyond the limitations of the Tax Code

Public charities can usually advocate on public policy issues a lot more than they think they can.

For years, they were conditioned to fear losing their exemption if they got involved in advocacy of any type. They knew that one of the conditions of Section 501(c)(3) status is that "no substantial part" of an organization's activities can include attempting to influence legislation or "lobbying."

Since there was no clear line to determine what is "substantial," and since they did not always understand what was meant by "attempting to influence legislation," many tended to shy away from any involvement in public policy debate.

In 1976, Congress attempted to relieve the fears by enacting Code Section 501(h), allowing most public charities to elect to measure their lobbying activity solely by the amount of money spent. The final regulations, which were promulgated 14 years later in 1990, eliminate many of the definitional problems. Public charities, and the private foundations which want to fund their advocacy efforts, should be a lot more confident about their ability to jump into the public policy fray.

Although technically the definitions apply only to those groups which have made the 501(h) election, they seem to embody the IRS thinking that would be applied even for non-electing organizations.

The first important point is that not all advocacy is limited. The limitation applies only to attempting to influence "legislation."

"Legislation" includes action by a legislative body at any level of government, such as Congress, a state legislature or city council. It also includes action by the public on a referendum, ballot initiative, constitutional amendment or similar procedure.

Legislation does not include promulgating administrative regulations or taking executive actions which do not require changes in the law. It does not include action by administrative bodies, such as school boards, zoning boards, housing authorities or other agencies which do not pass laws. And it does not include litigation.

An arts organization seeking an additional appropriation in this year's budget for the National Endowment for the Arts is lobbying. The same organization working with the NEA on its definition of decency for purposes of making grants is not lobbying, since an administrative regulation is not legislation.

Understanding this distinction opens a whole lot of territory for advocacy, without having to worry whether it is a substantial portion of your activity. When dealing with legislation, the regulations define two types of lobbying: direct lobbying and grass roots lobbying.

Direct lobbying is any attempt to influence legislation through communication with 1) a member or employee of a legislative body or 2) any government official or employee who may help formulate legislation, when the communication a) refers to specific legislation and b) reflects a view on that legislation.

Grass roots lobbying is a communication with the general public that a) refers to specific legislation, b) reflects a view on the legislation and c) encourages the recipient to take action.

It will be considered a call to action if it a) encourages the recipient to contact a legislator or employee of a legislative body; b) states the address or phone number of a legislator or employee of a legislative body; c) provides a tear-off postcard to mail to the legislator or employee; or d) specifically identifies that a legislator scheduled to vote on the legislation is opposed or undecided on the views expressed in the communication or is the recipient's representative, or identifies the legislator as a member of the committee that will consider the legislation.

A group may purchase a full page newspaper ad stating that a proposed bill is the most enlightened proposal possible on the subject. It is not grass roots lobbying unless it contains the call to action.

Certain activities are specifically excluded from the definition of lobbying. One of the more important exceptions is "nonpartisan analysis, study or research." Such analysis may even advocate a particular viewpoint "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" on the issue.

Even where the research is later used for the purposes of lobbying, the costs of the research will not be considered lobbying expenses where "the primary purpose" of the research was not for use in lobbying. The regulations provide a "safe harbor" which says that the primary purpose will not be for use in lobbying if, prior to or contemporaneously with the use of the materials in lobbying, the organization makes a substantial non-lobbying distribution, i.e. without a call to action.

The regulations exempt provision of technical advice in response to a written request by a governmental body. A charity may testify before a legislative committee without limitation if the testimony is pursuant to a written request. Assistance to an individual legislator or to a single political party does not qualify for this exemption.

The regulations also exempt "self defense" communications where a legislative body is considering action that may affect the continued existence of the charity, its powers or duties, its exempt status or the deductibility of contributions to it. Charitable activity opposing the Istook Amendment several years ago was widely believed to be self defense lobbying because the Amendment would have significantly reduced a charity's right to participate in public policy questions.

The rules for distributions to bona fide members of an organization are slightly more lenient and allow a broader range of activity without having it go against the limits.

Private foundations are also helped significantly by the final regulations. Private foundations, with very few limited exemptions, such as the "self defense" exemption, must pay an excise tax on any lobbying expenditures and traditionally were even more reluctant to engage in or support advocacy efforts.

The new rules, however, establish clear safe harbor provisions by which foundations may support ad-

vocacy projects without serious worry about their own status.

A grant for general support, unless earmarked for lobbying activities, will be deemed not to be a lobbying expense. A grant for a specific project will not be deemed to be a lobbying expense if the total of the foundation's grant to the project for the year does not exceed the amount budgeted for non-lobbying activities.

If a $100,000 project budget contains $20,000 for lobbying, the foundation may fund up to $80,000 without concern. The foundation is able to rely on the grantee's budget unless it has reason to know that the budget is wrong. The grantee charity may also get the other $20,000 from a private foundation without either foundation having a problem. Each of the two grants, although together they will provide funds for lobbying, is deemed to go to the non-lobbying activity.

Armed with a clear understanding of the rules, a charity interested in public policy advocacy should be able to mount significant efforts, and should be able to obtain foundation funding to support its work.

YOU NEED TO KNOW

A charity that does not spend at least a portion of its time in advocacy work is probably not doing its job as well as it should.

Therefore, charities must understand the tax law definitions of "lobbying" and "legislation." There is a vast amount of advocacy that can be carried on without approaching tax limitations. Private foundations can support most of it, and preparing an application with foundation rules in mind can make it easier to get funded.

Tax law is not the only issue, however. Beware of federal and state lobbying registration requirements, with different definitions and different reporting.