

# Lobbying, Advocacy and Fiscal Sponsorship

Sources:

Council on Foundations

Oklahoma Center for Nonprofits

# Questions from the Board



Define lobbying and advocacy



Describe the financial reporting requirements for lobbying activity



Can the Foundation restrict lobbying activity for component funds but not itself?



Recommended framework/recourse for violations of Foundation policy by component funds



What language exists in BCF documents about lobbying



What is a fiscal sponsor?

# Advocacy Vs. Lobbying



Define lobbying (policy) and advocacy

Two types of Lobbying. To satisfy the definition of direct or grassroots lobbying, all elements must be present.

## Direct Lobbying

- Communication directly
- With a legislator, legislative staff member, or any government official participating in the legislative process
- Expressing a view about specific legislation or a specific legislative proposal

## Grassroots Lobbying

- Communication
- With a segment of the general public
- Expressing a view about specific legislation or a specific legislative proposal
- AND, includes a “call to action”

Any activity that does not fall within these two narrow definitions is permissible and will not count toward limitations on lobbying expenditures.

# Advocacy vs. Lobbying



Define lobbying (policy) and  
advocacy

## Other definitions:

- **Legislation** – a specific proposal for dealing with an issue through legislation (at any level of government), regardless of whether it has been introduced as a bill. “Legislation” does NOT include litigation, regulations, executive orders, or interpretations or implementations of laws.
- **Legislator** – federal, state, and local representatives and their staff. This does NOT include members of special purpose boards – planning commissions, zoning commissions or school boards.
- **Are petitions or policies by city government considered legislation?** – it depends. If it’s an internally adopted policy, no. If the petitions or policies are subject to a voting process to be passed or implemented, then likely. If petitions or policies have external (external to the city council) implications and are applicable to the community at large, likely.
  - Per Council on Foundation’s legal team

# Federal Tax Law



Define lobbying (policy) and advocacy

- Limits the types of political activities in which foundations can engage. IRS Code 501(c)3 states that a 501(c)3 organization...
  - May “**NOT** participate or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”
    - Political campaign activity
    - Electioneering
    - Campaign intervention
    - Candidate-related political activity
  - May engage in a wide variety of nonpartisan election-related activities like
    - Voter registration and education
    - Lobbying – if it meets the “no substantial part test” or is disclosed on a 501(h)
    - Advocacy

# Advocacy Examples



Define lobbying (policy) and advocacy

- Educating legislators about foundations and the work that you do or assisting grantees with this education
- Educating legislators or members of the public about policy issues (e.g., hosting forums to discuss climate change), without a call to action;
- Self-defense communications – attempts to influence any legislation that impacts the foundation’s existence, its powers and duties, its tax-exempt status, or the deductibility of contributions
- Influencing regulatory bodies, including the development of regulations that implement legislation
- Participating in litigation, such as through an amicus brief
- Providing technical advice about legislation, such as through written or oral testimony before a legislative body
- Nonpartisan analysis or research that is distributed widely (to the general public or a segment of the public), is independent and objective, and offers enough information for a reader to draw their own conclusions
- Funding a non-lobbying portion of another organization’s advocacy work or funding lobbying incidentally through non-earmarked dollars

# Disclosing Lobbying Activity



Describe the financial reporting requirements for lobbying activity

- **Schedule C of Form 990** (required by all) requires annual report of lobbying activities regardless of engagement in lobbying activity
- **Insubstantial Part Test** – more details must be provided on Schedule C, Part IIB including:
  - Whether the charity lobbied via volunteers, paid staff, advertisement, mailings, published statements, grants to others for lobbying, direct contact with legislators, public events, or other means and any expenditures for these activities and/or a detailed description of activities if it falls outside of those listed.
- **501(h) – simplified annual reporting**
  - Simple reporting of broad expenditures toward grassroots and/or direct lobbying, expenses (staff salaries and benefits, costs of communications and mailings, overhead, grants, payments, or reimbursements)

# If Lobbying, then what? (1)



Describe the financial reporting requirements for lobbying activity

## The **insubstantial part** test

- Default test for lobbying
- A public charity's lobbying must constitute only an "insubstantial" part of its overall activities in a given year
- IRS provides no concrete guidance on what is "substantial". **The council and most practitioners advise 3-5%**
  - A federal court ruled in 1952 that 5% of an organization's "time and effort" was considered an insubstantial amount of its overall activities
- Applies to all activities not simply expenditures
  - For example: time employees, board members, or others associated with the organization spend engaging in direct or grassroots lobbying on the foundation's behalf (even as a volunteer)
- Activities are reported on Schedule C of Form 990
  - 990 requires these organizations report whether the charity engaged in lobbying through its volunteers, paid staff, advertisements, mailings (to members, legislators, or the public), published statements, grants to others for lobbying, direct contact with legislators, public events, or other means and to report any expenditures for such activity. And describe other activities including those with no cost.
    - **This includes lobbying activities by component fund volunteers as well as expenses toward lobbying**

# If Lobbying, then what? (2)



Describe the financial reporting requirements for lobbying activity

## Section 501(h) – Expenditure Election (advised)

- Provides clear rules on lobbying limits for public charities by setting a fixed limitation on annual lobbying *expenditures*. It also provides more generous limitations on lobbying than the insubstantial part tests.
- How – fill out IRS, Form 5768, Election/Revocation of Election by an Eligible Section 501(c)3 Organization To Make Expenditures To Influence Legislation. Applies from time submitted (and retroactively for current tax years) until revoked.
- Sets specific dollar limits on lobbying expenditures, calculated as a percentage of a charity's total exempt purpose expenditures. If the charity stays within the limit it will not risk losing its exempt status or incurring penalties because of its lobbying activities.
- 501(h) filing is the recommended route if the Foundation is considering engaging in lobbying because it offers high limits and clear guidance to lobby legally

# Expenditure Limits 501(h)



Describe the financial reporting requirements for lobbying activity

## The total lobbying expenditures under 501(h) test are:

20% of the first \$500,000 of exempt purpose expenditures\*\*, plus

15% of the next \$500,000 of exempt purpose expenditures, plus

10% of the next \$500,000 of exempt expenditures, plus

5% of the remaining exempt purpose expenditures, up to a total cap of \$1 million

\*\*Exempt purpose expenditures are typically the organization's budget minus some fundraising and capital costs.

# 501(h) Expenditure Test



Describe the financial reporting requirements for lobbying activity

- Provides significant benefits over the "insubstantial part test:"
  - No limit on lobbying activities that do not require expenditures, such as unreimbursed activities conducted by bona fide volunteers (not true for non-electing charities)
  - Clear definitions of various kinds of lobbying communication, enabling electing charities to control whether they are lobbying or not
  - Higher lobbying dollar limits and fewer items which count toward the exhaustion of those limits
  - Less likely to risk exemption because of high limits
  - No personal penalty for individual managers of an electing charity that exceeds its lobbying expenditures limits
- Only organizations with exempt purpose expenditures in excess of \$17 million will reach the \$1 million cap.
  - Includes grants earmarked for lobbying activities



Describe the financial reporting requirements for lobbying activity

	<b>”Insubstantial” Part Test</b>	<b>501(h) Expenditure Test</b>
<b>Amount of Lobbying Permitted</b>	Approximately 5% of overall activities	Sliding scale based on budget (up to \$1 million maximum)
<b>What Counts Against Lobbying Limits</b>	All resources: time, energy, dollars, etc.	Dollars spent on lobbying
<b>Consequences of Exceeding Limits</b>	Loss of tax-exempt status, excise tax to the organization and manager-level tax	Excise tax
<b>How to Inform IRS of your Choice</b>	None (default test)	Complete IRS Form 5768

# Internet Communications



Describe the financial reporting requirements for lobbying activity

- Federal tax law does not provide any unique treatment for transactions or activities of exempt organizations involving attempts to influence legislation, simply because the Internet is the medium of communication
- Four forms of Internet communication
  - Communication published on a publicly accessible Web page
  - Communication posted on a password protected portion of a Web site
  - Communication on a listserv, news group, chat room, forum
  - E-mail
- For charities that have elected the expenditure test, the law is most clear.
  - When a charitable organization posts a lobbying message on a publicly accessible portion of its Web site and takes a position with respect to specific legislation, **the message is not a direct lobbying communication**
- Substantiality (in the expenditure test context) is measured solely in terms of expenditures of funds. Internet communications is very cost-effective.

## Lobbying Exceptions: Activities a public charity can freely engage in without counting towards lobbying limitations

- Making available the results of a nonpartisan analysis, study, or research;
- Providing technical advice or assistance to a governmental body or to a committee or other subdivision in response to a written request;
- Appearances before, or communication 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;
- Communications between organizations and its members with respect to legislation or proposed legislation of direct interest to the organization and its members;
- Any communication with government official or employee that is not for the specific purpose of influencing legislation



Describe the financial reporting requirements for lobbying activity

# Lobbying Language in BCF Policies

- **NOT in BCF Bylaws**
  - BCF not prohibited from lobbying
- **Agreements & Policies** (grant funds cannot be used to influence legislation or participate in political activity)
  - DAF Policy
  - Fiscal Sponsor Agreement
  - Fiscal Sponsorship Policy
- **Possible Action**
  - Draft Lobbying Policy that specifically addresses lobbying by component funds
  - Establish Fund Governance Committee of the Board



Can the Foundation restrict lobbying activity for component funds but not itself?



What language exists in BCF documents about lobbying

# When Funds Act Outside BCF Policies



Recommended framework/recourse for violations of Foundation policy by component funds

## Fund Review Process

- Proposed funds business prior to BCF relationship not relevant to decision process
- Transactions are reviewed at the time they are made
- Quarterly review during fee calculation
- Ongoing monitoring by staff and community

## Fund Termination

- Board has legal control over all transactions and variance power over all charitable dollars
- BCF Board can terminate a relationship with any fund at any time