PhilanthroPolicy 101: Advocacy for Foundations and Charities

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First, Ask a Rabbi*

If I am not for myself, who is for me?
When I am for myself, what am I?
If not now, when?

— Hillel  (circa 70 B.C. - 10 A.D.)

*On religious questions, if you don’t like the answer, you may ask a different rabbi. On tax law, not so much.
(c)(3) Exempt Organizations (EOs)

501(c)(3) Charities – both PCs and PFs
- Charitable, religious, educational, scientific, testing, amateur sports, preventing cruelty to kids or animals
- Organized and operated exclusively for exempt purposes
- Assets permanently restricted
- Tax-exempt and **tax-deductible**
- No election activity for or against candidates
501(c)(3) EOs: PCs and PFs

- Assumed to be a private foundation (PF) unless qualifying as a public charity (PC)
- PCs have much greater flexibility, fewer prohibitions and limits, greater deductibility
- Idea is raising money from general public makes for a better charity (transparency, competence, corporate governance)
Benefits of Public Charity Status

Advantages of PC status include:

- No tax on net investment income, no absolute self-dealing prohibition, no minimum distribution requirements, no termination tax
- No excess business holding limitations or jeopardizing investment limitations
- Less restrictive taxable expenditure rules
- Cash donations deductible up to 50% AGI (PF 30%)
- LT Cap Gain property up to 30% of AGI (PF 20%)
- Can engage in limited lobbying
PF Taxable Expenditures

Excise tax is significant enough to act as a bar to any of these activities:

- Propaganda and influencing legislation
- Election activity or partisan voter registration
- Grants to individuals (with some exceptions)
- Grants other than to PCs (unless PF exercises “expenditure responsibility”)
- For anything other than 501(c)(3) purposes
Other key EO types

501(c)(4)—Public Education & Social Welfare
- Tax-exempt, but *not* tax-deductible
- Unlimited lobbying
- Can do “secondary” electioneering, but must follow federal and state election laws
- Initiative or referendum committees
- Potential *Citizens United* vehicles
  - Essentially no disclosure, plus anything you can do, they can do 10 or 100 times bigger
- How your donors/founders may act on their own
Lobbying by Public Charities

- Lobbying is permitted, but must be “no substantial part” of activities
  - Qualitative test—5% OK, but 10% too much?
  - Quantitative “Safe harbor”: Election under 501(h)
    - Clear dollar limits & definition of lobbying
    - Must elect by filing Form 5768
Overall limit under Section 501(h):

- 20% of first $500,000
- + 15% of next $500,000
- + 10% of next $500,000
- + 5% of remaining, subject to overall cap of $1 million

Plus “grassroots lobbying” sub-limit of 25%
Section 501(h) Examples

- EO with a $2 million budget:
  - 20% of $500,000 = $100,000
  - 15% of $500,000 = 75,000
  - 10% of $500,000 = 50,000
  - 5% of $500,000 = 25,000
- Total permitted $250,000, with $62,500 (25%) cap on grassroots lobbying
- EO with > $17 million probably could exceed $1 million cap in 501(h), don’t elect?
Political Campaign Activity is Verboten

- Can’t support or oppose “any candidate for public office”
  - Can’t favor one candidate over another
  - Can’t oppose a candidate in some manner
  - Can’t do things that *have the effect* of favoring a candidate or group of candidates, says the IRS

- Includes nonpartisan elections (judicial retention voting?)

- Initiative or referendum campaigns involve legislation—and thus permissible lobbying
What Is Lobbying (the IRS view)?

- Attempting to influence specific legislation
- Includes contacting staff as well as elected officials
- Grassroots lobbying—contacting members of public to urge them to contact legislators (“call to action”)
- Initiative or referendum campaigns (“no candidate, no problem”—within limits)
What Isn’t Lobbying?

- Nonpartisan analysis, study, or research
  - Full and fair discussion, no direct call to action, no broad dissemination
- Written requests for advice or assistance
- Organizational “self defense”
- Communication to “bona fide” members if no call to action (no grassroots lobbying)
- “Administrative” bodies
  - School & zoning boards, tax districts (limited jurisdiction)
- If no money, then no 501(h) accounting
What Is (and Isn’t) Lobbying

“Specific legislation” does not include:

- Regulations
- Enforcement of existing laws
- Executive Orders
- Litigation

“Specific legislation” does include:

- Constitutional amendments
- Bond measures
- Treaties
- Legislative confirmations
Difficult Situations for PCs

- Individual activity by charity leaders
- Issue advocacy vs. campaign intervention
- Inviting officeholder (candidate?) to speak
- Voter education, registration, and GOTV
- Business activity (leasing space, rental or sale of mailing lists)
- Web sites
- Timing of activity
Lobbyist Regulation

If you do lobby as an organization, may need to register and report:

- **Federal law (LDA/HLOGA)**
  - 20% of employee time, >1 contact, $12K spend

- **State law (A.R.S. §41-1231)**
  - Can be triggered by any expenditure or appearing on behalf of employer or entity

- **Definition of lobbying is broader than IRS**
  - Includes volunteers, nonpartisan research

- **PC hires a lobbyist and they report?**
What Can a Private Foundation Do?

- Not lobbying, not prohibited
  - Nonpartisan analysis, study, or research
  - Respond to written requests for assistance
  - Organizational “self defense”
  - Litigation
  - Convening public sessions, or educate legislators and public officials, on broad topics
  - Enforcement of existing laws
  - Relationships with elected officials

- Partnering with PCs or government
  - Jointly funded projects with government units
  - Grants to PCs; just can’t fund PC lobbying. Thus, no earmarking, or exclude from grant

- Your donors/leaders can act on their own
IRC limits lobbying by PCs to “no substantial part” of activities (or within 501(h) limits)

But within those limits, lobbying is legitimate, encouraged, and protected

And PFs, while prohibited from actual lobbying, can impact public policy and attention in limited, but effective, ways
Questions?

- For further information: [www.afj.org](http://www.afj.org), [www.bolderadvocacy.org](http://www.bolderadvocacy.org), or [www.independentsector.org](http://www.independentsector.org)

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