

Memo



June 18, 2008

To: District Days Participants

From: Kelly Shipp Simone, Senior Staff Attorney

Re: Legal Considerations when Meeting with Legislators and Legislative Staff

Private foundations and public charities, including community foundations, may meet with legislators and legislative staff, but must use caution when considering topics to discuss with legislators. Below are some general guidelines to consider prior to visiting with legislators during District Days.

Legal Background

Private foundations may not engage in lobbying activity but may have conversations with legislators that do not meet the IRS definition of lobbying.¹ In the context of a meeting between foundations and legislators and their staff, the IRS defines lobbying as communication with legislators (or legislative staff) that expresses a view about specific legislation. This definition of lobbying and its exceptions frame the conversations private foundations can hold with legislators.

Public charities—including community foundations—have more flexibility since they may engage in an “insubstantial” amount of lobbying. Surprisingly, the IRS defines “insubstantial” in fairly generous terms.² Any lobbying by public charities should be reporting on the organization’s Form 990.

Sharing Information about the Foundation

Both private foundations and public charities may share information about their organization, including its history, work, areas of interest, and value and impact on the community it serves. Such conversations are not lobbying because they are not addressing legislation. For example, a private or community foundation may discuss recent grants made by the foundation and the leadership work of the foundation in the legislator’s community.

¹ Treas. Reg. Section 53.4945-2 contains the regulations on private foundation rules regarding lobbying.

² Treas. Reg. Section 56.4911 contains the regulations on lobbying by public charities that elect the Section 501(h) expenditure test. The article [What You Need to Know: Getting Involved in Public Policy](#) provides a brief overview of the two different tests for measuring lobbying by public charities.

Discussing Issues Affecting the Foundation's Rights and Duties (Self-defense)

Private foundations and public charities are permitted to discuss issues with legislators that affect the organizations' existence, tax-exempt status, powers and duties, or the deductibility of contributions to the organization. These communications are frequently referred to as "self-defense communications." Treasury regulations specifically permit both private foundations and public charities to have self-defense communications with legislators or legislative staff without such communication being considered lobbying. Under this exception, organizations may discuss these issues with legislators and express an opinion on related legislation. Despite the name, self-defense communications can address issues proactively or reactively. A couple of examples may help to illuminate this form of permissible communication.

- A private foundation executive director may ask a senator to vote for legislation that would flatten the private foundation excise tax on net investment income to one-percent.
- A community foundation board member may ask a U.S. representative to vote for legislation that would extend the IRA charitable rollover to include donor advised funds as being eligible to receive distributions from IRAs.

An example of a communication that would *not* be a self-defense communication is offered below.

- A private foundation meets with a legislator to urge the legislator to vote against a budget bill that includes cuts that will affect charities serving its community. Such a discussion would not be considered self-defense communication because the legislation does not affect the private foundation's existence, tax-exempt status, powers, duties, or deductibility of its contributions. For this reason, the discussion would be impermissible lobbying for a private foundation.

Discussing Broad Social, Economic, and Other Problems

Private foundations may discuss broad issues with legislators, as long as the foundation does not address a specific legislative proposal. For example, a representative of a foundation that works in the area of education may discuss the complexities of measuring educational achievement, but cannot address legislation or a legislative proposal dealing with that issue.

By contrast, representatives of public charities may have the same discussions about broad issues. However, they have even more leeway and may express opinions on legislation when discussing issues with legislators. For example, suppose you represent a community foundation that is concerned about finding ways to measure educational achievement. While talking with your legislator, you could express an opinion about pending legislation that would tie educational achievement of schools to federal funding. Because your community foundation is a public charity, this would be permissible lobbying activity. Be sure to track such discussions so you can appropriately report such lobbying on your Form 990.

Sharing a Nonpartisan Analysis, Study or Research

Both private foundations and public charities may share a nonpartisan analysis, study, or research with legislators. Such information sharing is not considered lobbying. Briefly, a nonpartisan study or analysis is a report or other communication that includes a sufficiently full and fair discussion of an issue that allows the recipient to form his or her own opinion about the issue. As long as the report or presentation provides a full and fair discussion of the facts, it may reach a conclusion on the issue. The conclusion may include expressing a position regarding pending or proposed legislation. To qualify as a nonpartisan, the analysis, study, or research should be distributed to individuals on different sides of an issue. It should not be developed merely for the purpose of a single meeting with a legislator.

Jointly Funded Projects

Treasury regulations permit private foundation representatives to communicate with legislators about projects they are jointly funding or may jointly fund. For example, a private foundation representative may speak to a legislator about plans for a historic preservation project that would be funded both by the private foundation and the legislature.

Conversations to Avoid

Note that in an active election season, a legislator may ask for support in his/her reelection effort during a conversation. Such a scenario is unlikely, but possible. As Section 501(c)(3) organizations, neither private foundations nor public charities are permitted to support or oppose candidates for public office. For that reason, you should remind the legislator that you are visiting them in your capacity as a representative of a foundation or charity and cannot engage in such conversations.

Resources

What You Need to Know: Getting Involved in Public Policy (for community foundations and other public charities)

<http://www.cof.org/Members/content.cfm?ItemNumber=11992&navItemNumber=5247>

Top 10 Ways Private Foundations Can Influence Public Policy

<https://www.cof.org/Store/ProductDetail.cfm?&ProductID=6245>

What the Law Allows

<http://www.foundationnews.org/CME/article.cfm?ID=2454>

IRS Continuing Professional Education Text: Lobbying Issues

<http://www.irs.gov/pub/irs-tege/eotopicp97.pdf>