

ROCKY MOUNTAIN TAX SEMINAR FOR PRIVATE FOUNDATIONS

CAN PRIVATE FOUNDATIONS PARTICIPATE IN OR SUPPORT POLITICAL POLICY DEBATES?

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Introduction

- Section 4945 imposes an excise tax on private foundations and their managers for certain “taxable expenditures,” including amounts paid
 - To carry on propaganda or otherwise attempt to influence legislation;
 - To influence the outcome of any specific public election; and
 - To carry on, directly or indirectly, a voter registration drive (unless certain requirements are met)
- During election years, private foundations that fund public policy work frequently must determine whether particular activities, either carried on by the foundation themselves or by grantees using foundation funds, may violate prohibitions on lobbying, campaign intervention, and/or certain voter registration activities

Lobbying Expenditures (Section 4945(d)(1))

- Taxable expenditures include any amount paid by a private foundation to carry on propaganda or otherwise to attempt to influence legislation
- “Legislation” is defined to include action by Congress, a state legislature, a local council or similar legislative body and by the public in a referendum, ballot initiative, constitutional amendment or similar procedure
- Definition also includes proposed legislation an organization supports or opposes
- Definition of “legislative body” does not include executive, judicial or administrative bodies. Attempts to influence the executive branch or administrative agencies with respect to regulatory – rather than legislative – matters are not considered lobbying
 - Private foundations may engage in unlimited advocacy with respect to administrative agency action on purely regulatory matters

Types of Lobbying: Direct Lobbying

- Direct lobbying is attempting to influence legislation through communication with
 - Members or employees of a legislative body;
 - Other government officials or employees who may participate in formulating legislation, including administrative agency officials who have some responsibility for legislative matters
- A communication is a direct lobbying communication if it:
 - Refers to specific legislation; and
 - Reflects a view on such legislation
- In ballot referenda, members of the public are considered legislators

Types of Lobbying: Grassroots Lobbying

- Grassroots lobbying is attempting to influence legislation through an attempt to affect the opinions of the general public or any segment thereof. A communication is a grassroots communication if it:
 - Refers to specific language;
 - Reflects a view on such legislation; and
 - Includes a “call to action” that encourages the recipient to take action with respect to the legislation – meaning a communication that does any one of the following
 - Urges the recipient to contact a legislator, staffer or other government official or employee who may participate in the formulation of legislation, for the principal purpose of influencing legislation;
 - States the address, telephone number or similar information of a legislator or employee of legislative body;
 - Provides a petition, tear-off postcard or similar material, for the principal purpose of influencing legislation by facilitating such communication; or

Types of Lobbying: Grassroots Lobbying (cont'd)

- Specifically identifies legislators' positions on the legislation or identifies the legislators as members of a committee or subcommittee that will consider the legislation (this does not include naming the main sponsor(s) for purposes of identifying the legislation)

What Isn't Lobbying: Nonpartisan Study, Analysis and Research

- Lobbying does not include the conduct of nonpartisan analysis, study or research if the dissemination of such analysis does not advocate the adoption of legislation to implement its findings
- The analysis may conclude that legislation is appropriate to achieve a given objective, if it contains a “sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion”
- A product may lose its qualification as nonpartisan analysis if it is disseminated to those interested in only one side of a particular issue
- A broadcast or publication that is part of a series will qualify for the nonpartisan analysis exception, if the series, taken as a whole, would qualify

What Isn't Lobbying: Technical Advice or Assistance

- Lobbying does not include the provision of technical advice to a governmental body, committee or subcommittee thereof in response to a written request by such entity that is made available on a bipartisan basis, such as at a committee or subcommittee hearing. It does not apply to advice provided at the request of an individual legislator
 - Must have written request from ranking majority or minority member
 - Results must be disseminated to members of both parties

What Isn't Lobbying: Examinations of Broad Social, Economic and Similar Problems

- Lobbying does not include examinations of broad social, economic, and similar problems
- Where such examinations are directed to topics which are also the subject of specific legislation, however, this exception does not permit references to such legislation or statements encouraging the readers to take action with respect to such legislation

What Isn't Lobbying: Self-Defense Exception

- Lobbying does not include contacts with legislators about matters affecting charities' existence, powers, duties, tax-exempt status and deductibility of contributions
- Self-defense exception applies only to direct lobbying, not grassroots
- Self-defense exception does not apply to lobbying for/against programs of interest to foundations

Private Foundation Grants to Charities that Lobby: General Support Grants

- A private foundation may make a general support grant to a public charity that conducts lobbying activities if the grant is not specifically earmarked for lobbying purposes
- A grant is considered “earmarked” if it is made pursuant to an agreement, either written or oral, that the grant will be used for specific purposes

Private Foundation Grants to Charities that Lobby: Project Grants

- A private foundation may make a grant to fund a specific project by a public charity that lobbies if the grant is not earmarked for lobbying purposes, *and* the total amount given to the grantee by the foundation for the same project for the same year does not exceed the amount budgeted by the grantee for non-lobbying program activities during that year
- This rule also applies to a multi-year grant for a specific project and is applied by measuring either the actual annual grant disbursement or by dividing the grant equally over the years of the grant
- The foundation may choose which method of grant measurement to use, so long as the foundation uses the same method for all years

Private Foundation Grants to Charities that Lobby: Project Grants (cont'd)

- **Example:** Private foundation makes an annual \$25,000 general support grant to Charity X. This grant is not specifically earmarked for any specific project and is mixed in with X's other funds for various administrative and programmatic uses, including some lobbying. In addition to this general support grant, the foundation has been asked to give an additional \$100,000 grant to X for a new program. According to X's proposed budget, the program will have a budget of \$200,000, of which \$50,000 will be used for lobbying purposes. Neither of these grants constitutes a taxable expenditure. The general support grant is not earmarked and is therefore not lobbying. The specific project grant of \$100,000 is less than \$150,000 which is the non-lobbying amount budgeted for the specific project

Political Campaign Intervention (Section 4945(d)(2))

- Section 501(c)(3) contains an absolute prohibition on participation or intervention in political campaign activities in support of or in opposition to candidates
- Foundations that violate this ban are subject to revocation of their tax exemption
- Section 4945(d)(2) also imposes an excise tax on private foundation expenditures to support or oppose candidates
- Because the stakes are so high, foundations must understand what activities may violate the prohibition

Prohibition on Campaign Intervention: Who is a Candidate?

- Definition includes someone who “offers himself or is proposed by others” as a candidate for federal, state or local office
- IRS does not apply the definition of “candidate” used by the Federal Election Commission
- Determining whether someone is a candidate prior to the official declaration can be very difficult

Prohibition on Campaign Intervention: What is a Public Office?

- Includes any elective office at federal, state or local level
- Includes elective positions in political parties
- Includes “independent” offices for which candidates do not seek election based on party affiliation

What is Impermissible Intervention in a Political Campaign on Behalf of or in Opposition to a Candidate for Public Office?

- Includes direct endorsement of or opposition to candidate
- Includes any other action that has the effect of promoting or opposing a candidate
- Even nonpartisan activities may constitute campaign intervention, such as unbiased ratings of judges or other candidates

Permissible Political Activities: Candidate Debates and Forums

- Must include all qualified candidates (may exclude fringe candidates under certain circumstances)
- Must cover a broad range of issues
- Questions must be posed in a neutral manner
- Role of the moderator should be limited to asking questions and not commenting on responses

Permissible Political Activities: Use of Institutional Facilities

- Foundations may rent facilities, mailing lists, etc. to candidates on the same terms as to the public
- May not allow facilities or resources to be used by or for the benefit of candidates on a preferential basis
- Foundations should develop and disseminate policies reminding staff that facilities and resources cannot be used to support or oppose candidates
- Foundation employees are permitted to engage in campaign intervention on their own time and with their own resources

Permissible Political Activities: Voter Education

- Foundations may engage in or fund unbiased voter education
- Voter guides should cover a broad range of issues, should be carefully prepared to reflect candidates' views
- Get out the vote drives are permissible as long as the effort is directed to all voters
- Foundation executives and board members should take steps to ensure that their individual activities in support or opposition to candidates are not attributed to the charities

Attribution of Individual Activities to Private Foundations

- Private foundations need to ensure that campaign intervention by employees is not attributed to the foundation itself
- Employees of foundations may serve as advisors to candidates, make donations to candidates for public office, and may even run for office themselves, as long as such participation is solely in an individual capacity, without making any use of the resources of the foundation
- Foundations should issue guidelines on this subject, either as part of their employee handbooks, at the beginning of election cycles, or both
- Guidelines should cover at least the following matters:
 - Employees who desire to participate in campaign activities during normal working hours must take vacation time or leave without pay to do so
 - Employees cannot use the foundation's letterhead or email in connection with campaign activities
 - Employees should not use the foundation's support services or supplies (secretarial, phone, computer, duplicating, email, social media, fax, messenger, etc.) in connection with campaign activities

Rev. Rul. 2007-41

- Rev. Rul. 2007-41 contains a series of examples that illustrate whether particular activities will – or will not – violate the prohibition on campaign intervention under Section 501(c)(3)
- The examples are of equal relevance for private foundations, and involve seven categories of activities:
 - Voter education, voter registration and get out the vote drives;
 - Individual activity by organization leader;
 - Candidate appearances;
 - Candidate appearances where speaking or participating as a non-candidate;
 - Issue advocacy vs. political campaign intervention;
 - Business activities; and
 - Websites

Issue Advocacy

- Rev. Rul. 2007-41 is of particular relevance to private foundations that engage in or support issue advocacy
- Many foundations, and their grantees, believe that election season provides an important opportunity for reaching and engaging the public on advocacy issues, as well as for attracting candidate attention to particular issues that appear to have the support of voters
- Foundations have been understandably cautious about funding projects involving issue advocacy, and Rev. Rul. 2007-41 lists the following factors that are relevant in analyzing whether a communication is permissible issue advocacy or impermissible campaign intervention:
 - Whether the statement identifies one more candidates for a given public office;
 - Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
 - Whether the statement is delivered close in time to the election;

Issue Advocacy (cont'd)

- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidates are related to a non-electoral event such as a scheduled vote on specific legislation by an incumbent who also happens to be a candidate for public office

Voter Registration

- A private foundation's expenditures to fund voter registration activities, directly or indirectly, are considered to be taxable expenditures unless the foundation complies with the following requirements listed in Section 4945(f):
 - The voter registration activity must be carried on by a Section 501(c)(3) organization;
 - The organization's activities must be nonpartisan, carried on in five or more states, and not confined to one specific election period;
 - The organization must expend substantially all of its income directly for the active conduct of the activities constituting the purpose or function for which it is organized and operated (meaning the organization spent at least 85% of its income for the active conduct of activities, rather than to make grants to fund the activities of other organizations)

Voter Registration (cont'd)

- The organization must receive substantially all of its support (other than gross investment income) from exempt organizations, the general public, governmental units or any combination of the foregoing, with no more than 25% support from any one tax-exempt organization or more than 50% from gross investment income; and
- Contributions to the organization for voter registration drives may not be subject to conditions that they be used only in specified states or areas of the United States or that they be used in only one specific election period
- Note that Section 4945(f) applies only to the funding of voter registration drives and not “get out the vote” and similar activities

Penalties for Violation

- Section 4945 imposes excise tax penalties on:
 - Private foundations that make taxable expenditures;
 - Private foundation managers who approve such expenditures knowing them to be taxable expenditures
- Section 4945 imposes an initial tax on a private foundation and, in some cases, on foundation managers for making a taxable expenditure
 - An initial tax of 20% of the amount of the taxable expenditure is imposed on the private foundation;
 - An initial tax of 5% of the amount, not to exceed \$10,000, is imposed on private foundation managers who knowingly approve the making of such expenditure, where such action is willful and not due to reasonable cause
- Where an initial tax is imposed and the taxable expenditure is not corrected in the proper time frame, an additional tax is imposed

Penalties for Violation (cont'd)

- The second-tier tax on the private foundation is 100% of the amount involved;
- The second-tier tax on foundation managers is 50% of the amount involved, up to \$20,000, and is imposed on foundation managers who refuse to agree with the correction
- “Correction” of a taxable expenditure means recovering the expenditure to the extent possible and, where full recovery is not possible, taking additional corrective action that may be prescribed by the IRS
- Section 4962 allows the IRS to abate the first-tier tax under Section 4945 where the foundation can establish that the expenditure was corrected and that the making of the expenditure was due to reasonable cause and not to willful neglect

Penalties for Violation (cont'd)

- Some foundations seek written opinions of counsel before making grants that involve funding complex work in the public policy arena to establish reasonable cause for concluding that such grants do not violate Section 4945