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LOBBYING AND POLITICAL ACTIVITIES IN AN ELECTION YEAR, INCLUDING VOTER REGISTRATION ACTIVITIES AND SUPPORT OF THINK TANKS

by

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I. Introduction

All Section 501(c)(3) organizations are prohibited from participating or intervening in political campaigns on behalf of, or in opposition to, candidates for public office, and "no substantial part" of their activities may constitute "carrying on propaganda, or otherwise attempting, to influence legislation." Section 4945 imposes more stringent rules on private foundations by imposing an excise tax on private foundations and their managers for making payments that fall within the definition of "taxable expenditures." "Taxable expenditures" include 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, voter registration drives (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 foundations themselves or by grantees using foundation funds, may violate prohibitions on lobbying, campaign intervention, and/or certain voter registration activities. These issues often come up in the context of proposed grants to certain types of grantees—think tanks, for example—that routinely engage in public policy work that is the focus not only of legislative agendas but also of candidate platforms. This outline summarizes the rules that apply under Section 4945 to foundation expenditures for lobbying, campaign intervention, and voter registration, and helps private foundations identify whether proposed activities or grants in the public policy, voter education, and voter registration arenas are permissible or may constitute taxable expenditures.

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

Taxable expenditures include lobbying expenditures, i.e., amounts paid by private foundations to carry on propaganda or otherwise to attempt to influence legislation. For this purpose, "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. The definition of "legislation" is, therefore, not limited strictly to the passage of a bill.

The 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. Therefore, private foundations may engage in unlimited advocacy with respect to administrative agency action on purely regulatory matters.

A. Direct Lobbying

Direct lobbying is attempting to influence legislation through communication with members or employees of a legislative body or other governmental officials or employees who may participate in formulating legislation, including administrative agency officials who have some responsibility for legislative matters. A communication is considered a direct lobbying communication if it:

- refers to specific legislation; and
- reflects a view on such legislation.

B. Grassroots Lobbying

Grassroots lobbying is an attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof. A communication is considered a grassroots communication if it:

- refers to specific legislation;
- 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 a legislative body;
  - provides a petition, tear-off postcard or similar material for the principal purpose of influencing legislation by facilitating such communication; or
  - 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).

C. Exceptions – Activities Not Considered to Be Lobbying

Treas. Reg. § 53.4945-2 specifically excepts certain activities from the definition of "lobbying." These exceptions are important because they provide private foundations with guidance on how they may support or engage in advocacy without violating Section 4945.

1. Nonpartisan Study, Analysis and Research

Lobbying does not include the conduct of nonpartisan analysis, study, and research, i.e., independent and objective exposition of a particular subject matter. The analysis may advocate a

particular position or viewpoint 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" and is not a mere presentation of unsupported opinion. This exception does not apply if such study, analysis or research is disseminated to those interested in only one side of a particular issue. Many think tanks consider their work to fall within the "nonpartisan research" exception.

2. Examinations of Broad Social, Economic, and Similar Problems

Lobbying does not include examinations of broad social, economic, and similar problems even if the government would ultimately be expected to deal with such problems. In addition, public discussion and communication with members of legislative bodies or governmental employees on a general topic that is also the subject of legislation before a legislative body will not be considered lobbying communications so long as the discussion does not address the merits of a specific legislative proposal or encourage taking action with respect to such legislation.

3. Requests for Technical Advice or Assistance

Although Congress has restricted the lobbying activities of private foundations, it has done so in a manner that preserves lawmakers' access to the vast expertise represented by such organizations and their employees. Therefore, amounts paid in connection with providing technical assistance to a governmental body, committee, or subcommittee in response to a written request by such body, committee, or subcommittee are not considered taxable expenditures. The exception, however, does not extend to advice provided at the request of an individual legislator.

Because "technical advice or assistance" may be given only in response to an express written request, the response need not qualify as nonpartisan analysis, study, or research. Nevertheless, it must be made available on a bipartisan basis, e.g., at a committee or subcommittee hearing. Under this exception, a foundation employee or a foundation grantee may provide oral or written testimony at congressional hearings on proposed legislation and may express a view about such legislation's merits (or lack thereof), provided that the view is directly related to the request for technical advice.

4. Self-Defense Communications

Congress and the IRS have also recognized that private foundations must be free to engage in lobbying with respect to issues that go to the heart of their existence, powers, duties, tax-exempt status, and deductibility of contributions. Therefore, this exception allows a private foundation to communicate with legislators and their staff with respect to a possible decision of the legislative body on such issues, and even to initiate legislation on those issues.

The exception is fairly limited, however, and does not cover proposed legislation involving public policy issues that may be of importance to foundations in carrying out their educational programs.

> **Example:** Lobbying against legislation that would reduce federal funding for a particular program of interest to a private foundation would

not qualify under the self-defense exception, whereas lobbying against legislation to eliminate the charitable contribution deduction would qualify.

D. Special Rules

1. Mass Media Exception

Private foundations and the charities they fund can communicate an advocacy message intended to arouse public action without crossing the boundary that separates education from grassroots lobbying by avoiding making a "call to action."

A special rule applies in the case of mass media advertisements involving highly publicized legislation, even if such advertisements do not constitute grassroots lobbying under the regular test described above. Treas. Reg. § 53.4911-2(b)(5)(ii) imposes a rebuttable presumption that mass media advertisements involving highly publicized legislation constitute grassroots lobbying if they:

- appear in the mass media two weeks before a vote of a legislative body or a committee thereof (but not a subcommittee) on a piece of highly publicized legislation;
- reflect a view on the general subject of such legislation; and
- either refer to the legislation or encourage the public to communicate with legislators on the general subject of such legislation.

2. Subsequent Use of Nonpartisan Study, Analysis, and Research

In many cases, a communication initially covered under the grassroots lobbying exception for "nonpartisan analysis, study, or research" subsequently becomes a grassroots lobbying communication. This situation often occurs when the results of an analysis clearly favor or oppose certain legislation and the private foundation or others seek to adapt the original communication for lobbying purposes. The issue is whether—and under what circumstances—the subsequent lobbying use of a nonpartisan analysis or other nonlobbying product may taint the nonlobbying nature of the original product.

As an initial matter, the regulations clarify that the subsequent grassroots lobbying use of materials that originally were not lobbying communications will cause the expenses associated with the original preparation to be treated as grassroots lobbying only in limited circumstances.

As long as the original materials did not encourage the recipients to engage in lobbying, the subsequent use of these materials for grassroots lobbying will not result in their treatment as such. The IRS will assume that there was a nonlobbying primary purpose if the organization makes a "substantial distribution" of its nonlobbying materials either prior to or contemporaneously with the lobbying distribution.

If there is not a substantial nonlobbying distribution, the regulations permit treating any expenditures made within six months of the lobbying use as lobbying expenditures.

3. Private Foundation Grants to Charities That Lobby

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.

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 nonlobbying program activities during that year. This rule also applies to a multiyear grant for a specific project, and is applied either by measuring 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.

> **Example:** A 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 nonlobbying amount budgeted for the specific project.

III. 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. Organizations that violate this ban are subject to revocation of their tax-exempt status. In addition, Section 4945(d)(3) imposes an excise tax on private foundation expenditures to support or oppose candidates. Because the stakes are so high in the case of noncompliance, it is critical for private foundations to understand what activities may violate the prohibition on political campaign intervention. Many of the key standards in this area are found under Section 501(c)(3).

A. Definition of Terms

The prohibition on political campaign intervention contains three key elements. There must be a "candidate" who is seeking "public office," and the organization must "participate in, or intervene in," the candidate's political campaign.

1. Who Is a "Candidate"?

The IRS regulations define a candidate as "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local." (Treas. Reg. § 1.501(c)(3)–1(c)(3)(iii).) This definition includes all persons who have already declared their intent to run for office, and most likely includes incumbents who may be presumptively treated as candidates until they announce an intention not to run. The phrase "proposed by others" expands the category to include persons who may not have declared an intention to run, but whose potential candidacy is the subject of intense public speculation. The formation of an exploratory committee or campaign committee is a signal that a person is a candidate, even if he or she has not clearly announced an intention to run.

The Federal Election Commission and the Federal Communications Commission provide clearer definitions of a "candidate." However, the IRS has concluded that neither of those definitions may be used to determine whether an individual is a candidate for purposes of Section 501(c)(3).

2. What Is a "Public Office"?

The IRS regulations provide no specific definition of "public office," although they refer to an "elective public office, whether . . . national, State, or local," in their definition of "candidate." *Id*. The IRS has interpreted the term to encompass elective positions in political parties. However, an election need not be contested nor involve political parties to be counted as an election for "public office." The IRS has held that the term "public office" includes a state precinct committeeman, where the position was created by statute, has a fixed term, is not occasional or contractual, and requires an oath of office. (G.C.M. 39,811 (June 30, 1989).)

3. What Is "Intervention in a Political Campaign"?

Section 501(c)(3) defines participation in a political campaign as "including the publishing or distribution of statements." IRS regulations further provide that "publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to . . . a candidate" constitutes intervention in a political campaign. (*See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).) However, the regulations note that intervention "[is] not limited to" these named activities.

An activity that may be intended as a nonpartisan educational activity nevertheless may constitute a prohibited intervention in a campaign. The motive for the activity is irrelevant in determining whether it constitutes impermissible intervention. For example, the IRS held that an organization formed to promote public education that conducted an objective review of the qualifications of school board candidates and announced the names of those it considered most qualified violated the prohibition on political campaign activities. (*See* Rev. Rul. 67-71, 1967-1 C.B. 125.)

B. Permissible Political Activities

Some activities that are political in nature are permissible under Section 501(c)(3) as "educational" activities. The regulations provide that in order to be considered "educational," activities must present "a sufficiently full and fair exposition of the pertinent facts." (*See* Treas. Reg. § 1.501(c)(3)–1(d)(3).) The presentation of information must not be biased and must "permit an individual or the public to form an independent opinion or conclusion." Further

guidance is found in the definition of "educational" as "the instruction or training of the individual for the purpose of improving or developing his capabilities." Activities that further this purpose may be more likely to be considered "educational" than "political."

1. Candidate Debates and Forums

Public charities may provide, and private foundations may fund, forums for candidate debates without those activities constituting impermissible political activity. In general, the sponsoring organization must ensure a fair and neutral forum and provide equal time to all qualified candidates. The following factors help establish that the candidate debate is a permissible activity. (*See* Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 2007-41.)

- Both the format and content of the forum will be presented in a neutral manner.
- All legally qualified candidates will be invited to participate in the forum.
- The questions will be prepared and presented by a nonpartisan, independent panel.
- The topics discussed will cover a broad range of issues of interest to the public, notwithstanding that the issues discussed may include issues of particular importance to the organization's members.
- Each candidate will receive an equal opportunity to present his or her views on each of the issues discussed.
- The moderator selected by the organization will not comment on the questions or otherwise make comments that imply approval or disapproval of any of the candidates.

2. Other Voter Education

Organizations may wish to engage in other forms of voter education, such as the dissemination of voter guides and incumbent voting records. Both voter guides and voting records may be permissible forms of political activity if certain guidelines are followed. In general, voting records and responses to candidate questionnaires may be distributed if done so without editorial comment and if they cover a broad range of issues. (*See* Rev. Rul. 78-248, 1978-1 C.B. 154.) However, formats that "evidence a bias" toward a certain candidate or that cover only a narrow range of issues may constitute impermissible voter education activities.

Voter guides that cover only a narrow range of issues may be permissible under certain circumstances. (*See* Rev. Rul. 80-282, 1980-2 C.B. 178.) The guides should be disseminated only to members of an organization. They should be made shortly after the close of a legislative session and should not identify which incumbents may be candidates for reelection. Also, guides should include a caveat about judging the qualifications of an incumbent based on a few selected votes.

3. Attribution of Individual Activities to Private Foundations

A periodic source of concern for a private foundation is how to ensure that the participation by a member of the organization's community—an officer, director or staff member—is not attributed to the organization itself. Employees of foundations may serve as advisors to candidates, make donations to candidates for public office, and may even run for office themselves. Where such participation is undertaken solely in an individual capacity, without making any use of the resources of the institution, the activity should not be attributed to the institution for purposes of the prohibition on political campaign participation. The practical problem, however, is how a private foundation, particularly if it is a large and complex institution, can make sure that its resources are not inappropriately directed to activities in support of or opposition to candidates. One approach is for foundations to issue guidelines on this subject, either as part of their employee handbooks, at the beginning of election cycles, or both. The purposes of such guidelines are twofold: (1) to inform members of the institutional community about the rules applicable to the organization and what they are expected to do in compliance with such rules, and (2) to evidence the foundation's awareness of the requirements under Section 501(c)(3) and its commitment to compliance with such requirements. The 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 in connection with campaign activities.

- Employees should not use the organization's support services or supplies (secretarial, duplicating, email, fax, messenger, etc.) in connection with campaign activities.

4. 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 importance for private foundations, and involve seven categories of activities: (1) voter education, voter registration and get-out-the-vote drives; (2) individual activity by organization leader; (3) candidate appearances; (4) candidate appearances where speaking or participating as a noncandidate; (5) issue advocacy vs. political campaign intervention; (6) business activities; and (7) websites.

The examples in Rev. Rul. 2007-41 are straightforward and fairly predictable in outcome. One section of the ruling that is of particular relevance to private foundations involves issue advocacy. Many foundations, and their grantees, believe that election seasons provide 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. Frequently, neither the foundations nor their grantees have any interest in influencing the outcome of the election. They are, however, interested in building support for their issues, both from the public and from candidates. 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 particular communication will be considered permissible issue advocacy or impermissible campaign intervention:

- whether the statement identifies one or more candidates for a given public office;

- whether the statement expresses approval or disapproval of one or more candidates' positions and/or actions;

- whether the statement is delivered close in time to the election;

- whether the statement makes reference to voting or an election;

- 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 nonelectoral event such as a scheduled vote on specific legislation by an incumbent who also happens to be a candidate for public office.

IV. 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);

- the organization must receive substantially all of its support (other than gross investment income, as defined in Section 509(e)) from exempt organizations, the general public, governmental units or any combination of the foregoing, without receiving more than 25% of such support from any one tax-exempt organization or deriving more than 50% of its support 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 (however, so long as these provisions are met, grant funds may be earmarked for voter registration purposes generally).

Note that Section 4945(f) applies only to the funding of voter registration and not "get out the vote" drives and similar activities. The IRS has ruled privately that voter registration drives may

be targeted to specific populations, such as the homeless, low-income persons, and particular racial or ethnic groups, as long as the voter registration efforts are nonpartisan and nondiscriminatory and seek to register all interested voters in the targeted population.

A private foundation considering a grant to a charitable organization for voter registration activities should receive an opinion letter (which may come from the grantee) that the grantee qualifies as a Section 4945(f) organization and that the grant activities are consistent with the requirements of Section 4945(f). In addition, the grant proposal should represent that the voter registration activities will be conducted in a nonpartisan manner, and that the grantee's staff and volunteers will be instructed (i) to decline to express preference among candidates or political parties, even if asked; (ii) not to make statements in support of or in opposition to any particular candidate or party; (iii) not to carry on any other activities that reflect a preference or recommendation for any political candidate or party; and (iv) not to refuse the registration of anyone, or to refuse assistance in transport to the polls to anyone if such assistance is offered to others.

V. Penalties for Violations

Section 4945 imposes excise tax penalties on private foundations that make taxable expenditures and on private foundation managers who approve the making of such expenditures knowing them to be taxable expenditures.

A. First-Tier Taxes

Section 4945 imposes an initial tax on a private foundation and, in some cases, on foundation managers for making a taxable expenditure.

1. On the Foundation

An initial tax of 20% of the amount of the taxable expenditure is imposed on the private foundation.

2. On the Management

An initial tax of 5% of the amount involved is imposed on a private foundation manager who knowingly approves the making of such expenditure, where such action is willful and not due to reasonable cause. This tax may not exceed $10,000.

B. Second-Tier Taxes

Where an initial tax is imposed and the taxable expenditure is not corrected in the proper time frame, an additional tax is imposed.

1. On the Foundation

The second-tier tax on the private foundation is 100% of the amount involved.

2. On the Management

The second-tier tax on a foundation manager is 50% of the amount involved, up to $20,000, and

is imposed on a foundation manager who refuses to agree with the correction.

C. Correction of a Taxable Expenditure

"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.

D. Abatement of Penalties

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. 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.