

Political Advocacy By Private Foundations

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Can tax exempt entities lobby?

- Yes.
- But there are different rules depending upon which section of the Internal Revenue Code applies.

What type of tax exempt entity is The Peter and Elizabeth C. Tower Foundation?

- It is exempt under Section 501(c) (3) of the Internal Revenue Code.

What type of 501(c)(3) entities are there?

For our purposes there are two:

- Private Foundations; and
- Public Charities.

What is the difference?

- Private Foundations tend to get their funds from a limited number of people.
- Public Charities tend to get their funds from the general public, the government or Private Foundations.

What type of 501(c)(3) entity is The Peter and Elizabeth C. Tower Foundation?

- It is a Private Foundation.

Can both Public Charities and Private Foundations engage in advocacy (influencing legislation)?

- Yes, provided that a **SUBSTANTIAL PART** of their activities is **NOT** attempting to influence legislation (commonly referred to as lobbying).
- If a substantial part of their activities is lobbying either type entity may lose their exemption.

When is an organization “attempting to influence legislation” (i.e., lobbying)?

An organization attempts to influence legislation if it:

- Contacts or urges the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation, or
- Advocates adoption or rejection of legislation.

Are Private Foundations and Public Charities treated the same when it comes to advocacy?

- No.
- As noted, both can lose their tax exemption if advocacy is a substantial part of their activity.
- But, Private Foundations are subject to an excise tax on expenditures related to prohibited advocacy (lobbying the government for the passage, rejection, or repeal of any law outside the four exceptions we will discuss).

How do you determine whether a Section 501(c)(3) entity engages in a “substantial” amount of advocacy?

- It depends on whether the entity is a Private Foundation or a Public Charity?

How do you determine whether a substantial part of a Private Foundation's activity is advocacy (lobbying)?

- No clear cut rule. A facts and circumstances analysis.
- Probably “substantial” means between 5% and 20% of exempt purpose expenditures.
- Because of potential tax on prohibited advocacy, Private Foundations rarely fail substantial part test.

The Substantial Part Test

- Devoting less than 5% of activities to lobbying is not substantial. *Seasongood v. Commissioner*, 227 F.2d 907 (1955).
- Spending between 16.6% and 20.5% of an organization's time on lobbying is substantial. *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974).

The IRS has used other factors to determine substantiality:

- Time spent by employees and volunteers;
 - Money spent in relation to the organization's entire budget;
 - The amount of publicity the organization assigns to the activity;
 - Continuous or intermittent nature of the activity.
- G.C.M. 36148 (Jan. 28, 1975).

How is it determined whether a Public Charity engages in a substantial amount of lobbying?

- Most public charities make what is called the H Election.

What are the amounts of permissible lobbying under H Election?

If the amount of exempt purpose expenditures is:

$\leq \$500,000$

$> \$500,000$ but $\leq \$1,000,000$

$> \$1,000,000$ but $\leq \$1,500,000$

$> \$1,500,000$

Lobbying nontaxable amount is:

20% of the exempt purpose expenditures

\$100,000 plus 15% of the excess of exempt purpose expenditures over \$500,000

\$175,000 plus 10% of the excess of exempt purpose expenditures over \$1,000,000

\$225,000 plus 5% of the exempt purpose expenditures over \$1,500,000

What are the amounts of permissible lobbying under H Election?

- **on Direct Lobbying:**
20% of the first \$500,000 of its exempt purpose expenditures;
15% of the next \$500,000, and so on, up to one million dollars a year.
- **on Grassroots Lobbying:**
under the 501(h) election, grassroots lobbying is limited to 25% of the organization's total lobbying allowance.

What is "Direct" Lobbying?

- A communication, made to a legislator or other government official involved in formulating legislation, that refers to specific legislation and reflects a view on that legislation.
- ‘Specific legislation’ includes legislation that has already been introduced in a legislative body, and any proposed legislation that the organization either supports or opposes.

What is "Grass Roots" Lobbying?

- Grass roots lobbying refers to efforts to influence legislation through an attempt to affect the opinions of the general public or any segment of the general public.
- For Private Foundations—prohibited advocacy.
- For Public Charities—can engage in the activity up to amounts allowed pursuant to H Election.

- Public Charities (but not **Private Foundations**) often have on their Web sites messages urging the reader to ‘take action,’—for example, contacting legislators in support of or opposition to a certain law.
- Public Charities often send out e-mail correspondence which encourages the recipient to “write your elected officials.”
- This activity is permitted provided the total expenditures fit within the parameters of the H Election.

Can Private Foundations engage in “direct lobbying”?

- The expenditures related to such direct lobbying will be subject to an excise tax discussed below unless the activity falls within one of four exceptions.

Can Private Foundations engage in “grass roots” lobbying without being subject to excise tax?

Private Foundation will be subject to an excise tax discussed below if public communications include encouragement to take specific action such as the following:

- A statement that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation.

- The including of the address, telephone number, or other information on how to contact the legislator or legislator's employee in such a way as to suggest to reader that he/she should contact legislator or his/her staff and express opinion.
- A petition or similar material for the recipient to communicate his or her views to the legislator or legislative body, with the principal purpose of the contact being to influence legislation.

- Specific identification of one or more legislators who will vote on the legislation as either (1) opposing the view of the foundation with respect to the legislation, (2) being undecided on the legislation, (3) being the recipient's representative in the legislature, or (4) being a member of the legislative committee that will consider the legislation.

Are there any adverse consequences (besides potential loss of exemption) for Private Foundations that engage in prohibited advocacy?

- Yes, the Private Foundation (and individual managers) can be subject to an excise tax on expenditures on prohibited advocacy—“taxable expenditures”.

What is the excise tax?

- A first-tier tax, equal to 20% of the amount of each taxable expenditure, is imposed on the foundation for the year the expenditure was made.
- Each taxable expenditure also will result in a 5% tax due by the foundation manager, when there is evidence that the manager agreed to the expenditure and the manager knew that the expenditure had been made.

- If not addressed in a timely manner, the taxable expenditure may result in second-tier taxes on both the Private Foundation—equal to 100% of the taxable expenditure—and on the Private Foundation's manager—equal to 50% of the taxable expenditure.

What are "Taxable Expenditures"?

- Expenditure made in carrying on propaganda or otherwise attempting to influence legislation (commonly referred to as lobbying),

- Also expenditures incurred in influencing the outcome of any specific public election or carrying on any voter registration drive, unless certain requirements are satisfied.

What is influencing legislation?

- A taxable expenditure includes amounts paid to attempt to influence legislation, including both direct and grass roots lobbying. Taxable lobbying expenditures do not include amounts paid--
- for certain jointly funded projects;
- by certain program-related investment recipients;
- for certain general support grants; or
- for certain specific project grants.

Are Private Foundations subject to an excise tax on expenditures relating to advocacy if the expenditures do not relate to specific legislation?

- Private Foundations are not liable for excise taxes imposed as penalties for lobbying, if the nature of the public policy advocacy does not take a specific position on legislation, or generally does not urge the public to take action on the legislation.

What is “legislation”?

- For this purpose, *legislation* includes action by Congress, any state legislature, any local council or similar governing body, with respect to acts, bills, resolutions or similar items (such as legislative confirmation of appointive office), or by the public in referendum, ballot initiative, constitutional amendment or similar procedure. It does not include actions by executive, judicial or administrative bodies.

- The term *any attempt to influence any legislation* does not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, as long as the discussion does not address itself to the merits of a specific legislative proposal.

ABC Hypothetical

Congressional Activities:

- Meetings were held between officers of the ABC Foundation and the staff of Members of Congress during which they discussed generally the need for Congress to address the residential housing needs of adults with developmental disabilities; there was no reference to specific legislation.
- Meetings were held between a consultant to the ABC Foundation and Members of Congress during which the consultant advocated the sending of letters to various Federal agencies regarding the need for regulatory actions which may assist states and local communities in providing residential housing for individuals with developmental disabilities.

ABC HYPOTHETICAL

Executive Branch Activities:

- ABC Foundation officers met with representatives of federal agencies to urge the adoption of policies which may assist state and local communities address the housing needs of adults with developmental disabilities.
- A member of the board of directors of the ABC Foundation met with representatives of the White House staff interested in disability issues. In these meetings the Foundation's board member advocated for the White House to issue a statement on the importance of acceptable long term residential housing for adults with developmental disabilities.

Are there types of advocacy relating to legislation which will not subject a Private Foundation to an excise tax?

- Yes.
- There are four exceptions to the application of the excise tax rules on “lobbying”.

What are the types of “permitted advocacy” (activity relating to legislation) which will not subject a Private Foundation to an excise tax?

- Nonpartisan analysis, study, and research
- Examinations and discussions of broad social, economic, and similar problems
- Technical advice or assistance
- Decisions affecting the powers, duties, etc., of a private foundation

The Four Exceptions

1. Nonpartisan analysis, study, and research.
2. Providing examinations and discussions of broad, social, economic and similar problems (even if there is a reference to legislation);
3. Providing technical assistance or advice to legislative body or committee in response to a written request;
4. The "self-defense" exception.

What is permissible nonpartisan analysis, study and research?

- Engaging in nonpartisan analysis, study, or research and making the results of this work available to the general public or to governmental bodies, officials, or employees is not carrying on propaganda, or otherwise attempting to influence legislation.

- Nonpartisan analysis, study, or research means an independent and objective exposition of a particular subject matter, including activities that qualify as educational activities.
- Nonpartisan analysis, study, or research may **advocate a particular position or viewpoint as long as there is a sufficiently full and fair exposition of the relevant facts to enable the public or an individual to form an independent opinion or conclusion.**

- However, a mere presentation of unsupported opinion does not qualify as nonpartisan analysis, study, or research.

ABC Hypothetical

- The Foundation funded and published a study on the long term housing needs of adults with developmental disabilities. The study represented a full and fair analysis of the issues but clearly reflected the Foundation's view that this was an issue warranting some type of action at the federal, state and local level. The report recommended various measures which could be adopted. Copies of this study were sent to each Member of Congress, the governors of every state and to newspapers and broadcasters throughout the nation.

Example of Nonpartisan Analysis, Study and Research

- *Example 1.* M, a private foundation, establishes a research project to collect information for showing the dangers of using pesticides in growing crops. The information collected includes data on proposed legislation, pending before several state legislatures, that would ban the use of pesticides. The project takes favorable positions on the legislation without producing a sufficiently full and fair exposition of the relevant facts to enable the public or an individual to form an independent opinion or conclusion on the pros and cons of the use of pesticides. This project is not within the exception for nonpartisan analysis, study, or research **because it is designed to present information only on one side of the legislative controversy.**

Example of Nonpartisan Analysis, Study and Research

- *Example 2.* N, a private foundation, establishes a research project for the apparent purpose of examining and reporting information as to the pros and cons of the use of pesticides in growing crops. The information is collected and distributed in the form of a published report that analyzes the effects and costs of the use and nonuse of various pesticides under various conditions on humans, animals, and crops. The report also presents the advantages, disadvantages, and economic cost of allowing the continued use of pesticides unabated, of controlling the use of pesticides, and of developing alternatives to pesticides.

- Even if N's report gives conclusions that the disadvantages, as a result of using pesticides, are greater than the advantages of using pesticides and that prompt legislative regulation of the use of pesticides is needed, **the project is within the exception for nonpartisan analysis, study, or research because it is designed to present information on both sides of the legislative controversy.** In addition, the report presents a sufficiently full and fair exposition of the relevant facts to enable the public or an individual to form an independent opinion or conclusion.

What is the lobbying exception for issue examinations?

- Taxes on lobbying expenditures do not apply to expenditures for examinations and discussions of broad social, economic, and similar problems, even if the problems are the type the government would be expected to deal with ultimately.

What constitutes the examination and discussions of broad social, economic, and similar problems?

- Broad social or economic issues may be discussed through foundation expenditures, as long as the discussion does not include the merits of a specific legislative proposal nor directly encourage others to take action with respect to such legislation.

- The nonpartisan, analytical substance and style of the research are judged by the IRS on a case-by-case basis, according to the variety of political and social issues that may be involved, the political climate, and the state of the political and popular debate on each such issue.

Example of exception for issue examinations

- A Private Foundation may, without incurring the tax on taxable expenditures, present discussions of problems such as environmental pollution or population growth that are being considered by Congress and various state legislatures, but only if the discussions are not directly addressed to specific legislation being considered.

What about communications to public on issues?

- As noted in connection with definition of “grass roots” lobbying, as long as there is no call to action with respect to legislation, the expenditures relating to such communications will not be taxable.

ABC Hypothetical

- The Foundation created a program whereby it alerted the public on the needs of adults with developmental disabilities via media campaigns and public forums (including suggesting specific ways that communities could approach the need for better housing for individuals with developmental disabilities).

ABC Hypothetical

- The Foundation funded the production of a public television documentary on the lives of various individuals with developmental disabilities.

ABC Hypothetical

- The Foundation crafted and publicized specific policy positions on the needs of aging parents with adult children who have developmental disabilities. These “fact sheets” did not, however, refer to specific legislation.

ABC Hypothetical

- The Foundation regularly encouraged the public to convey explicit information (via written or spoken communications) to policymakers and their staff members on the needs of individuals with developmental disabilities (without expressing an opinion for or against pending legislation).

ABC Hypothetical

- The Foundation arranged for its leadership to appear on television and radio programs to discuss the housing needs of adults with developmental disabilities.

What is the lobbying exception for technical advice or assistance?

- Taxes on lobbying expenditures do not apply to amounts paid or incurred in connection with providing technical advice or assistance to a governmental body, a government committee, or a subdivision of either, in response to a *written request*.

- Under this exception, the request for assistance or advice must be made in the name of the requesting governmental body, committee, or subdivision rather than an individual member.
- Similarly, the response to the request must be available to every member of the requesting body, committee or subdivision.

- Technical advice or assistance may be given as a result of knowledge or skill in a given area. Because this assistance or advice may be given only at the express request of a governmental body, committee or subdivision, the oral or written presentation of assistance or advice need not qualify as nonpartisan analysis, study or research.

ABC Hypothetical

- A member of the board of directors of the Foundation testified at a Congressional hearing on the needs of adults with developmental disabilities. The request to testify came from the staff of the committee which called the hearing.

Example of lobbying exception for technical advice or assistance

Example 1. A Congressional committee is studying the feasibility of legislation to provide funds for scholarships to U.S. students attending schools abroad. X, a private foundation that has engaged in a private scholarship program of this kind, is asked, in writing, by the committee to describe the manner in which it selects candidates for its program. X's response, disclosing its methods of selection, is technical advice or assistance.

Example of lobbying exception for technical advice or assistance

Example 2. Assume the same facts given in Example 1, except that X's response not only includes a description of its own grant-making procedures, but also includes its views regarding the wisdom of adopting such a program. Because these views are directly related to the subject matter of the request for technical advice or assistance, the amount paid or incurred for the presentation of these views is not a taxable expenditure. However, the amount paid or incurred in connection with a response that is not directly related to the subject matter of the request for technical advice or assistance would be a taxable expenditure unless the presentation can qualify as making available nonpartisan analysis, study or research.

What is the lobbying exception for decisions affecting the powers, duties, etc., of a private foundation?

- Taxes on lobbying expenditures do not apply to any amount paid or incurred in connection with an appearance before, or communication with, any legislative body on a possible decision of the body that might affect the existence of the Private Foundation, its powers and duties, its tax-exempt status or the deductibility of contributions to the foundation.

- Under this exception, a foundation may communicate with the entire legislative body, committees, or subcommittees of the legislative body, individual congressmen or legislators, members of their staffs, or representatives of the executive branch, who are involved in the legislative process if the communication is limited to the prescribed subjects.
- In addition, the foundation may make expenditures to initiate legislation if the legislation concerns only matters that might affect the existence of the foundation, its powers and duties, its tax-exempt status or the deductibility of contributions to the foundation.

ABC Hypothetical

- Members of the Foundation's staff participated in a "lobbying day" event organized by a coalition of organizations in which meetings were held with Members of Congress to advocate against tax legislation that could impact 501(c)(3) entities.

Can a Private Foundation give a grant to a Public Charity that engages in advocacy (including prohibited advocacy)?

- Yes. There are different rules depending upon whether the Private Foundation's grant is a "general support" grant or a grant for a specific project.

Are there restrictions placed on a Private Foundation that gives a grant to a Public Charity that engages in advocacy (including prohibited advocacy)?

- No. A foundation grant to an organization that is not a private foundation (except certain organizations organized and operated exclusively for testing for public safety) will only be deemed a taxable expenditure if the grant is *earmarked* to be used for prohibited advocacy

What constitutes “earmarking” of a grant for lobbying?

- “Earmarking” is defined by the applicable Internal Revenue Regulations as an oral or written agreement that a grant will be used for specific purposes.

- It is important for grantmakers to avoid entering into specific agreements with grantee nonprofits that the funds will be used for lobbying - as such an agreement would constitute prohibited earmarking.
- It is permissible, however, for a foundation to make a general purpose grant to a nonprofit it knows lobbies as one of its activities.

ABC Hypothetical

- ABC Foundation gives a grant of \$100,000 to support the general operating expenses of the DEF Charity—a public charity that actively lobbies Congress on behalf of individuals with developmental disabilities. DEF's annual budget is \$1,000,000, of which \$100,000 is spent on lobbying activities. DEF has, in the past, advocated at the federal and state level for specific legislation assisting individuals with developmental disabilities.

Is a foundation required to include a specific provision in its grant agreements that no part of the grant funds may be used for lobbying?

- No.
- Private Foundations often include “no lobbying” clauses in their grant letters. However, such overtly restrictive clauses can have a chilling effect on public policy engagement by nonprofits.

- Private Foundation grant letters are often written to expressly prohibit grantees from using funds for lobbying.
- However, this language can confuse nonprofits or unnecessarily restrict their use of foundation funds beyond what is required by law.
- As long as a foundation does not earmark (e.g., direct the grantee organization to use the funds for lobbying), they do not have to include written provisions in grant agreements that state: “no part of the grant may be used for lobbying,” or any similar language.

Will the recitation in a grant agreement that “there is no agreement, oral or written, that directs that the grant funds be used for lobbying activities,” be sufficient?

- Yes. The IRS has stated that, as long as there is no oral or written agreement directing the grant funds to be used for lobbying, then no prohibited earmarking has occurred.

Example-General Support Grant

- A public charity that has received a general support grant informs the grantor foundation that, as an insubstantial part of its activities, it attempts to influence the state legislature with regard to changes in mental health laws. The use of the grant is not earmarked for the legislative activities of the public charity. The grant is not a taxable expenditure even if it is later used by the recipient charity in its legislative activities.

What if Charity loses its exemption?

If the public charity later loses its 501(c)(3) tax-exempt status due to its attempts to influence legislation, the grant is still not a taxable expenditure if the following conditions are met:

- The grant meets the requirements of the rules relating to general support grants and specific project grants;
- The grantee had received a ruling or determination letter that it is a public charity;

- Notice of a change in the grantee's status had not been made to the public, and the private foundation had not acquired knowledge that the Service had notified the grantee of a change in its status; and
- The grantee is not controlled by the private foundation.

Under what circumstances can a Private Foundation make a grant to a Public Charity for a specific project that includes lobbying?

- Private Foundations may make a grant for a specific project that has a lobbying component so long as the amount of the grant is not more than the amount in the project budget for the non-lobbying activities. In addition, the grant must not be earmarked and the foundation should have no reason to doubt the accuracy of the grantee's representations of the cost involved in the specific project.

Specific project requirements

A foundation may make a grant to a public charity for a specific project that includes lobbying when

- 1) the grant is not earmarked for lobbying,
- 2) the foundation obtains a budget signed by an officer of the grantee showing that the amount of the grant, together with the other grants by the same foundation for the same year, does not exceed the amount budgeted for the project by the charity for activities that do not constitute lobbying, and
- 3) the foundation has no reason to doubt the accuracy of the grantee's representations.

ABC Hypothetical

- ABC Foundation gives a grant of \$75,000 to support the “Hope Project” of the GHI Charity. The Hope Project is special program of the GHI Charity which focuses on the needs of adults with developmental disabilities. The Hope Project has an annual budget of \$100,000 of which \$25,000 is spent on lobbying at the local level for legislation making it easier for the establishment of group homes for adults with developmental disabilities.

ABC Hypothetical

- In addition, the ABC Foundation provided a \$50,000 grant to the GHI Charity to offset the cost of a conference on the needs of adults with developmental disabilities. Part of the agenda for the conference includes a discussion of existing law and possible actions that Congress should consider (although there was no particular bill on the issue pending in Congress at the time of the event).

Example

- If ABC nonprofit wants to conduct a consumer education project with a \$100,000 budget that includes asking the public to write to their legislators in support of pro-consumer legislation (which would be considered “grassroots lobbying”) – a Private Foundation may fund up to the amount of the cost of the non-lobbying part of the project. So, if the lobbying portion of the project costs \$25,000 then the foundation may fund the project up to \$75,000.

Activity that does not constitute the lobbying of the government for the passage, rejection, or repeal of any law.

Direct Lobbying and
Grass Roots Lobbying

Exceptions

Summary

- Private Foundations may engage directly in a wide range of activities that influence the formation of public policy so long as (1) the foundation does not reflect a view on specific legislation in discussions with legislators and (2) in communications with the general public, if a view on particular legislation is expressed, there is no “call to action” within the meaning of the Internal Revenue Code (and an exception for certain “mass media” communications do not apply).

Summary

- Foundations may also conduct a narrower range of advocacy activities that do reflect a view on specific legislation if those activities qualify as nonpartisan analysis, study, or research, self-defense lobbying, or the provision of technical advice to legislators.

Summary

- Private Foundations may give general grants to Public Charities that engage in advocacy (lobbying) provided the grants are not earmarked for such purpose.
- Private Foundations may give grants to specific projects of Public Charities as long as the funds are not used for advocacy (lobbying).