VIEWS FROM THE FIELD
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GRANT MAKERS IN HEALTH

Grant Agreements and Lobbying

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Have you read your grant agreement or grant award letter recently? Not just scanned it to make sure the reporting dates have been updated, but read every paragraph or clause to make sure the agreement says what you think it says…and what you want it to say? If not, it is time to do it now.

SHATTERING THE MYTH

Did you know that grant agreements need not prohibit lobbying? Let us shatter the myth for good: **federal tax law does not require foundations to include lobbying prohibitions in grants made to public charities**. Look at your grant agreement. Does it say funds cannot be used for lobbying or for "any propaganda or attempt to influence legislation"? If it contains this overly restrictive language, keep reading.

WHAT IS A GRANT AGREEMENT ANYWAY?

Before we go any further, let us be clear what we mean by a grant agreement or grant award letter. I am referring to the document that sets out the terms and conditions for how the funds should be spent, payment schedule, reporting requirements, and other desired provisions. It is the contract between the foundation and the grantee describing all the rights and expectations. Grant agreements can be multiple pages, full of legal language, or a short letter. There is no one standard format; each foundation, working with its legal counsel, must determine what provisions will provide adequate protection for the foundation and appropriate flexibility for the grantee. For more information on grant agreements, see Chapter Three of Alliance for Justice's guide *Investing in Change: A Funder's Guide to Supporting Advocacy.*

Language in a grant agreement will vary depending on whether the foundation is public or private, and whether the grant is for general support or a specific project. However, a foundation – whether public or private – is rarely required to prohibit its grant funds from being spent on lobbying. In fact, the only time such prohibition is legally required is when a private foundation grants to a nonpublic charity, such as a 501(c)(4) or labor union. For the vast majority of grants – those made to 501(c)(3) public charities – such language is overly restrictive and may undermine the grantee's ability to effectively and efficiently achieve its goals. If all of a public charity's grant funds were prohibited from being used for lobbying, the grantee may not be able to encourage legislators to support health care reform or State Children's Health Insurance Program reauthorization, reduce water pollution, or encourage the public to contact legislators to ban smoking in bars and restaurants in their community. As a result, critical legislation to improve the health and well-being of communities may be hindered.

WHAT IS LOBBYING?

There are two types of lobbying – direct lobbying and grassroots lobbying. In general, direct lobbying is a communication with a legislator (federal, state, local) or legislative staff member that refers to specific legislation and expresses a view on that legislation. Direct lobbying also includes communications with the general public that refer to and state a position on ballot measures (such as referenda and constitutional amendments). Grassroots lobbying is a communication with the general public that refers to specific legislation, reflects a view on that legislation, and contains a call to action.

PRIVATE FOUNDATIONS

- ***Why the Restrictive Language?*** More often than not, overly restrictive lobbying language is found in grant agreements from private foundations. Any money paid or incurred by a private foundation to carry on propaganda, or to attempt to influence legislation, constitutes a "taxable expenditure" and subjects both the foundation itself and any foundation managers who approve the taxable expenditure to a tax. This effectively prohibits private foundations from engaging in lobbying themselves and means they cannot instruct a grantee to use grant funds for lobbying. Understandably, private foundations are cautious to avoid

making expenditures that result in a prohibitive tax, but caution must be balanced with allowing grantees to be as effective as possible.

➤ ***Funding Public Charities that Lobby.*** While private foundations cannot make grants specifically earmarked for lobbying, they may still fund public charities that lobby. Under federal tax law, private foundations may make two types of grants that avoid creating taxable expenditures for the foundation, even if a grantee uses the funds to lobby. These two grantmaking options – general support grants and specific project grants – provide grantees with flexibility in the use of their funds. Grant agreements for these types of grants do not need to include restrictive language prohibiting lobbying. These two safe harbors, if properly used, allow grantees to use private foundation resources for their projects without sacrificing their ability to lobby and without exposing the private foundation to tax liability.

A general support grant is a grant given to a grantee for its general operating expenses. It is not earmarked for any purpose. The public charity may use the grant funds for any purpose, including lobbying. If the grantee uses the money for lobbying, the private foundation will not incur a taxable expenditure. The prohibition on earmarking does not mean that private foundations must require grantees to refrain from using grant funds for lobbying. A grant is considered earmarked for lobbying if it is conditioned upon an oral or written agreement that the grant be used for lobbying purposes.

Private foundations may also fund specific projects, even those that include lobbying. Before making a specific project grant, the private foundation must receive and review a proposed budget for the project that identifies the project's lobbying and nonlobbying costs. The foundation may give a grant in an amount up to the nonlobbying portion of the budget. The public charity must use the grant funds only for the specific project. If these conditions are met, the private foundation will not incur a taxable expenditure, even if the grantee subsequently uses some of the grant money for lobbying under the designated project.

➤ ***What Should Our Grant Agreements Say?*** There is a big difference between earmarking funds for lobbying and allowing the grantee discretion in how it spends the grant funds. In the grant agreement, a private foundation can state that a grantee can lobby to the extent allowed by law while also stating that the grant is not earmarked for lobbying.

As a general rule, private foundations should not make grants that restrict lobbying. Rather, foundations and grantees will be better served, and fully protected, by the careful application of the safe harbors provided by federal law. Whenever a foundation wants to include lobbying restrictions in its grant agreements, it should first consider the potential benefit for the foundation and the likely impact to the grantee. Unless the potential benefit to the foundation outweighs the impact to the grantee, restrictions should not be imposed.

USE THIS LANGUAGE:

"Grantee will utilize the grant's proceeds only for charitable and educational activities consistent with its tax-exempt status described above. Without limiting the generality of the preceding sentence, Grantee will not … engage in any lobbying not permitted by section 501(c)(3) of the Internal Revenue Code (IRC), or, if applicable, IRC §§ 501(h) and 4911."

Why? This clause means that a public charity can lobby – even with the grant funds – up to its lobbying limits – either under the insubstantial part test or the 501(h) expenditure test. It does not prohibit lobbying but affirms that the grantee will comply with the applicable law.

NOT THIS LANGUAGE:

"Grant funds may not be used to carry on propaganda, to lobby or otherwise attempt to influence legislation."

Why? This clause prohibits the grantee from using any of the grant funds for lobbying.

PUBLIC FOUNDATIONS

Grantmaking public charities, including public foundations, community foundations and women's foundations, may lobby – and may spend money directly on lobbying, subject to generous limits. Since public foundations can lobby themselves, they can allow their grantees to spend their grant funds on lobbying as well. In fact, they can even make a grant specifically to fund lobbying. Such an "earmarked" grant will count against the foundation's lobbying limit (as well as the grantee's lobbying limit when spent). For any grants not specifically earmarked for lobbying, the rules for general support and specific project grants discussed above for private foundations should apply to public foundations as well. For more information about public foundation grantmaking, visit the Alliance for Justice Web site www.afj.org.

Grant agreements should allow grantees to maximize the use of grant funds. Does yours do that?

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