

TAX LAW LOBBYING RULES

Under the federal tax rules applicable to United States private foundations such as the Open Society Institute, an activity is “lobbying” *only* if it involves either a “**direct** lobbying communication” or “**grassroots** lobbying communication.” Both of these terms have extremely narrow, but somewhat technical, definitions. (Note that the following rules apply to OSI-NY-funded activity at any level of government: federal, state, local, and *anywhere in the world.*)

A. Direct Lobbying

“Direct” lobbying is a “communication” with a legislator (federal, state, local, or *non-U.S.*) or legislative staff member which:

(1) refers to *specific pending legislation*, or to a “*specific legislative proposal*”;

AND

(2) “reflects a view” on that specific pending legislation or specific legislative proposal.

Referenda. Communications with the *general public* that both refer to and “reflect a view” on *referenda* or *ballot initiatives* also count as *direct* lobbying, because in those contexts, the public is *itself* the legislature.

Executive branch officials. Most communications with executive branch officials are *not* lobbying for purposes of the tax rules. A communication with an executive branch official is direct lobbying *only* if:

(1) the communication refers to and takes a position on *legislation* (not executive branch enforcement or interpretation action); and

(2) its *primary purpose* is influencing legislation.

Legislation. For purposes of the tax-code definitions of direct lobbying and grassroots lobbying, “legislation” includes:

(1) specific legislative proposals, *even before they have been introduced*;

(2) treaties requiring U.S. Senate ratification, from the time the President begins negotiating the U.S. position with the other treaty parties;

(3) Legislative confirmation of nominations, for example, federal judges and cabinet officials; and

(4) resolutions, even if they have no binding legal effect.

Examples of *direct* lobbying include:

- Meeting with legislators or their staff to discuss specific legislation;
- Drafting or negotiating the terms of a bill;
- Discussing the potential contents of a “Sense-of-the-Senate” resolution with legislators or staff;
- Meeting with officials of an administrative agency to influence the officials’ testimony on a legislative proposal;
- Providing comments to legislators on confirmation of an administration nominee, such as the Secretary of State, unless the comments qualify for the “technical assistance” exception described below; and
- Urging a Presidential or gubernatorial veto; note that legislation is “pending,” even after its passage by the legislature, *until it is actually signed into law*. A vetoed bill returns to the legislature for final legislative disposal.

B. Grassroots Lobbying

“Grassroots” lobbying is defined as a communication *with the public* which:

(1) refers to specific legislation;

AND

(2) ”reflects a view” on that legislation;

AND

(3) includes a "call to action."

Activities that constitute “calls to action” include, *but are not limited to*, the following:

- urging the recipient of the communication to contact a legislator or staffer (e.g. "Tell Congress what you think," "Call your Representative");
- providing the address or telephone number of a legislator;
- providing a petition, tear-off postcard, *etc.* addressed to a legislator; or
- identifying a legislator as opposing the legislation, as being undecided, as being a member of the committee considering the legislation, or as being the recipient’s representative. Identifying the sponsor of the legislation does *not* count as a call to action.

The one circumstance under which communications with the general public may be treated as lobbying communications, **even if they do not contain a call to action**, involves **paid mass media advertisements on highly publicized legislation**. The tax regulations establish a presumption that such paid communications are lobbying if

- (1) they occur within two weeks before a legislative vote;
- (2) they “reflect a view” on the general subject of the legislation; and
- (3) they either refer to the highly publicized legislation or encourage the public to communicate with legislators on the general subject of the legislation.

Legislation is "highly publicized" if the legislation receives frequent coverage on television and radio, and in general circulation newspapers, during the two weeks preceding the vote by the legislative body or committee, and (2) the pendency of the legislation or the legislation's general terms, purpose, or effect are known to a significant segment of the general public (as opposed to the particular interest groups directly affected) in the area in which the paid mass media advertisement appears.

Examples of *grassroots* lobbying include:

- Sending an action alert urging recipients to contact their legislators about a pending bill.
- Attending a coalition meeting to help plan a grassroots lobbying communication addressing pending legislation.

C. **Exceptions to the Tax-Law Definition of Lobbying**

There are five significant *exceptions* to the tax-law definition of lobbying:

- (1) **Nonpartisan analysis and research**. Making available materials that present a sufficiently full and fair exposition of public policy issues to allow the “*public*” (*not* legislators or other potentially interested parties) to form its own conclusions does *not* constitute lobbying, even if the materials both refer to and “reflect a view” on a specific legislative proposal. In general, this exception is intended to include substantial analyses of public policy issues. To qualify for this exception, the material must *not* explicitly encourage recipients to contact legislators (although it may identify legislators as holding a particular position on the legislation) and it must not be distributed only to persons interested in one side of the issue addressed.
- (2) **Self-defense**. Communications with government officials involved in the legislative process do not constitute lobbying for tax purposes if they concern legislation that could affect an organization's existence, powers, duties, tax- exempt status, or right to receive tax-deductible contributions.

- (3) Technical assistance. Oral or written responses to **written** requests for technical assistance from a legislative committee, subcommittee, or other governmental body likewise do not constitute lobbying for tax purposes. In order to qualify for this exception, the written request must be from the committee or subcommittee, **not** from an individual member asking on his own behalf.
- (4) Discussions of broad social issues. Communications addressing broad social, economic, and similar issues are excluded from the tax law definition of lobbying, even if the issues discussed are the subject of pending legislation.
- (5) Jointly-Funded Program. Under this exception, a private foundation will not be treated as having paid or incurred lobbying expenses if the subject of the legislative communications is an old or new program which was or will be jointly funded by the private foundation and the government, **and** the discussions with legislators or legislative staff are undertaken solely to exchange data and information on the subject matter of the program, **and** the private foundation is not directly attempting to persuade government officials or employees to take particular positions on specific legislative issues other than such programs. ***Note: OSI counsel must review all such proposed communications. If such a proposed communication is OKd by OSI counsel, the counsel is required to provide the OSI officer(s) with a letter addressed to the legislators or staff she, he, or they will be seeing. That letter must clearly state that the communications and/or meetings are intended only for purposes that fall within the “jointly funded project” exception. OSI could not meet with legislators solely to urge support for a government project if OSI was not committed to jointly funding the same project.***

D. Determining the Costs of Lobbying Communications

In general, **all** costs related to the preparation and distribution of a lobbying communication must be treated as lobbying expenditures. This includes all **direct** costs -- including an appropriate share of the current and deferred compensation of all participating personnel -- of researching, drafting, reviewing, copying, publishing, mailing, or otherwise distributing the lobbying communication. It also includes an allocable share of **overhead** costs. Grantees may not charge any such costs to their OSI grants.