

MEMORANDUM TO POTENTIAL GRANTEES REGARDING “LOBBYING” UNDER TAX REGULATIONS

Under federal tax regulations, the Open Society Institute and the Foundation to Promote Open Society, as private foundations, cannot and do not engage in or support any “carrying on propaganda, or otherwise attempting to influence legislation” (i.e. “lobbying”) whatsoever. By contrast, potential OSI or FPOS grantees that are public charities may legally engage in a certain amount of lobbying. Therefore, OSI closely reviews grant proposals and grantee reports to ensure that OSI and FPOS funds are not used by grantees to lobby, even if the lobbying by the grantee is permissible.

This memorandum is intended to explain the basic federal tax regulations that define lobbying and the major exceptions to the definition of lobbying. *It is not intended to provide legal advice to grantees.* Rather, these are the definitions and parameters that OSI uses to determine whether a potential grantee’s proposed activity is lobbying, which OSI and FPOS will not support.

This explanation is current as of May 2010, but tax regulations, and the tax authorities’ interpretation of them, are subject to change without notice. OSI is not responsible for any information here that is not accurate or no longer current. Grantees should contact their own lawyers or tax experts for advice on whether any specific activity constitutes lobbying.

A. Definition of Legislation. Lobbying is generally defined as attempting through communications with legislators or the public to influence specific legislation, whether pending or proposed. The legislation can be federal, state, local or foreign. Under the regulations, “legislation” includes all of the following:

- (1) specific legislative proposals, including referenda and ballot initiatives, even if they have not yet been introduced (such as model legislation);
- (2) treaties requiring Senate ratification become “legislation” under the regulations beginning when the Administration begins negotiating the U.S. position with other treaty parties;
- (3) Senate confirmation of Administration appointees (e.g. federal judges and Cabinet-level officials);
- (4) Congressional appropriations; and
- (5) Congressional resolutions, even if they have no binding effect.

B. Types of Lobbying

There are two types of “lobbying” under the regulations: “direct lobbying” and “grass roots lobbying.” Each has a specific and technical meaning.

C. **Direct Lobbying**

Direct lobbying is a communication with a federal, state, local or foreign legislator, staffer or other official participating in the legislative process, that:

- (1) refers to specific legislation; and
- (2) takes a position on that legislation.

Ballot Initiatives and Referenda. Communications with the general public that refer to and take a position on referenda or ballot initiatives constitute direct (not grass roots) lobbying. No “call to action” is required for these communications to be lobbying because in this case, the public is the legislature.

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

- (1) the communication refers to and takes a position on specific legislation (but not executive branch enforcement or interpretation action); and
- (2) the primary purpose of the communication is to influence legislation (e.g., preparing testimony for an executive branch official for hearings on proposed legislation.)

Some 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 testimony on a legislative proposal;
- providing comments to legislators on confirmation of an administration appointee, such as the Secretary of State; and
- urging a Presidential or gubernatorial veto or signing of a bill.

D. **Grassroots Lobbying**

Grassroots lobbying is a communication with the public that:

- (1) refers to specific legislation; and

- (2) reflects a view on that legislation; and
- (3) includes a “call to action” (except in specific cases, when a call to action isn’t necessary to constitute grass roots lobbying).

Some examples of a call to action include:

(a) urging the recipient to contact a legislator or staffer (e.g., “Tell Congress what you think,” “Call your Representative”); or

(b) providing the address or telephone number of a legislator; or

(c) providing a petition, tear-off postcard, other mailing or email communication, addressed to a legislator; or

(d) 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. Note: Simply identifying the sponsor of the legislation does not count as a call to action.

Important exception to the call to action requirement. The one circumstance in which a communication with the general public about specific legislation might be considered lobbying even without a call to action involves paid mass media advertisements on highly publicized legislation. The regulations presume that such paid communications are lobbying if:

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

Legislation is “highly publicized” if it receives frequent coverage on television, radio, and in general circulation newspapers during the two weeks preceding the vote by the legislative house or committee; and (2) the pendency of the legislation or its 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 geographic area where the advertisement appears.

Some 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.

E. Exceptions to the Definition of Lobbying

There are five significant exceptions to the definition of lobbying:

- (1) Nonpartisan analysis and research. It is not lobbying to make materials available that present a sufficiently full and fair exposition of a public policy issue to allow the public to form its own conclusions about the issue. This is true even if the materials both refer to and take a position on a specific legislative proposal. To qualify for this exception, materials distributed to the public may not include a “call to action” and may not be distributed only to people interested in one side of the issue.
- (2) Technical assistance. Oral or written responses to written requests for technical assistance from a legislative committee, subcommittee, or other government body likewise do not constitute lobbying for tax purposes. The response may include facts, analysis and recommendations, even on specific legislation. To qualify for this exception, the written request must be from the committee or subcommittee, not from an individual legislator asking on her own behalf or an informal caucus of legislators, and the response must be provided to all members of the committee or subcommittee.
- (3) Discussions of broad social issues. Communications addressing broad social, economic, and similar issues are excluded from the definition of lobbying, even if the issues discussed are the subject of pending legislation, but the communication may not refer to specific legislation.
- (4) Self-defense. Communications by an organization to officials involved in the legislative process do not constitute lobbying if they concern legislation that could affect the organization’s existence, powers, duties, tax-exempt status or right to receive tax-deductible contributions. This exemption is not transferable and does not apply to grass roots lobbying.
- (5) Jointly funded projects. Discussions with legislators exchanging information about a project that is, or might be, funded by both the organization and the government do not constitute lobbying. This exception does not include discussions of legislative topics other than the jointly funded project. In addition, it applies only to actions taken by the co-funding organization or its agents, not by grantees.

E. 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 research, drafting, review, copying, publishing, mailing, or otherwise distributing the lobbying communication. It also includes an allocable share of overhead costs.

Research is not a lobbying expenditure if its primary purpose is not for a lobbying communication or if the costs were incurred more than six months before the first lobbying use.