



LEGAL DIMENSIONS OF INTERNATIONAL GRANTMAKING

May a Private Foundation Make an International Grant That Includes Political Advocacy?

By Gregory E. Siegler and Gregory L. Colvin

U.S. private foundations may want to pursue a variety of goals in their international grantmaking, including an element of political “advocacy”—encouraging foreign governments to fight disease or poverty, supporting a new national park or opposing a hydroelectric dam overseas, promoting new laws or even entire constitutions in emerging democracies, assisting foreign organizations to protect human rights or to seek “regime change” in their home countries. But is it legal for private foundations to make these grants?

Because there is no body of law created specifically for international grantmaking activities, answering this question requires applying the same laws that govern private foundations domestically to their international grantmaking activities.¹ Most of the relevant rules come from U.S. federal tax law, which were usually not drafted with consideration of how they should apply to international situations.

PRIVATE FOUNDATIONS AND ADVOCACY AT HOME

Like all other charities, private foundations are governed by Internal Revenue (IRS) Code Section 501(c)(3), which restricts only two categories of advocacy activities. First, Section 501(c)(3) bars charities from supporting or opposing candidates for public office (sometimes referred to as *candidate electioneering*). Second, it limits charities’ ability to lobby on specific legislation; for private foundations, Section 4945 extends this to prohibit such legislative lobbying altogether. But Section 501(c)(3) places no restrictions on any advocacy activity that meets neither the definition of candidate electioneering nor that of legislative lobbying—so long as the activity furthers the foundation’s tax-exempt purposes, of course.

This means that a private foundation may be actively involved in shaping public policy, both in its own programs

and through financial support to others. For instance, a private foundation may conduct or fund any of the following activities without violating Section 4945’s ban on lobbying:

- Attempting to influence an administrative agency about its regulations, rulings and other matters that will not come before a legislative body for a vote;
- Communicating with the President, a governor, a mayor or other official or employee of the executive branch of government on decisions that are executive and not legislative;
- Attempting to influence legislators on non-legislative matters, such as conducting investigative hearings or intervening with a government agency, if the issue is one of public policy rather than specific legislation and the principal purpose of the foundation’s communications is not legislative;
- Filing, funding or participating in lawsuits to affect public policy through securing a favorable judicial decision; and
- Communicating with the public (that is, to anyone outside of government) about specific legislative proposals as long as there either is no “call to action” that directly or indirectly encourages the recipient to contact a legislator regarding the legislation or the communication reflects no view on the legislation.

Even when an activity otherwise would be lobbying, one of several exceptions may be available, namely:²

- Conducting “nonpartisan analysis, study or research,” consisting of a sufficiently full and fair exposition of the pertinent facts to enable the study’s audience to form an independent opinion or conclusion and making the results available to the public;

¹ This may not remain true for long. See, for instance, the Fall 2002 *Legal Dimensions* article, “International Grantmaking after September 11: Dealing with Executive Order 13224 and the USA Patriot Act,” by Timothy R. Lyman, Michael G. Considine, and Jennifer L. Sachs; and the subsequently released “U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: *Voluntary* Best Practices for U.S.-Based Charities,” available online at www.treas.gov/press/releases/docs/tocc.pdf.

² Treas. Reg. Sec. 4945-2(d).



- Providing technical advice or assistance to a government body or committee in response to a written request or invitation from that body, so long as the request is made in the name of the committee or agency rather than by an individual member of it;
- Appearing before or communicating to any legislative body on a possible decision of the body that might affect the private foundation's own existence, its powers and duties, tax-exempt status or the deductibility of contributions to it (known as the self-defense exception);
- Conducting an "examination...[or] discussion of broad social, economic, and similar problems," so long as the discussion does not address itself to the merits of a specific legislative proposal; and
- Communicating with government officials about a program that is or may be jointly funded by the foundation and the government.³

Private foundations may also make grants to public charities that lobby without running the risk that the grantee's lobbying activities will be attributed to the private foundation, if the grant agreement between the private foundation and the public charity grantee contains appropriate protective language. A private foundation generally does not need to require its grantees to refrain from lobbying. Rather, the grant agreement should state either that the grant is expressly not earmarked to be used for lobbying or, if a specific project is involved, that the private foundation has relied on the project budget provided by the grantee and the budget shows that the expected non-lobbying expenditures are higher than the foundation's proposed grant (sometimes referred to as a "McIntosh" grant).⁴

ADVOCACY "OVER THERE"

A U.S. private foundation grant for an international purpose usually takes one of three forms. First, it could be a grant to a U.S. public charity, either for direct support of the public charity's own activities abroad or for the public charity to re-grant to support the charitable work of a foreign recipient. Second, a private foundation might make a

documented equivalency determination that an overseas grant applicant is the foreign equivalent of a U.S. public charity, in which case the private foundation may treat the foreign recipient essentially as it would a U.S. public charity grantee. Third, a private foundation may make a grant to an organization or individual it does not know to be the equivalent of a U.S. public charity if the private foundation follows the monitoring and oversight rules that make up expenditure responsibility.

Some international advocacy activities are not permissible for private foundations regardless of the form its grant would take. For instance, Section 501(c)(3)'s electioneering prohibition would preclude a private foundation from supporting a candidate's campaign to become President of France or supporting peace candidates for the Israeli Knesset.

Likewise, making a grant to support an activity that violates other U.S. laws is not permitted under federal tax law (not to mention whatever other laws it is violating), in part because illegal activities are contrary to public policy and therefore are not conducted for the purpose of providing a public or charitable benefit (the "illegality doctrine"). The government's recent efforts to eliminate diversions of charitable funds to support terrorism have expanded the categories of international activities that violate U.S. law.⁵ But when the potentially illegal activity involved is one of nonviolent civil disobedience, the IRS has to balance the maintenance of public order against First Amendment speech and association protections. The line the IRS has drawn in doing so has generally been to permit charities to support or engage in protests, demonstrations and picketing, if it is in furtherance of their tax-exempt missions, so long as those activities do not violate the law.⁶

A different question is presented by a private foundation's funding of an activity that would be legal in the United States but would violate the law of the foreign country where it is carried out. An example might be the granting of personal computer equipment to libraries or schools in nations whose governments would rather their citizens had no Internet access, and so, restricted the import of computer technology. Such philanthropy might

³ Treas. Reg. Sec. 53.4945-2(a)(3).

⁴ Treas. Reg. Sec. 53.4945-2(a)(6), based upon an earlier IRS private letter ruling issued to the McIntosh Foundation, PLR 7810041.

⁵ See Note 1, above.

⁶ See IRS Gen. Couns. Mem. 34631 (Oct. 4, 1971).



contravene the illegality doctrine and could present very real, practical concerns to the people carrying out the program and conceivably even could affect U.S. diplomatic relations with the country involved.

As for legislative lobbying, whether a private foundation may consider funding an international project that includes lobbying is affected by which of the three forms the proposed grant would take. If the grant would go to a U.S. public charity or a foreign public charity equivalent, the McIntosh rule discussed above applies. If the grant is made with expenditure responsibility, the private foundation grantor must explicitly prohibit the recipient from using any of the grant funds for lobbying or in connection with any specific public election or voter registration drive.⁷ But the IRS defines lobbying in a technical way that may not apply at all if the body that ultimately would act on the given proposal does not meet the tax regulations' definition of "...the Congress, any state legislature, any local council or similar legislative body [excluding any executive, judicial or administrative body] or...the public in a...[ballot measure] or similar procedure."⁸

CONCLUSION

So for any contemplated international grant designed for an advocacy purpose, a private foundation must ask and answer the following questions: Would making the grant further our exempt purposes? Would the grantseeker's proposed activity violate U.S. law or public policy or that of another country? Would it constitute candidate electioneering? Would it involve legislative lobbying, as opposed to, for example, calling for an executive, administrative or judicial action? If legislative, would it qualify for one of the exceptions to the lobbying definitions? If it must involve lobbying, would we be using expenditure responsibility, which would make such a grant impossible? Or is the grantee a public charity (or foreign equivalent) that has submitted a project budget upon which we can rely and apply the McIntosh rule? Little in this analysis differs from the questions a foundation must ask about any domestic advocacy grant it considers.

Each case depends on the specifics proposed. Assuming that a grant would be in furtherance of the foundation's exempt purposes, one of the main questions to ask would likely be whether the grantee's proposed activity would meet the IRS definitions of lobbying on specific legislation. For instance, the action being sought might be a decision by an official entity (perhaps a court, a politburo, even a military dictatorship) not described by the IRS regulations as a "similar legislative body."

This is rather uncharted territory. So far, the IRS has not issued any guidance on what would constitute a similar legislative body outside of the United States. It seems certain that a parliamentary body (e.g., in the United Kingdom) would be seen as similar to the U.S. Congress, but other bodies may not. In the United States, legislative bodies at the national, state and local levels include Congress, state legislatures, county and city councils and Indian tribal councils. These entities are democratically elected and have general law-making power throughout their jurisdictions. The IRS regulations are clear that special-purpose bodies, whether elected or appointed, such as school, transportation or water boards, are not legislative bodies,⁹ and therefore, private foundations are free to lobby them. This distinction should apply abroad, as well.

If it is possible to identify the bodies exercising general lawmaking authority at the national and local levels in a particular country, there is still the further question of whether they are similar to a legislature in the United States. If they are not democratically elected or are advisory only, with real power located in the executive branch or in the military, a religious body or political party, it is at least arguable that no "similar legislative body" exists. In that circumstance, U.S. private foundations would be free under U.S. tax law to influence the other country's lawmaking process without limitation.¹⁰

Presumably, in a country where leaders are appointed, anointed or installed by military coup, Section 501(c)(3)'s prohibition against charities' electioneering for or against candidates likewise would not apply, and U.S. private foundations could intervene in those non-electoral selection

⁷ Treas. Reg. Sec. 53.4945-5(b)(3)(iv).

⁸ Treas. Reg. Sec. 56.4911-2(d) (italics added), as applied to private foundations through Sec. 53.4945-2(a).

⁹ Treas. Reg. Sec. 56.4911-2(d)(3) and (4), as applied to private foundations through Sec. 53.4945-2(a).

¹⁰ Although the country may have its own legal restrictions on foreign lobbyists.



processes, again, without limitation under U.S. tax law.

The result is an ironic, but perhaps logical, implication of our American preference for democratic process: our private foundations are free to influence the making of laws and the selection of leaders in foreign dictatorships, but somewhat constrained from intervening where democratically elected representative bodies and governing executives are in place. The policy underlying the U.S. tax laws' restrictions on charitable advocacy seems to be to restrain charities (as recipients of "tax-subsidized" deductible contributions), and specifically, private foundations (as concentrations of wealth) from using those resources to influence

the will of the people, expressed directly or through their elected representatives—but only where popular democracy exists.

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