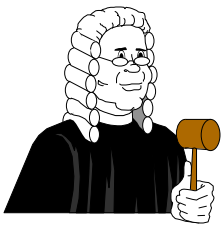

It's The Law

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The Restrictions On The Use Of Grant Funds For Lobbying And Other Political Activity

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Overview

Not too surprisingly, Federal laws, regulations, and Office of Management and Budget (OMB) Circulars control the use that can be made of Federal funds for political activity. From time to time, questions have arisen within the Department of Commerce (DoC) about what constitutes political activity – especially lobbying – and how award funds may be used. This edition of It's The Law" discusses the laws, regulations, and administrative guidelines that govern the use of Federal funds for the purpose of lobbying, grass-roots organizing, or other political activity by financial assistance recipients.[1]

A. Appropriations Acts Limitations

A series of statutes in which political activity is addressed in a general way is in the appropriations acts of Federal departments, with a prohibition against the use of funds for "publicity or propaganda." For example, the DoC's FY 1999 appropriation statute contains the following language: "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."[2] The terms "publicity" and "propaganda" are not defined, but instead have typically been applied by administrative interpretation. For many years, it was unclear whether this provision was applicable to Federal grantees. However, in November 1981, the Comptroller General concluded that "Federal agencies and departments are responsible for insuring that Federal funds made available to grantees are not used contrary to [the publicity and propaganda] restriction." [3] The

[1] A general prohibition against using appropriated funds to lobby appears at 18 U.S.C. §1913. It prevents Federal employees from lobbying Congress on behalf of legislation. However, it has typically been applied only to Federal agencies and their employees and is therefore outside the scope of this discussion. *See Grassley v. Legal Services Corp.*, 535 F.Supp. 818 (S.D. Iowa, 1982).

[2] P.O. 105-227, §601.

[3] B-202975 (Nov. 3, 1981). This matter involved the Los Angeles Downtown People Mover Authority, which had received a grant from the

Comptroller General has further interpreted the publicity and propaganda restrictions to be limited to lobbying the United States Congress, not to lobbying at the state level.[4]

B. Byrd Amendment (31 U.S.C. §1352).

The "Byrd Amendment" is more specifically directed at the use of Federal funds awarded through a financial assistance instrument than the statutes mentioned above. It was enacted in 1989, and OMB issued guidance on implementation of the law, requiring each agency to adopt a common regulation. The DoC's adoption of the common rule appears at 15 C.F.R. §28.

The Byrd Amendment requires organizations requesting or receiving Federally-appropriated funds to certify that they have not and will not use Federally-appropriated funds for purposes of influencing or attempting to influence the Government's decision regarding a Federal contract, grant, loan or cooperative agreement. This legislation also requires organizations receiving funds over $100,000 to disclose the names of registered lobbyists who, using non-appropriated funds, have made contacts regarding Federal awards. If non-appropriated funds are used to pay an employee's salary who isn't a registered lobbyist, disclosure is not required even if that employee engages in actions that constitute lobbying under the statute.[5]

C. The Lobbying Disclosure Act of 1995 (2 U.S.C. §§1601-1607).

The Lobbying Disclosure Act of 1995 (LDA) expanded on the definition of "lobbying," and created a new scheme for disclosure of lobbying activity. The revisions still prohibit using Federal funds for lobbying activities, however, the LDA revised the Byrd Amendment by reducing the amount of information that must be disclosed. Organizations are no longer required to disclose the amount of money spent on lobbying activities, or to describe the specific lobbying activities. For grants and cooperative agreements, lobbying expenditures must be disclosed once they reach $100,000. If an organization makes a prohibited expenditure or fails to file the required certification and disclosure, it is subject to a civil penalty of up to $100,000.

The LDA revisions were effective for awards made on or after January 1, 1996. The LDA also provides that tax-exempt organizations with an Internal Revenue Code section 501(c)(4) status, that engage in lobbying activities, are ineligible to receive Federal awards (effective January 1, 1996). Those organizations that have 501(c)(4) status are generally referred to as "social organizations," i.e., civic organizations and volunteer fire departments.

For purposes of the LDA, "lobbying activities" include: lobbying contacts

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Department of Transportation. The grantee, fearing that it would lose its funding, distributed a letter urging readers to contact their representative in Congress to support continued funding for the project. The Comptroller General found that the letter, to the extent that it was produced with grant funds, violated the publicity or propaganda restriction.

[4] B-214455 (Oct. 24, 1984); B-206466 (Sept. 13, 1982).

[5] *Helmets Limited*, 71 Comp. Gen. 281 (Feb. 28, 1992); *Construcciones Aeronauticas*, 71 Comp. Gen. 81 (Nov. 14, 1991).

and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.[6]

A "lobbying contract" is virtually any substantive communication made to a "covered executive (or legislative) branch official." The LDA defines a "lobbying contact" as: any oral or written communication (including an electronic communication) to a covered executive or legislative branch official made on behalf of a client regarding the formulation, modification or adoption of Federal legislation, legislation proposals, rule regulation, executive order, ay other program, policy or position of the U.S. Government; the administration or execution of any Federal contract, grant, loan, permit or license.[7]

"Lobbying contact" does not include a communication: made on a public official acting in his/her official capacity; made by a representative of a media organization for the purpose of gathering and disseminating information through mass communication mediums; made on behalf of a foreign government, or political party and disclosed under the Foreign Agents Registration Act; requesting a meeting, status of an action, or other similar administrative request; made in the course of participation in a Federal Advisory Committee Act action; involving testimony given before a committee, subcommittee or task force of Congress; provided in response to a written request by a covered executive branch official; required by a subpoena; in response to a notice in the *Federal Register* soliciting communications; or made in compliance with written agency procedures regarding an adjudication matter.[8]

D. Cost Principles-OMB Circulars A-21, A-87 and A-122

The three OMB circulars setting out cost principles[9] each contain a section that pertains to the use of financial assistance funds for the purpose of lobbying. Under "Lobbying" in Circulars A-21 (Section J. 24) and A-122 (Attachment B, Section 21), there are prohibitions against using award funds to influence Federal elections and legislation, or urging others to do the same thing.[10] Circular A-87 (Attachment B, Section 27) does not contain the restrictions detailed in Circulars A-21 and A-122,

[6] 2 USCS §1602(7).
[7] 2 USCS §1602(8)(A).
[8] 2 USCS §1602(8)(B).
[9] OMB Circular A-21, "Cost Principles for Educations Institutions"; OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments"; and OMB Circular A-122, "Cost Principles for Nonprofit Organizations."
[10] The pertinent section of OMB Circular A-122, Attachment B, Section 21, **Lobbying**, prohibits the use of funds (1) to influence or assist campaigns for Federal, State or local election, referendum, etc.; (2) to assist political parties, political action committees, or other organization established to influence elections; (3) to attempt to influence the introduction or enactment of Federal or state legislation through contact with legislators or their employees; (4) to attempt to influence the introduction or enactment of Federal or state legislation through contact with legislators or their employees though grass roots "publicity or propaganda"; (5) to carry out activities such as gathering information regarding legislation or analyzing the effects of legislation, when they are carried out in knowing preparation for an effort to engage in unallowable lobbying.

The provisions in A-21 are substantially the same.

but instead notes the provisions of the Common Rule, "New Restrictions on Lobbying," which implements the Byrd Amendment.[11] Circular A-21 also contains a reference to the Byrd Amendment.

With regard to lobbying at the state and local governmental levels, Circulars A-21 and A-122 contain a prohibition against trying to influence state and local elections and state legislation. Circular A-87 does not contain such a prohibition. It does, however, prohibit membership in organizations "substantially engaged in lobbying" (which would presumably include lobbying at the state or local levels).[12] Thus, non-governmental recipients may not use Federal funds to lobby state governments, However, State, local and Indian tribal governments do not appear to be precluded from using Federal funds to lobby at the state and local levels. Nevertheless, it is unclear how a state agency recipient could justify using award funds to lobby the executive branch of the state government.

E. Examples

There have been a number of questions that have arisen in DoC in the last several years pertaining to use of financial assistance funds for lobbying about which the Federal Assistance Law Division has offered opinions.

Example 1. A DoC program funds a number of organizations throughout the country which carry out similar activities in their geographic region. These recipients agree to provide funding for an independent organization to organize conferences and training and facilitate the transfer of information among the members. If the membership dues the recipients pay are charged to the financial assistance awards they receive, can the organization engage in an effort to encourage Congress to provide more money for the program?

Answer: The cost principles allow Federal funds to be used to pay membership fees.[13] As discussed above, in general they prohibit use of Federal funds for lobbying.[14] The Byrd Amendment restrictions are limited to using Federal funds to lobby Congress with regard to a particular award. However, the publicity and propaganda restrictions in the DoC Appropriations

[11] OMB Circular A-87, Attachment B, Section 27, **Lobbying** states: "The cost of certain influencing activities associated with obtaining grants, contracts, cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants contracts, cooperative agreements and loans shall be governed by the Common Rule, "New Restrictions on Lobbying" published at 55 FR 6736 (February 26, 1990) , including definitions, and the Office of Management and Budget "Government-wide guidance for New Restrictions on Lobbying" and notices published at 54 FR 52306 (December 20, 1989), 55 FR 24540 (June 15, 1990), and 57 FR 1772 (January 15, 1992, respectively."

[12] The phrase is not defined in the Circular. The Lobbying Disclosure Act of 1995 may provide a benchmark, however, with its provision that a lobbyist is someone who spends 20% or more of his or her time on lobbying for the employer. Perhaps, analogously, an organization spending 20% or more of its time or budget on lobbying is so "substantially engaged in lobbying" as to trigger the A-87 provision.

[13] The pertinent sections are Circulars A-21, Section 28, Circular A-87, Section 30 and circular A-122, Section 25.

[14] The prohibition in Circulars A-21 and A-122 is very broad, that in Circular A-87 is more constrained in its reference to the Byrd Amendment and with a prohibition against joining an organization "substantially engaged in lobbying."

Act provides additional constraints on recipients covered by Circular A-87. This would apply to both "grassroots" lobbying (encouraging the public to express their views to Congress) or direct lobbying of members of the legislative and executive branches.

Since it is known that one of the activities of the organization is lobbying, the portion of the membership dues that would go to lobbying would constitute a violation of the Appropriations Act prohibition against publicity and propaganda and result in the unallowability of these costs under the costs principles. If the membership dues for an organization could be reduced by the amount spent on lobbying, that might address the concern. However, this might not dispose of the issue if the organization essentially receives all of its funding from organizations which themselves receive Federal support. Reducing the amount of dues in that case would simply reduce the overall budget, so that some percentage of the remaining budget will still go to lobbying, which would, therefore, be supported by Federal funds. In such a case, it may not be possible to use Federal funds at all to pay membership dues.

The restrictions discussed above pertain to use of funds from Federal awards. If the organization paid the membership dues from non-Federal and non-cost share funds, the issue is avoided completely. Cost-sharing funds cannot be used because they are subject to the same provisions under the Circulars as are Federal funds. If the recipient has no other source of funds besides the Federal award and the required cost share, then it would not be able to join an organization involved in lobbying unless the lobbying organization itself could segment out its lobbying costs and not include those in the membership fee.

Example 2. A citizen uses a computer workstation in a public library to send an electronic message to express an opinion on a political issue to a member of Congress or any elected official. Consider the case where the computer workstation and access to the electronic mail service are supported by grant funds.

Answer: In this situation, where the grantee has done nothing to encourage individuals to contact members of Congress, and has not set up a specific bulletin board for the purpose of providing information on where a user can write to express an opinion on a piece of pending legislation, in our opinion the grantee is not using grant funds for lobbying activities. This is a case where the grantee has no control over what users are disseminating over the network.

Example 3. The same citizen uses the same service to send electronic mail messages to other individuals urging them to contact their elected officials and express their opinions on a political issues.

Answer: Again, as with Example 2, in our opinion the grantee cannot control everything that is being disseminated by individual users over the network. Therefore, the grantee would not be using grantee funds to lobby.

Example 4: A recipient uses grant funds to provide an information service to non-profit organizations. Subscribers use this service to post bulletins of

interest to other users of the service. Some of these bulletins urge readers to contact their elected officials and express their opinions on political issues or pending legislation.

Answer: Here the grantee may need to warn individuals that the network is not intended to be used to encourage users to contact their Federal and state elected officials to express their opinions on political issues or pending legislation. If the grantee in any way gives approval before the bulletins are posted on the network, there may be an appearance of sanctioning or promoting this type of activity. Otherwise, it would likely be difficult to show that the grantee had control of the bulletin board's content and the grantee could show it took steps not to sanction or encourage such activity.

Example 5. In the case of the service provided in Example 4, the service provider (the grantee) designs its service to include a special section for bulletins related to political activity.

Answer: This is a gray area. To the extent the recipient is providing a bulleting board announcing political events or activities, and there is no encouragement by the grantee or the individual who posted the bulletin to write a member of Congress about pending legislation or to attend the activity, such bulletin board should be an allowable cost under the award.

However, if the grantee is providing a bulletin board where individuals will be encouraged to write members of Congress or state legislators regarding pending legislation, or providing a chat room for political activities, encouraging people to contact their members of Congress, the grantee may appear to be sanctioning or encouraging grassroots lobbying, in violation of Circular A-122.

Example 6: A recipient uses grant funds to provide an information service to non-profit organizations. The users of this service exchange electronic mail communications about a particular policy issue. The subscribers use this service to edit a policy statement that, once completed, is mailed by one of the subscribers through the Postal Service to a member of Congress.

Answer: Another gray area. Although the stated intent is simply to provide an exchange medium for policy issues and the policy statement is not transmitted over the network, such an exchange forum may have the appearance that the grantee was supporting the preparation of an effort to engage in unallowable lobbying.

Example 7: A recipient uses grant funds to develop a network that is used to collect data on the use of certain social services. Without using grant funds, the grantee uses the data generated by the network to support an opinion expressed to a member of Congress.

Answer: The answer to this example would depend on what the purpose was in gathering the data. As noted in Example 6, if it was to gather the data to support unallowable lobbying, then those costs would be unallowable. However, if it was for some other informational purpose, and a user took advantage of the information and used it to support an opinion expressed to a

member of Congress about proposed or pending legislation, this would not result in disallowed costs for the grantee. The grantee would not have control of the information if it was downloaded from the network.

Conclusion

As the above discussion makes clear, it is not always easy to know what is allowable with regard to the use of Federal financial assistance in situations in which political activity is involved. Any questions on these types of issues should be addressed to the Federal Assistance Law Division at (202) 482-8035.