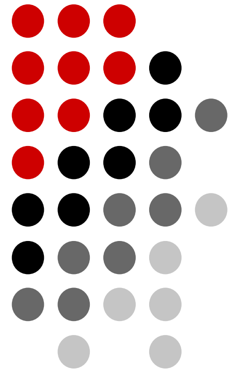

Northern California Grantmakers

Public Policy Committee

The Private Foundation's Guide to the California Initiative Process

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I. Introduction

Perhaps more than in any other state, and at both the state and local level, Californians make crucial public policy decisions through ballot measures. When citizens are the legislators, the quality of policymaking depends on the depth of voters' knowledge of the issues and their understanding of the measures put before them.

In California, the ballot initiative process casts citizens as powerful legislators.

Many private foundations and their grantees wish to help voters make wise policy decisions by expanding their knowledge of the issues at stake and the effect that ballot measures would have if enacted. Grantmaking in this arena can be intimidating, however. Federal tax law generally prohibits private foundations from supporting lobbying activities, and urging voters to support or oppose ballot measures is considered "lobbying" under federal tax rules. In addition, few grantmakers are familiar with the provisions of California's Political Reform Act, which governs registration and disclosure of ballot measure campaign financing. The result has been a persistent reluctance among many private foundations to get involved in ballot measures.

This Guide seeks to clarify two distinct legal frameworks applicable to private foundations participating in educational activities relating to ballot measures: the Internal Revenue Code provisions restricting lobbying activity by private foundations, and the California Political Reform Act provisions that govern the disclosure obligations of participants in ballot measure campaigns. Most importantly, this Guide addresses how these two legal frameworks intersect in practice. By outlining these two legal frameworks and flagging the issues created by their overlapping application, this Guide is intended to help private foundations and their legal counsel to more confidently navigate the decisions they will face when working in the ballot measure arena.

In this Guide:
- *IRS lobbying regulations*
- *California ballot measure campaign laws*
- *The intersection where tax and campaign law meet*

Funding public policy advocacy—from policy research and analysis, to public education campaigns, to engaging in or funding direct advocacy—represents an extremely effective way to leverage foundation resources for long-term systemic change. While the tax-exempt status of private foundations entails certain restrictions on lobbying activities, important opportunities remain for private foundations to participate in public policy questions, including those raised by ballot measures.

California's ballot initiative process is part of a dynamic democratic system. The decisions voters make in a direct democracy system are based on the information available to them—whether good or bad, complete or incomplete. Private foundations can play a legitimate and significant role in the ballot measure process, without jeopardizing their tax-exempt status, by funding nonpartisan analysis of ballot measures and public education campaigns about policy issues; they can also support the diverse array of public charities that play a vital role in enriching the public debate and broadening participation in California's ballot measure process.

Private foundations can play a legitimate and significant role in the ballot measure process without jeopardizing their tax-exempt status.

Organization of this Guide

Some readers of this Guide will find detailed legal rules and analysis valuable; others may be looking for general overview of the legal issues that private foundations face in the ballot measure arena. This Guide attempts to serve both audiences.

The main body of the text provides an overview of the issues and discusses practical strategies. Part II discusses the California ballot measure process and the role of private foundations. It includes a brief introduction to the disclosure requirements of the Political Reform Act and the lobbying rules applicable to private foundations. Part III discusses the implications for private foundations funding or engaging in activities that must be reported under the Political Reform Act. Part IV lists some strategies for private foundations that wish to fund or engage in activities related to ballot measures that are both not lobbying for tax purposes *and* that do not create reporting obligations under California campaign finance laws. Finally, Part V concludes with some "take away" thoughts about engaging in the ballot measure arena.

The more detailed legal rules and analysis are found in the appendices. Appendix A provides an overview of the federal tax rules applicable to private foundation lobbying, while Appendix B summarizes the provisions of the California campaign finance disclosure laws that relate to ballot measure campaigns. Appendix C discusses five detailed hypotheticals that illustrate the legal framework discussed in this Guide. Finally, Appendix D is a reprint of an article discussing an actual case study of an effective and influential public education campaign about a ballot measure funded by a private foundation.

The main body of the report is an overview of issues and practical strategies. Detailed legal analysis is found in the appendices.

How you read this Guide will depend on your needs and your existing level of knowledge. Some readers will start with the main text to get an overview, and then read the appendices to get a deeper understanding of the legal framework within which private foundations

operate. Those who learn best by example may want to study the illustrations in Appendix C and the case study in Appendix D first, and then go back to legal summaries of tax and campaign finance law to the extent necessary; others will prefer to review the legal rules in Appendices A and B first, and then move on to the hypotheticals that discuss their application. Readers already familiar with either the applicable tax or campaign finance rules may skip the related appendix entirely. Others may want to focus on the appendices, where the substantive legal framework is discussed in detail.

Limits to this Guide

Although this Guide provides an overview of the relevant laws, it is not intended to be legal advice, and cannot substitute for legal counsel. We hope this Guide will help you to understand what facts might be important and what issues can arise; but the legal consequences depend on the particular facts of each situation. Many of the issues are potentially complex because there are so many factual variables, changes in any one of which could change the legal result. Also, this Guide gives a general overview of tax and disclosure laws, but for brevity's sake, many important details and nuances have been omitted. For example, the specifics of the campaign reporting requirements—including when, where, and how to file disclosure reports—are not covered. Many reporting requirements are time sensitive and thus should be considered prior to engaging in any potentially reportable activity.

Finally, ballot measure campaigns can sometimes become intertwined with candidate elections. If a particular ballot measure becomes closely identified with one candidate or political party, or if a candidate or party controls the committee promoting or opposing a measure, Section 501(c)(3) organizations must take extra care in planning and documenting their own activities to prevent any appearance of intervening in the candidate election, since electioneering with respect to candidates is strictly prohibited for Section 501(c)(3) organizations. Mentioning candidates or office holders in communications about ballot measures or coordinating activities with candidates or office holders can also implicate federal or state campaign finance laws. While these concerns should not prevent private foundations from engaging in ballot measure activities, these other bodies of law must be considered in some situations that are not addressed in this Guide.

501(c)(3) organizations must avoid intervening in candidate elections.

Before undertaking any particular project, private foundations should consult attorneys with the requisite expertise; this may require both a tax attorney knowledgeable about tax-exempt organizations in general and private foundations specifically, and an election law specialist versed in California campaign finance laws.

Guide for Private Foundations

This Guide is written for charitable organizations that are exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, and classified as "private foundations" under Section 509(a) of the Code. When we use the phrase *private foundation*, we mean this type of nonprofit organization.

This is a Guide for private foundations. A separate NCG Guide outlines the advocacy opportunities available to public foundations.

We use the term *public charities* to mean charitable organizations that are exempt under Section 501(c)(3) of the Internal Revenue Code, but classified as "not private foundations" under Section 509(a). As most private foundation managers know, public charities are less stringently regulated under the tax laws than private foundations, and in particular the lobbying rules differ. While some sections may be relevant, this Guide is not addressed to a public charity audience.

The classification of Section 501(c)(3) charities as either private foundations or public charities does not depend on whether the organization is a grantmaker, nor does it depend on whether the word "foundation" appears in the organization's name. Community foundations are public charities, for example, and some museums are private foundations. If you do not know if your charitable organization is a private foundation, consult your legal advisor.

II. The Ballot Measure Process

The California Constitution reserves to the voters the powers of initiative and referendum through the use of citizen petition. Initiatives enable voters to adopt statutes or constitutional amendments. The more rarely used power of referendum enables voters to reject laws enacted by the legislature. Both types of measures are qualified for the ballot through the gathering of signatures of registered voters. State law confers similar powers on the voters of California cities and counties to adopt or reject ordinances through the initiative and referendum process.[1]

*A **ballot measure** could be an initiative, referenda, constitutional amendment, or bond measure, at either the state or local level.*

In addition to initiatives and referenda placed on the ballot by voter petition, California law also permits the legislature to place measures on the ballot. Both amendments to the California Constitution and state bond measures require voter approval, and statewide ballots frequently include measures put before voters by legislation rather than petition. Local boards of supervisors and city councils have similar powers to put measures on the ballot.

We use the term *ballot measures* to refer to initiatives, referenda, constitutional amendments, and bond measures, at both the state and local level, placed on the ballot by either legislation or petition. We do not include recall campaigns in this category, however. The power to recall elected officials is also reserved to voters by the California Constitution, but recalls involve a different set of issues for private foundations because federal tax law prohibits Section 501(c)(3) organizations from intervening in campaigns on behalf of (or in opposition to) candidates for public office. Therefore, this Guide only addresses ballot measures which address legislative issues.

The California Political Reform Act

The Political Reform Act, which was adopted through the initiative process in 1974, requires detailed public disclosure of the role of money in California politics. In the ballot measure arena, the Political Reform Act requires the disclosure of contributions and expenditures made in connection with campaigns to support or oppose both state and local measures. This law is a sunshine statute—it requires public reporting of the sources of funding for ballot measure campaigns. The Act does not limit ballot measure spending[2];

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[1] In addition, some cities and counties are governed by their own "charters," akin to a local constitution; such charters may grant additional initiative and referendum rights to voters and may require voter approval of charter changes.

[2] There is one exception to this general rule; the Political Reform Act prohibits ballot measure contributions or expenditures by foreign nationals.

Californian individuals and organizations can spend as much as they choose on ballot measure campaigns as long as they comply with the applicable reporting obligations.

In general, reporting obligations are triggered under state campaign disclosure laws by making contributions to ballot measure campaigns, receiving contributions for ballot measure campaigns, and making independent expenditures urging voters to adopt or reject a measure (although certain dollar thresholds must be met before reporting obligations are triggered).

Actions that trigger reporting:
●Making contributions to ballot measure campaigns
●Receiving contributions for ballot measure campaigns
●Making independent expenditures urging voters to adopt or reject a measure

Contribution has a broad and multi-faceted meaning under the Political Reform Act and the regulations interpreting it. It can mean a transfer of money or property for the purpose of supporting or opposing a ballot measure, or with the knowledge that the transferred money will be used for that purpose. It can also mean the provision of services or office space to a ballot measure committee, or payments for activities that are done at the behest of or in coordination with a ballot measure committee. An *independent expenditure* is a payment for a communication to the public that expressly advocates the qualification, passage, or defeat of a ballot measure, and which is not made at the behest of a ballot measure committee.

In this Guide, we use the term "contribution" only for payments that meet the definition of a contribution to a ballot measure committee under the Political Reform Act; similarly, the term "independent expenditure" is used only as it is used in the Act, to describe payments for communications urging voters to sign or not sign a petition, or to adopt or reject a measure. Together, making contributions, receiving contributions, and making independent expenditures are *reportable ballot measure activity*, i.e., activities that have to be reported on forms filed with the Secretary of State if the applicable dollar thresholds are met.

Further information

A summary of California's campaign finance disclosure rules for ballot measures can be found in Appendix B to this Guide.

The definitions of *contribution* and *independent expenditure* under the Political Reform Act are discussed in Appendix B at pages 43-45.

Disclosure requirements for reportable ballot measure activity are discussed in Appendix B at page 47.

The Role of Nonprofit Organizations

Nonprofit organizations often play major roles in campaigns to pass or defeat ballot measures. While individuals and businesses may set out to gather signatures or broadcast radio commercials on their own, typically ballot measure supporters and opponents organize themselves into, align themselves with, or contribute their time and money to, coalitions, committees, and other nonprofit organizations that are involved in the debate.

Ballot Measure Committee *refers to any group that is devoted to enacting or defeating a single measure.*

When a controversial measure is on the ballot, it is common for new organizations with names like "No on Measure C" or "Yes on Proposition 47" to spring up for the sole purpose of supporting or opposing the measure. In this Guide, we use the term *Ballot Measure Committee* to refer to any group that is devoted to enacting or defeating a single measure. Ballot Measure Committees may be created informally, as unincorporated associations, or may be established more formally as California nonprofit public benefit corporations or limited liability companies.

For federal tax purposes, they will usually qualify as tax-exempt "social welfare" organizations under Section 501(c)(4) of the Internal Revenue Code, a status which allows unlimited lobbying on public policy issues but does not permit donors to claim income tax charitable deductions for their contributions. Under the California Political Reform Act, all state Ballot Measure Committees must file periodic reports with the Secretary of State disclosing their receipts and expenditures; local Ballot Measure Committees file with the local filing officer.

Other nonprofit organizations with broader and longer-term missions also get involved in ballot measure campaigns. These include trade or professional associations and unions, which are exempt from federal taxes under Sections 501(c)(6) and 501(c)(5) of the Internal Revenue Code, respectively. Both business and labor organizations can, consistent with their tax exemption, engage in unlimited lobbying in support of their missions. Established issue advocacy organizations that are exempt Section 501(c)(4) social welfare organizations also participate in ballot measure campaigns.

Public charities may be significant players in ballot measure campaigns. A forthcoming NCG Guide outlines what public charities can and cannot do in greater detail.

Occasionally candidate committees, formed to support or oppose the election of candidates for public office, get involved in ballot measures; these candidate committees are usually tax exempt under Section 527 of the Internal Revenue Code. All of these types of organizations may have to file reports under the Political Reform Act if they engage in reportable ballot measure activity.

Of most interest to private foundations, however, is the role that Section 501(c)(3) public charities play. Public charities' operations are often deeply affected by ballot measures through the constituencies they serve, and groups that never engaged in public policy activities may resolve to actively support or oppose a measure that would, if passed, impact their work.

Public charities may engage in lobbying activities within certain limits; consequently, public charities may be significant players in ballot measure campaigns. Their efforts may include:

- Researching the need for, or prospects of, a ballot measure, and participating in the drafting of the proposed law
- Testifying at legislative hearings about proposed ballot measures
- Making contributions (in cash or in kind) to a Ballot Measure Committee or to another nonprofit actively engaged in ballot measure activities
- Undertaking independent actions to gather signatures to put a measure on the ballot, or to advocate the passage or defeat of a measure
- Soliciting contributions to be used to support or oppose a ballot measure (with such contributions either received by the soliciting organization to fund independent expenditures, or contributed directly by donors to Ballot Measure Committees)
- Publicly endorsing a ballot measure or taking a public stance advocating its defeat
- Organizing coalitions to work on ballot measure issues
- Engaging in research or polling about ballot measure issues, or the ballot measure itself
- Disseminating public information about the contents of the ballot measure, the issue it addresses, or the identity of its proponents and opponents
- Holding public debates or hosting speakers about ballot measures
- Engaging in public education on social issues and policies addressed by ballot measures
- Post-passage implementation and evaluation
- Post-passage legal challenges

If a public charity engages in reportable ballot measure activity, it must file public disclosure reports as mandated by the Political Reform Act. State disclosure rules may require that a charity report expenditures it incurs to make contributions or independent expenditures in ballot measure campaigns; in addition, a public charity may have to disclose contributions it receives for ballot measure activity.

While public charities may lobby, federal tax law limits the amount of lobbying they can do. Therefore, public charities with a strong interest in a particular ballot measure may limit the involvement of the public charity itself, and (either alone in cooperation with other organizations) create a Ballot Measure Committee as a vehicle for the charity's donors and volunteers to get more involved. Segregating the ballot measure activity into a separate legal entity helps the public charity keep its lobbying within appropriate limits; it also may simplify recordkeeping and reporting of ballot measure activity.

Further Information

The restrictions on public charity lobbying are discussed in Appendix A at pages 28-29.

Campaign finance reporting obligations are discussed in Appendix B at page 43-52.

Additional information about campaign finance reporting obligations is available on the web sites of the California Fair Political Practices Commission, www.fppc.ca.gov, and the California Secretary of State, www.ss.ca.gov.

The Role of Private Foundations

Private foundations are generally prohibited under federal tax law from making lobbying expenditures, and thus cannot themselves engage in, or make grants to public charities for, many of the ballot measure activities engaged in by public charities. However, not all of the activities described above are treated as lobbying under the tax rules applicable to private foundations, and private foundations can play a significant role in ballot measure campaigns.

In general, any communication made to legislators which refers to and reflects a view on legislation is treated as lobbying for tax purposes. In the ballot measure context, the public is the legislature; hence, any communication to the public which refers to a ballot measure and reflects a view on the measure is prohibited lobbying for private foundations.

While private foundations are generally prohibited from making lobbying expenditures, private foundations can play a significant role in ballot measure campaigns.

Consequently, private foundations cannot publicly endorse a ballot measure or take a stance advocating its defeat. They also cannot fund communications that reflect a view on the merits of a pending ballot measure.

Lobbying expenditures include not only the costs to deliver or distribute lobbying communications, but also the costs to research and prepare them. Therefore, private foundations cannot engage in or make grants for activities that are undertaken in preparation for later communications supporting or opposing a ballot measure; for example, private foundations cannot make grants for the drafting of initiative language or for research undertaken in order to develop a subsequent lobbying communication. (Private foundations also cannot provide direct financial support to Ballot Measure Committees.)

However, there are a number of exceptions to this general definition of lobbying; one important exception provides that making available the results of nonpartisan analysis, study, and research is not lobbying (even when the study or research report refers to a ballot measure and reflects a view on its merits). This exception allows private foundations to support the distribution of fair and objective studies about the impact a proposed measure would have; hosting a nonpartisan debate on a measure can also fall within this exception, if both sides get a fair and equal chance to present their positions.

Communications that do not refer to a ballot measure fall outside the definition of lobbying, so private foundations can support education campaigns about the general issues addressed by a measure if no reference is made to the pending measure. Similarly, communications that refer to a measure but do not reflect a view on its merits are outside the definition of lobbying, so private foundations can support communications that provide facts about a pending ballot measure as

long as the communication is value-neutral.

By providing general support to public charities and by engaging in or supporting educational activities not specifically classified as lobbying, private foundations can play a significant role in ballot measure public education campaigns.

Private foundations can also provide unrestricted grants to public charities engaged in ballot measure activities or support capacity building activities of such charities. By providing general support to public charities, and by engaging in or supporting educational activities that are not classified as lobbying under tax rules, private foundations can play a significant role in ballot measure public education campaigns.

Further Information

Appendix A provides an overview of the federal tax rules that define what is and what is not considered a lobbying expenditure. The definition of lobbying for private foundations is discussed in Appendix A at pages 31-33.

Preparations for lobbying expenses are discussed in Appendix A at pages 33-35. The exceptions to the definition of lobbying are discussed in Appendix A at pages 36-38.

The tax treatment of grants to public charities that lobby is discussed in Appendix A at pages 39-42.

III. The Intersection: Where Tax and Campaign Finance Laws Meet

The California Political Reform Act and the federal Internal Revenue Code set forth two completely different legal regimes related to ballot measure activity. The two laws have different goals, different analytical frameworks, and different consequences.

A private foundation might engage in an activity that is not classified as a lobbying expenditure, but must nonetheless be reported to the California Secretary of State.

It is therefore entirely possible that a private foundation will engage in an activity or make a grant that is not a lobbying expenditure for tax purposes, but is within the definition of a ballot measure independent expenditure or contribution that must be reported to the California Secretary of State. In this circumstance, the private foundation may be concerned that the state law disclosure requirement creates an inference that the private foundation engaged in prohibited lobbying activities for federal tax purposes.

Legal analysis

As a purely legal matter, the authors do not believe that California reporting obligations determine the treatment of activity under federal tax law. For IRS purposes, communications are classified as lobbying or nonlobbying through the application of federal law – in other words, the classification is based on the Internal Revenue Code, IRS regulations, federal judicial decisions, and IRS rulings. How the State of California characterizes an activity for the purposes of its disclosure laws does not change the tax definitions of lobbying. While there is no specific IRS ruling confirming this analysis, it follows from the general principle that federal tax laws are to be applied uniformly nationwide, and from the specific definitions of taxable lobbying expenditures in the IRS regulations, which are binding on the IRS.

Furthermore, Congress deliberately carved out a number of exceptions to the general prohibition on private foundation lobbying expenditures.

California reporting obligations do not determine the treatment of activity under federal tax law.

For example, the existence of a specific statutory exception for the public distribution of nonpartisan analysis, study, or research demonstrates that Congress understood the activity might otherwise be considered lobbying. That such an activity might constitute reportable ballot measure activity for state law purposes does not change the fact that Congress made a deliberate policy choice that nonpartisan research, study, and analysis is an appropriate and permissible use of private foundation

funds. The same is true for the self-defense exception, also written into the statute by Congress.

Private foundations can engage in certain activities that are reportable under California campaign finance law – reportable activities are not necessarily illegal or even questionable.

The fact that a private foundation engages in an activity that is reportable under California campaign finance laws does not mean the activity is unlawful; it will only be unlawful if the activity is also considered lobbying under IRS rules. However, if there is a judgment call to be made concerning whether a communication is lobbying under IRS rules—if the communication is in a grey area under tax law—then the fact that state law would characterize the communication as reportable campaign activity could make the argument for nonlobbying status under tax law more difficult.

Practical concerns

Reports filed under the Political Reform Act are public documents, accessible to the media and to anyone else who cares to look. The fact that a private foundation engaged in reportable activity could generate press coverage of its activities, or whistle blowing reports to regulatory agencies by those on the other side of a ballot measure debate. This is particularly true if the foundation's activities were influential in shaping the public debate about a ballot measure. Media attention could lead to increased scrutiny from the IRS, the California Attorney General, or the Fair Political Practices Commission. Responding to such media stories or investigatory proceedings can be expensive and disruptive even when there is no wrongdoing.

In addition, not every foundation is comfortable with the public role that media attention may bring. While one private foundation may be proud to be identified with conservation, civil rights, or healthcare reform positions, another may worry that being publicly identified as a supporter of one side in a ballot measure campaign may change its image as a nonpolitical entity concerned with the common good. If the private foundation's aim is to give voters access to unbiased facts and impartial analysis regarding ballot measures, being listed as a supporter or opponent of the measure could undermine the credibility of this educational effort.

Reports filed under the Political Reform Act are public documents, accessible to the media and to anyone else who cares to look.

Finally, if the private foundation itself is required to file campaign disclosure reports, it will necessarily incur compliance costs to fulfill these obligations. Because public reporting of its ballot measure activities raises a private foundation's profile, a private foundation should only engage in reportable activities if its Board and staff understand the implications and are comfortable taking a public role. We recommend that private foundations determine ahead of time

whether their activities will subject them to any reporting requirements and factor these disclosure obligations into their decision-making.

Private foundations should only engage in reportable activities if their Boards and staff understand the implications and are comfortable in taking a public role.

IV. Avoiding the Intersection: Activities That Are Neither Lobbying Nor Reportable Ballot Measure Activity

Private foundations cannot make lobbying expenditures; but there is no similar ban on engaging in reportable ballot measure activity. The California Political Reform Act provisions applicable to ballot measure campaigns require public reporting and disclosure, but the Act does not limit what a private foundation can do. Nevertheless, many private foundations prefer not to engage in any reportable ballot measure activity, for the practical reasons discussed in the previous section.

"Can do" strategies

We are often asked what private foundations can do in the ballot measure arena that will not violate the tax law ban on lobbying, and also will not cause the foundation to incur reporting obligations under state campaign disclosure laws or to be listed in a grantee's campaign finance reports. This section describes seven strategies private foundations can use to engage in the ballot measure arena without incurring reporting obligations. Our "can do" list (summarized on the next page) is not exhaustive, but represents some of the more common strategies.

Applying the complex legal rules to a particular activity is an intensely fact-specific process, so general guidance is difficult to give. Careful planning, and building in time and a budget for consultation with legal counsel as the facts evolve or specific communications are drafted, is indispensable to safely maximizing a private foundation's impact in the ballot measure context.

Careful planning and budgeting the time and resources for consultation with legal counsel is indispensable to safely maximizing a private foundation's ballot measure advocacy efforts.

“Can Do” Strategies

Common ballot measure strategies for private foundations that do not violate the tax law ban on lobbying, and do not trigger campaign finance reporting obligations

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1. **Distributing nonpartisan analysis, study, or research on a ballot measure without telling people how to vote, and without contact (by foundation or grantee) with a Ballot Measure Committee.**
2. **Public education campaigns on particular ballot measures that discuss the measure without reflecting any bias for or against it, and without contact (by foundation or grantee) with a Ballot Measure Committee.**
3. **Public education about policy issues that does not refer to a ballot measure and is planned and carried out without contact (by foundation or grantee) with a Ballot Measure Committee.**
4. **General or core operating support grants to public charities that engage in ballot measure activities, with provisions in your grant agreement to prevent use of grant funds for reportable activity.**
5. **Making a grant restricted to a project of a public charity that includes some lobbying on a ballot measure, if the amount of the grant is less than the nonlobbying portion of the project budget, and with provisions in the grant agreement to prevent use of grant funds for reportable ballot measure activity.**
6. **Providing assistance to grantees in support of, or making grants restricted to, capacity-building, grass-roots organizing, or coalition-building around public policy issues without referring to any ballot measure or other specific legislation, and without contact (by foundation or grantee) with a Ballot Measure Committee.**
7. **Funding post-passage legal challenges to a ballot measure, monitoring implementation of ballot measure provisions by administrative agencies, and evaluating the impact of ballot measures.**

(These strategies are described in more detail in the following seven pages)

Strategy 1: Distributing nonpartisan analysis, study, or research on a ballot measure without telling people how to vote, and without contact (by foundation or grantee) with a Ballot Measure Committee.

A private foundation can publicly distribute a communication that discusses a ballot measure and reflects a view on it, if the communication as a whole qualifies as an objective examination of an issue, including a sufficiently full and fair exposition of the pertinent facts to enable the audience to form an independent opinion or conclusion on the issue. Mere assertions of opinion or a one-sided view will not qualify. A scholarly, dispassionate study of a ballot measure, regardless of its conclusions for or against, epitomizes this exception. Private foundations may distribute or make available the results of nonpartisan analysis, study and research, or make a grant restricted for this purpose, without violating the ban on lobbying.

A private foundation can publicly distribute a communication that reflects a view on a ballot measure, as long as it is objective and balanced.

In addition, directly distributing a nonpartisan report or making a grant for this purpose will not create reporting obligations under state law as long as the distribution of the results is made to the public (and not for the private use of one side or the other in the ballot measure campaign); the communication does not tell people how to vote; and neither the foundation nor the grantee coordinate the activity with a Ballot Measure Committee.

Further Information

The tax lobbying exception for nonpartisan analysis, study, or research is discussed in **Appendix A at pages 36-37;** **a hypothetical applying the exception is in** **Appendix C, Example 2 at page 58.**

When communications must be reported as contributions or independent expenditures is discussed in **Appendix B at pages 43-46;** **a discussion of when foundation grants to a public charity could be reportable contributions appears in** **Appendix B at pages 50-52.**

Hypotheticals in Appendix C illustrate the significance for campaign reporting purposes of expressly telling people how to vote **(Example 2 at page 58)** **or coordinating a communication with a Ballot Measure Committee** **(Example 4 at page 62).**

Strategy 2: Public education campaigns on particular ballot measures that discuss the measure without reflecting any bias for or against it, and without contact (by foundation or grantee) with a Ballot Measure Committee.

Private foundations may engage in or fund communications with the public that provide neutral and objective information about a ballot measure to improve the public's understanding of the likely impacts of the measure, without reflecting any view on its merits, but ensuring that the public's voting decision will be fully informed. This approach requires careful unbiased scrutiny of the communication, however, since a communication may reflect a view even though it avoids any blatant praise or condemnation of a measure.

In order to improve the public's understanding of the likely impacts of a measure, private foundations may fund public communications that provide neutral and objective information about a ballot measure.

For tax purposes, a public communication is not lobbying on a ballot measure if it reflects no view on the measure. A private foundation can therefore engage in such an educational campaign directly or make a grant to a public charity restricted for this purpose.

If the communication reflects no bias, it obviously will not urge voters to support or oppose a measure, and thus will not be reportable for state law purposes as an independent expenditure.

However, the private foundation must also ensure that the campaign is not coordinated with a Ballot Measure Committee to prevent the costs of the public education communications from being a contribution under the California campaign finance laws.

Further Information

Communications that do not express a view on a ballot measure are not considered lobbying. See the definition of lobbying in **Appendix A at page 31-32.**

The rules on coordinating an activity with a Ballot Measure Committee are discussed in **Appendix B at pages 43-46 and in Appendix C, Example 4 at page 62.**

For a case study of a neutral public education campaign funded by a private foundation, See **Appendix D.**

Strategy 3: Public education about policy issues that does not refer to a ballot measure and is planned and carried out without contact (by foundation or grantee) with a Ballot Measure Committee.

Before any ballot measure has been proposed, and even while a ballot measure on the same topic is pending, private foundations may fund or engage in public education campaigns that discuss public policy issues without referring to the ballot measure. For example, a private foundation may fund a public education campaign about the role of wilderness areas in preserving biodiversity at the same time a park bond measure is pending. This type of early background education can completely change the environment in which voting on a ballot measure will occur. For tax purposes, the education campaign will not be lobbying if it does not refer to the measure.

Private foundations may fund or engage in public education campaigns that discuss public policy issues without referring to the ballot measure.

If the communication makes no reference to the measure, it obviously will not urge voters to support or oppose a measure, and thus will not be reportable for state law purposes as an independent expenditure. However, the private foundation must also ensure that the campaign is not coordinated with a Ballot Measure Committee to prevent the costs of the public education communications from being a contribution under the California campaign finance laws.

Further Information

Communications that do not refer to a ballot measure do not meet the definition of lobbying, as discussed in **Appendix A at page 35.**

The rules on coordinating an activity with a Ballot Measure Committee are discussed in **Appendix B at pages 43-46** **and in** **Appendix C, Example 4 at page 62.**

Strategy 4: General or core operating support grants to public charities that engage in ballot measure activities, with provisions in your grant agreement to prevent use of grant funds for reportable activity.

For tax law purposes, a private foundation can make an unrestricted, general support grant to a public charity without concern that any lobbying activity of the charity will be attributed to the private foundation. As long as the general support grant is not earmarked for lobbying, it will not be a lobbying expenditure for the private foundation even if the grantee public charity uses the funds to engage in lobbying activities.

A private foundation can make an unrestricted, general support grant to a public charity without concern that any lobbying activity of the charity will be attributed to the private foundation.

Under state disclosure laws, however, a different set of rules apply to determine whether any portion of a general support grant will be treated as a contribution for the public charity's ballot measure activities. To prevent the possibility that some part of a general support grant would be treated as a ballot measure contribution in the event that the recipient charity engages in reportable ballot measure activity during the year, a private foundation can include a clause in the grant agreement that prohibits use of grant funds for reportable ballot measure activity. (This will mean that the grantee will have to identify other sources of funding for its reportable activities.)

Further Information

The tax rules relating to general support grants are discussed in Appendix A at pages 39-40.

Campaign finance disclosure of funding sources is discussed in Appendix B at pages 50-52.

Appendix C includes a hypothetical discussing a general support grant at page 53.

<u>Strategy 5</u>: Making a grant restricted to a project of a public charity that includes some lobbying on a ballot measure, if the amount of the grant is less than the nonlobbying portion of the project budget, and with provisions in the grant agreement to prevent use of grant funds for reportable ballot measure activity.

For tax law purposes, a private foundation may support a specific project of a public charity that includes both ballot measure lobbying and nonlobbying activities if (1) the amount of the grant does not exceed the budget for the project's nonlobbying activities, and (2) the grant is not earmarked for lobbying. The private foundation may rely on the public charity's representations regarding the portion of the project budget that will be spent on lobbying, unless that reliance is unreasonable under the circumstances.

A private foundation may support a specific project of a public charity that includes both ballot measure lobbying and nonlobbying activities.

Again, however, the rules are different for state law disclosure purposes. To ensure that no part of the project grant will be reported as a ballot measure contribution in the event that the recipient charity's project includes reportable ballot measure activity, a private foundation can include a clause in the grant agreement that prohibits use of grant funds for reportable ballot measure activity. (Again, this will mean that the grantee will have to identify other sources of funding for its reportable activities.)

Further Information

The tax treatment of grants restricted to projects that include both lobbying and nonlobbying activities is discussed in Appendix A at pages 40-41.

Campaign finance disclosure of funding sources is discussed in Appendix B at pages 50-52.

Strategy 6: Providing assistance to grantees in support of, or making grants restricted to, capacity-building, grass-roots organizing, or coalition-building around public policy issues without referring to any ballot measure or other specific legislation, and without contact (by foundation or grantee) with a Ballot Measure Committee.

One of the most effective ways for private foundations to support public policy analysis and advocacy is to support the capacity of the charitable sector to participate in the process. Grants for organizational development, legal education and advice, coalition building, and research and study of policy issues in general can have a dramatic impact on the ability of public charities to address public policy issues, through ballot measures or otherwise, without being lobbying.

One of the most effective ways for private foundations to support public policy analysis and advocacy is to support the capacity of the charitable sector to participate in the process.

The relevant question to ask about such activities is whether they are done primarily in preparation for later lobbying communications. For example, a project to compile a list of individuals or organizations interested in a certain policy issue may be a preparation-for-lobbying expense if the primary purpose of the list is for later lobbying, but typically such lists will be used for a wide variety of activities, only a few of which are lobbying, so that the costs of compiling the list need not be counted as lobbying expenses.

Further Information

Whether activities are done in preparation for lobbying is discussed in Appendix A at page 33-35 and in Appendix C, Example 5, at page 65.

<u>Strategy 7</u>: Funding post-passage legal challenges to a ballot measure, monitoring implementation of ballot measure provisions by administrative agencies, and evaluating the impact of ballot measures.

The public policy process does not end with the passage of legislation. Funding activities that take place after legislation is on the books can be a safe and effective strategy for public policy impact. For example, once a ballot measure has been enacted, a private foundation can fund litigation to challenge its constitutionality or interpret its provisions; this is not lobbying for tax purposes, and not reportable under state campaign finance law.

Post-passage activities relating to the implementation and evaluation of ballot measures can sometimes have an even greater impact on public policy than the ballot measure itself; all of them can be funded by private foundations.

A private foundation may also fund administrative lobbying of government agencies charged with promulgating regulations to implement the measure and then monitor and publicize their progress; advocacy on administrative regulations is not subject to the prohibition on legislative lobbying by private foundations. Such administrative advocacy is also not subject to the campaign disclosure rules applicable to ballot measure campaigns. (However, there are lobbying disclosure rules in California applicable to contacts with legislators and administrative agency decision-makers, which are beyond the scope of this Guide; these registration and reporting rules might apply to participation in rulemaking following a ballot measure.)

Finally, evaluating the impacts of legislation or constitutional amendments adopted by voters will not typically be lobbying, nor will it be reportable for state law purposes. (If a communication discusses a proposal to change the law, however, it could it be lobbying if the elements of a lobbying communication are present.)

Such post-passage activities relating to the implementation and evaluation of ballot measures can sometimes have an even greater impact on public policy than the ballot measure itself; all of them can be funded by private foundations.

Further Information

Post-passage activities are discussed in Appendix A at page 36 and Appendix B at page 49.

The grant agreement process

In the "can do" list above, we suggest that campaign finance disclosures can often be avoided by including appropriate prohibitions in a grant agreement. However, we do not encourage foundations to rely solely on a clause in a contract to protect themselves. Rather, a grant agreement should be the culmination of a process in which a funder and grantee arrive at an understanding of how grant funds will or may be used.

As part of this process, it is often appropriate for grantmakers to assess the sophistication of potential grantees with respect to the legal framework discussed in this Guide. If your grant agreement prohibits the use of foundation funds to make ballot measure contributions or independent expenditures, will the grantee understand what this means? If the grant funds a project that has both lobbying and nonlobbying components, does the grantee have the capacity to properly classify its activities and track its spending for the project?

A grant agreement should be the culmination of a process in which a funder and grantee arrive at an understanding of how grant funds will or may be used.

If the grant is for nonpartisan analysis, study and research, will there be an adequate review process before publication to ensure the work product qualifies? Depending on the situation, it may be wise to address any implementation concerns ahead of time by building procedural safeguards into the proposed project description, adding funding for training or capacity building of the grantee or legal review of the grant-funded work product, or defining the scope of the project in light of the grantee's capacity to implement it.

Addressing concerns in advance:
● Build procedural safeguards into the project description
● Budget for training or legal review
● Define the scope of the project within the grantee's capacity to implement it.

In addition, any grant agreement restrictions need to be consistent with the actual understanding of the parties. Use of a grant agreement form with standard restrictions will not necessarily change the legal outcome, if communications between a grantee and a foundation demonstrate that a contrary understanding was reached about the use of grant funds.

With these caveats, we do suggest that private foundation can prevent their grants from being treated as reportable contributions for ballot measure activity by including in the grant agreement a clause prohibiting the use of grant funds to engage in reportable ballot measure activity. On the other hand, we also recommend giving grantees the maximum flexibility to use grant funds for lobbying that is not attributable to the private foundation under federal tax rules.

Consult your legal counsel as to whether the following language or some variant thereof may be appropriate in your situation:

> *This grant is not earmarked for lobbying within the meaning of Section 4945 of the Internal Revenue Code. No portion of this grant may be used to make any independent expenditure or contribution within the meaning of the California Political Reform Act, including expenditures treated as in-kind contributions as a result of direct or indirect communications with any ballot measure committee, or delivery of grant-funded materials to a ballot measure committee for its private use.*

This clause may not be appropriate in all circumstances. In some cases, it may be preferable to prohibit use of grant funds for lobbying entirely. For example, when a private foundation is providing 100 percent of the funding for a nonpartisan research report, and all grant funds are restricted for this project, it will not unnecessarily bind the hands of the grantee to include an outright prohibition on use of grant funds for lobbying. Alternatively, a private foundation may not always be concerned about campaign finance reporting requirements and may choose to make a true unrestricted, general support grant to a public charity without including any restriction relating to the Political Reform Act. Grant agreement language should be tailored to the particular situation with the assistance of legal counsel.

V. Conclusion

As discussed in the introduction, the purpose of this Guide is to help California private foundations interested in becoming involved in the ballot measure arena, and their legal counsel, to understand the legal issues and decisions they may face. It is unfortunate that the legal terrain covered by this Guide—the intersection of two independent legal frameworks, each complex in its own right—raises difficult issues. (If nothing else, the hypotheticals discussed in Appendix C make that clear.) In light of this, we want to leave you with four concluding thoughts.

First, there are many activities private foundations can engage in or fund that will not be lobbying for tax law purposes, and that also will not be reportable for state campaign finance law purposes. Nonpartisan analysis that reflects a view without crossing into express advocacy; litigation to shape how a ballot measure is interpreted; public education on likely impacts of a ballot measure without express advocacy—all of these can be safely funded with minimal legal concerns.

There are a variety of effective advocacy activities open to private foundations that are neither lobbying for tax law purposes, nor reportable for state campaign finance law purposes.

Second, planning is key to avoiding unpleasant surprises. Private foundations are not prohibited from engaging in activities that trigger state reporting requirements, as long as the activities are permissible, nonlobbying expenditures for tax purposes. If your foundation is willing to fund reportable activity, be prepared to follow through with your reporting obligations and understand that the reports will be public documents.

Planning is key to avoiding unpleasant surprises.

The public policies you care about, and the need to advance them, may well be worth the hassle. Or decide to avoid funding or engaging in reportable activities entirely, and then just be careful to implement that strategy properly, using this Guide and expert legal counsel.

Third, don't expect to get by without legal counsel. Plan to get two attorneys in your corner early—one attorney who is familiar with tax-exempt organization law generally, and the private foundation lobbying rules specifically, and another attorney who is familiar with ballot measure campaign finance disclosure rules generally, and issues unique to nonprofits specifically. (It is almost impossible to find an attorney who knows both fields well.) In our experience, getting two legal specialists on the phone at the same time is often the best and quickest way to find solutions that work for both tax and reporting purposes.

Even if your strategy is to avoid reportable activities entirely, you may need to turn to someone in a hurry (like just before a printing deadline) to make sure your grantee has avoided inserting express advocacy into a media piece.

Don't expect to get by without legal counsel.

Finally, remember that if you find this area confusing and difficult, imagine how your grantees feel. We believe intimidation is a major factor in deterring private foundations and their grantees from critical public policy engagement. Learning and applying these rules should not be so complicated that only the largest, most sophisticated organizations can contemplate it. We urge you, as a funder, to seek ways to build the capacity of grassroots organizations – often those who are closest to the voters and can be most effective in ballot measure advocacy – to engage with you, for the benefit of California.

If you find this area confusing and difficult, imagine how your grantees feel.

Appendix A:
Federal Tax Rules

Ballot measures are considered legislation for federal tax purposes, and encouraging voters to cast their votes for or against a ballot measure is treated as lobbying. Therefore, private foundations must look to the tax rules concerning legislative lobbying to determine whether grantmaking and other activities relating to ballot measures are permissible under Internal Revenue Service (IRS) rules.

Ballot measures are considered legislation for federal tax purposes, and encouraging voters to cast their votes for or against a ballot measure is treated as lobbying.

A. 501(c)(3) Lobbying: Three Sets of Rules

With respect to lobbying, the Internal Revenue Code divides the universe of Section 501(c)(3) organizations into three groups, each subject to a different set of rules. Although this Guide focuses on private foundations, funders also need a basic understanding of the rules that apply to their grantees in order to assess the lobbying implications of their grantmaking, so the rules for public charities are briefly described here before we turn to the private foundation rules in depth.

Although this Guide focuses on private foundations, funders also need a basic understanding of the rules that apply to their grantees in order to assess the lobbying implications of their grantmaking.

Almost all public charities that consider engaging in lobbying have a choice to make. They can file an election under Section 501(h) of the Internal Revenue Code to have the scope of their permissible lobbying activities determined under an expenditures test; or, if no 501(h) election is made, they will be governed by the "no substantial part" test.

Non-electing public charities

Public charities that cannot or do not make the Section 501(h) election are *non-electing public charities* governed by the "*no substantial part" test*. This test arises from language in Section 501(c)(3) itself, which states an organization will be eligible for tax-exempt status under Section 501(c)(3) only if "no substantial part" of the organization's activities consists of influencing or attempting to influence legislation.[3] There is no clear legal standard establishing how much lobbying is allowed before attempting to influence legislation will be considered a

[3] Section 501(h) is an exception to the "no substantial part" test. *See* IRC Section 501(c)(3).

substantial part of an organization's activities. The few court cases interpreting the "no substantial part" test have established that substantiality is not a strict percentage test, where up to x% is permissible, but anything more than x% is not. Rather, the test considers all facts and circumstances bearing on whether lobbying activity is substantial, including not only the percentage of spending devoted to lobbying, but also the amount of time spend by Board members and volunteers and the importance of the legislative activity to the organization's mission and programs. In addition, there is no precise definition of exactly what constitutes "attempting to influence legislation" under the "no substantial part" test.

Electing public charities

For public charities that make the Section 501(h) election[4] by filing a one-page form with the IRS, the scope of their permissible lobbying activities is determined by an expenditure test described in Sections 501(h) and 4911 of the Internal Revenue Code, and roughly 45 pages of implementing IRS regulations. Collectively, we call these laws and regulations the *Section 501(h) rules*.

The Section 501(h) rules impose an annual dollar limit on the electing charity's overall lobbying expenditures. A second, more stringent annual dollar limit applies to the charity's "grassroots" lobbying expenditures.[5] Both the overall and the grassroots lobbying limits are calculated as a sliding percentage of the organization's total exempt-purpose expenditures. For charities with exempt-purpose expenditures of $500,000 or less, the overall lobbying limit is 20% of their exempt-purpose expenditures; the percentage is lower for larger organizations, and the lobbying ceiling is capped at $1 million per year regardless of the size of the charity. Because the 501(h) test is based on expenditures alone, lobbying done by volunteers does not count against a charity's 501(h) limit.

The Section 501(h) rules also define in detail what constitutes lobbying for electing public charities, and provide a number of exceptions to the lobbying definition. Any activity that does not fall within the definition of lobbying in the Section 501(h) rules does not count against an electing charity's annual expenditure limit.

Private foundations

Private foundations are effectively prohibited from engaging in lobbying themselves, or from funding a grantee's lobbying, by Section 4945 of the Internal

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[4] Some public charities, like churches, are not eligible to elect to be governed by Section 501(h), and therefore are all subject to the "no substantial part" test. Private foundations are also not eligible to make the 501(h) election. *See* IRC Section 501(h)(3) and (4).

[5] As this Guide went to press, legislation was pending in Congress to eliminate the grassroots lobbying limit. If this legislation is enacted into law, electing public charities will have only one lobbying ceiling, limiting the aggregate amount of grassroots and direct lobbying expenditures.

Revenue Code.[6] Section 4945 imposes a punitive two-tier excise tax on any "taxable expenditure" made by a private foundation; taxable expenditures include amounts paid or incurred to "attempt to influence legislation." Initially, an excise tax of 10% of the amount of the prohibited lobbying expenditure is assessed; if the lobbying expenditures are not reversed or corrected to the satisfaction of the IRS, a second and much heavier excise tax, equal to 100% of the amount of the taxable expenditure, is imposed. In addition to the excise tax on the private foundation itself, the foundation managers, officers, or directors who knowingly approved a lobbying expenditure may be subject to taxes personally.

Section 4945 imposes a punitive two-tier excise tax on any "taxable expenditure" made by a private foundation; taxable expenditures include amounts paid or incurred to "attempt to influence legislation."

However, these sanctions only apply if a private foundation makes an expenditure that falls within the Section 4945 definition of a "taxable expenditure." Section 4945 and the IRS regulations interpreting it define the types of activities that will be treated as taxable lobbying expenditures, and carve out a number of exceptions for activities that are permissible to a private foundation (and not taxable expenditures) even though they may be undertaken in an attempt to influence legislation.[7]

The law carves out a number of exceptions for activities that are permissible to a private foundation (and not taxable expenditures) even though they may be undertaken in an attempt to influence legislation.

These rules defining lobbying for Section 4945 purposes are similar in most respects to the Section 501(h) definitions that apply to electing public charities. Indeed, the Section 4945 definition of lobbying applicable to private foundations actually refers to the regulations defining lobbying for Section 501(h) electing public charities, and the two sets of rules have a number of parallel regulations carving out nearly identical exceptions to the definition of lobbying. However, the Section 4945 rules defining private foundation lobbying are not precisely the same in every detail as the Section 501(h) rules applicable to public charities.

By observing the rules defining lobbying, private foundations can and do engage in activities that are intended to influence ballot measures. Such permissible activities either do not meet the definition of lobbying, or qualify as nonlobbying activities under an exception, or involve private foundation funding of public charity grantees whose lobbying activities are not attributable to the private foundation.

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[6] Private foundations are also subject to the "no substantial part" test as a requirement of their Section 501(c)(3) status, but this has little practical significance because of the stricter prohibition in Section 4945.

[7] Treas. Reg. Section 53.4945-2(a).

Permissible activities either do not meet the definition of lobbying, or qualify as nonlobbying activities under an exception, or involve private foundation funding of public charity grantees whose lobbying activities are not attributable to the private foundation.

B. Private Foundation Lobbying: Definitions

In this section, we give an overview of the rules that define prohibited lobbying expenditures for private foundations. This overview is not specific to ballot measures, but if a concept is more relevant or differently applied in the ballot measure context, the overview points that out. First, we examine the basic definition of lobbying for Section 4945 purposes. Next, we look at activities falling outside the definition of lobbying, and specific exceptions to that definition that allow private foundations to engage in legislative advocacy without running afoul of the ban on lobbying expenditures. Finally, we consider the special rules that apply when private foundations make grants to public charities.

Lobbying expenditure: An expenditure will be treated as a prohibited attempt to influence legislation if it is for either a "grassroots lobbying communication" or a "direct lobbying communication," and no exception applies.[8] The term *communication* should be understood in its broadest sense, encompassing printed materials, letters, radio and television broadcasts, websites and e-mails, speeches, press releases, and one-on-one conversations by phone or in person.

Direct lobbying communication: A *direct lobbying communication* is an attempt to influence any legislation through communication with a legislator, an employee of a legislative body, or (under some circumstances) any other government official or employee who may participate in the formulation of legislation.[9] Such a communication will be treated as a direct lobbying communication if and only if both of the following two elements are present:

- The communication refers to specific legislation; and
- The communication reflects a view on the legislation.

In the case of a ballot measure, the general public in the state or locality where the vote will take place is considered to be the legislative body.

In the case of a ballot measure, communications to the public or a segment of the public that refer to a specific ballot measure and reflect a view on the measure are direct lobbying communications.

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[8] *See* Treas. Reg. Section 53.4945-2(a)(1) (defining lobbying for Section 4945 purposes by reference to Treasury Regulations issued under Section 4911).

[9] *See* Treas. Reg. Section 56.4911-2(b)(1).

Consequently, individual members of the public are considered "legislators" for the purpose of the direct lobbying definition, and communications to the public or a segment of the public that refer to a specific ballot measure and reflect a view on the measure are direct lobbying communications (unless, as discussed below, an exception applies).[10]

Grassroots lobbying communication: A *grassroots lobbying communication* is an attempt to influence legislation by affecting public opinion. A communication to the public or a segment of the public is considered to be grassroots lobbying if and only if all three of the following elements are present[11]:

- The communication refers to specific legislation;
- The communication reflects a view on the legislation; and
- The communication encourages the recipient to take action with respect to the legislation.

The third requirement of a grassroots lobbying communication, often referred to as the "call to action" requirement, is satisfied if the communication urges the recipient to contact a legislator or an employee of a legislative body. A communication also contains a call to action if the communication states the recipient should contact any other government official or employee who may participate in the formulation of legislation—for instance, executive branch officials— if the purpose of urging contact with the government official or employee is to influence legislation. A communication urging recipients to contact the Governor to influence the Governor's budget proposal is a grassroots lobbying communication, for example.

A communication that does not explicitly encourage recipients to contact legislators or officials may nevertheless be treated as a grassroots lobbying communication if it includes statements that are treated like a call to action under Section 501(h) rules. For instance, identifying one or more legislators who will vote on the legislation as opposed to the communication's view with respect to the legislation, undecided, or the recipient's representative in the legislature, is treated as a call to action. Similarly, if a communication includes a petition or tear-off postcard for the recipient to use to contact his or her legislator, or includes a legislator's address or phone number, it is has a call to action.[12]

Because the general public is the legislature with respect to ballot measures, communications supporting or opposing ballot measures will generally be direct lobbying, not grassroots lobbying.[13]

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[10] *See* Treas. Reg. Section 56.4911-2(b)(1)(iii).

[11] Treas. Reg. Section 53.4911-2(b)(2).

[12] Treas. Reg. Section 56.4911-2(b)(2)(iii).

[13] Some ballot measures are placed on the ballot through a vote of a legislative body. State bond measures in California, for example, are put before the voters by an act of the legislature, and constitutional amendments are

Specific legislation: To fall within the definition of either direct or grassroots lobbying, a communication must refer to "specific legislation." *Legislation* is defined to include action by Congress, any state legislature, local council, or similar legislative body, or action by the public on ballot initiatives, referenda, constitutional amendments, or similar procedure.[14] Because they are voted on by legislative bodies, budgets and the confirmation of federal judicial nominees by the Senate fall within the definition of specific legislation.

Specific legislation includes not only legislation that has been actually introduced, but also a specific legislative proposal that the organization supports or opposes. There is little firm guidance regarding how detailed a proposal must be to considered "specific legislation;" we generally advise that if a proposal is detailed enough to tell a legislator how to draft a bill, it is specific legislation.

Specific legislation includes not only legislation that has been actually introduced, but also a specific legislative proposal that the organization supports or opposes.

For example, urging a legislator to "get criminals off the street" is not a specific legislative proposal. But if the communication urged mandatory life sentences for all persons convicted of specifically enumerated offences, it would almost certainly be a communication that referred to and reflected a view on specific legislation. In the case of a referendum or initiative placed on the ballot by petition, the measure becomes specific legislation when the petition is first circulated among voters for signature.[15]

Lobbying expenses: All costs of preparing a direct or grassroots lobbying communication are lobbying expenditures, including the costs to research, draft, and review the proposed communication, and to publish, mail, or broadcast the final product.[16] This includes the cost of employee time preparing or delivering the communication. In addition to all directly-related costs, a reasonable share of overhead and other indirect costs must be allocated to lobbying activities and counted as lobbying expenses.

All costs of preparing a direct or grassroots lobbying communication are lobbying expenditures, including the costs to research, draft, and

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sometimes initiated by the legislature. Any public communications encouraging recipients to contact legislators in support of or opposition to legislation to place a ballot measure before the voters would be grassroots lobbying.

[14] Treas. Reg. Section 56.4911-2(d)(1)(i). "Legislation" also includes a proposed treaty required to be submitted by the President to the Senate for its advice and consent from the time the President's representative begins to negotiate.

[15] Treas. Reg. Section 56.4911-2(d)(1)(ii).

[16] Treas. Reg. Section 56.4911-3(a).

review the proposed communication, and to publish, mail, or broadcast the final product.

Expenses incurred in preparation for making a lobbying communication are also lobbying expenditures. For example, if a public opinion poll is obtained for use in crafting an effective lobbying message, the costs of the poll are lobbying expenditures.

If research materials or other communications (like publications or videotapes) are not initially lobbying communications, but are subsequently used in lobbying, the question arises whether the original costs to produce the research materials or communications should be treated as preparation-to-lobby expenses. If the communications or research materials are later used in a grassroots lobbying communication—i.e., a communication that refers to and reflects a view on specific legislation and urges recipients to contact legislators—there are specific IRS regulations that apply. These *subsequent use rules* decide whether the initial costs are lobbying expenses based on a "primary purpose" test. If the organization's primary purpose in creating or preparing the materials was for use in lobbying, the costs to prepare the materials are lobbying expenses; but if the materials were prepared primarily for another, nonlobbying purpose, the costs of preparation are not lobbying expenses, notwithstanding the later lobbying use.

The subsequent use rules also provide two safe harbors. First, an organization does not have to treat the costs of creating research materials or a publication as lobbying expenditures if, prior to or contemporaneously with the grassroots lobbying use, the organization makes a substantial public nonlobbying distribution of its research or publication. Unless the research or publication qualifies as nonpartisan analysis, study, or research (described in more detail below), the nonlobbying distribution must be at least as extensive as the grassroots lobbying distribution in order for this safe harbor to apply. Second, an organization does not have to treat the costs of compiling research or preparing a publication as lobbying expenditures if they were paid more than six months before their later use in a grassroots lobbying communication.

The subsequent use rules in IRS regulations only address the use of research materials or nonlobbying communications in subsequent grassroots lobbying communications. Since members of the public are legislators in the ballot measure context, ballot measure lobbying is usually direct lobbying and the subsequent use rules do not technically apply. It is likely, however, that the IRS would follow a "primary purpose" approach to determine whether the costs of undertaking research or developing materials are preparation-to-lobby expenses when the materials are later used in ballot measure lobbying.

If the primary purpose in creating or preparing materials was for use in lobbying, the costs to prepare the materials are lobbying expenses; otherwise, the costs of preparation are not lobbying expenses, notwithstanding the later lobbying use.

Initiatives and referenda do not become specific legislation until petitions to place them on the ballot begin to circulate. In the pre-circulation phase of an initiative, organizations interested in the topic of a proposed ballot measure engage in a variety of activities related to it, such as coalition building, polling, drafting ballot measure language, research on the topic, and organizational capacity building. Even though the measure is not yet legislation, if these activities are undertaken to prepare for lobbying communications to be made after the measure is in circulation, they may be lobbying expenditures.

Further Information

Example 5 in Appendix C (page 65) discusses when activities are considered lobbying because they are undertaken in preparation for later lobbying communications.

C. Activities Outside the Definition of Lobbying

Some activities are not lobbying because they do not fall within the basic definition of either a direct lobbying communication or a grassroots lobbying communication (and also are not undertaken in preparation for direct or grassroots lobbying communications). For example, a public education campaign on policy issues that does not refer to any specific legislation falls outside the definition of lobbying.[17] Communications that refer to legislation but do not reflect a view on its merits are also outside the definition of lobbying; however, a communication can reflect a view even though it avoids any blatant statements of support for or opposition to the legislation.

In the case of legislation pending in or proposed to a legislative body, a communication to members of the public that refers to and reflects a view on the legislation, but contains no call to action, usually falls outside the definition of lobbying.[18] Such a communication is not direct lobbying because it is not made to legislators, legislative employees, or government officials who may participate in the formulation of legislation; and it is not grassroots lobbying because it contains no call to action. (In the ballot measure context, however, the public is the legislature; a communication that refers to a measure and reflects a view on its merits is direct lobbying, and no call to action is required.)

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[17] Treas. Reg. Section 53.4945-2(d)(4) actually states an "exception" for examinations and discussions of broad social and economic problems; these are not treated as lobbying communications, even if the nature of the problems are such that government would be expected to deal with them ultimately. In the authors' view, this is not really an exception to the general definition of lobbying, but it confirms that private foundations can communicate about public policy issues without making lobbying expenditures if their communications address broad issues, not specific legislation.

[18] A call to action is not necessary in the case of certain mass media advertisements. *See* Treas. Reg. Section 56.4911-2(b)(5). A call to action can also be implied rather than express. *See id.* Section 56.4911-2(b)(2)(iii).

A public education campaign on policy issues that does not refer to any specific legislation falls outside the definition of lobbying.

Post-passage litigation regarding the constitutionality and interpretation of laws, including laws adopted through ballot measures, is also not treated as lobbying; once passed, an enacted law is not "specific legislation." Administrative agency regulations are also not "specific legislation," so advocacy regarding regulatory rulemaking is not prohibited lobbying for private foundations.

D. Exceptions to the Definition of Lobbying

Even if a communication falls within the general definition of a direct or grassroots lobbying communication, the expenses to produce and distribute it will not be treated as prohibited lobbying expenditures if the communication falls within one of four exceptions.

Nonpartisan analysis, study, or research [19]

It is not lobbying to distribute or otherwise make available the results of nonpartisan analysis, study, and research to the public or to legislators. For the purposes of this exception, *nonpartisan analysis, study, or research* means an independent and objective exposition of an issue, including a sufficiently full and fair exposition of the pertinent facts to enable the recipient to form an independent opinion or conclusion on the issue.

It is not lobbying to distribute or otherwise make available the results of nonpartisan analysis, study, and research.

To qualify for this exception, a communication cannot be a mere presentation of unsupported opinion. A communication can qualify as nonpartisan analysis, study, or research, even if it both refers to specific legislation and reflects a view on the legislation.

The results of nonpartisan analysis, study, or research may be made available to the public by any suitable means, including speeches, published reports, or website postings. The distribution cannot be confined or directed solely to people interested in one side of the issue, however, so if a research report is distributed only to likely proponents or opponents of a ballot measure, it will not qualify for this lobbying exception.

Nonpartisan analysis, study, or research means an independent and objective exposition of an issue, including a sufficiently full and fair

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[19] IRC Section 4945(5); Treas. Reg. Section 53.4945-2(d)(1).

exposition of the pertinent facts to enable the recipient to form an independent opinion or conclusion on the issue.

Under IRS rules, nonpartisan analysis, study, or research cannot directly encourage the recipient to take action with respect to specific legislation, meaning it cannot contain a call to action urging recipients to contact their legislators. The tax law rules do not address what, if anything, might constitute a "call to action" in the context of ballot measure direct lobbying; the safest course of action is to refrain from directly encouraging recipients to vote for or against the measure in any communication intended to qualify as nonpartisan analysis, study, or research.

Further Information

A hypothetical illustrating the exception for nonpartisan research, study, and analysis, appears in **Appendix C, Example 2, at page 58.**

Technical advice or assistance [20]

If a governmental body, committee, or subcommittee makes a written request to a private foundation for technical advice or assistance on legislation, the foundation's costs incurred to comply with the request are not treated as lobbying, even if the response reflects a view on specific legislation and would not qualify as nonpartisan analysis. For example, if a legislative committee requests that a foundation testify at a hearing on a proposed bill, the foundation's costs to research, prepare, and present its testimony are not treated as lobbying expenditures.

The request must be made in name of the committee, subcommittee, or governmental body, rather than an individual member; and the response must be made available to every member of the requesting body. For the exception to apply, the foundation's opinions or recommendations may only be given if specifically requested by the committee or body, or if directly related to materials requested by the committee or body. In the ballot measure context, this exception could only be relevant if legislative hearings are held on a proposed ballot measure.

If a governmental body, committee, or subcommittee makes a written request to a private foundation for technical advice or assistance on legislation, the foundation's costs incurred to comply with the request are not treated as lobbying.

[20] IRC Section 4945(e)(2); Treas. Reg. Section 53.4945-2(d)(2).

Self-defense lobbying[21]

Private foundations are permitted to engage in direct lobbying of legislators regarding legislation that might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of donations to the foundation.[22] For example, private foundation can engage in direct communication with California legislators to urge the enactment of more generous state income tax deductions for charitable donations to private foundations, or direct communications with members of Congress to oppose changes to the minimum distribution rules. However, only direct lobbying is covered by this exception; private foundations may not engage in grassroots lobbying by urging members of the public to contact their representatives in support of or opposition to legislation, even if the private foundation can lobbying legislators directly under the self-defense exception.

Private foundations are permitted to engage in direct lobbying of legislators regarding legislation that might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of donations to the foundation.

Also, this exception does not cover all legislation that might conceivably affect a foundation's operations, but is generally understood to encompass legislation which is in some way specific to the tax-exempt status of private foundations or the deductibility of gifts to them. There is limited guidance on the scope of this exception, so legal counsel should be consulted before using it. Presumably, since ballot measure lobbying is generally direct lobbying, private foundations could use this exception in an appropriate ballot measure case.

Jointly-funded projects exception[23]

Amounts paid or incurred by a private foundation in carrying on discussions with officials of government bodies are not legislative lobbying if the discussions concern jointly funded programs, the discussions are undertaken for the purpose of exchanging data and information on the subject matter of the program, and the discussions are not undertaken by private foundation managers for the purpose of persuading the officials to take positions on specific legislative issues other than the program. This exception is unlikely to arise in the ballot measure context.

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[21] IRC Section 4945(e)(flush language); Treas. Reg. Section 53.4945-2(d)(3). As this Guide goes to press, legislation is pending in Congress that may affect whether expenses incurred to engage in self-defense lobbying will count towards a private foundation's minimum distribution requirement.

[22] In a well-known example, many private foundations engaged in direct lobbying communications with members of Congress several years ago in a successful effort to enact more generous charitable income tax deductions for donors who contribute qualified appreciated stock to private foundations.

[23] Treas. Reg. Section 53.4945-2(a)(3).

E. Special Rules for Grantmaking Activities

The rules discussed above apply when a private foundation pays its own staff or hires outside contractors to engage in an activity directly; they also generally apply when a private foundation makes a grant to another organization that is restricted for a particular activity.[24] If a foundation makes a grant to an organization restricted for use on a project that includes no lobbying, making the grant will not be a lobbying expenditure for the private foundation. On the other hand, if a private foundation were to make a grant restricted for an activity that is lobbying under the Section 4945 rules, making the grant would be treated as a lobbying expenditure.

But what about unrestricted grants to public charities, or restricted grants for projects that are only partially funded by the private foundation and include both lobbying and nonlobbying activities? We turn now to special grantmaking rules that address when a public charity's lobbying will be attributed to its private foundation funders.

General support grants

A *general support grant* is an unrestricted grant or donation which the grantee's Board of Directors may decide to use for any of the grantee's programs or expenses.

When a private foundation makes a general support grant to a public charity, the grant will not be treated as a lobbying expenditure—even if the grantee uses the funds to engage in lobbying activities—as long as the grant is not "earmarked" for lobbying.

When a private foundation makes a general support grant to a public charity, the grant will not be treated as a lobbying expenditure—even if the grantee uses the funds to engage in lobbying activities—as long as the grant is not "earmarked" for lobbying.[25] A grant is *earmarked* for lobbying if the grant is made pursuant to an oral or written agreement that the grant funds will be used for that purpose.[26]

This rule enables private foundations to make general support grants to public charities without concern that any lobbying activities of the grantee will be attributed to the private foundation. However, the grant must be truly unrestricted in order to take advantage of this rule. If staff members of the foundation and the grantee have a tacit agreement that the grant will be used for a particular purpose,

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[24] One exception is the jointly-funded projects exception, which is only available to private foundations and not public charities.

[25] This rule applies whether or not the grantee public charity has made a 501(h) election.

[26] Treas. Reg. Section 53.4945-2(a)(5)(i), (6)(i).

the grant is earmarked for that purpose and must be analyzed as a specific project grant.

Further Information

A hypothetical regarding a general support grant appears in Appendix C, Example 1, on page 53.

Specific project grants

A *specific project grant* is a restricted grant made to support one or more specific projects or programs of the grantee. When a private foundation makes a specific project grant to a public charity, the grant will not be a lobbying expenditure as long as two requirements are met. First, as with a general support grant, the grant cannot be earmarked for lobbying. Second, the amount of the grant cannot exceed the amount budgeted by the grantee public charity for nonlobbying activities of the project.[27]

When a private foundation makes a specific project grant to a public charity, the grant will not be a lobbying expenditure as long as two requirements are met.

For example, imagine that a public charity applies for a grant for a specific project with a $100,000 budget, $80,000 of which will be spent on nonlobbying activities and $20,000 on lobbying communications. A private foundation makes a $50,000 grant to the public charity earmarked for the project, but not for lobbying. So long as the amount of the grant is less than the nonlobbying portion of the budget, the grant will not be treated as a lobbying expenditure by the private foundation. In fact, this rule still holds even if two private foundations each make a $50,000 grant to the public charity earmarked for the project, but not for lobbying—neither private foundation will be treated as having made a prohibited lobbying expenditure, even though some portion of grant funds provided by one or both foundations must be used by the charity for the lobbying activities of the project.

The specific project grant rule is applied on a year-by-year basis. If a private foundation makes a multi-year grant for a project, the nonlobbying portion of the project budget must exceed the amount of the private foundation's grant in each year.

A private foundation is generally entitled to rely on the grantee's budget documents or signed statements as to what part of the project budget (if any) will

[27] Treas. Reg. Section 53.4945-2(a)(6)(ii). This rule is also known as the "McIntosh rule" after case involving a private foundation that came to this conclusion. The decision in the case is now reflected in the IRS regulations.

be used for lobbying communications. The only exception is where the private foundation doubts or reasonably should doubt the reliability of grantee's representations under the circumstances. For example, if the grant application indicates that the project includes communications with legislators referring to and reflecting a view on legislation, and there is no mention of using an exception to the direct lobbying definitions for these communications, the foundation cannot rely (at least without further inquiry) on a grantee statement that no money is budgeted for lobbying.

A private foundation is generally entitled to rely on the grantee's budget documents or signed statements as to what part of the project budget (if any) will be used for lobbying communications.

The specific project grant rule applies to a private foundation's grant whether or not the public charity grantee has made the Section 501(h) election. If the grantee is a non-electing charity, it still must apply the Section 501(h) definitions of lobbying to determine how much if any of the project expenditures are lobbying.

Using nonlobbying materials in lobbying[28]

What if a private foundation makes a grant to a public charity earmarked to produce a nonlobbying communication—for example, a nonpartisan research report—and the grantee subsequently uses the report in lobbying communications? Depending on the circumstances, the grantee's subsequent use of the report may be perfectly fine, and have no negative effect on the private foundation; or it may cause the costs of preparing the report (and sometimes even the private foundation's grant) to be a lobbying expenditure.

If a public charity grantee takes an existing nonlobbying communication and uses it to lobby – for example, if the grantee sends an existing report that refers to and reflects a view on legislation to members of the public, with a cover letter urging them to contact their legislators, thus adding a grassroots lobbying call to action – the treatment of the costs of preparing the communication depends on the grantee's primary purpose for creating it. The general rule is that subsequent lobbying use will cause the grantee to have to count all the expenses of producing the report as lobbying expenses if lobbying was the grantee's primary purpose for preparing the communication. Lobbying will not be treated as the primary purpose—and grantee will not have to treat the costs of preparing the report as lobbying expenses—if either (1) the subsequent lobbying use occurred more than six months after the expenses to prepare the report were incurred, or (2) if there was a substantial nonlobbying distribution of the report before or simultaneous with the lobbying use.

But even if a grantee has to treat its expenses to create the report as lobbying expenses (because it prepared the report for the purpose of lobbying and

[28] Treas. Reg. Section 53.4945-2(d)(v)(B).

used it in lobbying), the private foundation's grant to fund the report will not be characterized as a prohibited lobbying expenditure unless either (1) the private foundation knew (or reasonably should have known) at the time it made the grant that the grantee's primary purpose in preparing the report was to use it in lobbying, or (2) the private foundation's primary purpose in making the grant to the public charity was for lobbying.

Further Information

Example 3 in Appendix C discusses subsequent lobbying use of nonlobbying communications at page 60.

Special rule for certain member communications[29]

For electing public charities, expenditures to make certain communications to their members are treated more leniently than communications with nonmembers. Specifically, some communications to members are nonlobbying even though they would be lobbying if made to a nonmember. These special rules do not apply to private foundations' communications, even if the private foundation has members. But if a private foundation makes a grant to a public charity earmarked for the grantee's membership communications, and the communications are not lobbying by the public charity under the special member communication rules, then the grant will also not be a lobbying expenditure by the private foundation. This rule is unlikely to have application in the ballot measure context.

Prohibitions on lobbying in the grant agreement

One final important point on the subject of lobbying attribution and grants: even if federal tax law permits a public charity to use funds from a private foundation to lobby without attribution to the private foundation, this flexibility is lost if the funder includes an absolute lobbying prohibition in its grant agreement. In that case, the contractual agreement is binding on the grantee, even if it is more stringent than what tax law requires. Private foundations should therefore draft their grant agreements carefully, to protect themselves while maintaining maximum flexibility for their grantees.

[29] Treas. Reg. Section 53.4945-2(a)(2).

Appendix B: California Campaign Finance Disclosure Rules

California has comprehensive campaign finance disclosure laws which apply to all campaign activity in state and local elections, including both the election of candidates to public office and activity relating to state and local ballot measures.[30] The Fair Political Practices Commission (FPPC) is the state agency charged with the principal responsibilities for interpreting, implementing, and enforcing these laws.[31] Generally, the campaign finance disclosure laws require disclosure of the receipts and expenditures made in ballot measure campaigns. In addition, there are some source disclosure requirements which may apply to ballot measure advertising that are not addressed in this Guide. Contribution limits apply to candidate campaigns, but do not apply in state or local ballot measure campaigns.

Campaign finance disclosure laws require disclosure of the receipts and expenditures made in ballot measure campaigns.

Many cities and counties have additional requirements in their local campaign finance ordinances, but local campaign finance laws are not addressed in this Guide. Local laws must also be consulted prior to pursuing any activity relating to a local ballot measure.

A. Key Definitions and Concepts

Understanding the campaign finance disclosure rules begins with understanding some basic terms and concepts.

Contribution: A *contribution* is broadly defined to include any payment for political purposes for which full and adequate consideration is not made to the donor.[32] A payment is made for *political purposes* if (1) it is made for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or (2) it is received or made at the behest of a candidate, a committee controlled by a candidate, a political party committee, or an organization formed or existing primarily for political purposes (e.g., a Ballot Measure Committee or a political action committee).

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[30] These laws are found in the California Political Reform Act of 1974, as amended, codified as Cal. Gov. Code Section 81000-91015.

[31] The regulations of the Fair Political Practices Commission are found in Division 6, Title 2 of the California Code of Regulations.

[32] Cal. Gov. Code Section 82015; FPPC Regulation 18215.

Contributions include monetary payments made to committees, loans to committees, and in-kind or "non-monetary" contributions. Any payment for goods or services which is made "at the behest of" a committee or its agents is treated as an in-kind contribution to the committee.

In the ballot measure context, this means that a payment by a private foundation may constitute a contribution even if the payment is not made to the Ballot Measure Committee; for example, a payment for research which is made "at the behest of" the Ballot Measure Committee is a contribution to the Ballot Measure Committee. ("At the behest of" is defined below.")

Contributions include monetary payments made to committees, loans to committees, and in-kind or "non-monetary" contributions.

The term "contribution" is also defined to include any payment made to a person or organization other than a candidate or Committee when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or independent expenditures. If the donor knows or has reason to know that only part of the payment will be used to make contributions or expenditures, the payment shall be apportioned on a reasonable basis in order to determine the amount of the contribution. There is a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the receiving person or organization has made expenditures or contributions of at least $1,000 or more in the aggregate during the calendar year in which the payment is made, or in any of the immediately preceding four calendar years.[33]

"Contributions" include any payment to a person or organization other than a committee when the donor knows the payment . . . will be used to make contributions or independent expenditures.

Conversely, if a payment is made to a person or organization other than a candidate or Committee, and the donor expressly prohibits or otherwise restricts the use of the donation so it is clear that the funds may not be used to make political expenditures or contributions, then the payment is not a contribution even if the receiving organization subsequently engages in reportable campaign activity.

Independent expenditure: An *independent expenditure* is a payment for a communication to the public which expressly advocates either the election or defeat of a candidate or the qualification, passage or defeat of a ballot measure, and which is not made at the behest of the affected candidate or committee (i.e., it is not a contribution).[34]

[33] FPPC Regulation 18215(b)(1).

[34] Cal. Gov. Code Section 82031; FPPC Regulation 18225.

An independent expenditure meets all three of the following elements:

- The expenditure is for a *communication* to the public, which can take any form (including mail, radio, television, billboard, door hanger, flyer, e-mail and any other Internet communication).

- The communication constitutes *express advocacy* of the qualification, passage or defeat of a ballot measure (e.g., Vote against 99, Reject Prop. A, Support Measure C); and

- The communication is *independent*, meaning it is not made "at the behest of" the Ballot Measure Committee or its agents (see additional discussion below).

What constitutes "express advocacy" in the context of campaign communications has been the subject of substantial discussion, regulatory action, and litigation. The two basic elements are a clear reference to the measure and a call to action by the voters. The use of specific words of advocacy such as "vote for," "support," "cast your ballot," "vote against," "defeat," "reject," and "sign petitions for" clearly qualify as express advocacy.

An independent expenditure is a payment for a communication to the public which expressly advocates the qualification, passage or defeat of a ballot measure, and which is not made at the behest of the affected Committee.

Whether more ambiguous terminology qualifies as "express advocacy" must be analyzed on a case by case basis with reference to all aspects of the communication; the most recent court decisions strongly suggest that the types of express words cited above are essential, and more ambiguous statements do not qualify as express advocacy. For instance, "Measure A is bad public policy" alone is probably not express advocacy but "Measure A is bad public policy – don't forget to vote on Tuesday" would likely be determined to be express advocacy. On this issue, a careful legal review of any public communications is highly recommended.

At the behest of: Expenditures are made "at the behest" of a Ballot Measure Committee if they are made at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express prior consent of, the Committee or any of its agents.[35] Generally an expenditure is presumed to be made at the behest of a Committee if the expenditure is based on information provided by the Committee or its agents about the Committee's needs or plans, or if the expenditure is made by or through the Committee or its agents. With respect to public communications in particular, an expenditure for such a communication is presumed to be made at the behest of the Committee if the Committee or its agents have made or participated in making decisions concerning,

[35] FPPC Regulation 18225.7.

or substantially discussed with the expending party, the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement, of the communication.

An expenditure is presumed to be made at the behest of a Committee if the expenditure is based on information provided by the Committee or its agents about the Committee's needs or plans.

Measure: A *measure* is any constitutional amendment or other proposition which is submitted to a popular vote at an election by action of a legislative body, or which is submitted or is intended to be submitted to a popular vote at an election by initiative, referendum or recall procedure, whether or not it qualifies for the ballot.[36]

For a measure placed on the ballot by a legislative body, the proposal does not become a "measure" until the legislative body votes to place it on the ballot.[37] Consequently, expenditures in support of the proposal prior to that time are not usually subject to campaign reporting requirements.[38]

For a measure placed on the ballot through the petition process, the proposal does not become a measure for reporting purposes until the signature gathering process begins.

Payments for a poll or other research which is aimed solely at testing the content or viability of the measure and which are made prior to the signature gathering process are not reportable expenditures.

Note, however, that payments made prior to a proposal becoming a measure may be reportable if they are made to directly support the qualification of the measure for the ballot, or the campaign for or against the measure, or are used or relied on in the qualification or campaign process. For example, if a poll is conducted before a proposal becomes a measure which tests possible campaign messages, and the poll results are later relied on in crafting the message appearing in campaign communications on the measure, then the payment for the poll will likely be an in-kind contribution to the Ballot Measure Committee at the time the results are used.

On the other hand, payments for a poll or other research which is aimed solely at testing the content or viability of the measure and which are made prior to the signature gathering process are not reportable expenditures.

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[36] Cal. Gov. Code Section 82043.

[37] See FPPC Fontana Opinion; 2 FPPC Ops. 25 (1975).

[38] However, California law imposes registration and reporting requirements on direct lobbying of the legislative branch which may apply depending on the nature and extent of lobbying contacts made, and which are beyond the scope of this Guide.

Committee: For the purpose of this Guide, the definition of *Committee* includes two basic types. A *Recipient Committee* is a person or a formal or informal organization that receives contributions and makes either contributions or independent expenditures of $1,000 or more in a calendar year. A *Major Donor/Independent Expenditure Committee* is any person other than a Recipient Committee (such as an individual, business, or organization) which does not receive contributions, but which makes contributions totaling $10,000 or more, or independent expenditures totaling $1,000 or more, in a calendar year.[39]

The campaign finance disclosure laws generally require that all Committees report all contributions and independent expenditures the Committee makes in state and local elections. Recipient Committees are also required to report the contributions received by the Committee, and, for the majority of Recipient Committees, all other expenditures made by the Committee.[40]

A public charity would qualify as a Recipient Committee if it expressly solicits and receives contributions of $1,000 or more for ballot measure contributions or independent expenditures.

If an organization such as a public charity makes expenditures for both political purposes (i.e., ballot measure activity) and for non-political purposes, it will be a Recipient Committee if it receives contributions as defined above and will be required to register and report its campaign related activity and the donors for that activity. If it has not received contributions, then it will report as a Major Donor/Independent Expenditure Committee.

A public charity would qualify as a Recipient Committee if it expressly solicits and receives contributions of $1,000 or more for ballot measure contributions or independent expenditures. A public charity would also be a Recipient Committee if it has a "history" of using its donor funds to make contributions or independent expenditures. An organization establishes a "history" if it has made contributions or independent expenditures of $1,000 or more during the current or any of the four preceding calendar years.[41] Often a public charity can avoid classification as a Recipient Committee, and therefore having to disclose its donors, if it can identify other, non-donor funds (such as investment income or other forms of revenue) from which it can make its contributions or independent expenditures. In these cases, the public charity will file disclosure reports only if it qualifies as a Major Donor/Independent Expenditure Committee.

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[39] Cal. Gov. Code Section 82013.

[40] The campaign disclosure requirements are found primarily in Chapter 4 of the Political Reform Act, Cal. Gov. Code Sections 84100 - 84511.

[41] See FPPC Regulation 18215(b)(1).

B. Reportable Ballot Measure Campaign Activities

In a typical state ballot measure campaign, there are Ballot Measure Committees formed for the express and only purpose of supporting or opposing the measure, and these Committees usually terminate after the election. These are called "primarily formed" Ballot Measure Committees (a form of Recipient Committee); in addition to reporting all of its receipts and expenditures, this type of Committee is subject to additional special reporting, naming and disclaimer requirements. Often these Committees are "sponsored" by a group or coalition of organizations or other persons.[42] Occasionally this type of Committee will be "controlled" by a candidate or officeholder.[43]

Ballot measure Committees usually solicit monetary and in-kind contributions to the Committee and directly expend funds in support of the measure campaign. In addition, if the Committee is sponsored by a group of organizations, the supporting or sponsoring organizations may devote staff, office space, or other organizational resources to the campaign, resulting in the making of reportable in-kind contributions to the Committee.

An in-kind contribution may involve the use of paid staff or other organizational resources on behalf of a Committee, including expenditures made at its behest.

In addition to the Ballot Measure Committee itself, the supporting organizations and other persons who become involved in the ballot measure campaign may incur reporting obligations as either a Recipient Committee or as a Major Donor/Independent Expenditure Committee as a result of the following activities:

1) The making of monetary contributions to a Ballot Measure Committee or to another Committee which is involved in the ballot measure campaign.

2) The making of in-kind contributions to a Ballot Measure Committee or to another Committee which is involved in the ballot measure campaign.

3) The making of independent expenditures (i.e., public communications that include express advocacy and which are not made "at the behest of" the Ballot Measure Committee or other Committee) with respect to the qualification, passage or defeat of the ballot measure.

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[42] The definitions of "sponsor" and "sponsored committee" are found in Cal. Gov. Code Section 82048.7; generally the law requires the disclosure of all Committee sponsors.

[43] A Committee is "controlled" by a candidate if the candidate has "any significant influence" on the actions or decisions of the Committee. Cal. Gov. Code Section 82016.

An in-kind contribution may involve the use of paid staff or other organizational resources on behalf of a Committee, including expenditures made at its behest. Note that an in-kind contribution is not limited to public communications; for example, a payment for consulting services may be an in-kind contribution if it is made at the behest of a Committee, even if it does not result in a public communication.

C. Activities That Are Not Reportable

Pre-circulation research and drafting

Funding preliminary research concerning the content or viability of a proposed initiative or the drafting of a proposed initiative will not generally result in any reporting obligations, since the proposal is not yet a measure.

Public communications that are not at the behest of a Committee and do not expressly advocate support or opposition to a measure

The distribution of a study or other educational materials would not be a contribution if the distribution were made to the public, and not just to one or more Committees for their private use, as long as the time and contents of the distribution were not coordinated in any way with the Ballot Measure Committee or other Committee. The public distribution could occur through the use of a press release or press conference or through a mailing to the media or other public information sources such as libraries, government agencies, and the like.

Words of express advocacy in the conveyance of an educational report would transform the entire distribution into reportable activity.

Cover letters, press releases, and other communications accompanying the study are part of the communication; words of express advocacy in the conveyance of a report would transform the entire distribution into reportable activity. Hence, in addition to the contents of the study or analysis, the content of any press releases or accompanying letters should also be reviewed carefully to ensure that there is no express advocacy of the defeat or passage of the measure.

Post-passage litigation

Also, funding litigation relating to a ballot measure which has already been passed by the voters is generally not reportable activity. For example, payments to fund a challenge to the constitutionality of a measure do not result in reportable campaign activity. In contrast, payments in support of litigation concerning a ballot measure after it is a measure but before it is passed or defeated by the voters may result in reportable campaign activity.

D. Required Reporting of and by Funding Sources

While reporting obligations are complex and highly dependent on the specific facts of a particular transaction, there are some commonly occurring situations involving funding sources that require closer scrutiny to determine whether a reporting obligation will arise, while others will almost never create reporting obligations of or for the funder. In this section, we look at reporting obligations arising when a donor transfers money to an organization, like a public charity, that may be involved in ballot measure activity but is not a Ballot Measure Committee, candidate committee, or political action committee.

Grant for a project intended to be reportable campaign activity

If a donor makes a gift or grant to an organization with the agreement or understanding that the funds will be used for a particular project, and the project the donor agreed to constitutes reportable campaign activity, then it is possible that the donor will have campaign reporting obligations because the donor knew and intended that his or her funds would be used for reportable campaign activity. It is also possible that the donor will be treated as a sponsor of the committee, with additional reporting requirements, if the donor participates in decisions concerning the reportable activity.

A donor will have campaign reporting obligations if the donor knew and intended that his or her funds would be used for reportable campaign activity.

Grant for a project that, as implemented, includes reportable activity

The situation is somewhat different if the donor agrees to fund a particular project of an organization without knowing or agreeing to the aspects of the project that make it reportable campaign activity. The donor may still be deemed to have made a reportable contribution to the organization if the donor knew or should have known that the donation would be used for reportable activity by the organization. Reporting obligations in this case would depend on a fact-specific inquiry to determine if the donor had the requisite knowledge to cause the grant to be treated as a contribution within the meaning of the campaign reporting laws. Relevant facts will include the description of the funded project, the statements in the solicitation and award documents, discussions between the donor and the organization about the project, involvement of the donor in implementation, and the organization’s history of ballot measure activity.

A donor may be deemed to have made a reportable contribution to the organization if the donor knew or should have known that the donation would be used for reportable activity by the organization.

Grant for a project that includes no reportable activity

If a donor makes a gift or grant to an organization with the agreement or understanding that the funds will be used for a particular project, and the project includes no reportable activities (i.e., no independent expenditures or ballot measure contributions, in cash or in kind), then the donation will not be reportable. This is true even if the organization engages in reportable activity with other funds.

Unrestricted donation to an organization that engages in reportable ballot measure activities

If an organization engages in reportable ballot measure activity, the organization could meet the definition of a Recipient Committee. If so, it will have to report the contributions it receives to fund its own ballot measure activities. Whether a particular donor will be reported by the organization on its Recipient Committee report depends on whether the donation is a "contribution" within the meaning of the campaign disclosure laws.

A donation made with the direction, agreement, or understanding (explicit or implicit) that the organization will use the donated funds to engage in the reportable activity, is a reportable contribution. A donation is also a contribution if the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used for ballot measure activity. An organization's history of ballot measure activity is an important factor in determining whether donors will be deemed to have made contributions, since the history gives them a reason to know their donations could be used for reportable activities.

When an unrestricted donation is made to an organization with a history of ballot measure activity (without any agreement or understanding regarding its use), it is not always possible to determine at the moment of gift whether the organization will be a Recipient Committee and whether any portion of the donation will be a reportable contribution. If the organization engages in reportable contributions to Ballot Measure Committees or makes independent expenditures during the year, it will have to determine whether the activity was funded with contributions, causing it to be a Recipient Committee.

If the organization is a Recipient Committee, it will have to allocate its reportable ballot measure expenses to the donations available to fund them (excluding donations that were not available because they were restricted to non-reportable activity), and report as contributions the share of each available donation used for reportable activity. To give an example, if an organization determines it is a Recipient Committee, and that it had $100,000 in donations available to fund its $15,000 in independent expenditures (excluding from the calculation any gifts and grants that were not available to fund the independent expenditure), the organization would treat 15% of each available donation as a

contribution, reporting the names of all donors deemed to have contributed $100 or more.

When an unrestricted donation is made to an organization with a history of ballot measure activity, it is not always possible to determine at the moment of gift whether any portion of the donation will be a reportable contribution.

If a donor is treated as making a contribution of $100 or more, the organization will identify the donor on its Recipient Committee report. If the donor's aggregate contributions equal or exceed $10,000 during a calendar year, the donor must file as a Major Donor Committee. Becoming a Major Donor Committee can happen as a result of a single large reportable contribution to a single Recipient Committee, or through a series of smaller reportable contributions to several different Recipient Committees made in a single year. A Recipient Committee must notify donors that they have been reported as contributors if the amount of the contribution attributed to them is $5,000 or more.

Appendix C: Illustrations

The intersection between federal tax law rules and state campaign disclosure laws is difficult terrain, since each body of law is complex in its own right. The hypotheticals in this section illustrate the application of these laws in the context of private foundation grants to public charities. For the sake of simplicity, we assume that the public charity in each of these examples has made the 501(h) election.

Example 1: General support grant when the grantee engages in ballot measure activity

Density Defenders, a public policy think tank focusing on environmental sustainability in urban development, receives a $100,000 grant from a private foundation ("Foundation") that is not restricted to any particular program or area of Density Defenders' work, but rather is described in the grant agreement as "core operating support". Neither the grant application nor the grant agreement refers to any ballot measure, and Density Defenders did not indicate in discussions with Foundation that it planned to engage in any ballot measure activity. This is a substantial grant for Density Defenders, whose total annual budget is approximately $300,000.

This example illustrates when core operating support may be treated as a "contribution" under California's campaign finance disclosure rules. It also reviews the reporting obligations of organizations that make contributions and organizations that receive contributions. Finally, it illustrates the favorable tax treatment for private foundations that make unrestricted, general support grants to public charities.

Density Defenders, a public charity, has reported lobbying (including work on ballot measures) on its Form 990 regularly over the past several years. Four years ago, Density Defenders made a $1,000 contribution to a Ballot Measure Committee supporting a public transportation ballot measure.

Now, a state ballot measure is pending to create a tax mechanism for funding brownfields clean-up and development; the need for public funding for such efforts has been a key recommendation on Density Defenders' agenda for years. Density Defenders makes a $15,000 cash contribution to the Ballot Measure Committee supporting the measure, and provides staff and office space to the Committee with a value of $15,000.

Density Defenders' contributions to Ballot Measure Committee, including both the cash contribution and the provision of in-kind services and office space, are clearly lobbying for tax law purposes, and Density Defenders must report these $30,000 in contributions as lobbying expenditures on its next Form 990 filing. (Density Defenders must also make sure that its other lobbying expenditures during the year stay below $30,000 so that Density Defenders stays within its Section 501(h) limit, which will be $60,000 for the year if Density Defenders' actual expenditures end up equaling its $300,000 budget).

Both cash and in-kind contributions to a Ballot Measure Committee are "contributions" under campaign disclosure laws.

The $30,000 in cash and in-kind contributions must also be reported for state law purposes by the Ballot Measure Committee, listing Density Defenders as the source. Density Defenders also has an independent obligation to file campaign disclosure reports, because of the size of its contribution.

The question is whether Density Defenders must report as a Major Donor Committee that made contributions out of its own funds, or as a Recipient Committee that received contributions from others to support its ballot measure work. Density Defenders might have received "contributions" for state disclosure purposes if its donors knew or should have known that their donations would be used by Density Defenders (or commingled with funds used by Density Defenders) to make contributions or independent expenditures in ballot measure campaigns. Density Defenders does have a history of involvement with ballot measure campaigns; it made a contribution that met the $1,000 threshold during the four-year look-back period. In addition, Density Defenders' Form 990 indicated it engaged in other lobbying on ballot measures.

A donation to an organization that is not a Ballot Measure Committee is a "contribution" if the donor knew or should have known that the organization would use it to make ballot measure contributions or independent expenditures.

Density Defenders' annual reports or descriptions of its activities might also have disclosed its previous ballot measure activities. On these facts, donors to Density Defenders would likely be deemed to have notice that general support donations and grants might be used by Density Defenders to make contributions or independent expenditures in ballot measure campaigns. Hence, Density Defenders must report as a Recipient Committee and include in its report a list of contributions received for ballot measure work. If Density Defenders can identify a source of funds for its $30,000 in contributions other than the Foundation's grant, like other grants, interest, or earned income, it will not have to report the Foundation as a "contributor" to its ballot measure work on its campaign disclosure report. Otherwise, Density Defenders will have to disclose a pro rata portion of its general support grant from Foundation as a source of its ballot measure contribution.

Foundation has not engaged in prohibited lobbying for tax purposes, since a grantee's lobbying is never attributed to a private foundation grantor in the case of an unrestricted, general support grant. However, Foundation may be required to report as a Major Donor Committee, and Foundation may also be listed as a contributor to Density Defenders in Density Defenders' Recipient Committee report. As discussed above, Density Defenders has a history of ballot measure activities, and Foundation may be deemed to have notice of the fact that an unrestricted grant of $100,000 could be commingled with funds used to support Density Defenders' reportable ballot measure activity.

An unrestricted grant to a public charity is not a lobbying expenditure, even if the public charity uses grant funds to engage in lobbying activities.

Assuming Foundation provided one-third of Density Defenders' funds, one-third of Density Defenders' ballot measure activity (i.e., one-third of the $30,000 contribution to the Ballot Measure Committee or $10,000) would be deemed to be funded by Foundation. Density Defenders would be required to notify Foundation that it had been deemed to make a contribution (since the deemed contribution was $5,000 or more), and Foundation would be required to report its $10,000 contribution to Density Defenders on a Major Donor Committee report.

However, if Foundation's grant agreement prohibited use of any of the grant for contributions to a Ballot Measure Committee, Foundation would not be deemed to have made a reportable contribution to Density Defenders. Alternatively, if Density Defenders can trace all of its $30,000 contribution to sources or revenue other than donations, such as interest income or income earned from its activities, then Foundation's grant will not be deemed to be a contribution to Density Defenders for ballot measure activity.

Now suppose Density Defenders had no history of reportable ballot measure activity, and had not made any independent expenditures or contributions prior to the $30,000 contribution to the Ballot Measure Committee. In that case, Density Defenders would only file a Major Donor Committee report as a result of the $30,000 contribution, and would not be required to disclose its donors. This is only true because Foundation had no actual knowledge that its funds would be used for ballot measure contributions; if Foundation had known, its contribution would have been reportable even though Density Defenders had no history of ballot measure activities.

Finally, suppose again that Density Defenders has triggered reporting obligations as a Recipient Committee, but Density Defenders' contribution to the measure this year were smaller, say $1,800 instead of $30,000. Now, in every scenario, Foundation's share of Density Defenders' contribution would be less than $10,000, so Foundation will not become a Major Donor Committee with its own obligations to make campaign disclosure reports. However, if Density Defenders cannot identify other sources of non-donor funds for its contribution, and

Foundation's grant agreement did not prohibit use of grant funds for a ballot measure contribution, then Density Defenders could still have to report Foundation as a contributor on Density Defenders' Recipient Committee report, since Foundation's one-third share of a $1,800 contribution is $600, in excess of the reporting threshold of $100.

From the complexities of the foregoing discussion, it should be apparent that legal counsel is needed to determine whether a particular general support grant could result in the funder having its own reporting obligations or lead to the grantee's reporting the foundation's grant as a contribution on its Committee report.

Further Information

For the reporting obligations of Recipient Committees and Major Donor/Independent Expenditure Committees under campaign finance disclosure laws, see Appendix B at page 47 and 50-2.

For the definition of a contribution under campaign finance disclosure laws, see Appendix B at page 43.

For the federal tax rules regarding general support grants to public charities, see Appendix A at pages 39-40.

(Pointers from Example 1 are found on the following page.)

Pointers from Example 1:

- If Density Defenders had not made any reportable independent expenditures or contributions during the four-year look-back period, a presumption would arise that donors did not know their general support grants and donations would be used for ballot measure activity. The look-back period includes the current calendar year through the date of the donation, plus the four full calendar years proceeding the current year. Because many charities are on a fiscal year that is not a calendar year, it is critical to know exactly when prior reportable ballot measure activity occurred.

- If Foundation was concerned about the possibility of campaign disclosure reporting, it could have asked Density Defenders about its previous ballot measure activities, or even required Density Defenders to represent that it had not engaged in reportable activities during the look-back period as a condition of getting the grant.

- Alternatively, if Foundation had restricted the grant to prohibit use for ballot measure contributions or independent expenditures, the grant would not have been a reportable contribution. However, this restriction would also have diminished Density Defenders' flexibility and increased Density Defenders' administrative burden of tracking its use of Foundation funds.

- An unrestricted grant to a public charity is clearly not lobbying under federal tax rules. Even if part of the grant is deemed to be a reportable contribution, Foundation has not made a prohibited lobbying expenditure.

Example 2: Nonpartisan analysis, study or research

A private foundation ("Foundation") receives a grant proposal from the Do-Gooders Network (DGN), a public charity that represents a range of human services organizations. DGN seeks funding for an in-depth analysis of the likely economic and social impacts on specific demographic groups of a ballot measure scheduled for a vote in a few months. The project budget is $40,000, of which $33,000 would cover time and expenses of economists and social scientists at a local university to conduct research and draft a study, and $7,000 is slated for copying and distributing the study to various interested parties. Foundation makes a grant of $20,000 for the project.

This example illustrates that nonpartisan analysis, study, or research may be reportable ballot measure activity, if it expressly urges voters to support or oppose a measure.

The study, when written, runs 35 pages plus data tables in appendices, addressing the major claims of proponents and the concerns of opponents. As required in the grant agreement, the study is distributed to the media, sent to a mailing list of human services organizations, and posted on DGN's website. It concludes that the proposition "would significantly reduce the economic opportunities available to some of California's most vulnerable populations, and increase the likelihood of fragmenting already marginal communities, without sufficient counterbalancing benefits" and therefore "Californians must vote against the proposition, or the past two decades of progress in these communities may be lost."

While the study clearly refers to and reflects a view on the proposition, its distribution will not be lobbying for IRS purposes if the study, taken as a whole, is an objective and even-handed economic analysis. Whether a study is sufficiently objective and fair to be "nonpartisan" is a judgment call; in this hypothetical, the conclusion is intended to be clear, in spite of the strong viewpoint expressed at the end. Any real study would have to be reviewed completely to be sure the tone of the conclusion is not present throughout the study to such a degree as to take it out of the nonpartisan analysis exception.

At the same time, the study's concluding statement constitutes express advocacy, since it names the measure, and says voters should vote against it. Since it was prepared and distributed without any contact with a Ballot Measure Committee, the expenses of preparing and distributing the study are reportable independent expenditures. Whether reporting obligations are incurred by DGN, the Foundation, or both, will depend on a number of factors, including the content of the grant agreement or other direction from Foundation as to the content or distribution of the study, as well as the actual involvement of Foundation in its preparation.

Pointers from Example 2:

- The distribution of the study would not have been an independent expenditure if the conclusion had not expressly advocated defeat of the measure. By simply eliminating the express advocacy, all campaign finance reporting obligations could have been avoided.

- The biased tone of the conclusion raises the bar to be met in evaluating the nonpartisanship of the entire report under tax law; a study would more easily qualify as nonpartisan analysis, study, or research without an express advocacy conclusion. If there is any doubt about whether the rest of the study qualifies, express advocacy should also be avoided for tax purposes.

- Foundation could have required DGN to obtain a legal review of the study to determine whether it qualifies as nonpartisan analysis, study, and research, and whether it contains express advocacy, before it is printed and distributed. Foundation could also include the costs of such a review in its grant.

- Since Foundation and DGN both understood from the beginning that the study would be nonlobbying for tax purposes by virtue of qualifying for the nonpartisan analysis, study, or research exception, this is an instance where including a clause in the grant agreement prohibiting DGN from using the funds for lobbying for tax purposes would have been appropriate. Foundation could also have prohibited DGN from engaging in express advocacy for state law purposes with Foundation's grant.

Further Information

The nonpartisan analysis, study and research exception to lobbying is discussed in Appendix A at page 36.

The definition of independent expenditure is provided in Appendix B at pages 44-45.

Example 3: Projects done at the behest of a Committee

KidWonks is a public charity working on education policy. An initiative called "Children First" is circulating for petition signatures; the measure would, among other things, guarantee a minimum level of state funding for early childhood education programs for poor children.

A Ballot Measure Committee was formed to promote the Children First initiative, governed by a steering committee. The steering committee discusses various themes for the campaign, and decides to focus on the hard-headed argument that investing in programs for young, at-risk children saves government money by reducing costs in the public education, health care, and juvenile justice systems. Steering committee members are aware that existing research documents these cost savings; summarizing the research in an accessible, attractive report and distributing it broadly well before the initiative campaign would help increase the public's receptivity to the campaign's messages closer to the election. The steering committee explains the situation to Jane, an employee of KidWonks, and asks KidWonks to prepare and distribute the publication. KidWonks has an excellent reputation for solid research in this area, and producing this report is a good fit with KidWonks' other work.

This example illustrates how a communication that is not lobbying for tax purposes may be reportable under California campaign finance laws due to coordination with a Ballot Measure Committee.

Jane relates this discussion to the KidWonks Board of Directors and the Board agrees that distributing this education policy research is consistent with its core mission. KidWonks submits a $50,000 grant request to a private foundation ("Foundation") to produce and distribute the report. Foundation approves the grant after being assured that the report will not mention the proposed Children First measure, directly or by implication. By the time the report is produced and distributed, the initiative has qualified for the November ballot. The KidWonks report is widely distributed, and neither the report nor any communication sent with the report mentions the Children First proposition.

Although KidWonks apparently intended to assist the ballot measure campaign by producing the report, the distribution of the report is probably[44] not lobbying for tax purposes because it does not refer to any specific legislation, let alone reflecting a view on any legislation, and it was broadly distributed without any lobbying message. However, for state law reporting purposes, KidWonks prepared the report in response to a direct request from the Ballot Measure Committee

[44] This is one situation in which the state law reporting obligation might possibly have tax consequences; the state law treatment of the report as an in-kind contribution to a Ballot Measure Committee could cause the IRS to take the position that distribution the report was like KidWonks writing a check to the Committee, so that the costs of the report would be lobbying expenses regardless of whether the report qualified as a lobbying communication under the tax rules. While there is some tax risk, we are not aware of any case in which the IRS has taken such a position.

primarily formed to promote the Children First proposition; the contents and timing were discussed by the Committee with Jane before KidWonks decided to take the project on. Because the report was coordinated with the Committee, KidWonks made an in-kind contribution, which the Committee must report on its campaign disclosure forms. KidWonks also its own has campaign reporting requirements.

Assuming that Foundation had no knowledge of the coordination between KidWonks and the Ballot Measure Committee (and did not itself coordinate with the Committee), probably the grant to KidWonks would not be treated as a reportable contribution by Foundation. However, if Foundation had known that KidWonks was preparing the report in coordination with the Ballot Measure Committee, Foundation's grant for the report would have been reportable by both Foundation (as a Major Donor Committee) and by KidWonks (as a Recipient Committee).

Pointers from Example 3:

- The distribution of the report was only reportable campaign activity because of coordination with the Ballot Measure Committee. If Jane, aware of the proposed Children First initiative, had decided independently that such a report would be helpful to the ballot measure campaign, and taken her proposal straight to the KidWonks Board without any discussion with representatives of the Ballot Measure Committee, no state campaign finance reporting obligations would have arisen.

- Foundation could not have determined that the report would be an in-kind contribution based on its contents; it was the context of KidWonks' decision to prepare a report that caused it to be a contribution. Unless KidWonks mentioned those facts to Foundation, or Foundation asked about coordination, Foundation could not foresee the campaign disclosure reporting. KidWonks may not have understood the implications of its contacts with the Ballot Measure Committee; Foundation should not rely on KidWonks to protect its interests unless KidWonks is well-advised by campaign finance counsel.

- To ensure that Foundation did not have reporting obligations, Foundation could have included a clause in its grant agreement prohibiting KidWonks from using the funds for any project that was done at the behest of, or in coordination with, a Ballot Measure Committee. This would be particularly important if KidWonks had a history of engaging in reportable ballot measure activity.

Further Information

Issues raised by coordination with a Ballot Measure Committee are discussed in Appendix B, at pages 43-46.

Example 4: Public education on a legislative issue and subsequent lobbying use

Citizens for Less Absurd and Stupid Policies ("CLASP") plans to engage in a public education campaign on a topic that has been the subject of multiple failed and on-going attempts to pass legislation in California over the past several years. The first step is extensive research to explain and support CLASP's positions on various legislative proposals that have surfaced, and present the results in the form of a study that CLASP can distribute to raise public understanding of this important public policy problem. Also, CLASP is a member of an association of similar nonprofits, and the association and CLASP's fellow members would find the information in the study useful. Foundation agrees to fund the study. CLASP and Foundation agree that the distribution of the study will avoid any call to action as defined by the tax rules; accordingly, the grant agreement also provides that CLASP is prohibited from using grant money for lobbying for tax law purposes.

This example illustrates the issues raised by subsequent lobbying use of private foundation funded communications.

At the time the grant was made, CLASP's study was not a lobbying communication for tax purposes because it did not urge the public, directly or by implication, to contact their legislators. Because CLASP agrees that the study will be distributed without any call to action, Foundation's grant to CLASP to prepare the study is not a lobbying expenditure, even though the study will refer to and reflect a view on specific legislative proposals. Similarly, Foundation and CLASP did not expect that state ballot measure reporting obligations would be an issue, since there was no ballot measure at the time.

However, shortly before completion of the study, a ballot measure is proposed that tracks one of the failed bills discussed in the study. With the introduction of a ballot measure, the situation changes: suddenly, the public becomes the legislature, and distribution of the study to the public would constitute direct lobbying for tax purposes, because the study refers to the legislative proposal that would be enacted by the ballot measure and reflects a view on the ballot measure.

CLASP wants to use the study anyway, since it can lobby within its Section 501(h) limits, but Foundation cannot lobby at all. What use can be made of the study that is not lobbying for tax purposes? Can CLASP distribute the study without having the costs of the study be attributable to Foundation as a prohibited lobbying expenditure?

CLASP may use Foundation funds to distribute the study, but not to the public (who are the legislature in a ballot measure), nor to the Legislature (who may still vote on legislation similar to the ballot measure). Instead, CLASP can use Foundation funds to distribute the study to the like-minded organizations who are

its fellow association members, both within California and nationwide. Foundation may share the study with like-minded funders nationally who participate in an affinity group with interests in the topic of the ballot measure. CLASP and Foundation reasonably expect the recipients will find the study useful in many phases of their work, not just for lobbying. Neither of these distributions will constitute lobbying for tax purposes by CLASP or Foundation. Unless it appears that CLASP or Foundation *intended* the recipients of the study to use it in lobbying, even if the recipients do use the study in lobbying communications, that lobbying will not be attributed back to CLASP or to Foundation.

What if CLASP subsequently uses the study in a lobbying communication – will that convert what started out as a nonlobbying project into lobbying attributable to Foundation? Suppose that after making the nonlobbying distribution described above, CLASP drafted a cover e-mail sent to its entire California mailing list, with the study attached, saying "This study shows why you should vote for Proposition X on November 6." Here, it is important that when Foundation agreed to fund the study, the Foundation expected and required the study to be distributed as a nonlobbying communication. Consequently, Foundation's grant for the initial preparation of the study is not a lobbying expenditure, and CLASP's subsequent use is not attributed to Foundation. This "no attribution" result is bolstered by the actual nonlobbying distribution of the study by CLASP and Foundation. If the total nonlobbying distribution of the study is at least as large as the CLASP's lobbying distribution, it is very unlikely the lobbying use would taint the entire study. It would also be helpful if any later lobbying distribution were separated in time from the initial nonlobbying distributions, and the longer the better. If the lobbying distribution can be delayed as long as six months, for example, the risk that the study preparation costs would be lobbying would be minimal. Foundation cannot, of course, fund CLASP's lobbying distribution of the study.

The situation would be different if Foundation knew or should have known that CLASP's purpose in preparing the study was lobbying. For example, if CLASP's development director made it clear to Foundation's program officer that CLASP wanted the study as a tool in a planned campaign to get the legislature to enact the reforms discussed in the study, then CLASP's lobbying intentions would taint Foundation's grant, and the grant would likely be a lobbying expenditure.

The e-mail, with its words of express advocacy for the measure, makes CLASP's public distribution of the study via e-mail an independent expenditure. It is likely that only the costs of the e-mail distribution (and not the costs of preparing the study) would be independent expenditures, principally because the study was not prepared for the purpose of making an express advocacy communication to voters, but this determination would depend on all the circumstances. In addition, it is unlikely that the Foundation would incur reporting obligations here, since it was not involved in the e-mail distribution.

Pointers from Example 4:

- As in the first example, CLASP would not incur campaign reporting obligations if its e-mail did not include express advocacy.
- A private foundation funding a nonlobbying study may want to consider making itself, or requiring (and possibly funding) a substantial nonlobbying distribution of the study by its grantee, to ensure that any later lobbying use by its grantee will not taint the costs of the original study funded by the foundation.

Further Information

The definition of direct lobbying can be found at in Appendix A at pages 31-32.

The impact of subsequent use of non-lobbying materials in a lobbying communication are discussed in Appendix A, at pages 34-35.

Example 5: Pre-circulation activities

Statewide Advocates for Youth Access and Health (known by its acronym, SAY AAH) is a public charity that works on a variety of issues addressing the health care needs of the poor and children. SAY AAH has commented on several legislative proposals to improve access to health care services, but believes it can come up with a better package that will be politically viable, either before the legislature or as a ballot measure. Parts of the package are likely to address administrative regulations, rather than requiring new laws or appropriations. Political viability is critical, of course.

This example discusses when activities done before a measure exists will be treated as preparation for later lobbying.

SAY AAH develops a strategy that will begin with an opinion poll to find out what the public believes about the current state of health insurance in California, who is uninsured and why, what the public thinks of various proposals for increasing the rate of health insurance in the state, and what they would be willing to pay, and in what form, to achieve higher rates of insurance. Information from the poll would be used to develop the package of proposals to improve access to health care, including drafting legislation and possibly a ballot measure, while building a coalition of community groups to support change.

The project will culminate in an effort to get the package of reform proposals adopted, whether in the form of new regulations or legislation either in a ballot measure or before the Legislature. That campaign would include both lobbying and nonlobbying public education components. SAY AAH requests $50,000 from a private foundation ("Foundation") to commission the poll, and is awarded the grant. The poll demonstrates widespread public support for providing free health care to children through the public schools. Several months later, SAY AAH and a number of other organizations form a Ballot Measure Committee to draft and circulate the "Nurse in Every School" initiative.

It is unlikely that SAY AAH's expenses for the poll are entirely lobbying for tax purposes. It appears from the context that the poll results have a variety of nonlobbying, as well as some potential lobbying uses; therefore, at worst, SAY AAH would have to allocate the polling costs between lobbying and nonlobbying. If nonlobbying uses clearly predominate, SAY AAH may be able to treat the entire cost of the poll as nonlobbying. However, a determination of the poll's purposes cannot be based on just the context; both the poll questions themselves, and the way the results of the poll are written up, could change the tax law conclusion.

For example, poll questions designed gather information about uninsured Californians and the reasons they lack insurance are likely to have a nonlobbying research purpose. Questions to test specific legislative language, specific lobbying campaign messages, or specific campaign spokespersons, have no other possible

purpose than to prepare to lobby, and the presence of such questions would require that at least a portion of the poll costs be treated as lobbying for tax purposes. If the analysis of poll results focuses heavily on what the poll says about how to sell potential legislation to the public or legislators, and addresses only in passing the relevance of poll results to general public knowledge, it could affect a determination of whether the poll's purposes are primarily preparation for lobbying. If SAY AAH's plan called for a second poll, later in the planning process, to explore campaign messages and spokespersons in preparation for lobbying, it would be easier to conclude that the initial poll primarily served nonlobbying purposes. If SAY AAH published its poll results as an educational resource about public opinion on and awareness and understanding of health issues, it also more likely that the poll will be treated as a nonlobbying activity.

Under state campaign disclosure laws, the costs of the poll do not have to be reported as ballot measure activity because expenses associated with drafting a measure, and other pre-petition expenses, are not reportable. This would be true even if the poll questions focused on specific legislative language designed to inform the drafting of legislation. Poll questions concerning campaign messages and spokespersons, however, if later actually used by a Ballot Measure Committee to craft the message and select spokespersons, would be reportable activities when so used, requiring allocation of the total cost of the poll among questions.

Coordinating the poll questions and timing with a Ballot Measure Committee could also cause the poll to be treated as a reportable campaign activity (although in this example, no Ballot Measure Committee exists when the poll is commissioned). Also, if SAY AAH decided to give the poll results to the Nurse in Every School Committee for its private use, then the entire cost of the poll could become an in-kind contribution. For campaign valuation purposes, there is a formula for valuing the poll based on the initial cost and the age of the results at the time the poll is privately supplied to the Committee, e.g., for the first 30 days, a poll is valued at 100% of its cost; after 180 days, the value drops to zero. There would not be an in-kind contribution if the Committee obtained a copy of the poll results because it was publicly distributed, such as through a press release or press conference, mailing to the media, libraries, or government agencies, or posting on the Internet.

For Foundation, characterization of any portion of the poll as preparation for lobbying for tax purposes is problematic, since it earmarked its grant for the poll, and was the sole funder. Therefore, Foundation may want to require either that the poll and the final analysis be reviewed by its legal counsel, or that SAY AAH obtain such a review, to ensure that the poll serves nonlobbying purposes primarily, and that no portion of the poll serves only lobbying purposes so as to require that a portion of the poll be allocated to lobbying for tax purposes. It is not possible to know, before the poll questions are drafted or selected, the proper characterization of the poll under tax law.

Unless Foundation takes steps to control what SAY AAH can do with the poll and results after it is complete, SAY AAH's actions may determine whether

Foundation is reported as having made a contribution for campaign finance law purposes to some Ballot Measure Committee in the future. Under the circumstances described here, it is unlikely the grant would be treated as a contribution from Foundation unless Foundation directed the donation of the poll to the Ballot Measure Committee.

Pointers from Example 5:

- This hypothetical illustrates the importance of thinking about possible ultimate uses of poll results up front, and possibly addressing them in the grant agreement. For example, a grant agreement could require that the poll results be made public, or that the results not be provided privately to any Ballot Measure Committee.
- Polling and the analysis and distribution of poll results are highly fact-specific areas; if possible, build in time and a budget for a legal review to ensure that consequences are understood before actions are taken, and that polls are properly characterized. Polling is not always lobbying for tax purposes, nor is it always reportable for campaign finance law purposes; but the costs of polling can be lobbying and can be reportable, whether or not specific legislation or a ballot measure exists at the time, depending on the details of the facts and circumstances.
- Drafting of ballot measure language is one of the few areas where the state campaign finance law definitions of what is ballot measure activity are narrower than the tax law definitions of what is lobbying. Drafting the ballot measure is probably preparation for lobbying in most cases, and therefore expenses of the drafting process probably should not be funded by a private foundation, even though the activity is not reportable for campaign finance law purposes.
- Both bodies of law treat expenses incurred before circulation of petitions on a measure, but in order to prepare for express advocacy lobbying communications that will occur after the measure is in circulation, as lobbying/reportable activity.

Further Information

Preparation for lobbying before a measure circulates for tax purposes is discussed in Appendix A, at pages 34-35.

Treatment of pre-circulation expenses for campaign finance disclosure purposes is discussed in Appendix B at page 49.

Appendix D:
Voter Education Case Study

In 1994, The California Wellness Foundation funded a nonpartisan public education campaign by the Public Media Center to educate voters about Proposition 188, a ballot measure regarding the regulation of smoking.

In this appendix, we reprint an article by Gregory Colvin discussing why this voter education effort was a permissible use of private foundation funds. An advertisement from this voter education campaign is also reprinted. The authors thank Gregory Colvin, the publishers of *Taxation of Exempts*, and The California Wellness Foundation for allowing us to reproduce these materials.

- Gregory Colvin, "A Case Study in Using Private Foundation Funds to Educate Voters," was originally published in the *Journal of Taxation of Exempt Organizations*, Vol. 6/Issue 6, May/June 1995, © 1995 the Thompson Legal and Regulatory Group. This publication has subsequently been renamed *Taxation of Exempts*.

- The Proposition 188 advertisement was designed by the Public Media Center, with grant funding from The California Wellness Foundation.

A Case Study in Using Private Foundation Funds to Educate Voters

GREGORY L. COLVIN

New ground was broken for private foundations and public charities in November 1994 as two organizations in California spent $4 million to educate voters on a critical ballot measure affecting public health—Proposition 188, the statewide smoking initiative. This was the largest single expenditure directed at a piece of legislation since the IRS issued new lobbying Regulations for charities in 1990.

The two organizations were The California Wellness Foundation (TCWF), one of the largest private foundations in the country devoted to public health, and the Public Media Center (PMC), a nonprofit, public-interest advertising agency serving the charitable sector.

The nonprofit voter education campaign paid for by TCWF and conducted by PMC illustrates how private foundation funds, which are subject to the highest level of lobbying restrictions imposed by federal tax law, can still be used effectively in a nonpartisan, public-interest campaign, and can have a major impact on the voters' perception of an issue.

GREGORY L. COLVIN is a partner in the San Francisco firm of Silk, Adler & Colvin. He represented The California Wellness Foundation and the Public Media Center on the federal tax issues discussed in this article.

THE INITIATIVE

In 1994, TCWF's board of directors became concerned about the public policy issue of "preemption" in the area of smoking and tobacco regulation. There has been a movement toward stricter regulation of smoking at the local level in California and elsewhere, and the tobacco companies have been aggressively lobbying for uniform (but weaker) national or statewide laws to preempt local laws. Proposition 188 was placed on the November 1994 California ballot primarily as a result of efforts by Phillip Morris to convince voters that a uniform state law would be an improvement over the existing system of regulation. Proponents touted the proposition as an antismoking measure, even though its actual effect would be to loosen smoking regulations. Independent nonpartisan analysis by the Institute of Health Policy at the University of California in San Francisco indicated that Proposition 188 would result in a higher level of smoking in California and, correspondingly, a worsening of public health.

In the summer of 1994, it looked as though Proposition 188 would pass. Surveys showed approximately 50% of the voters in favor of and 45% opposed to the initiative. More important, the surveys revealed widespread confusion and misunderstanding among the voters as to whether the proposition would result in more or less regulation of smoking in California. It appeared that a substantial proportion of voters favoring the initiative did so in the belief that it would increase smoking regulations and reduce smoking in California—apparently what proponents intended. For this reason, TCWF's board decided to get involved in an attempt to raise the level of accurate public knowledge about the measure.

Two main choices were available to the foundation. It could urge the public to vote against the initiative, using the "nonpartisan analysis" exception under IRS rules that generally prohibit pri-

EXHIBIT I: Legal Options for Private Foundation Action on a California Ballot Measure

Level of Advocacy	Example	Treatment Under Section 4945(e) Analysis	Consequences
Express advocacy.	"No on 188."	Lobbying, partisan.	Taxable expenditure.
Express advocacy, taken in context.	"188 weakens smoking laws. Don't let them trick you."	Lobbying, partisan.	Taxable expenditure.
Advocacy, within full and fair exposition.	Long analysis of facts, arguments pro and con, or both."We think it's bad. You decide."	Nonpartisan analysis.	None.
Implied advocacy, within full and fair exposition.	Long analysis of facts, generally unfavorable. No conclusion.	Nonpartisan analysis.	None.
Statement of fact, without advocacy.	"Philip Morris has spent $X to pass Prop 188. The American Cancer Society has spent $Y to defeat the measure."	If no view reflected on the measure, not lobbying.	None.
Neutral suggestion to voters to study the issue.	"Before you vote on 188, see who's for it and who's against it, and how it would affect our health."	If no view reflected on the measure, not lobbying.	None.
Equal time pro and con.	Read or print first 100 words of each side's argument from ballot pamphlet.	Because no view reflected on the measure, not lobbying.	None.

vate foundations from lobbying. Alternatively, it could educate the voters in a neutral fashion, which IRS rules also permit, hoping that the electorate in fact did not want to weaken the regulation of smoking in California and would vote accordingly.

Under Section 4945(e), a private foundation such as TCWF cannot engage in "any attempt to influence any legislation ... other than through making available the results of nonpartisan analysis, study, or research" without causing the foundation, and potentially its management, to be liable for excise taxes. Lobbying expenses are taxable expenditures under Section 4945, and "substantial" lobbying activities by any Section 501(c)(3) organization can result in loss of tax-exempt status.

BASIC DEFINITION OF LOBBYING

A private foundation can avoid crossing the line into lobbying if its activity does not become an attempt to influence legislation. The definition of "influencing legislation" for private foundations is virtually identical to that provided for public charities, whether or not they make the Section 501(h) election.[1] The Regulations contain a special rule for referenda, ballot initiatives, and similar procedures.[2] The rule provides that in an initiative vote, "the general public in the state or locality where the vote will take place constitutes the legislative body, and individual members of the general public are ... legislators." If a lobbying communication—one that "refers to and reflects a view on" the subject of the initiative—goes to "one or more members of the general public in that state or locality, the communication is a direct lobbying communication (unless it is nonpartisan analysis, study or research...)."

Therefore, if the communication lacks one of the two basic requirements for a direct lobbying communication—either the reference to the measure or the reflection of a view on the measure—the foundation has not lobbied. If TCWF were to pay for communications that referred to Proposition 188, but those communications reflected no view on the measure, TCWF would not be lobbying under the IRS rules.

As the examples in Exhibit I, above, indicate, if the communication is a simple statement of symmetrical facts that does not reflect a view on the measure, a neutral

[1] See Colvin, "The Section 501(h) Election Allows Many Charities to Become Aggresive Lobbyists," 5 JTEO 38 (Jul/Aug 1993).

[2] Reg. 56.4911-2(b)(1)(iii), incorporated by reference in Reg. 53.4945-2(a)(1). Ballot measure activity is lobbying rather than electioneering. Because the initiative is functionally analogous to legislation, federal tax law for charities treats intervention in initiative elections as a form of "influencing legislation," while "electioneering" refers only to intervention in elections for political candidates.

suggestion to voters to study the issue, or an "equal time pro and con" format, there is no violation of Section 4945(e).

NONPARTISAN ANALYSIS

Even if the communication refers to a measure and reflects a view on that measure, there is an exception for nonpartisan analysis, study, or research.[3] This is defined as an "independent and objective exposition" of an issue, "including any activity that is 'educational' within the meaning of §1.501(c)(3)-1(d)(3)." It can advocate a particular position or viewpoint "so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion." The mere presentation of unsupported opinion is not "nonpartisan analysis, study, or research."[4]

Rev. Proc. 86-43, 1986-2 CB 729, provides a test based on the methodology used to prepare the communication, rather than the beliefs advocated by the organization, for determining what is "educational." This test was recently found to be constitutional by the Tax Court in *Nationalist Movement*, 102 TC 22 (1994), *aff'd* 37 F.3d 216 (CA-5, 1994), *cert. den.*

Regulations also govern the manner in which nonpartisan analysis may be disseminated within the exception under Section 4945(e).[5] A private foundation may choose "any suitable means, including oral or written presentations." Distribution may be free or the foundation may charge. "Suitable means" include:

- Distribution of reprints of speeches, articles, and reports.
- Presentation of information through conferences, meetings, and discussions.
- Dissemination to the news media, including radio, television, and newspapers, and to other public forums.

The communications may not be limited to, or directed toward, those who are interested only in one side of a particular issue.

The Regulations require, therefore, that a nonpartisan analysis be distributed to the general public or, if it is provided only to a segment of the public, that there should be no "targeting" in an effort to achieve a particular impact on the election.

THE STRATEGY CHOSEN

TCWF's board granted $2 million to PMC in September 1994 for the first stage of a $4 million public education project to inform the voters about Proposition 188 in a manner that would not be a taxable lobbying expenditure for TCWF. The board also approved a challenge grant of $1 million to match any grants made by other foundations to the PMC effort.

Given the two main options for educating the voters, TCWF and PMC chose to avoid referring to the legislation. Instead, they decided to approach the issue in a neutral, symmetrical, balanced fashion that reflected no view on the measure.[6] By urging voters to study the issue, and by supplying information to the voters gathered from official government sources, PMC's advertisements maintained an independent, objective voice. Although the organizations could have chosen a nonpartisan analysis coupled with a viewpoint expressed against the measure, the neutral approach was preferred because:

- The facts about the major donors and sponsors for and against the measure, drawn purely from government sources without interpretation, were directly related to the voters' perceptions about whether Proposition 188 would tighten or loosen regulations on smoking in public places. Therefore, it was possible to achieve the desired voter education goals without going beyond those facts.
- The approach of not reflecting a view or advocating a position on the Proposition allowed the project to proceed without any filings with the IRS or the Political Reform Division of the California Secretary of State's office.
- The requirement of a full and fair exposition (for a nonpartisan analysis) would be difficult to accomplish in a 30-second television or radio advertisement.

TCWF granted the funds to PMC for the voter education effort with broad discretion to educate the public about Proposition 188. Editorial control over the content of

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[3] Reg. 53.5945-2(d)(1).

[4] Reg. 53.4945-2(d)(1)(ii).

[5] Reg. 53.4945-2(d)(1)(iv).

[6] PMC achieved symmetry and balance by preparing the materials as follows: Sources of information were limited to official government materials such as the ballot arguments for and against Prop. 188 presented in the voter handbook, the officially approved descriptions of the committees supporting and opposing the measure, and the periodic reports filed by each committee listing its major donors and the amounts received. In newspaper advertisements, PMC reprinted exactly the same amount of text from the pro and con ballot arguments and encouraged voters to read their voter handbooks. In TV and radio commercials, PMC posed a general question, such as "who are the major contributors on each side?" PMC provided the answers from the campaign disclosure reports filed with the State of California by the respective committees. PMC strictly avoided any bias in the way it posed the questions or presented the answers.

EXHIBIT II: Script for a Typical 30-Second Television Commercial by the Public Media Center on Proposition 188 Video

VIDEO	AUDIO (voiceover)
Full-view of animated file folder labelled: "Proposition 188 Campaign File."	Californians have a lot of important decisions to make this November. Before you vote, be sure you get the facts.
Folder opens to two screens: "Yes on 188" and "No on 188."	Proposition 188 is a good example. Do you know who the major contributors are on each side?
Add to both screens in succession: "Largest contributor:"	According to official records,
Add to left screen: "Phillip Morris, USA $1.9 million."	The Phillip Morris tobacco company is the largest contributor to YES on 188.
Add to right screen: "American Cancer Society, California Division $10,171."	The American Cancer Society is the largest contributor to NO on 188.
Folder closes; superimposed "crawl" across screen: "You have a right to know the facts about Proposition 188. Read your official voter handbook before you decide."	You have a right to know the facts about Prop 188. Read your official voter handbook before you decide.
Then, superimposed across screen: "For more facts about Prop 188, call 1-800-KNOW-188." Add: "Paid for by Public Media Center."	

the message was left to PMC's sole discretion, thereby protecting TCWF from responsibility for the content under Federal Communications Commission, California Fair Political Practices Commission (FPPC), and IRS rules and Regulations.

In mid-October 1994, the PMC advertising campaign began, on television and radio and in newspapers, using the theme "you have a right to know the facts." The text of a typical television commercial is set out in Exhibit II, above. Although the "Yes on 188" side complained to the California Attorney General, no legal action was taken by the Attorney General, the IRS, the FPPC, or even by the "Yes on 188" campaign, to challenge PMC's assertion that its ads were completely balanced, fair, and independent.

The PMC media campaign was unprecedented. No organization had ever spent $2 million to inform the voters about a California ballot measure without being required to register as favoring or opposing the initiative. PMC used only government sources of information, presented the facts symmetrically, and did not make interpretations of the facts that could be construed as biased in any way. PMC strictly avoided any contact with either side in the campaign, so no one could charge that PMC had coordinated its strategy with any partisan forces.

To ensure that PMC's public education campaign would continue up to election day, TCWF's board authorized a second grant to fund the remainder of the $4 million media budget.[7] PMC's unique advertising generated several news stories, which noted that the effort was principally funded by TCWF.

Unable to mount a legal attack on the PMC ads, the "Yes on 188" committee tried another tactic—it adopted the neutral format of the PMC commercials and used it to deliver their pro-188 message. On October 31, the committee began to broadcast television commercials that copied several visual elements, and even much of the audio text, of the PMC commercials. Their radio and direct mail campaign materials also copied the PMC advertising.

PMC filed suit against the "Yes on 188" committee in the U.S. District Court for Northern California to enjoin the copycat ads.[8] PMC

[7] Alliance Health Foundation made a grant of $7,500 to PMC for the Prop. 188 media program.

[8] The suit was brought primarily under the Lanham Act, 15 U.S.C. section 1125(a), which protects the "trade dress" and other unique attributes of an advertiser's message from misappropriation by other advertisers, where the similar elements create a "false designation of origin" tending to confuse the public.

feared that the pro-188 ads would be attributed to PMC due to their similarity to the ads actually authored by PMC. Although the temporary restraining order against the television ads was later stayed by the Ninth Circuit,[9] the judge's order was accompanied by an unusual 13-page opinion that described in detail the uniquely nonpartisan stance taken by PMC.

On Tuesday, November 8, Proposition 188 failed in the California election by a vote of approximately 30% to 70%. Significantly, the "Yes on 188" committee blamed the loss on PMC's advertising.

CONCLUSION

The work of PMC and TCWF on Proposition 188 represents a milestone in federal tax law, California political law, and public health. In this public education campaign, TCWF and PMC achieved the following:

- They pioneered a method, particularly in the broadcast media, for discussing election issues in a balanced way that educated the voters, reaching far more people than the estimated 3% to 5% of voters who read the official ballot pamphlets.
- They successfully demonstrated that IRS and FPPC rules will not prevent heavy use of the media to communicate facts to the voters on a ballot proposition, as long as no view is reflected, no position is advocated, and independence from the campaign committees for and against the proposition is maintained.
- They established, as an alternative to the negative campaigning by candidates that has inundated and largely alienated the voters, a clear, nonpartisan civic voice.
- They demonstrated a willingness to defend the clarity of that nonpartisan voice with litigation if necessary.
- The public interest was served because pluralism was increased. Not only did the public hear from the advocates, both pro and con, but it also heard from another voice, reminding the voters of the importance of simply paying attention to all the surrounding facts. ■

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[9] Public Media Center v. Californians for Statewide Smoking Restrictions, No. C94-3854 SBA, slip. op. (ND Calif., 11/14/94). PMC was presented to the court as a neutral, public interest group whose "trade dress" had been usurped by the Yes on 188 committee for partisan purposes. The choice of a neutral strategy, which had been motivated by a desire to minimize the exposure of TCWF and PMC as they broke new ground in charitable electioneering, gave PMC a position from which it could challenge the pro-188 forces in court for improper use of PMC's material.

You have the right to know about Proposition 188

The Facts: Californians have a lot of important decisions to make on election day, November 8. Before you vote, be sure you get the facts. Proposition 188 is a good example. Do you know what will happen if it passes? Do you know who's behind it? Who opposes it? Who the major contributors are on each side? You have a right to know the facts about Proposition 188. Read your official voter handbook before you decide.

YES ON 188

VOTE YES ON PROPOSITION 188. IT HELPS PROTECT NONSMOKERS BY REGULATING SMOKING IN PUBLIC AND IT HELPS KEEP TOBACCO AWAY FROM MINORS

Proposition 188 protects nonsmokers from being subjected to secondhand smoke by prohibiting smoking in all workplaces except individual private offices, conference rooms with the consent of all occupants, or completely separate smoking areas if tough ventilation standards are met.

Proposition 188 allows individual business and restaurant owners who are willing to meet tough new ventilation standards the option of permitting smoking in small separate sections. Government needs to be very careful about going too far when regulating issues that involve an individual's choice of personal or private activities.

Proposition 188 balances the interests of employers and employees and their nonsmoking and smoking patrons. It is a real alternative, a fair balance, and the reasonable solution to a tough problem.

JEANETTE ROACHE
Member, San Diego Tavern and Restaurant Association

ROBERT M. JACOBS
Executive Director, San Francisco Hotel Association

JESSE NAVARRO
President, International Hispanic Chamber of Commerce

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188 **Smoking and Tobacco Products. Local Preemption. Statewide Regulation. Initiative Statute.**

Argument in Favor of Proposition 188

VOTE YES ON PROPOSITION 188
IT HELPS PROTECT NONSMOKERS BY REGULATING SMOKING IN PUBLIC AND IT HELPS KEEP TOBACCO AWAY FROM MINORS

One of the most effective ways to reduce smoking in the future is to stop minors from starting to smoke today. Proposition 188 will impose strict laws that will discourage minors from smoking by:

- Outlawing tobacco advertising within 500 feet of any elementary, junior high or high school.
- Doubling the current fines for selling tobacco to minors, up to $2,000 for a third offense.
- Banning cigarette vending machines in unsupervised public places where minors are allowed.
- Making illegal purchase of tobacco by a minor punishable by a $500 fine or 100 hours of community service.

PROPOSITION 188 IS TOUGH AND RESTRICTIVE

Proposition 188 completely bans smoking in restaurants, workplaces and other public places except in designated separate areas that meet tough, new ventilation standards.

Proposition 188 will impose tougher restrictions on the sale and use of tobacco products than currently faced by a majority of Californians.

TOUGH RESTAURANT SMOKING LAW

Proposition 188 will require restaurants to keep a minimum of 75% of their seats in separate, well-ventilated, nonsmoking sections.

TOUGH WORKPLACE SMOKING LAW

Proposition 188 protects nonsmokers from being subjected to secondhand smoke by prohibiting smoking in all workplaces except individual private offices, conference rooms with the consent of all occupants, or completely separate smoking areas if tough ventilation standards are met.

TOUGH ANNUAL REVIEW

Proposition 188 mandates annual certification of ventilation systems to insure that nonsmokers are protected from being subjected to secondhand smoke.

PROPOSITION 188 IMPOSES TOUGH, UNIFORM STATEWIDE RESTRICTIONS

Currently, California has a mismatched patchwork of local smoking ordinances that is confusing to the public and unfair to businesses. Proposition 188 will solve that problem by:

- Replacing the confusing patchwork quilt of numerous, differing local smoking ordinances with a single, tough uniform statewide law, just as alcohol is regulated at the statewide level.
- Guaranteeing nonsmokers the same protection and ability to avoid secondhand smoke everywhere in the state.
- Providing clear-cut rules so smokers and nonsmokers know where smoking is allowed.

PROPOSITION 188 PROVIDES FOR FREEDOM OF CHOICE

Proposition 188 allows any restaurant, any bar, any workplace, or any public place to become 100% nonsmoking if the individual business owner wishes to do so.

Proposition 188 allows individual business and restaurant owners who are willing to meet tough new ventilation standards the option of permitting smoking in small separate sections.

Government needs to be very careful about going too far when regulating issues that involve an individual's choice of personal or private activities.

Proposition 188 balances the interests of employers and employees and their nonsmoking and smoking patrons. It is a real alternative, a fair balance, and the reasonable solution to a tough problem.

VOTE YES ON PROPOSITION 188
THE REASONABLE AND FAIR SOLUTION

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JESSE NAVARRO
President, International Hispanic Chamber of Commerce

Smoking and Tobacco Products. Local Preemption. Statewide Regulation. Initiative Statute. **188**

Argument Against Proposition 188

WARNING: PROPOSITION 188 IS HAZARDOUS TO YOUR HEALTH. Philip Morris, the world's largest tobacco company, is spending millions of dollars to pass Proposition 188 to protect tobacco industry profits. It should be called the "Tobacco Industry Protection Act!"

They claim Proposition 188 will limit smoking in public places. DON'T BE FOOLED! PROPOSITION 188 IS A SMOKE SCREEN.

CALIFORNIA ALREADY HAS A TOUGH STATEWIDE STANDARD LIMITING WORKPLACE SMOKING. Proposition 188 would repeal this statewide standard and eliminate the California Indoor Clean Air Act of 1976 and *all the current, local smoking restrictions passed by cities and counties in recent years.*

IF THE TOBACCO INDUSTRY SUCCEEDS, CALIFORNIA'S OFFICIAL POLICY WILL ENCOURAGE SMOKING IN PUBLIC PLACES. Smokers will find it harder to quit and tobacco companies will have an easier time addicting young people.

Less than one in five adult Californians smokes, so Philip Morris executives are hoping they can fool voters at the polls in November by misrepresenting it as a strong anti-smoking measure. THIS IS THE SAME WAY THE TOBACCO INDUSTRY TRICKED PEOPLE INTO SIGNING PETITIONS TO PUT PROPOSITION 188 ON THE BALLOT.

Secondhand smoke causes health problems in nonsmokers, including asthma, respiratory disease and cancer. According to one estimate an additional one to four million nonsmoking workers will be exposed to second hand smoke if Proposition 188 passes.

If Proposition 188 passes, nonsmokers will be forced to breathe secondhand smoke nearly everywhere. Smoking will be allowed in restaurants and employee cafeterias, private offices, conference rooms and many other indoor workplaces.

The biggest lie is the promise of clean air in enclosed smoking areas. The ventilation required by Proposition 188 will not protect our health. The proposed standards require only the smell of tobacco smoke be removed from the air, not the cancer-causing chemicals.

Proposition 188 will not discourage children from buying tobacco. Children will still be targeted by the tobacco industry's slick advertisements and victimized by exposure to secondhand smoke.

Strong local laws discouraging tobacco sales to children and creating smoke-free environments would be eliminated by Proposition 188. These local controls have helped reduce smoking in California by 28%—three times the national average.

Effective local controls are causing huge financial losses for the cigarette companies. That's why the tobacco industry put Proposition 188 on the ballot, to prohibit any local government from regulating tobacco in the future.

Who do you trust? The tobacco industry . . . OR . . . the American Cancer Society, American Lung Association, American Heart Association, Americans for Nonsmokers' Rights, California Association of Hospitals and Health Systems, California Dental Association, California Medical Association, California Nurses Association, League of California Cities, California Common Cause and many other consumer, health care, senior citizen, minority and law enforcement organizations which urge you to vote NO on PROPOSITION 188.

C. EVERETT KOOP, M.D.
Surgeon General, U.S. Public Health Service 1981–1989

NANCY HOUSTON MILLER, R.N., B.S.N.
Chairman, American Heart Association, California Affiliate

SPENCER KOERNER, M.D.
Chairman, American Lung Association of California

NO ON 188

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Who do you trust? The Tobacco industry...OR...the American Cancer Society, American Lung Association, American Heart Association, Americans for Nonsmokers' Rights, California Association of Hospitals and Health Systems, California Dental Association, California Medical Association, California Nurses Association, League of California Cities, California Common Cause and many other consumer, health care, senior citizen, minority and law enforcement organizations which urge you to vote NO on PROPOSITION 188.

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SPENCER KOERNER, M.D.
Chairman, American Lung Association of California

The Figures: All major contributors to each side of Prop. 188 are required by law to be listed on campaign disclosure statements filed with the Secretary of State on a regular basis. This is important public information that you have the right to know. Here are the most recent official reports for the major contributors for and against Prop. 188 (through 9/30/94).

Top Five Contributors to YES on 188	
Philip Morris USA (New York)	**$4,962,570**
R.J. Reynolds Tobacco Co. (North Carolina)	**$1,617,150**
Brown & Williamson Tobacco Corp. (Kentucky)	**$628,500**
The American Tobacco Co. (Connecticut)	**$364,260**
Lorillard Tobacco Co. (New York)	**$260,000**

Top Five Contributors to NO on 188	
American Cancer Society, California Division	**$44,290**
American Lung Association of California	**$35,000**
American Heart Association, California Affiliate	**$32,500**
California Dental Association	**$31,000**
California Medical Association	**$21,000**

For more facts call **1-800-KNOW-188**

A public service message from Public Media Center, a non-profit organization dedicated to providing information on important issues to Californians. Public Media Center takes no position for or against Proposition 188.

About the Authors

Rosemary E. Fei is a principal at the San Francisco law firm of Silk, Adler & Colvin, which specializes in representing nonprofit organizations. Ms. Fei's practice spans the full range of nonprofit and tax-exempt legal issues, with emphasis on political advocacy issues and nonprofit corporate governance. She is the Chair of the Board of Redefining Progress; a member of Asian Americans/Pacific Islanders in Philanthropy; a member of the Exempt Organizations Committee of the Tax Law Section of the American Bar Association; and a former director of CompassPoint Nonprofit Services and The Marine Mammal Center. She also serves on the Nonprofit Policy Council of the California Association of Nonprofits, and on the Public Policy Steering Committee of Northern California Grantmakers. Before joining Silk, Adler & Colvin, Ms. Fei was a general business lawyer, a Federal election law compliance officer and budget director for the Dukakis Presidential campaign, and an attorney in the U.S. Department of State. She received her undergraduate degree, summa cum laude, from The Wharton School, University of Pennsylvania, and she graduated from Harvard Law School, cum laude, in 1986.

Diane M. Fishburn is a partner at Olson, Hagel & Fishburn LLP, with 20 years of experience in political and administrative law. She earned both her B.A. and law degrees from the University of California, Los Angeles. She clerked with the New Mexico state supreme court and received the Order of the Coif and Distinguished Advocate awards. Ms. Fishburn was an attorney with the Fair Political Practices Commission from 1981 to 1985 and spent five years with the California Air Resources Board Office of legal affairs (1985 1990). Ms. Fishburn joined Olson, Hagel & Fishburn in 1990 and became partner in 1993. She advises private and public clients on campaign reporting obligations, financial disclosure, ethics, lobbying and conflicts of interest. She has expertise in state and local ballot measures and defends enforcement cases before the FPPC and other administrative agencies. She has presented numerous seminars on various aspects of political and ethics laws before groups of public officials, candidates, unions, trade associations and others. Ms. Fishburn is a past president of the California Political Attorneys Association.

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