

Foundation Support for Public Charities that Influence Judicial and Executive Branch Confirmation Votes

501(c)(3) public charities may legally influence the Senate confirmation of federal judicial and executive branch nominees. Efforts to influence nominations are considered lobbying, and public charities may engage in a limited amount of lobbying. Subject to certain rules, public and private foundations may support public charities that engage in these activities.

Influencing Nominations is Lobbying

The Internal Revenue Service (“IRS”) has recognized that influencing the confirmation of federal judges is exactly like influencing any other legislative vote through lobbying. “Because the Senate’s action of advice and consent on a judicial nomination is an action with respect to a resolution or similar item, the Senate’s confirmation vote constitutes a vote on legislation.” (Notice 88-76, 1988-2 C.B. 392.). Likewise, Senate actions to confirm cabinet level nominations are also considered legislative actions. Attempts by a 501(c)(3) public charity to influence the confirmation of executive branch nominees would similarly fall under the IRS definition of lobbying.

Foundations May Fund Public Charities That Lobby

Private foundations may support public charities that lobby, but they must follow specific rules. Most importantly, the grant may not be “earmarked” for lobbying, as earmarked funds create a taxable expenditure to the foundation. A grant is considered earmarked for lobbying if it is conditioned upon an oral or written agreement that the grant be used for lobbying purposes. The prohibition on earmarking does not mean that private foundations must require grantees to refrain from using grant funds for lobbying; in fact, a grant agreement that forbids use of the funds for lobbying is unnecessarily restrictive.

Under federal tax law, private foundations may make two types of grants that avoid creating taxable expenditures – general support and specific project grants – while permitting grantees flexibility in the use of their funds. A general support grant is not earmarked for a particular purpose and specifically is not earmarked to be used in an attempt to influence legislation. The public charity may use the grant funds for any purpose, including lobbying. If the grantee uses the money for lobbying, the private foundation will not incur a taxable expenditure.

Private foundations may also fund specific projects, even those that include lobbying. When making a specific project grant, the private foundation must review the grantee’s project budget and may give a grant in an amount up to the non-lobbying portion of the budget. The public charity must use the grant funds only for the specific project. If these conditions are met, the private foundation will not incur a taxable expenditure, even if the grantee subsequently uses some of the grant money for lobbying under the designated project.

Public foundations may earmark funds for lobbying; however, earmarked grants will count against the public foundation’s lobbying limit. Such earmarked grants will be double counted—against the lobbying limits of both the public foundation and the public charity. In addition, public foundations that have made the [501\(h\) election](#) may follow the same general support and specific project grant rules that apply to private foundations, and these grants should not be considered a lobbying expenditure by the foundation, even if the recipient public charity spends the grant funds on lobbying.¹

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¹ Alliance for Justice received a [Private Letter Ruling](#) from the IRS confirming that AFJ, a 501(h) elector, may rely on the two grantmaking safe harbors. Although organizations other than AFJ may not rely on the ruling or cite it as precedent, it does reflect the approach the IRS likely will take in evaluating grants from one charity to another.