

Investing in Change in Texas

PRIVATE AND PUBLIC
FOUNDATIONS MAY FUND
GRANTEES THAT LOBBY

 **BOLDER ADVOCACY**
A program of Alliance for Justice



**PHILANTHROPY
ADVOCATES**
a COLLABORATION with EDUCATE TEXAS

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About Us

At BOLDER ADVOCACY, we are lawyers, coaches and nonprofit experts with one big goal: to make advocacy easy and accessible for you, the nonprofit and foundation leaders who want to be great fighters for your cause. This resource was prepared in collaboration with PHILANTHROPY ADVOCATES, a statewide funder's collaborative that empowers philanthropy to invest and engage in public and higher education policy and advocacy.

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INTRODUCTION

Advocacy grantmaking is a great way for foundations to leverage their dollars and advance their missions.

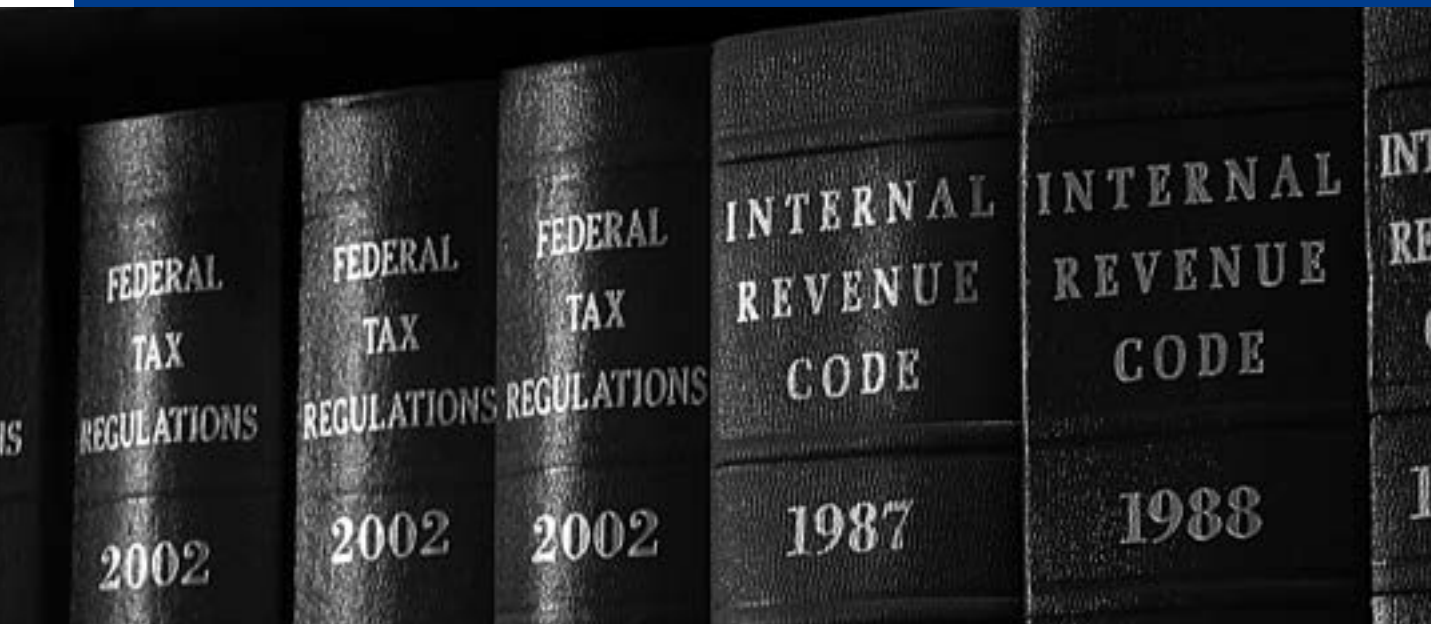
Both private and public foundations can support grantees who lobby for sound public policies that protect the interests of the communities they serve. This guide provides information about several methods that funders can utilize to lawfully engage in advocacy grantmaking.

Contrary to common belief, federal tax law does not require foundations to include lobbying prohibitions in grants made to public charities. **Unfortunately, many foundations make restricted grants by using grant agreement letters that prohibit their grantees from using grant funds for “any propaganda or attempt to influence legislation” (aka lobbying). Such language is overly restrictive and may undermine the grantee’s ability to effectively and efficiently achieve its goals.** The prohibition on using grant funds for lobbying only applies to private foundation grants to non-public charities, such as 501(c)(4) organizations.





WHAT IS LOBBYING ACCORDING TO THE INTERNAL REVENUE CODE?



501(c)(3) public charities, including public foundations (i.e. community foundations), can lobby within generous limits allowed by the Internal Revenue Code. How much lobbying a public charity can do depends upon which of two tests the organization uses to measure and define lobbying—the “insubstantial part” test or the “501(h) expenditure” test. Lobbying under the “insubstantial part test” includes any activity that advocates for the adoption or rejection of legislation at any level of government. Under the “501(h) election” lobbying is more narrowly defined as either direct or grassroots. **Conveniently, the definitions for direct and grassroots lobbying under the 501(h) test are the same definitions for lobbying that apply to private foundations.**

In general, **direct lobbying** is a communication with a legislator (federal, state, local, international) or legislative staff member that refers to specific legislation and takes a position on that legislation. Direct lobbying also includes communications with the general public that refer to and state a position on ballot measures (such as referenda, bond measures, and constitutional amendments). For example, if a foundation staff member travels to Austin and meets with state legislators to express support for a bill that increases funding for mental health services in Texas public schools, that staff member would be engaged in a direct lobbying activity.

Grassroots lobbying, on the other hand, is a communication with the general public that refers to specific legislation, reflects a view on that legislation, and contains a call to action. The four types of “call[s] to action” include:

1. encouraging the communication's recipient to contact a legislator (or other government officials who participate in the formulation of legislation when the purpose of the contact is to influence that legislation),
2. providing an address or other contact information for a legislator (or legislative employee),
3. including a mechanism to communicate with a legislator (or legislative employee), or
4. specifically identifying one or more legislators who will vote on a piece of legislation and are opposed or undecided on that legislation.

PRIVATE FOUNDATIONS MAY SUPPORT PUBLIC CHARITY GRANTEES THAT LOBBY

The Internal Revenue Code allows private foundations to support **public charities** that lobby, even though they cannot lobby themselves, but they must follow specific rules.¹ Most importantly, a private foundation grant to a public charity should not be “earmarked” for lobbying, as funds earmarked for lobbying create a taxable expenditure to the foundation. A grant is considered earmarked 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 prohibit grantees from using grant funds for lobbying; **in fact, a grant agreement that forbids use of the funds for lobbying is unnecessarily restrictive.** Instead, a private foundation could simply clarify in its grant agreements that grant funds “are not earmarked” for lobbying purposes.

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 general support 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.

Specific Project Grant Example: A private foundation’s public charity grantee proposes a project budget to expand access to afterschool programs in low-income communities. The budget includes educational activities totaling \$80,000 and lobbying expenses totaling \$20,000. The organization plans to use the \$20,000 in lobbying funds to persuade Texas legislators to allocate additional funding for after-school programs during the 2023 legislative session. The private foundation may safely fund the project up to the \$80,000 mark since that is the cost of the educational, non-lobbying portion of the specific project grant budget. But, the foundation must avoid funding more than that amount since that would earmark a portion of the grant funds for lobbying and create a taxable expenditure.

¹ The Internal Revenue Code imposes a prohibitive excise tax on private foundation lobbying expenditures. This prohibition extends to activities that qualify as either direct or grassroots lobbying using the tax code’s lobbying definitions. It does not, however, extend to all activities that are defined as lobbying under Texas’s lobbyist registration and reporting requirements. Under Texas definitions, lobbying is defined as direct communication with a legislator or executive branch official to influence legislation or administrative action. Therefore, a private foundation could engage in administrative advocacy (i.e. advocacy related to agency rulemaking) without violating the tax code’s lobbying prohibition. It could also directly fund its grantees’ administrative advocacy activities.

CAN A PRIVATE FOUNDATION MAKE A GRANT TO A NON-PUBLIC CHARITY?

Private foundations may make a grant to a 501(c)(4) organization (or other non-public charity) so long as the grant is for charitable purposes. Charitable purposes include any permissible [501\(c\)\(3\) public charity activity](#) except lobbying and voter registration. Although a private foundation can fund a 501(c)(3) organization for lobbying activity using the general support and specific project grant safe harbors described in the previous section of this guide, it is prohibited from funding a non-public charity's lobbying efforts. The private foundation must exercise [expenditure responsibility](#) over a grant to a non-public charity; if it follows the expenditure responsibility requirements, it will avoid tax liability regardless of how the grantee spends the grant money.

“Expenditure responsibility” means that a private foundation must satisfy three requirements to ensure that the money is spent properly.

1. **The Pre-Grant Inquiry:** Before the grant is issued, the private foundation must develop a level of trust that the non-public charity will spend the grant funds solely for the purpose(s) for which the grant was made. A private foundation must inquire whether the non-public charity has ever improperly used a grant before. The private foundation needs to identify the non-public charity's other grants, review its prior grant history, and get to know the organization and its managers. For instance, a private foundation would want to know about the experience the managers of the nonpublic charity have, and whether the non-public charity has properly administered and adhered to the terms of other grants. If the private foundation has made previous grants to the non-public charity, knows it is still operating under the same management, and has adhered to all the terms of earlier grants, the foundation would not need to make any further inquiries.
2. **Get it in Writing:** A written grant agreement, signed by both the private foundation and the non-public charity, must accompany the grant. The agreement should clearly detail the purposes of the grant, and must advise the non-public charity that no grant funds can be spent on lobbying, conducting voter registration drives or influencing a public election, grants to individuals, or non-charitable purposes. The non-public charity must agree to repay any portion of the grant which is not used for the grant activity outlined in the agreement, submit full and complete annual reports on how the funds are spent and progress of the program, maintain records of receipts and expenditures, and make its books and records available to the private foundation. Before issuing the grant, the private foundation should make sure that an officer, director, or trustee of the grantee has signed the grant agreement letter.

3. **Reporting Requirements:** The non-public charity must submit reports to the private foundation on how it used the grant funds, whether it complied with the grant requirements, and on its progress toward achieving the grant objectives. On its annual information returns to the IRS, the private foundation must provide information about the grant.

It may rely on the information provided by the non-public charity in its reports.

PUBLIC FOUNDATIONS MAY DIRECTLY FUND GRANTEES THAT LOBBY

Public foundations, such as community foundations, may engage in lobbying themselves and may also earmark grant funds for lobbying; however, earmarked lobbying 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 giving the grant and the public charity spending the grant funds on lobbying. 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.²



² 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.

CAN A PUBLIC FOUNDATION MAKE A GRANT TO A NON-PUBLIC CHARITY?

Yes! Public foundations may make grants to 501(c)(4)s for any activities that the foundation itself would be permitted to engage in, including lobbying. However, a public foundation grant to a 501(c)(4) will count against the foundation's own lobbying limit unless the grant agreement specifies that the funds are not to be used by the 501(c)(4) for lobbying purposes. Grants to non-public charities should also prohibit the use of funds for partisan activities (e.g. support or opposition of candidates for public office).

Need More Guidance?

Bolder Advocacy is here to help! Just call our Technical Assistance hotline at 1-866-NP-LOBBY or complete [this form](#), email us at advocacy@afj.org, or visit our website at bolderadvocacy.org. Please share this with your funders, and encourage them to reach out to us with their questions.



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