Recent FEC Rulemaking And the Future of Nonprofit Lobbying

By Liz Baumgarten and Bob Smucker

When we were asked recently to predict what might come next from the Federal Election Commission (FEC) in the way of action regarding nonprofit lobbying, our first thought was to try to beg off answering the question because of the old truism that "in Washington, nothing is as certain as change." However, if one thing is certain, it is that there exists a trend toward scaling back nonprofit advocacy rights. This article reviews that trend and the coordinated and continued nonprofit sector response.

Recently , the FEC proposed a new rule that would designate certain 527 and 501(c) organizations as political committees—if they spend more than $1,000 within 120 days of any election on voter registration, contacting voters to assist them in getting to the polls and issue ads that promote, support, attack or oppose named federal candidates. If designated as a political committee, an organization would be precluded from accepting any gifts above larger than $5,000 and private foundation funding. However, in quick response to this proposed rule, the nonprofit sector made its voice heard, deluging the FEC with thousands of e-mails and similar communications, a record amount for the FEC. As a result, the FEC delayed its ruling for 90 days. It seems possible, based on comments at a May 13 FEC meeting, that the agency will exclude 501(c)s from the final rule.

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If the FEC staff do their homework, they will learn about the often powerful and effective response by nonprofits to advocacy rights threats over the past 10 years. Legislation proposed by Rep. Ernie Istook, R-Okla., in the mid-1990s serves as one example. After a nine-month battle, Mr. Istook dropped his idea of sharply curtailing lobbying by nonprofits that receive federal funds. Or perhaps the FEC staff will review the 1983 resounding defeat of the effort by the Office of Management and Budget to enact a measure similar to the Istook initiative. These actions should send a clear message to the FEC not to muzzle nonprofits' voices on public policy issues.

In trying to predict the future regarding what the FEC or any other government agency might do regarding lobbying by public nonprofits, the past gives the best guide. The federal government and nonprofits have, since 1934, repeatedly tested the limits with each other regarding how much lobbying by nonprofits should be permitted.

In 1934, Congress passed a provision that a charitable organization may qualify for tax exemption only if "no substantial part of the activities of the organization is carrying on propaganda or attempting to influence legislation." The failure of Congress to indicate what it meant by "no substantial part" naturally led to enormous uncertainty regarding how much lobbying could be conducted by a nonprofit without losing its tax exemption. This uncertainty in the law led to two major IRS actions curtailing, or attempting to curtail, nonprofit lobbying.

In 1963, the Sierra Club opened an office in Washington, D.C., and began fighting federal proposals to dam the Grand Canyon. The Sierra Club published a number of full-page advertisements in major U.S. newspapers to recruit people to lobby for the protection of Grand Canyon National Park. As a result of the advertisements, the IRS revoked the Sierra Club's right to raise tax-deductible contributions. The IRS claimed that the Sierra Club was heavily engaged in efforts to influence legislation—a violation of tax law, according to the IRS.

The second action concerned the Maryland Association for Mental Health. In the spring of 1972, the IRS was threatening to remove the association's tax-exempt status because of its aggressive lobbying at state and national levels regarding the need to improve treatment of mentally ill persons. However, in this instance and as a result of a pro bono audit of the association's lobbying activities and an appeal to the IRS, the charges were dropped.

However, the two cases struck great fear among nonprofits regarding their lobbying activities and were primarily responsible for congressional action, following the urging of a huge nonprofit coalition. In 1976, Congress, in part hoping

to put an end to what seemed like capricious IRS enforcement of the law, passed legislation that provided clear guidance regarding which activities constituted lobbying and how much could be spent on those activities. Regulations were promulgated to implement this law in 1990.

As is clear from the list of challenges below, the clarity of the law has not stopped threats to nonprofits' right to engage in advocacy and lobbying. It has, however, encouraged nonprofits to be bolder about their engagement in the public policy arena. There has been a sharp increase in nonprofit lobbying expenditures, according to the most recent figures available from the IRS (a 19 percent jump from 1999 to 2001). Yet, the need to be vigilant is clear from reviewing current and recent actions to curtail nonprofit public policy engagement:

Federal Election Commission

Under the FEC's proposed rules regarding 501(c)(3) lobbying activities, nonprofits would be prohibited from spending money on public communications that promote, support, oppose or attack a candidate for public office. The enormous difficulty in defining the circumstances under which those terms would apply to nonprofit lobbying would reintroduce the same uncertainty that Congress, after seven years of hearings and a number of legislative proposals, effectively addressed with legislation in 1976. The public policy activities that would become subject to the proposed FEC rules are not only ambiguous but also seemingly endless. Thousands of organizations across the ideological spectrum have raised serious concerns with the FEC about the impact the rules would have on public policy engagement.

Minnesota Community Solutions Fund

This past June, the Community Solutions Fund, one of the nation's first United Way Alternatives, was readmitted to the Minnesota state payroll deduction drive. The fund had been expelled from the campaign because a significant number of the fund's members are advocacy organizations. According to the state employee relations commissioner, the fund, therefore, didn't meet the statutory requirement for inclusion—to devote "substantially all of its activities to health, welfare, social or other human services to individuals." When a number of organizations, including the Minnesota Council of Nonprofits, the National Committee for Responsive Philanthropy, Charity Lobbying in the Public Interest (CLPI) and many others, immediately raised questions about the decision, the Community Solutions Fund was readmitted. While the action by the commissioner in reversing the decision is encouraging, Minnesota groups close to the issue believe the matter will be brought up again.

IRS Audits

In 2003, local IRS offices began audits of a sampling of nonprofits that had spent $10,000 or more on lobbying and other activities. It appeared that the 501(h) election (taken by many nonprofits to come under the 1976 law that sets defined lobbying expenditure limits and defines lobbying activities) was serving as a trigger for the audits. A coalition of national organizations acted immediately, armed with a 2000 letter from the IRS to CLPI stating that the (h) election would never be a red flag for an audit. In a meeting with the IRS, the organizations made clear that they would continue to promote good public policy and would oppose any threats to the rights of nonprofits to engage in policy matters. Moreover, the groups urged the IRS not only to act swiftly to restore the election protection for nonprofits once stated in the Internal Revenue Manual, but also to help nonprofits promote lobbying and other advocacy as a legitimate and essential aspect of the nonprofit sector. The IRS canceled the audits and reaffirmed its continued support for the 501(h) election.

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Head Start

In another small and subtle attack, advocacy by nonprofit Head Start programs was threatened a year ago by the Department of Health and Human Services (HHS). In a memo to Head Start programs throughout the country from the associate commissioner of the Head Start Bureau, HHS sent a strong warning regarding the lobbying activities by the 501(c)(3) programs—a message that was viewed by many as having a chilling effect on the legal public policy activities of the programs. It was only after strong opposition to this allegation from a large number of nonprofits, including the National Head Start Association, that HHS issued a memo to Head Start programs reaffirming that those programs could use their privately raised funds (versus federal funds) to lobby.

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act, which provides support for education of children

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with special needs, was threatened last year with a provision to prevent any advocacy by parent center grantees. A provision in the legislation would have stopped any organization such as a nonprofit or affiliated entity from qualifying as a parent center when it "conducts, in whole or part, federal relations." The provision would have disallowed any board members or paid staff of a parent center from serving on the board or as staff of any organization, nonprofit or for-profit that conducts "federal relations"—a term that was not further defined in the legislation. The huge e-mail response to members of the House committee objecting to the provision resulted in the withdrawal of the vague and harmful provision.

Hip Hop Summit Action Network

In 2003, the New York State Temporary Commission on Lobbying held that the Hip Hop Summit Action Network's public campaign and rally opposing the Rockefeller drug laws required the group to register as lobbyists in the state of New York. The network maintains that it should not be required to register as lobbyists unless, at a minimum, its activities include explicit encouragement to the audience to engage in what is known in the federal tax code as a "call to action." The litigation, which was initiated last fall, is before the United States District Court Southern District of New York.

Legal Services Corporation Funding

CLPI has joined as amici in the *Dobbins v. Legal Services Corporation* lawsuit challenging federal funding restrictions on civil legal aid. The suit seeks to overturn federal rules that block legal aid programs that accept taxpayer money from filing class-action suits, lobbying or representing immigrants without green cards. In order to engage in such activities, the rules require that legal aid programs establish physically separate offices and budgets. The suit continues to galvanize a growing coalition of organizations working to educate the public about the broader implications of these restrictions and the specific threat they pose to private funders and nonprofits engaging in advocacy and other forms of free expression on a wide range of issues.

So, how do past and present actions by government and other groups speak to the possible outcome of the FEC and similar proposals? What can be deduced from this trend of attempting to scale back nonprofit advocacy rights, and what should be the response?

First, challenges like those from the FEC and others no doubt will continue, unabated. Second, to meet those challenges, nonprofit lobbying and advocacy should become an integral part of every organization's armor. Third, it is important to consider the wisdom of the renowned philosopher Yogi Berra, who said, "It ain't over till it's over." As well as another philosopher, David Cohen of the Advocacy Institute, who added, "And it's never over." While the sector should take time to celebrate victories along the way, it should also continue to develop its defense to such attacks—a defense grounded in protection of nonprofit free speech. All of the above challenges have been confronted by the establishment and effective use of strong coalitions. Such coalitions should continue to be nurtured and not just in times of crisis. Through effective work in coalitions, the sector can rapidly respond to future efforts to curtail advocacy rights and, in the end, exercise those rights fully.

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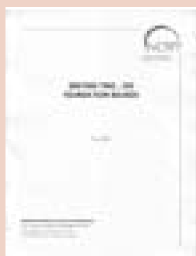

NEW! Serving Time on Foundation Boards

Serving Time on Foundation Boards, released in June 2004, provides a list of fraudulent corporate executives who are still serving on foundation boards of directors. It also discusses recent federal legislation that is designed to clean up the scandals plaguing the nation's for-profit organizations, as well as New York state's proposed efforts to better regulate its foundation and nonprofit sectors. The report concludes with policy recommendations and options that will improve foundation governance and help restore the public's faith in institutional philanthropy.

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