Bringing Nonprofit Advocacy Rules and Culture into the 21st Century

By Larry Ottinger

In a 7 July 2010 message, Independent Sector President Diana Aviv described nonprofit advocacy as a "defining tenet of our work" and stated that "it is high time to update laws governing our advocacy…"[1] Philanthropies and charities will need to dramatically increase investments and involvement in organizing, policy and civic engagement to have a significant impact on today's social and economic problems. Moreover, updating the nonprofit advocacy rules will play a strategic role in making this happen by helping to change the culture and behaviors that have held back far too many within the sector from meaningful participation in the democratic process.

RULES MATTER

Rules matter and not only for what they may directly permit or restrict. Rules affect attitudes and action, power and possibility. Coordinated activity around rules builds awareness and partnerships, which have been part of every social justice movement throughout our history.

When women and blacks were prohibited from voting, not only was this a fundamental injustice, but the resulting decisions of elected officials were grossly distorted, too. As further, recently debated examples, United States House and Senate rules related to legislative amendments, the budget, "holds" and the filibuster significantly affect which public policies and nominations get considered and acted upon.

Moreover, rules are inextricably linked to culture and behavior. Thus, back in 1980 when Mothers Against Drunk Driving (MADD) was founded, the dominant culture in American society did not take drinking and driving seriously. MADD engaged not just in service to victims' families but also in advocacy to raise the legal drinking age, lower the amount of alcohol drivers can have in their bloodstream, increase punishments and get bars to require identification of underage patrons. Organizing around these rules helped to change attitudes and behaviors, saving hundreds of thousands of lives.

According to a 2008 survey report conducted by Johns Hopkins University's Center for Civil Society Studies in coordination with the Center for Lobbying in the Public Interest, charities reported that foundations still too often discourage or even prevent grantees from engaging in advocacy through grant agreements, guidelines and statements by foundation staff. In response, CLPI, Council on Foundations, CFLeads and Rockefeller Brothers Fund recently released private and community foundation toolkits for foundation staff, boards and other stakeholders on how to communicate both internally and externally in a way that encourages, rather than inadvertently discourages, permissible advocacy and civic engagement.

In addition, books like *Change Philanthropy* and *Forces for Good*, and the state-based reports produced by the National Committee for Responsive Philanthropy as part of its Grantmaking for Community Impact Project, all demonstrate that organizing, advocacy and civic engagement yield a high impact return on investment. Training, support and other efforts also are making a difference in changing the culture within the sector.

Now, the sector needs to accelerate this change, recognizing that one often-neglected aspect involves a focus on the rules of civic engagement.

TIME IS RIPE FOR REVISITING CHARITABLE ADVOCACY RULES

The time is ripe for simplifying and updating the advocacy rules for charities and foundations.

First, the current advocacy rules are outdated, confusing and burdensome, discouraging critical civic participation and undermining compliance.

Second, the Supreme Court's *Citizens United* decision has altered the legal and political landscape, providing a window of opportunity to rationalize the rules with broad, ideological support.

Third, the ongoing economic crisis and challenges facing underserved communities requires the policy expertise, partnership and critical perspective of our nation's nonprofits and their constituents.

Fourth, philanthropy has even more limited resources to address even larger social problems these days. Thus, increased, effective advocacy will be needed to leverage scarce resources.

SIMPLIFYING AND UPDATING THE IRS CHARITABLE LOBBYING RULES

The nonprofit sector should start by asking Congress to simplify and update the IRS charitable lobbying rules. There is

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broad, ideological support for reducing unnecessary government burdens on the First Amendment activities of private nonprofits.

The current IRS charitable lobbying rules actually consist of two sets of alternative rules. The default rules date back to before World War II.

In 1934, Congress acted to include the restriction that "no substantial part" of a charity's activities may involve influencing legislation. The vagueness and uncertainty surrounding the "substantial part" test, combined with the extreme sanction of revocation of exempt status, caused controversy and confusion that discouraged charitable lobbying and undermined effective tax compliance. In a famous late 1960s case, the Sierra Club lost its 501(c)(3) exemption for limited lobbying to prevent the flooding of the Grand Canyon.

In 1976, to provide more objective standards regarding a charity's permissible participation in lobbying activities, Congress passed legislation allowing 501(c)(3) organizations (excluding churches, private foundations and certain other organizations) to elect a substitute for the "substantial part" test – the so-called 501(h) election for its place in the tax code. A charity making the 501(h) election may spend up to a specific percentage of its annual exempt-purpose expenditures on lobbying. The sliding scale of percentages created by 501(h) begins at 20 percent of the first $500,000 and has an overall cap of $1 million.

Unfortunately, the much-improved 501(h) test was made an elective "opt-in" test and was never indexed for inflation, thus cutting away more than two-thirds of its value since 1976. Today, fewer than 5 percent of the nation's more than one million charities are covered by the 501(h) test, and many larger charities are effectively precluded from participation by the static limits and cap.

LEGISLATIVE PROPOSAL TO UPDATE IRS CHARITABLE LOBBYING RULES

Under a proposal supported by several exempt-organization leaders, Congress would enact a single lobbying standard for most, if not all, public charities based on an updated version of the 501(h) reform standard that was adopted in 1976.[2]

The vague and burdensome 1934 "substantial part" test would be eliminated, and a modified 501(h) test would become the single standard. The modified 501(h) test would be updated and simplified by:

a) Eliminating the separate grassroots and direct lobbying dollar and percentage limits, leaving grassroots lobbying subject to the same limits as direct lobbying;
b) Increasing and indexing the current lobbying limits under section 501(h) for inflation since 1976 and moving forward; and
c) Eliminating the $1 million cap under section 501(h) leaving the upper limit at 5 percent or higher for larger public charities.

BROAD SUPPORT FOR UPDATING THE CHARITABLE LOBBYING REFORM

In 2005, a narrower version of lobby simplification (that would have eliminated the separate grassroots and direct lobbying limits) passed Congress as part of the CARE Act, which was not enacted. In addition to CLPI and Independent Sector, this effort included the following broad coalition of liberal, conservative and mainstream sector organizations: Alliance for Justice, American Cancer Society, American Heart Association, American Symphony Orchestra League, Concerned Women for America, Defenders of Wildlife, Focus on the Family, Girl Scouts of the USA, Goodwill Industries, National Council of La Raza, National Council of Nonprofits, Natural Resources Defense Council, United Way of America and YMCA of the USA.

PRIVATE FOUNDATIONS AND IRS LOBBYING RULES

It has been 40 years since Congress, in the aftermath of Treasury Department investigations and hearings by Representative Wilbur D. Mills, enacted the Tax Reform Act of 1969. This law prohibited private foundations from lobbying with important exceptions (such as self-defense) and from earmarking grants to charities for lobbying. CLPI founding board chair Thomas A. Troyer, as attorney for the Council of Foundations, along with others, did yeoman work that allowed private foundations to give general support and special project support grants (so long as the grants themselves are not earmarked for lobbying) to char-

ities and to engage directly in unlimited advocacy that does not constitute lobbying or partisan political activity.

After all these years, the trauma of the 1969 law and the fight over it continues to sow enormous confusion among funders and to perpetuate a culture of fear and skittishness.[3]

Independent Sector has proposed a legislative solution that would amend the tax code to treat private foundations like non-church, public charities when it comes to lobbying.[4] Thus, under the modified 501(h) proposal, private foundations would be able to engage directly in lobbying or to make direct grants to charities for lobbying up to certain limits depending on their annual expenditures for their charitable purposes.

If private foundations seek this reform, it would further simplify and update the IRS lobbying rules. It would eliminate much confusion and have an important impact on the culture of fear that still exists among many funders.

IRS NEEDS TO CLARIFY ITS POLITICAL ACTIVITY RULES

The IRS will need to revisit its rules on political activities, which are regulated separately from lobbying. (Advocacy that is not lobbying and not partisan political activity is generally permissible and unlimited.) The IRS political activity rules prohibit partisan activities by charities and foundations for or against candidates or political parties. The IRS decides what is partisan versus nonpartisan based on all of the "facts and circumstances."

While these rules should definitely continue to prohibit charities and foundations from engaging in partisan politics, they need to be far clearer so that charities and foundations can engage safely in nonpartisan voter activities without a regular need to hire lawyers. This is particularly important for small- to mid-sized charities, which comprise the vast majority of the sector.

The sector needs to reach some broad understanding on sensible rules. Admittedly, voter engagement is more complicated than lobbying, as the former involves everything from voter registration and get-out-the-vote to candidate pledges and forums. However, if the sector and IRS don't step up, the courts likely will step in. Given the Supreme Court ruling in *Citizens United v. FEC*, it is questionable whether a vague "facts and circumstances" test would survive a First Amendment challenge for restrictions on core political speech.

In addition, in light of *Citizens United*, 501(c)(4) nonprofits now can be expressly partisan, and the sector must confront a new level of potential partisan abuse of such exempt organizations. Moreover, donor disclosure for 501(c)(4) nonprofits has become a front-burner issue. The sometimes conflicting First Amendment rights of donors, nonprofits and voters in a new electoral context will need to be resolved.

CONCLUSION

As described in The Foundation Center's *Social Justice Grantmaking II* report (2009), philanthropy has made important quantitative and qualitative progress in its support for advocacy, but the progress has been more a difference of degree than of kind. For example, private and community foundation giving for "structural change" that benefits underserved communities remained around 12 percent of overall giving between 1998 and 2006.

What is needed today is a paradigm shift, one that makes participation by foundations, charities and their constituents in the democratic process an "ordinary, not extraordinary" part of the sector's identity and activities. Organizing to update the rules governing our advocacy will play an important part in hastening this transformation. ■

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Notes

1. http://independentsector.org/blog/post.cfm/rubins-vase-and-the-role-of-advocacy.
2. Some influential religious institutions did not want to be included in the 1976 law because they did not want to set a precedent for government regulation of religion. Depending on the religious community's current preferences, the legislative proposal could keep things the same, apply the updated standard to all public charities, or allow interested religious institutions to opt in.
3. See Bass, Arons, Guinane, & Carter, Seen But Not Heard: Strengthening Nonprofit Advocacy (The Aspen Institute, 2007), pp. 68-73.
4. http://www.independentsector.org/uploads/Policy_PDFs/2009_Nonprofit_Platform.pdf.

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