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Stephen Bortone
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RE: Sea Grant Director Letters to Congress (MASGP 08-007-04)

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Dear Stephen,

It was nice seeing you again last week. Below is the summary of research regarding the question as posed to the National Sea Grant Law Center on the issue of Sea Grant Directors submitting letters to Congress. As I understand it, you are particularly concerned with a recent request to send letters to Congress urging support for Sea Grant reauthorization bills. The following information is intended as advisory research only and does not constitute legal representation of Minnesota Sea Grant or its constituents. It represents our interpretations of the relevant laws.

It is important to note that, in general, it is not the activity of lobbying that is of primary concern, but how those activities are paid for. The issue for Sea Grant directors involved in lobbying efforts is – who is paying you while you are writing the letters or visiting Congress.

At the most basic level, recipients of federal funds are subject to restrictions on lobbying activities. The "Byrd Amendment" (31 U.S.C. § 1352) prohibits recipients of federal grants, contracts, loans or awards from using any federal funds to lobby for a grant or renewal of a grant. Your question, however, relates to more general lobbying activities related to programmatic or national issues.

Cost Restrictions for Educational Institutions

With a few exceptions, Sea Grant programs are integrated into academic institutions and thereby bound by the lobbying guidelines for educational institutions receiving federal funds and non-

profit organizations (most state universities are 501(c)(3) non-profit organizations). Federal grant expenditures at universities are primarily governed by Office of Management and Budget (OMB) circulars A-21 (Cost Principles for Educational Institutions) and A-122 (Cost Principles for Non-profit Organizations). The two circulars have identical lobbying provisions.

Section (J)(28)(a) of OMB Circular A-21 states that costs associated with the following activities are unallowable:

(3) Any attempt to influence –
(i) the introduction of Federal or State legislation;
(ii) the enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature, including efforts to influence State or local officials to engage in similar lobbying activity; or
(iii) any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence –
(i) the introduction of Federal or State legislation; or
(ii) the enactment or modification of any pending Federal or State legislation by preparing, distributing, or using publicity or propaganda, or by urging members of the general public, or any segment thereof, to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign.[1]

Writing a letter to a member of Congress in an attempt to influence the introduction or enactment of legislation is therefore an unallowable cost under OMB Circular A-21. So how does this relate to your question? In my opinion, the OMB Circular prevents you from writing a letter to Congress while you are being paid from federal funds. The simplest hypothetical would involve a Sea Grant director whose salary is paid 100% by federal funds. That director could not engage in lobbying, including writing letters, while at work. That director could, of course, write letters at home in his personal capacity as a private citizen.

I would guess, however, that most directors work in multiple capacities in their Universities and their salaries are paid through a combination of state and federal funds. Assuming there are no state laws or University policies restricting similar activities, a Sea Grant director could write letters while being paid from non-federal funds. We have now entered the realm of accounting and recordkeeping. Given that it is often very hard to pinpoint who is paying your salary at any given moment (at least in my personal experience), it is probably safe to assume that the lobbying activities of a director paid only partially from federal funds occurred while on the state payroll.

In preparing this memo, I did not conduct any research on Minnesota state law regarding the use of state funds for lobbying activities. I would be happy to look into that for you, but the University of Minnesota's Office of Government Relations would be able to provide that answer much faster.

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[1] OMB Circular A-21 is available on-line at http://www.whitehouse.gov/omb/circulars/a021/a21_2004.html.

Nonprofit Organizations

Unfortunately to analysis is not over quite yet. Even if there are no state laws restricting the use of state funds to lobby Congress, a 501(c)(3) organization cannot maintain its tax-exempt status and devote a "substantial part" of its activities to "carrying on propaganda, or otherwise attempting, to influence legislation."[2]

"Influencing legislation" means:

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.[3]

Legislation "includes action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure."[4]

On its face, this broad definition would seem to prohibit a 501(c)(3) organization from approaching a legislative body or governmental employee regarding any policy matter. It is very important to note, however, that the definition of "legislative body" does not include executive, judicial, or administrative bodies[5] and the IRS only treats a communication with a legislator or governmental official as a prohibited direct lobbying communication if the communication (1) refers to specific legislation and (2) reflects a view on such legislation.[6] Specific legislation "includes both legislation that has already been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes."[7]

Universities, therefore, may conduct lobbying activities as long as those activities do not constitute a substantial part of the organization's overall activities. Whether an organizations' lobbying activities constitutes a substantial part of its overall activities is determined on a case-by-case basis. "The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity."[8] An organization that conducts excessive lobbying may lose its tax-exempt status and be subject to an excise tax on its lobbying expenditures.

Most universities have an Office of Government Relations that control and monitor the lobbying activities of employees. If I remember correctly, you notified the University of Minnesota about the letter request and they cleared the contact. From that it is reasonable to conclude that the

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[2] 26 U.S.C. § 501(c)(3).
[3] *Id.* § 4911(d)(1).
[4] *Id.* § 4911(e)(2).
[5] *Id.* § 56.4911-2(d)((3).
[6] *Id.* § 56,4911-2(b)(1)(ii).
[7] *Id.* § 56,4911-2(d)((1)(ii).
[8] Internal Revenue Service, Measuring Lobbying: Substantial Part Test, http://www.irs.gov/charities/article/0,,id=163393,00.html .

University determined that the letter would not result in the University exceeding the "substantial part" threshold.

Conclusion

I have not run across anything in my research that would legally prohibit a Sea Grant director from writing a letter to Congress while working in his/her capacity as a university employee. The propriety of this activity, however, is a completely different matter. As I understand it you are being asked to write several letters, some of which are urging support of ocean research or NOAA-related bills and some urging support of bills that would result in direct funding increases for Sea Grant. While this activity may be technically proper under the OMB guidelines and federal tax regulations, it may not pass your own ethical "gut test." I can imagine scenarios in which such activities could generate conflicts of interest. For instance, do you as a Sea Grant director support this legislation because it is good for ocean research and coastal communities or because it will increase the funding for your program and maybe even your salary? Participation in these letter-writing campaigns is ultimately a personal decision for each director to make after consulting with the relevant university officials.

I hope you find this information useful. Please contact me at anytime if you have additional questions.

Sincerely,

Stephanie Showalter
Director, National Sea Grant Law Center