



COUNCIL *on* FOUNDATIONS

**Washington  
Update:  
*Rules of Engagement*  
2016**

Wednesday, February 3<sup>rd</sup>, 2016





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# Moderator



## **Sue Santa**

Senior Vice President of Public Policy and  
Legal Affairs, Council on Foundations



# Speakers



**Don Snyder**

Tax Associate  
*Federal Policy Group*



**David Thompson**

Vice President of Public Policy  
*National Council of Nonprofits*



**Katherine LaBeau**

Policy Director & Counsel  
*Council on Foundations*



**David Heinen**

Vice President for Public Policy & Advocacy  
*North Carolina Center for Nonprofits*



# **Lay of the Land:** *What's Happening on the Hill in 2016?*

**Don Snyder**, Tax Associate, *Federal Policy Group*



# Lay of the Land

## 2016 Congressional Schedule

- In 2016, there are 366 days because it is a leap year. Of those days, 251 are work days because of holidays and weekends. The House will be in session for 111 of the 251 work days. The Senate will be in session for 149 of the 251 work days.

Quarter	Number of Work Days	House: Days in Session	Senate: Days in Session	House: % of Work Days	Senate: % of Work Days
1 <sup>st</sup> Quarter	62	33	41	53%	66%
2 <sup>nd</sup> Quarter	64	36	54	56%	84%
3 <sup>rd</sup> Quarter	64	26	27	41%	42%
4 <sup>th</sup> Quarter	61	16	24	26%	39%



# Lay of the Land

## 2016 Agenda

### House

- Speaker Paul Ryan plans to roll out major policy initiatives in five areas:
  - The economy, including energy reform, tax reform and regulatory reform
  - National security policy
  - Policy to combat poverty
  - Healthcare policy addressing Obamacare, Medicare and Medicaid
  - Restoring the Constitution: initiatives to combat the use of executive actions by the President
- Speaker Ryan also plans to pass all twelve appropriations bills through “regular order”



## 2016 Agenda

### Senate

- Majority Leader Mitch McConnell has not publicly indicated he supports an expansive legislative agenda. Rather, it is reported that he intends to focus on “doable” items, such as:
  - Modernizing energy policy
  - Bolstering national security
  - Reducing regulatory morass and restricting executive actions
  - Healthcare policy addressing Obamacare





## Relative Congressional “Newness”

### Number of Representatives with less than 5 years tenure

- Republican: 141
- Democrat: 68

### Number of Representatives with 5 to 10 years tenure

- Republican: 33
- Democrat: 31

### Number of Representatives with 10 to 15 years tenure

- Republican: 40
- Democrat: 25

### Number of Representatives with more than 15 years tenure

- Republican: 32
- Democrat: 64



# **The Legal Framework:** *Overview of Rules for Lobbying & Election-Related Activity*

**Katherine LaBeau**, Policy Director & Counsel, *Council on Foundations*



# Legal Framework: *Lobbying*

## Basic Lobbying Rules

### Federal Tax Rules:

- Private Foundations: lobbying prohibited\*
- Public Charities: “insubstantial” lobbying permitted
- Both: Other types of advocacy generally unlimited

Other state rules regarding reporting/registration may also apply.

***\*Self-defense exception for private foundations***



# Legal Framework: *Lobbying*

## Public Charity Lobbying Tests

	Insubstantial Part Test	501(h) Expenditure Test
Amount of Lobbying Permitted	Approximately 5% of overall activities	Sliding scale based upon budget (\$1 million absolute maximum)
What Counts Against Limits	Any lobbying activity, including cost-free	Money spent on lobbying
Consequence of Exceeding Limits	Loss of tax-exempt status	Excise tax
How to Inform IRS of Choice	Nothing (default test)	Complete IRS Form 5768



# Legal Framework: *Lobbying*

## Direct Lobbying

### 1. Direct Communication,

### 2. With a legislator,

- Federal, state, and local level representatives and their staff
- Executive officials when participating in formulation of legislation
- The public, if it is a ballot measure
- NOT members of special purpose boards (planning commissions, zoning commissions, school board)

### 3. Expressing a view about specific legislation.

- EXCLUDES:
  - Regulations
  - Litigation
  - Executive Orders
  - Enforcement or Implementation of Laws



# Legal Framework: *Lobbying*

## Grassroots Lobbying

1. **Communication,**
2. **With the general Public,**
3. **Expressing a view about specific legislation.**
4. **Includes a “call to action”**
  - Urging recipient to contact legislator(s)
  - Providing address, telephone number, and/or other contact information of legislator(s)
  - Providing mechanism to ensure communication with legislator(s)
  - Identifying legislator(s)



# Legal Framework: *Lobbying*

## Funding Lobbying – all foundations

- Both private and community foundations can fund lobbying, with certain restrictions
- Community foundations can fund lobbying up to their own lobbying limit (“insubstantial part” or 501(h) limit)
  - *Community foundations selecting 501(h) can follow private foundation safe harbors for general support or project-specific grants*
- Private foundations can make two types of grants to avoid a taxable expenditure:
  - *General Support*
  - *Project-Specific*



# Legal Framework: *Lobbying*

## Funding Lobbying – Private Foundations & 501(h) Community Foundations

- **General Support Grants:**

- Permissible, even if grantee has lobbying activities
- No written or oral agreement that it will be used for lobbying (earmarking)

- **Project-Specific Grants:**

- May fund up to the *non-lobbying amount*
- May rely on grantee budget if reasonable
- No earmarking

### Project Budget Example

Total Anti-hunger project:	\$100,000
Lobbying:	\$ 10,000

Grant Request:	\$ 50,000
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\*Can fund up to \$90,000, so a \$50,000 grant for the non-lobbying activity is permissible





# Legal Framework: *Election-Related Activity*

## Prohibition on “Campaign Intervention”

Under no circumstances can a nonprofit or foundation:

“Participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”



# Legal Framework: *Election-Related Activity*

## What is “Campaign Intervention”?

Facts and circumstances test, with some clearly **impermissible activities, including (but not limited to):**

- Endorsing candidates;
- Making any campaign contributions;
- Making expenditures on behalf of candidates;
- Asking candidates to sign pledges on any issue;
- Communications that explicitly or implicitly favor or oppose a candidate;
- Making a positive or critical reference to a candidate.



Despite these rules, there is **A LOT** that foundations can do to engage with lawmakers.





# **It Can be Done!**

## *Hypothetical Scenarios of Permissible Foundation Engagement*

**David Thompson**, VP of Public Policy, *National Council of Nonprofits*

**David Heinen**, VP for Public Policy & Advocacy, *N.C. Center for Nonprofits*

**Katherine LaBeau**, Policy Director & Counsel, *Council on Foundations*



## Situation #1

*Several nonprofits in [North Carolina] come to you seeking advice on setting up coordinated voter registration efforts across the state.*



## Situation #2

*Joe is a well-known E.D. of a respected community foundation. Jane is a board member. Both Joe and Jane have a lot of political opinions, and seize every opportunity to bad-mouth Candidate X—including...*

- ▶ *At your foundation's board meeting?*



## Situation #2

*Joe is a well-known E.D. of a respected community foundation. Jane is a board member. Both Joe and Jane have a lot of political opinions, and seize every opportunity to bad-mouth Candidate X—including...*

- ▶ *At a public gathering hosted by your foundation?*



## Situation #2

*Joe is a well-known E.D. of a respected community foundation. Jane is a board member. Both Joe and Jane have a lot of political opinions, and seize every opportunity to bad-mouth Candidate X—including...*

- ▶ *Via email from Jane to a donor, who agrees with Jane's views on Candidate X?*





## Situation #2

*Joe is a well-known E.D. of a respected community foundation. Jane is a board member. Both Joe and Jane have a lot of political opinions, and seize every opportunity to bad-mouth Candidate X—including...*

- ▶ *In an op-ed that Joe publishes in a local paper? (Note: the by-line identifies him as E.D. of the foundation, and he references the foundation's work)*



## Situation #2

*Joe is a well-known E.D. of a respected community foundation. Jane is a board member. Both Joe and Jane have a lot of political opinions, and seize every opportunity to bad-mouth Candidate X—including...*

- ▶ *In an op-ed that Joe publishes in a local paper? (Note: the op-ed includes a footnote stating that Joe's comments are not representative of foundation views)*



## Situation #3

*The November elections are fast approaching. You see that there is a pattern in several ballot measures in multiple states. Some would amend state constitutions to restrict state spending; others would repeal the property tax exemption for 501(c)(3)s; and some would earmark a percentage of sales tax revenue to fund nonprofit arts activities.*



## Situation #4

*You're hosting (or considering funding) a town hall meeting where candidates would be invited to participate.*

- ▶ *What if only one candidate shows up?*
- ▶ *What information would you want from the grantee prior to funding this?*
- ▶ *What are some other rules and considerations to keep in mind?*



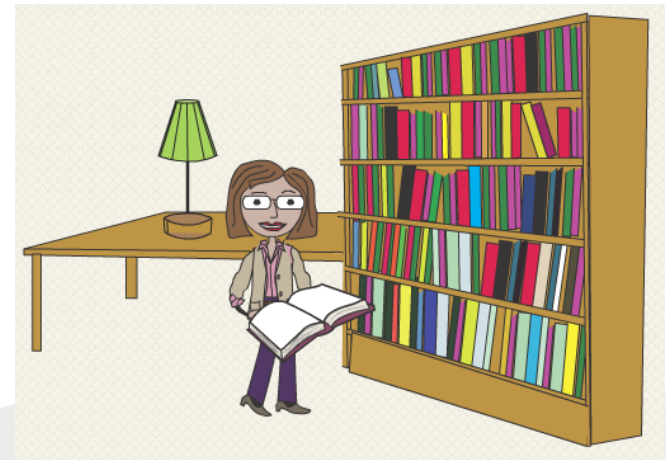
## Situation #5

*The Governor's spouse is nationally known for his/her work in early childhood literacy—which happens to be one of your program areas. You have an event coming up and a board member suggests asking the Governor's spouse to come for a speech and photo-op in front of your logo.*



## For More Information:

- ***Mastering Foundation Law: The Council on Foundations Compendium of Legal Resources***
  - Coming soon... Stay tuned!
- ***Learn Foundation Law courses for:***
  - Advocacy and Lobbying
  - Expenditure Responsibility
  - Electioneering Prohibition
  - Program-Related Investments
  - Working with Government Officials
  - Visit: [www.learnfoundationlaw.org](http://www.learnfoundationlaw.org)
- Nonprofit VOTE: [www.nonprofitvote.org](http://www.nonprofitvote.org)
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## Questions?

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