



ChangeLab Solutions

Law & policy innovation for the common good.

June 29, 2012

To: Public Health Organizations with Federal Contracts

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CEO, ChangeLab Solutions (formerly Public Health Law & Policy)

Re: Complying with the Law: Interpreting Changes to the Consolidated Appropriations Act of 2012

ChangeLab Solutions has commissioned a comprehensive legal analysis of the changes in federal appropriations law that restrict lobbying with federal funds.¹ The changes were enacted in late December 2011 and have caused significant confusion among federal grantees who actively work on policy change strategies in their states and communities. We are offering several resources for public health organizations to help clarify activities that are and are not allowable under federal law.

- Webinar: Monday, July 9 at 12 noon Pacific/3:00 pm Eastern. Space is limited, but a recording will be available at www.changelabsolutions.org within 24 hours of the live presentation.
- Brief Analysis with FAQs: The brief analysis provides a high-level overview of the law along with practical examples of what the new restrictions mean in everyday public health practice.
- In-depth Legal Analysis: The in-depth analysis is recommended for legal counsel to public health organizations and others who wish to understand more of the history and technical requirements of a series of federal anti-lobbying rules and statutes.
- Additional FAQs: ChangeLab Solutions will research additional questions that arise as public health organizations seek to understand the law.

ChangeLab Solutions will host these resources along with copies of the relevant statutes, regulations, and guidance documents on our website for easy reference. See www.changelabsolutions.org.

ChangeLab Solutions does not enter into attorney-client relationships and will not be available to provide legal technical assistance on the issues covered on the webinar or in the briefs. We encourage public health organizations to contact the authors of the briefs with any legal questions that require a privileged and confidential relationship. Ted Waters and Susannah Vance are attorneys in private practice at Feldesman Tucker (www.feldesmantucker.com), a law firm based in Washington, D.C. They are available to work with agencies and organizations on an hourly basis. Both are experts in regulatory compliance and health law and represent many nonprofit and government clients.

¹ Section 503, Division F of the Consolidated Appropriations Act of 2012 (CAA 2012).



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Briefing Paper on New Restrictions on Federal Grantee Lobbying Activities under Section 503 of the Consolidated Appropriations Act of 2012, Division F

This Briefing Paper summarizes the expanded restrictions on the use of appropriated funds for lobbying activities in Section 503, Division F of the Consolidated Appropriations Act, 2012 (“CAA 2012”), attached for your reference. This summary is prepared for nonprofit organizations, and state and local government entities that perform public health policy research and other activities (“public health organizations”) using grant funds from the U.S. Department of Health and Human Services (“HHS”). This Briefing Paper is intended to assist in your assessment of the impact the restrictions in CAA 2012 will have on your work. It also includes an overview of existing restrictions on grantee lobbying imposed under federal grants law.

Note that a more in-depth legal memorandum analyzing various sources of federal law restricting the use of grant funds for lobbying is available on the website of ChangeLab Solutions (www.changelabsolutions.org).¹

Summary of Grantee Lobbying Restrictions Under Federal Law

Costs that are “ordinary and necessary” for achieving the purposes of a given federal grant program as set forth in that program’s authorizing statute are allowable charges to a federal grant. For example, public health organizations can use federal grant funds (as grantees or subrecipients) to do research on public health issues and to conduct public education activities under the Center for Disease Control’s (“CDC”) Community Transformation Grant (“CTG”) Program, as such activities are clearly within the ambit of that program.

However, federal law contains specific limits or prohibitions on the allowability of certain categories of cost under federal grants. Most of these limitations can be found in the “Cost Principles” issued by the U.S. Office of Management and Budget (“OMB”)² and, for a particular program, in that program’s authorizing statute and regulations. In addition, some limits are regularly contained in appropriation acts of Congress, including limitations on using federal grant funds for lobbying activities discussed in this memo.³

¹ Also, note that the Centers for Disease Control issued a memorandum on its implementation of Section 503 on June 25, 2012.

² The cost principles applicable to non-profit organization grantees are contained in OMB Circular A-122, codified at 2 C.F.R. Part 230; those that apply to state and local government grantees are located in OMB Circular A-87, codified at 2 C.F.R. Part 225. The restrictions on lobbying in the two Circulars are substantially identical, and we refer to the Circulars generically as the “OMB Cost Principles” in this Briefing Paper.

³ Note that nonprofit organizations also must comply with IRS regulations related to lobbying. Those rules are different than and apply concurrently with the restrictions on allowable grant costs outlined in appropriations riders, the OMB Cost Principles, and any authorizing statute or regulation.

Since the early 1980s, through annual appropriation acts, Congress has prohibited HHS and many other federal agencies from using appropriated dollars to fund expenditures (*i.e.*, the cost of staff time, goods and services) for lobbying activities incurred by recipients of financial assistance (grants and cooperative agreements).

These restrictions, which were subsequently incorporated in the OMB Cost Principles, bar the use of federal funds for “direct” or “indirect” lobbying by grantees relating to legislation on the state or federal level. Direct lobbying is making an appeal to government decision-makers to advocate for or to defeat the introduction or enactment of a law. Indirect lobbying (sometimes called “grassroots lobbying”) is making an appeal to the general public for the same purposes. In addition, federal grant funds cannot be used for “legislative liaison” activities, which are activities to prepare for lobbying.

In CAA 2012, through Section 503 of Division F, Congress added to the longstanding restrictions on the use of HHS funds for lobbying by expanding the reach of those restrictions to include (1) lobbying on a local government level as it relates to legislative actions (in addition to the pre-existing restrictions on legislative lobbying at the state and federal levels), and (2) lobbying on the state level as it relates to administrative actions (in addition to the pre-existing restrictions on legislative lobbying).

Key questions for any recipient of federal funds to answer when analyzing whether Section 503 or other legal restrictions would prohibit the use of federal grant funds for a given activity include:

- **First**, is the activity within the purposes of the grant program to which the grantee wants to charge the cost of that activity? This is a threshold question that must be answered in the affirmative before considering whether there is a restriction on the allowability of the cost of the activity. If an activity does not further the purposes of a grant, no matter how laudable that activity is, the cost of the activity is not an allowable charge to that grant.
- **Second**, if the activity does further the purposes of the grant program, is the activity lobbying? There must be a **direct appeal to a government decision-maker or to the general public urging a specific governmental action** for an activity to constitute lobbying. For example, an objective analysis prepared to educate the public (such as a report on approaches to reducing the prevalence of childhood obesity that includes analysis of the effectiveness of taxes or other policies in reducing access to sugar-sweetened beverages) is not lobbying if it does not include a direct call to action.
- **Third**, if the activity is “lobbying,” does it fall within one of the exceptions to the restrictions on lobbying outlined in Section 503? There are two exceptions to lobbying: (1) any grantee or subgrantee may share technical or factual information with government bodies at the government body’s documented request, and (2) in the case of a grantee that is a government entity or of a subgrantee of that government entity, the grantee or subgrantee may provide input on policy issues to either legislative bodies

or executive branch agencies within the grantee's own government (State, local or tribal), even if the input would otherwise constitute "direct lobbying."

- **Finally**, even if the answers to the questions above indicate that the cost of the activity is not an allowable cost, **it only means that the activity must be paid for out of a non-federal funding source**. It does not mean that the activity cannot be done at all. Appropriate accounting and documentation procedures are necessary to demonstrate that federal funds are not being used to pay for or subsidize the lobbying activity; however, the OMB Cost Principles make clear that lobbying costs can be documented in the same manner as any other cost. Under the federal grants rules, there are no special documentation requirements for lobbying costs.⁴

New Restrictions Contained in Section 503

Section 503, as it appears in in CAA 2012, Division F, includes the following changes as compared to prior years' versions of the HHS appropriations rider. (See Addendum for the actual text of the law.)

- **Advocacy Supporting or Opposing Measures That Are Not Formally "Pending"**: Section 503(a) applies to the use of appropriations for publicity or propaganda activities by grantees "related to any activity to influence the *enactment* of legislation . . . proposed or pending," or "to advocate or promote any proposed, pending, *or future* Federal, State or local tax increase." Under the previous appropriations law, only a statement referring to a specific *pending* bill would meet the standard for lobbying. However, this restriction is not new to grantees, because the OMB Cost Principles already prohibit using grant funds for lobbying for the introduction of legislation (not just the enactment of pending legislation).⁵
- **Application to Administrative Processes**: With CAA 2012, the lobbying restrictions of Section 503 apply for the first time to actions intended to influence the promulgation of regulations and other administrative processes. However, the restrictions on agency lobbying in Section 503, as they relate to grantees or subgrantees, effectively apply **only to lobbying on State agency issues**; they do not apply to lobbying before federal and local executive agencies. We are assuming here that local entities such as zoning boards and school boards would be considered quasi-legislative entities, and communications relating to matters pending before them would fall under the restrictions of Section 503. Such a determination, however, should be analyzed in light of local government law in the state in which the grantee is located. These laws vary significantly from state to state and therefore, there is not a "one size fits all answer" to the question of what is a local executive agency.

⁴ Such expenditures, however, are required to be disclosed and reported under IRS Form 990 and the lobbying disclosure reports to Congress under the Lobbying Disclosure Act.

⁵ See OMB Circular A-122, Att. B, ¶ 25.a.3.

- **Application to Local Government:** With CAA 2012, the lobbying restrictions of Section 503 apply for the first time to actions to influence local legislative entities. This is contrary to the longstanding policy and practice of OMB of not prohibiting the use of grant funds for lobbying at the local level. When promulgating the lobbying restrictions in the Cost Principles, OMB stated that it had decided not to include units of local government in the restrictions. OMB stated, “Since there is no rigorous separation between legislative and executive authority at the local level, it would be difficult to enforce a rule regarding lobbying at the local level.”⁶ That said, HHS has historically prohibited the use of grant funds for lobbying at the local level in restrictions placed on individual grants. (For CDC grants, this restriction has been included in Additional Requirement (AR) 12 in funding opportunity announcements.)
- **Activities To Advocate or Promote a Tax Increase or Restriction on Legal Consumer Products:** Subsection (c) of Section 503 provides that the restrictions on use of appropriated funds by federal agencies or grantees set forth in the prior subsections of the statute “shall include any activity to advocate or promote any proposed, pending or future Federal, State or local tax increase, or any proposed, pending, or future requirement or restriction on any legal consumer product . . . not limited to advocacy or promotion of gun control.” We do not believe that Section 503(c) substantively expands the restrictions on lobbying in the prior subsections; instead, we believe it is intended to ensure that lobbying on the actions listed in Section 503(c) with federal funds is prohibited.

Note, however, that subsection (c) is new language in this long-standing statute, and it has not been interpreted by a court of law.⁷ Therefore, public health organizations should be aware that subsection (c) includes broad, ambiguous and undefined terms such as “advocate or promote.” And it restricts action related to “future” tax increases or requirements or restrictions on “legal consumer products.” Although we do not believe these undefined terms place additional restrictions on public health organizations beyond those included in subsections (a) and (b), grantees ought to be aware of the presence of these terms in the statute.

Provisions Allowing Lobbying By Government-Entity Grantees

In one respect, Section 503 permits *more* advocacy activity by grantees than previous versions of the HHS appropriations rider. Under subsection (b), the restrictions on lobbying do not apply to communications pursuant to “normal and recognized executive-legislative relationships” or to or “participation by an agency or officer of a State, local or tribal

⁶ See 49 Fed. Reg. 18,260, 18,269 (Apr. 27, 1984).

⁷ While the provisions of subsection (c) are, for the most part, new, restrictions on the use of appropriated funds for advocacy on or promotion of gun control have appeared in HHS appropriations riders at various points since 1996. See, for example, H.R. Rep. No. 106-370, 60-61 (1996).

government in policymaking and administrative processes within the executive branch of that government.” (See Addendum.) These exceptions allow appropriated grant funds to be used for communication (including recommendations of specific legislative or executive actions) relating to proposed or pending laws and regulations between the government-entity grantee or its agent and (1) legislative bodies within its own government, or (2) other executive branch decision-makers within its own government. Both grantees and subgrantees serving as the agents of a grantee organization fall within these exceptions.

We believe the exceptions in subsection (b) encompass communications between different levels of government – for example, between State and local officials, or local and county officials – only if the two entities are defined as being within the same government under applicable law. (Again, this is a determination that can only be made in light of the law of the state of residency.)

Conclusions about the Impact of Section 503

Section 503 will impose some new restrictions on public health organizations’ mass communications and interaction with legislative or executive bodies, but because of the multiple other federal rules and regulations related to lobbying, the new requirements are not a significant change from existing law. The main change reflected in Section 503 of CAA 2012, Division F is that the restrictions now apply to advocacy before State executive agencies and local governments.

Most importantly, public health organizations may continue to use grant funds to engage in a wide variety of activities to promote evidence-based solutions to public health problems without running afoul of the lobbying restrictions, such as those listed below. (Please also see the Questions and Answers included as an addendum to this memorandum for additional detail concerning the types of activities that may be impacted by Section 503.)

- **Publications and Public Information Campaigns:** Section 503 and other lobbying restrictions do not prohibit grantees from continuing to use HHS grant funds to engage in public information campaigns or publish research, so long as (1) the campaigns or research papers advance the purposes of the grant, and (2) the campaigns or publications do not include a “direct appeal” to influence legislative action at any level, or regulatory action at the State level. The fact that a published analysis provides data showing that some strategies are more effective than others does not mean that the analysis is lobbying.
- **Communications with Government Officials:** In many cases, grantees may provide information to a government entity or official to advance the purposes of the grant award, without that activity constituting “lobbying.” For example, a public health organization could submit to a legislator a research report on a health-related topic. So long as the report advances the purposes of the grant, and the organization does not (either through the publication itself or through any accompanying communication)

make a direct appeal for action, then it is not lobbying when the organization prepares or sends the report. Grantees can also, as described above, use grant funds to provide information to government entities at their request.

Addendum

Consolidated Appropriations Act, 2012

DIVISION F--DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION,
ANDRELATED AGENCIES APPROPRIATIONS ACT, 2012

Pub. L. No. 112-74

TITLE V

GENERAL PROVISIONS

(TRANSFER OF FUNDS)

SEC. 503. (a) No part of any appropriation contained in this Act or transferred pursuant to section 4002 of Public Law 111–148 shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, electronic communication, radio, television, or video presentation designed to support or defeat the enactment of legislation before the Congress or any State or local legislature or legislative body, except in presentation to the Congress or any State or local legislature itself, or designed to support or defeat any proposed or pending regulation, administrative action, or order issued by the executive branch of any State or local government, except in presentation to the executive branch of any State or local government itself.

(b) No part of any appropriation contained in this Act or transferred pursuant to section 4002 of Public Law 111–148 shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before the Congress or any State government, State legislature or local legislature or legislative body, other than for normal and recognized executive-legislative relationships or participation by an agency or officer of a State, local or tribal government in policymaking and administrative processes within the executive branch of that government.

(c) The prohibitions in subsections (a) and (b) shall include any activity to advocate or promote any proposed, pending or future Federal, State or local tax increase, or any proposed, pending, or future requirement or restriction on any legal consumer product, including its sale or marketing, including but not limited to the advocacy or promotion of gun control.