Lobbying Q&A

By Anita Lichtblau, Esq., CAPLAW

QUESTION #1

Can Community Action Agencies (CAAs) lobby to influence legislation?

Yes, federal laws permit private nonprofit 501(c)(3) CAAs to lobby. Public CAAs, however, should check their local and state government's rules to determine if they may lobby.

QUESTION #2

Can CAA associations lobby to influence legislation? My state CAA association is a (c)(4) (or it has two entities, one a (c)(3) and one a (c)(4)). Are the rules any different?

Yes, somewhat. Most importantly, under federal law (the Simpson Amendment to the Lobbying Disclosure Act of 1995, 22 USC 611), 501(c)(4) organizations that engage in federal legislative lobbying (other than grassroots lobbying) may not receive federal grants. So, if your association is a (c)(4) and it receives federal grant funds, it cannot lobby on federal legislation (except grassroots lobbying), even with non-grant funds. If the association has two entities, for example a (c)(3) and a (c)(4), the (c)(3) should receive the federal grant and the (c)(4) can then lobby.

501(c)(4) organizations, unlike 501(c)(3)s, may engage in an unlimited amount of lobbying without jeopardizing their tax-exempt status, as long as the legislation that the 501(c)(4) attempts to influence pertains to the purpose for which it was formed. Make sure that you maintain clear distinctions and allocations of expenses between the (c)(3) and the (c)(4) and maintain the separate legal identities of the organizations through separate boards, board meetings, bank accounts, etc. See the Alliance for Justice's "The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations." To order, visit *www.afj.org*.

QUESTION #3

So what's the bottom line on the best way to lobby within the rules?

Because federal grant funds generally cannot be used for lobbying, we recommend that CAAs put aside a small amount of non-federal, unrestricted funds to pay for legislative lobbying expenses, including an allocation of staff time, travel, and other expenses. These lobbying expenses should be tracked for purposes of establishing that they were paid out of nonfederal funds and for reporting to the IRS. CAA associations, which may want to engage in a more substantial amount of lobbying, should put aside a larger amount of unrestricted funds and those that are 501(c)(3)s should consider electing under section 501(h) of the Internal Revenue Code to be subject to the expenditure test for determining if they have exceeded the limit on lobbying, or alternatively, set up a 501(c)(4) to engage in an unlimited amount of lobbying. Also, do not forget to check whether your state has lobbying registration and reporting rules that may apply to your lobbying activities.

QUESTION #4

What type of lobbying are we talking about here?

For purposes of this Q&A, we are only talking about legislative lobbying, i.e. activities for the purpose of influencing state or federal legislation (but not local legislation), or referenda or ballot initiatives (that are voted on by the general public, rather than the legislature). This includes appropriations bills and budget resolutions, such as activities in connection with influencing Congress's appropriation of funds for CSBG, but does not include trying to influence executive branch agencies in connection with actions that do not require legislative action, such as comments on proposed Head Start regulations or requests to the U.S. Department of Health and Human Services to release LIHEAP fuel

(Continued on page 12)

T&TA *(continued from inside cover)*

In January 2011, the National Partners convened in Washington, DC to share current resources and explore opportunities for collaboration and streamlining of effort. The National Partners recognize the need to identify areas of crossover in order to lessen or eliminate redundancies. The goal is both to maximize the value of the Office of Community Services' investment in T&TA, and to provide CAAs with a comprehensive, readily accessible menu of high quality T&TA resources. The National Partners are actively working together to better coordinate activities and respond to CAA Network T&TA needs.

The CAPLAW National Nonprofit Financial & Grants Management Training Program

Beginning in 2011 and continuing at least through 2012, CAPLAW will develop a National Nonprofit Financial and Grants Management Training Program as an expansion of its core legal education and assistance services. The Program's goals are: 1) to identify and share best practices from within the CAA network and adapt external models to CAA structure; 2) to develop a diverse menu of training programs in a range of formats, e.g., synchronous and asynchronous webinars, peer learning audio-conferences, interactive online training modules, hands-on workshops, etc.; 3) to commission and disseminate a series of CAA-specific toolkits on financial, governance, and administrative challenges; 4) to improve and expand CAPLAW website resources; and 5) to facilitate communication, resource sharing, and peer learning by CAAs.

On April 27, 2011, CAPLAW, in collaboration with Meliora Partners, Inc., launched "Beyond The Basics: Strategic Approaches to Organization-wide Compliance, Risk Management, and Resource Development." This in-depth multi-session webinar series will help executive directors, financial officers, fundraisers, program managers, and board members work together to adopt a proactive and solutions-driven approach to the risks, compliance demands, and financing challenges CAAs face today. Sessions in the "Beyond the Basics" series will help both seasoned and emerging CAA leaders identify and incorporate best practices and aim for the Community Action Partnership Standards of Excellence and other nonprofit sector high performance standards. "Beyond the Basics" extends through September 2011. Visit *http://www.caplaw.org/audioconferences/beyondthebasics2011.html* to learn more about the series, access archived sessions and materials and register for one of the remaining sessions.

CAPLAW WANTS TO HEAR FROM YOU!

If you would like to learn more about CAPLAW's training and technical assistance programs, or to share your ideas, questions, and concerns, please contact Linda DeLauri, CAPLAW's Project Director for the National Nonprofit Financial and Grants Management Training Program, at linda.delauri@caplaw.org or (617) 348-6466. We are especially interested in hearing from CAAs who are willing to share their success stories as well as ongoing fiscal or administrative challenges with their Community Action network peers. We invite all CAAs to consider participation in CAPLAW webinars, audio conferences, and workshops as presenters, panelists, or content contributors. If your CAA has policies, procedures, or financial tools that have proven effective, consider sharing them with us.

Lobbying *(continued from page 3)*

assistance funds to the states. However, you should check the terms and conditions of your grants for additional lobbying restrictions.

QUESTION #5

So, is every contact with a legislator or his or her staff lobbying?

No, not unless it's made for the purpose of influencing legislation. The key factor usually is whether specific legislation is discussed.

QUESTION #6

Isn't there a limit on how much lobbying we can do?

If your organization is a nonprofit 501(c)(3) CAA or a CAA association, the Internal Revenue Code does limit the organization's legislative lobbying; it cannot be a "substantial part" of the organization's overall activities. There is no strict percentage of budget test to determine whether lobbying is "substantial"; rather, the IRS looks at all of the "facts and circumstances," including not only expenditures, but also time spent by volunteers. The IRS will balance the significance of the lobbying

activities against the objectives and circumstances of the organization as a whole, rather than just looking at the time or money spent. For most CAAs, however, because the vast majority of their efforts are focused on providing direct services to and administering and coordinating antipoverty programs for low-income individuals and families, it is unlikely that lobbying activities will exceed the "substantial part" test. A CAA association, however, may want to spend a larger portion of its overall activities on lobbying.

A 501(c)(3) nonprofit CAA or CAA association may elect to be subject to the "expenditure test" rather than the "substantial part" test described above, for measuring lobbying activity. The "expenditure test" election is made under internal revenue code section 501(h) and subjects the organization to a sliding scale expenditure test measured on the basis of a four-year average. The organization may spend annually up to 20% of the first $500,000 of its total expenditures for a tax-exempt purpose on legislative lobbying; 10% of the next $500,000, and 5% of the balance of expenditures, up to a total of $ 1 million per year. The election may be made by filing IRS Form 5768. Another alternative is to form a 501(c)(4) entity that may engage in unlimited lobbying if it does not receive federal grants.

QUESTION #7

Do we need to report to the IRS on lobbying?

Yes, if your organization is a 501(c)(3), it must answer questions on the Form 990 (the informational return filed annually with the IRS) about legislative lobbying activities. If the 501(h) election is not made (most CAAs have not made this election), you must answer questions about the specific type of activity (including volunteer time and other unpaid activities) and, for some questions, lobbying expenditures. We recommend reviewing the Form 990 and instructions relating to lobbying to better understand information that must be collected.

QUESTION #8

But I thought that CAAs can't lobby because they receive so much federal funding?

Even 501(c)(3)s that receive federal funding may conduct lobbying activities, so long as they do not use federal funds to do so. This means that resources paid with federal funds, such as staff time (paid with direct or indirect funds), supplies, equipment, postage, or space, generally may not be used for lobbying activities relating to state or federal legislation (local legislation is OK). Don't forget that program income and federal matching funds are also considered federal funds for purposes of restrictions on their use.

QUESTION #9

How do we lobby without using federal funds?

There are generally three ways:

1. **Use unrestricted funds**. Allocate resources so that any time, supplies, etc. spent on legislative lobbying is tracked and paid for out of nonfederal, unrestricted funds (also check rules and/or grant and contract terms of other funding sources, such as state funds, to determine if lobbying use is allowed). Don't forget, though, that lobbying costs may not be included in the indirect cost pool if your organization has a federally negotiated indirect cost rate. These lobbying costs must still be separately identified in the indirect cost rate proposal.
   - Example: If one staff member is primarily responsible for lobbying, then some or all of that person's compensation should be paid out of nonfederal funds.
   - Example: If staff members, either in addition to or instead of one primary person, spend just a small amount of time engaging in lobbying activities, then based on past history, you could estimate the percentage of time spent on lobbying by each person (as long as lobbying constitutes no more than 25 percent of the employee's total work time) and pay that percentage of compensation from nonfederal funds. See 2 C.F.R. Part 230, App. B, ¶ 25 (c)(4). Or charge time spent on lobbying out of nonfederal funds as needed based on actual reporting.
   - Example: If the compensation of an employee who lobbies is charged to indirect costs, a portion of the compensation must be charged as a direct cost and paid out of nonfederal funds. This lobbying time could be tracked on a time card on an ongoing basis, or as an "exception report" when the employee engages in lobbying activities.

2. **Lobby on personal time**. Employees may lobby on their own time and without using the organization's resources to do so. The organization should have a written policy indicating regular work hours. Even if an executive director is expected to be "on duty" 24/7, that doesn't mean that s/he is never on personal time.

(Continued on page 14)

Lobbying *(continued from page 13)*

Example: An executive director may choose to take an afternoon off to meet with legislators at the state capital to lobby for passage of increased state supplemental Head Start appropriations. In that case, not only the time spent meeting with the legislators, but also preparation time spent either by the executive director or staff, must also be either done on personal time or compensated out of nonfederal funds. If this is done during the regular workday and workweek, however, make sure that time cards or other records reflect that this activity is done on personal time.

Also, be careful if non-salaried employees (i.e. those that are ***not*** exempt from being paid overtime under federal and state wage and hour laws) "volunteer" to lobby on their own time. If they are asked or required to lobby, or if the lobbying relates to their paid job, they must be paid to do so; otherwise this may result in a violation of the wage and hour laws.

3. **Use board members or other volunteers**. A third way to lobby without using federal funds is to use board members or other volunteers. Again, make sure that any resources used to prepare for or carry out the lobbying activities (for example, staff time to research and provide talking points, food or space for meetings, phones, paper, etc.) are not paid out of federal funds.

QUESTION #10

But we don't lobby legislators, we educate them. That's OK with federal funds, right?

Hate to sound like lawyers, here, but it depends. Just because you call it "educating," doesn't mean it isn't lobbying as well. If the "education" is done for the purpose of passing, defeating, or introducing state or federal legislation or a referendum or ballot initiative, then it's still lobbying and federal funds generally can't be used. Don't forget that legislation also includes appropriations bills.

- Lobbying Example: If you meet with, call or email your U.S. representative or a member of his/her staff to ask him/her to increase Head Start appropriations, that is lobbying. Of course, you can still do it, but not on federally-funded time or using federally-funded resources.
- Education Example: If you invite your state senator to visit and tour your job training program and explain the program and needs of your clients, and perhaps even ask the legislator to hold a hearing on the job training needs of your community, but do not discuss any pending or proposed legislation, then that is education, or advocacy, but not lobbying. If costs associated with that meeting fall within one of your grants, and are otherwise allowable under 2 CFR Part 230 (OMB A-122) (i.e. documented, reasonable, allocable, etc.), then they could be charged to federal funds.

QUESTION #11

Can you give us some other examples of legislative lobbying activities?

- Signing on to a letter to legislators about proposed legislation or appropriations.
- Paying dues or donating to an organization primarily engaged in lobbying, such as the National Community Action Foundation (NCAF), and encouraging others to do so.
    - Contributions to lobbying organizations must be made out of unrestricted, non-federal funds. Any such contributions would be counted as lobbying for IRS and Form 990 purposes.
- Paying dues to a CAA association, to the extent the dues are used for lobbying. If a CAA pays dues to an organization that does some lobbying, but that is not its primary activity, such as a state 501(c)(3) CAA association, and if the association uses dues to pay lobbying expenses, then that portion of dues used for lobbying expenses should be paid out of nonfederal funds.
- Asking your U.S. representative or senator to sign on to a "Dear Colleague" letter requesting support for a piece of legislation or increase a legislative appropriation.
- Legislative liaison activities, such as attendance at legislative hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support or in knowing preparation for an effort to influence legislation. But, if such activities are not carried out for that purpose, but rather to keep informed about programs and appropriations for purposes of budgeting and planning, that is not considered lobbying.

- Asking the governor to sign legislation.
- Asking clients or staff to engage in the activities described above.

QUESTION #12

What about lobbying on the Internet, Facebook, Twitter, etc.?

The same rules apply, just different media. Be careful about including links to websites or pages that are lobbying; it can be done but will count as lobbying. If employees are lobbying on their personal Facebook pages or Twitter accounts, that should be done on their own time and without reference to their CAA or CAA association positions, or counted as lobbying if done on work time or with work resources, such as computers. For a more comprehensive answer, take a look at the Alliance for Justice's "E-Advocacy for Nonprofits," available at *http://www.afj.org/for-nonprofits-foundations/resources-and-publications/free-resources/e-advocacy-for-nonprofits-1.html*

QUESTION #13

Can CAA or CAA association employees or board members lobby as private citizens?

Yes. If they don't represent themselves to be acting on behalf of the CAA, and don't use any CAA resources or the CAA name, then they would be lobbying as private citizens (or perhaps on behalf of another organization). That's fine and the CAA would not need to report that activity on the IRS Form 990 or allocate any unrestricted CAA funds to the activity.

QUESTION #14

Aren't there some exceptions in 2 C.F.R. Part 230 (OMB A-122) to the general rule that federal funds can't be used for lobbying:

Yes, there are:

- Lobbying in connection with local legislation.
- Lobbying to influence state legislation in order to directly reduce the cost, or to avoid material impairment of the organization's authority to perform the grant, contract, or other agreement.
    - Example: Lobbying for legislation to lower unemployment insurance premiums
- Providing a technical and factual presentation of information on a topic directly related to the performance of a grant or contract:
    - Through hearing testimony, statements or letters;
    - To Congress or a state legislature, or subdivision, member, or cognizant staff member of such body;
    - In response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing);
    - Provided such information is readily obtainable and can be readily put in deliverable form; and
    - Provided costs for travel, lodging or meals are unallowable unless incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for the presentation made by the chairman or ranking minority member of the committee or subcommittee conducting the hearing.
- Any activity specifically authorized by statute to be undertaken with grant funds.

QUESTION #15

Can you boil down the implications of those exceptions to the OMB A-122 lobbying restrictions?

The only exception that a CAA is likely to be able to make much use of is the third one listed in Q14 – the technical and factual presentation. But read the numerous requirements carefully. It does not cover phone calls or meetings; only written or oral testimony or letters in response to a documented request and it generally doesn't cover travel and hotel costs in connection with the presentation. The clearest activity to come within this exception is personally testifying at and/or submitting a written statement to a public hearing held by a legislature or legislative committee (although, again, travel costs are not generally allowable). Due to the fact that language in annual federal appropriations laws prohibiting use of appropriated federal funds for lobbying to influence federal, and sometimes state, legislation, does not explicitly include these exceptions, if your CAA is receiving federal funds indirectly, such as through the state, it is important to confirm whether OMB A-122 (or 2 C.F.R. Part 230) applies to your subgrant or state contract. You can check this in the grant terms and conditions or state contract provisions.