OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
Advisory Opinion # AO-2014-005

Date: June 9, 2014

Subject: Part 1612 Lobbying Activities

QUESTION PRESENTED

What communications by recipients of LSC funding are prohibited "attempts to influence" government decisionmaking under 45 C.F.R. Part 1612, and what communications are permitted under that regulation?

BRIEF ANSWER

The restrictions at 45 C.F.R. § 1612.3 prohibit attempts to influence government decisionmaking through communications addressing actions the government should or should not take. The restrictions do not prohibit creating or distributing information about the impact and effects of actual or potential government actions, so long as that information does not advocate outcomes of government decisionmaking.

BACKGROUND

Advisory Opinion 2013-010 and Program Letter 13-5 discuss the framework of the LSC lobbying restrictions appearing at 45 C.F.R. Part 1612, which implement statutory restrictions in the LSC Act and LSC's annual appropriation. The National Legal Aid and Defender Association and the chief executive officers of the organizations that publish the Clearinghouse Review and the Management Information Exchange Journal requested further guidance from LSC on the scope of the "attempt to influence" prohibitions in the legislation and Part 1612. This opinion addresses the restrictions in 45 C.F.R. § 1612.3 on "attempts to influence" legislative, executive, and administrative activities (hereinafter "government decisionmaking") and how they affect recipient communications about government decisionmaking.

As discussed in AO 2013-010, the language of the attempt-to-influence restrictions is broad, and the legislative history and judicial interpretations relating to the attempt to influence provisions indicate that the provisions are intended to be broadly construed. The LSC Act provides that the Corporation shall:

> insure that no funds made available to recipients by the Corporation shall be used at any time, *directly or indirectly*, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State or Local agency, or to undertake to influence the passage or defeat of any legislation

> by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition.

42 U.S.C. § 2996f(a)(5)(emphasis added).

The restrictions in the LSC appropriations legislation contains materially similar substantive prohibitions and adds language that bars "attempts to influence" executive or agency actions "of general applicability and future effect." Pub. L. 104-134, § 504(a)(2)–(5) (1996) (incorporated by reference thereafter). Under section 504(a),

> [n]one of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to *any person or entity* (which may be referred to in this section as a recipient)—
>
> (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State or local agency;
>
> (3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;
>
> (4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;
>
> (5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation . . . .

Id. (emphasis added). These "attempt-to-influence" restrictions in the appropriations legislation are entity restrictions—they preclude LSC from providing financial assistance "to any person or entity" engaging in the enumerated activities *regardless* of the funding source for those activities (subject to a blanket exception for tribal funds and limited exceptions for non-LSC funds). *See* 45 C.F.R. §§ 1610.2(b) and 1610.4 (1996 restrictions on non-LSC funds) and 45 C.F.R. 1612.6 (non-LSC funds exceptions to Part 1612).

> The House Committee report accompanying the 1996 restrictions states that:
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> The Committee understands that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society. However, the Committee *does not believe such advocacy is an appropriate use of Federal funds*. The Committee notes that there are hundreds of private organizations which can and do fulfill this advocacy role. The Committee notes

> that any *funding devoted to advocacy is funding taken away from basic legal assistance*.

H.R. Rep. No. 104-196, at 119-21 (1996) (emphasis added). This report language associates the "attempt-to-influence" prohibitions with "advocacy."

In interpreting these provisions, the Second Circuit has stated that "the restrictions here placed on grantees are not narrow; they are extremely broad" and that the "language imposes a sweeping restriction on grantee activity." *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 766, 767-68 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

The LSC regulations implement these statutory restrictions, providing that recipients "shall not attempt to influence":

> (1) The passage or defeat of any legislation or constitutional amendment;
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> (2) Any initiative, or any referendum or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in any legislative capacity;
>
> (3) Any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or the Corporation; or,
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> (4) The conduct of oversight proceedings concerning the recipient or the Corporation.

45 C.F.R. § 1612.3(a). Furthermore, the regulations provide that "recipients shall not":

> participate in or attempt to influence any rule-making, or
>
> attempt to influence the issuance, amendment, or revocation of any executive order.

45 C.F.R. § 1612.3(b).

45 C.F.R. § 1612.2 provides a number of relevant definitions, the most significant of which are as follows.

> (b)(1) *Legislation* means any *action or proposal for action* by Congress or by a State or local legislative body which is *intended to prescribe law or public policy.* The term includes, but is not limited to, action on bills, constitutional amendments, ratification of treaties and intergovernmental agreements, approval of appointments and budgets, and approval or disapproval of actions of the executive.
>
> . . .

> (c) *Public policy* means an overall plan embracing the general goals and procedures of any governmental body and *pending or proposed* statutes, rules, and regulations.
>
> . . .
>
> (d)(1) *Rulemaking* means any *agency process for formulating, amending, or repealing* rules, regulations or guidelines of general applicability and future effect issued by the agency pursuant to Federal, State or local rulemaking procedures ….

45 C.F.R. § 1612.2 (emphasis added).

The LSC regulations provide a non-exhaustive list of *permissible* activities. These are not exceptions to the rule, but rather examples of activities that fall outside of the prohibitions. When adopting the rule in 1997, LSC stated that:

> As with prior regulations regarding lobbying and rulemaking, the final regulation seeks to *clarify the activities that are not prohibited by the rule. This list is not intended to be exhaustive*. Rather, it seeks to clarify those instances likely to raise close questions.

62 Fed. Reg. 19,400, 19,401 (April 21, 1997) (preamble to the final rule) (emphasis added). 45 C.F.R. § 1612.5(c) provides three examples relevant to this opinion:

> (c) Nothing in this part is intended to prohibit a recipient from:
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> . . .
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> (2) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies [which is also excluded from the definition of "rulemaking" at 45 C.F.R. § 1612.2(d)(2)(ii)];
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> (3) Informing clients, other recipients, or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations;
>
> . . .
>
> (6) Advising a client of the client's right to communicate directly with an elected official;
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> . . .

45 C.F.R. § 1612.5(c)(2), (3) & (6).[1]

Part 1612 does not define "attempt to influence." Some additional guidance on the meaning of "influence" appears in the definition of "grassroots lobbying," which is subject to a separate prohibition at 45 C.F.R. § 1612.4. Section 1612.2(a)(1) defines grassroots lobbying as an action that includes "a direct suggestion to the public to contact public officials" regarding "pending or proposed" government decisionmaking *or* "participation by recipients in any . . . lobbying campaign . . . for the purpose of influencing" government decisionmaking. Section 1612.2(a)(2) states that grassroots lobbying "does not include communications which are limited solely to reporting on the content or status of, or explaining, pending or proposed legislation or regulations." LSC has determined that providing that type of explanatory information is not, by itself, participating in a lobbying campaign for the purpose of influencing government decisionmaking. Thus, the same type of explanatory information also does not, by itself, constitute an attempt to influence government decisionmaking.

LSC added the term "or explaining" to this provision in the final rule to expand on the phrase "report on the effects" in the interim rule. LSC noted "that it is appropriate for recipients to prepare communications explaining the meaning [of] and analyzing pending or proposed legislation," which could include "what the legislation does, the changes it would make in existing laws, the problems which the proposed legislation addresses, and who would be affected by the proposal." Nonetheless, LSC cautioned that "recipients could not prepare communications which encourage the public to support or oppose proposed or pending legislation." 62 Fed. Reg. 19,400, 19,401 (April. 21, 1997) (preamble to the final rule).

ANALYSIS

Examples of activities explicitly permitted under 45 C.F.R. § 1612.5(c)

The "attempt to influence" prohibition is a broad statutory restriction, but not without limit. The examples of permissible activities provided in section 1612.5(c) identify ways in which recipients are permitted to communicate regarding government decisionmaking that do not constitute "attempts to influence" as that term is used in the regulation. These examples are not exhaustive and provide context for analyzing other situations. Impermissible "attempts to influence" usually involve some statement about what decision the government should make

[1] 45 C.F.R. § 1612.5 identifies several other categories of permissible activities using any funds – "administrative representation for an eligible client in a proceeding that adjudicates the particular rights or interests of such eligible client," "negotiations directly involving that client's legal rights or responsibilities . . .", and participation "in litigation challenging agency rules, regulations, guidelines or policies . . ." *Id.* § 1612.5(a) & (b). 45 C.F.R. § 1612.6 identifies permissible activities using non-LSC funds, including responding to a written request from a governmental agency (§ 1612.6(a)) and participating in a public rulemaking proceeding (§ 1612.6(e)). The questions raised by the National Legal Aid and Defender Association and the chief executives of the Clearinghouse Review, and the Management Information Exchange Journal do not focus on these activities, so they are not addressed in this opinion.

with regard to adopting or rejecting proposed policy. Conversely, permissible activities do not involve communications advocating the adoption or rejection of proposed policy.

Section 1612.5(c)(2) permits communications with an agency "for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies." Such inquiries may include statements reflecting a recipient's understanding of how the rules, regulations, practices, or policies would operate and how they would affect the eligible-client population.

Section 1612.5(c)(3) permits "[i]nforming clients, other recipients, or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations." This example permits recipients to both identify the government action and explain how it could affect eligible clients. Thus, a recipient may provide information and analysis about how pending or potential legislation will affect low-income people and the mechanics of how it could be implemented. In doing so, however, an LSC recipient may not express an opinion about what action the government should take regarding the legislation. Nor may an LSC recipient suggest that other organizations or individuals should themselves lobby in favor of or against the legislation. The permissible provision of information and education activities may extend to other relevant audiences, such as community groups or other stakeholders. The attempt to influence prohibition focuses not on the audience, but on the information conveyed.

Application of these examples

Application of the distinctions embedded in these examples is illustrated by two recent articles. AO-2013-010 concluded that an article authored by an LSC recipient violated section 1612.3 because it stated that the failure by states to expand Medicaid "should not be allowed to happen." The article thus went well beyond an explanation of the effect of potential government action on recipient clients and contained clear advocacy statements regarding the ultimate government decision about potential legislation or regulations that every state had to consider. *Medicaid Expansion of the Affordable Health Care Act and the Supreme Court's Decision: Will Legal Services Programs Rise to the Challenge*, 26 Management Information Exchange Journal No. 4, 3 (2012).

By contrast, a different article by an LSC recipient regarding approaches to addressing the condition of sheepherders did not violate section 1612.3 because it did not express any position regarding government decisionmaking. *The Sheepherder Project: Systemic Change for Marginalized Workers*, 45 Clearinghouse Review No. 45, 472 (2012). Rather, the article described legislation in Colorado and the legislative process involved in the consideration of that legislation, including the LSC recipient's responses to legislators' requests for information, permitted under 45 C.F.R. § 1612.6(a). *Id. at 477.* The article also discussed litigation challenging special procedures adopted by the U.S. Department of Labor exempting sheepherders from many of the general H-2A regulatory protections.[2] *Id.* The article did not

[2] The article did not state if any LSC recipients were among the advocates who participated in this litigation. 45 C.F.R. § 1612.5 states that an LSC recipient "may initiate or participate in litigation

state an opinion regarding whether the procedures themselves should be repealed or replaced. Rather, the article described the effect of the procedures on sheepherders and the process of challenging the procedures under the Administrative Procedure Act. *Id.*

Application of Part 1612 to professional publications

The two articles referenced above illustrate another point: the "attempt-to-influence" restrictions do not create exceptions for articles appearing in professional publications, as contrasted to newspapers or other publications of wider circulation. There is nothing in the LSC Act, the appropriations legislation, or the LSC regulations that suggests, for example, that articles advocating the enactment or defeat of proposed legislation, or the repeal of a current public law, do not constitute "attempts to influence" simply because they appear in a professional publication or legal aid journal. Similarly, information distributed via e-mail, electronic discussion groups, or other means can also violate Part 1612 if it involves prohibited activities.

Proposals for legislative action

Part 1612 prohibits any "attempt to influence . . . [t]he passage or defeat of any legislation," and "legislation" is defined as "any action or *proposal for action* by Congress or by a State or local legislative body which is intended to prescribe law or public policy." 45 C.F.R. §§ 1612.3(a)(1) (prohibition) and 1612.2(b)(1) (definition of "legislation") (emphasis added). A proposal for action necessarily occurs prior to the formal introduction of a bill and may include advocacy for, or opposing, the introduction of a bill.

In analyzing the scope of these limitations on *proposals* for legislative action, we have considered comparable limitations in the Internal Revenue Code and regulations issued by the Internal Revenue Service ("IRS") to implement the Code. These IRS statutes and regulations address lobbying activities of 501(c)(3) organizations using the 501(h) election for lobbying expenses. This statutory and regulatory framework is similar to Part 1612, and we believe that its interpretation by the IRS provides useful guidance for the interpretation of Part 1612.

The Internal Revenue Code addresses "lobbying expenditures" that are "for the purpose of influencing legislation," which "includes actions with respect to Acts, bills, resolutions or similar items" by any legislature, and "actions" are defined as "limited to the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items." 26 U.S.C. § 4911(a), (c), (d), & (e), incorporated by reference at 26 U.S.C. § 501(h). For 501(h) elections, the IRS defines both "direct lobbying" and "grassroots lobbying" as any communication that "refers to specific legislation," which "includes *both* legislation that has *already been introduced* in a legislative body *and a specific legislative proposal* that the organization either supports or opposes." 26 C.F.R. §§ 56.4911-2(b) and (d)(1) (emphasis added). The IRS then provides the following example involving potential legislation that has not been introduced:

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challenging agency rules, regulations, guidelines or policies, unless such litigation is otherwise prohibited by law or Corporation regulations."

> Example 2. An organization based in State A notes in its newsletter that State Z has passed a bill to accomplish a stated purpose and then says that State A should pass such a bill. The organization urges readers to write their legislators in favor of such a bill. No such bill has been introduced into the State A legislature. The organization has referred to and reflected a view on a specific legislative proposal and has also encouraged readers to take action thereon.

Id. at § 56.4911-2(d)(1)(iii). The IRS concludes that the language for a bill that *could be introduced, but has not been introduced*, is a "specific legislative proposal" subject to these lobbying rules. Likewise, under Part 1612, the same type of action would constitute a prohibited attempt to influence legislation.

With respect to potential legislative proposals, the IRS also considered and ultimately rejected a test based on how "imminent" the potential legislation might be. In 1990 revisions to regulations regarding lobbying, the IRS deleted the reference to legislation "to be submitted imminently." The IRS stated that "the term implies that a temporal standard determines whether or not an unintroduced legislative proposal is 'specific legislation' that can be influenced." The IRS concluded that "[g]iven the nature of the legislative process, *a temporal standard is inappropriate and underinclusive*. For example, numerous specific legislative proposals are subject to extensive scrutiny, debate and controversy *long before* they are formally introduced as a bill. Moreover, effective lobbying could prevent a bill from ever being introduced." 55 Fed. Reg. 35,579, 33,581 (Aug. 31, 1990) (final rules regarding 501(h) elections and lobbying by private foundations) (emphasis added). For these reasons, we likewise believe that the application of the Part 1612 restriction applicable to legislative proposals should not turn on the imminence of the potential legislation.

Finally, the distinction between *impermissible* attempts to influence legislation and *permissible* creation or distribution of information discussed above also applies with respect to "proposals" for legislative action. LSC recipients may provide the same types of explanatory information about proposals for legislative action as they may for already-introduced legislation. Such communications should not advocate for or against such proposals.

Communications regarding funding for LSC and its recipients and restrictions on recipient functions

Subject to exceptions provided in 45 C.F.R. §§ 1612.5 and 1612.6, section 1612.3(a)(3) prohibits attempting to influence "any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or [LSC]." This provision prohibits a recipient from expressing an opinion regarding how much funding Congress should appropriate for LSC, which would include a general statement that Congress should substantially increase funding. This provision likewise prohibits a recipient from attempting to influence the existence or scope of the restrictions on recipient functions.

45 C.F.R. § 1612.6(f) expressly permits recipients to use non-LSC funds to communicate regarding state or local funding of the recipient:

> Recipients may use non-LSC funds to contact or communicate with, or respond to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

Notably, this provision does not permit use of non-LSC funds for communicating with the federal government about federal funding for LSC or LSC recipients.

A recipient may educate government officials or the officials' staff about the work of the recipient and the types of problems and challenges experienced by the recipient itself and the recipients' client community. Given the breadth of the attempt to influence restrictions, however, the recipient should make clear that it is not attempting to influence the passage or defeat of any measure and should carefully consider the Part 1612 requirements when planning such communications.

45 C.F.R. § 1612.5(c)(4) expressly permits "[c]ommunicating directly or indirectly with the Corporation for any purpose including commenting upon existing or proposed Corporation rules, regulations, guidelines, instructions and policies." LSC recipients may also communicate with others about their interpretations of LSC regulations and about how restrictions will apply to specific situations. Such communications do not eliminate the requirement that recipients comply with the LSC restrictions as LSC interprets them. LSC's Office of Legal Affairs welcomes questions regarding the interpretation of LSC's regulations.

CONCLUSION

The restrictions at 45 C.F.R. § 1612.3 prohibit attempts to influence government decisionmaking through communications addressing what actions the government should or should not take. The restrictions do not prohibit communicating information about the impact and effects of actual or potential government actions, so long as that information does not advocate outcomes of government decisionmaking.

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