

# CDC Implementation of Anti-Lobbying Provisions

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Language included in Section 503 of Division F, Title V, of the FY 12 Consolidated Appropriations Act (P.L. 112-74) reinforces and (in selected respects) expands long-standing statutory and other provisions governing the use of appropriated funds by CDC and our grantees for advocacy, lobbying, and related activities.

The new language does not appear to fundamentally alter the ground rules for CDC's own activities, but stricter prohibitions apply to recipients of CDC funds. These differences are explored in more detail below. As a renewed expression of Congressional intent, the language of Section 503 also serves as an important reminder of limits on lobbying activities that have always governed CDC. These long-standing guidelines have enabled CDC and our grantees to advance a strong public health agenda, and the new language continues to enable many of these same activities.

The discussion below provides a general overview of the legal aspects of policy work. The interpretation and examples should not be regarded as definitive legal guidance, as they may not apply to the specific circumstances of your work or that of your grantees. Additionally, even when operating within what could be argued are legal limits, we should pay continuing attention to the policy positions we adopt, to Congressional intent regarding the use of appropriations, and the appropriateness of our grantee activities.

## Overview of Application of Section 503 to CDC and Grantees

A literal reading of Section 503 (attached) tells only part of the story. A long history of opinions by the Government Accountability Office (GAO) and the Justice Department (DOJ) helps inform the interpretation of its ostensibly broad language. Section 503(a), applicable to the Department's activities, bars communications efforts considered "publicity or propaganda," as well as certain activities designed to influence the passage or defeat of legislation or other matters. Section 503(a), however, does permit the Department to engage in direct communications to legislative bodies that fall within normal and recognized executive-legislative relationships.

Because the Executive and Legislative Branches are co-equal under the Constitution, the power of Congress to restrict the Executive Branch's ability to articulate its views on public policy matters is constitutionally suspect. Accordingly, Section 503(a) has been interpreted by GAO and DOJ, in a manner similar to the Anti-Lobbying Act, 18 U.S.C. § 1913, to bar only those expenditures that would initiate "grass roots" lobbying activities that expressly encourage members of the public to contact their elected representatives to support or defeat legislative matters.

Section 503(b), applicable to grantees and contractors, however does not have the same constitutional problems as 503(a). Congress has the power to set terms and conditions on the use of federal funding by grant recipients and the parties to contracts and cooperative agreements. Accordingly, the Department of Justice has interpreted the operative text in Section 503(b) as prohibiting the use of federal funds for any type of lobbying by federal grantees and contractors, not just the express "grass roots" lobbying that the Department itself is prohibited from performing. Grantees and contractors may lobby at their own expense if they can segregate federal funds from other financial resources used for that purpose and provided they abide by federal tax provisions relating to expenditures to influence legislation.

In the material below and attached, you will find general examples of allowable and restricted activities. For further guidance on the applicability of Section 503 to CDC grantees please see the attached Additional Requirement (AR) 12, which is CDC's policy on impermissible lobbying activities by CDC grantees. AR 12 is part of the terms and conditions of CDC grants.

In general:

### **What is allowed?**

- CDC is permitted to make scientific and policy recommendations, and to inform the public and the Congress of Administration positions on legislative and policy-related matters. Section 503(a) specifically recognizes executive–legislative relationships and the Executive Branch's ability to speak directly to policymakers, including working directly with state and local government agencies and Congress. But because these provisions ultimately recognize the prerogatives of the President (and by extension the Executive Branch), and not unsanctioned statements by individual agencies, this reinforces the need for working through appropriate Executive Branch channels. Matters that should proceed through official channels include, for example, clearance of testimony; Administration review of policy positions on pending Federal legislation; and other elements of Congressional relations as specified in OMB Circular A-19. For matters related to the Congress, these channels begin with CDC Washington.
- State and local agencies funded by CDC are permitted to work directly on policy-related matters across their equivalent branches of state or local government. This derives from language in Section 503 permitting communications through a normal and recognized executive-legislative relationship, and permitting a grantee to participate in policymaking and administrative processes within the executive branch of their state or local government, if within these boundaries.
- Non-government entities funded by CDC may also engage in a range of policy-related activities. However, these non-governmental entities do not have recognized executive-legislative relationships, and their allowable activities are therefore more constrained than state and local government grantees. The most relevant description of allowable activities is that which applies to non-profit institutions under the Internal Revenue Code (IRC), inasmuch as non-profit grantees generally are bound by those limits in order to maintain their tax-exempt status. Therefore, the obligation to comply with the provisions in the IRC will greatly limit grantee participation in certain activities to influence legislation.
  - Although they cannot engage in direct or indirect activities defined as lobbying, non-government grantees can undertake a range of other activities. Those activities, when conducted within applicable limitations, include highlighting and translating public health evidence; collecting and analyzing data; publishing and disseminating results of research; implementing prevention strategies; conducting community outreach services; fostering coalition building and consensus on public health initiatives; providing leadership and training, and fostering safe and healthful environments.

## What is prohibited?

- **Grassroots lobbying.** No appropriated Federal funds can be used by CDC or CDC grantees for grassroots lobbying activity directed at inducing members of the public to contact their elected representatives to urge support of, or opposition to, proposed or pending legislation or appropriations or any regulation, administrative action, or order issued by the executive branch of any Federal, state or local government. With respect to federal agencies, this prohibition has been interpreted over the years as referring only to overt efforts that expressly solicit members of the public to contact their elected representatives regarding a pending matter (now modified to include “proposed” matters). Because grantees are prohibited by Section 503(b) from engaging in any type of federally funded lobbying activities, grantee communications that imply that an external audience should contact legislators concerning specific legislation require scrutiny and may run afoul of the prohibition, unless the communications fall within certain recognized exceptions to the definition of “lobbying” or “influencing legislation.” It is this restriction on grassroots lobbying that prevents us from issuing “calls to action” by the public, along with preventing direct efforts on the part of grantees to encourage participation by others in advocacy.
- **Direct lobbying by grantees:** Except in certain cases of state and local government communication, as part of their normal and recognized executive-legislative relationships, as discussed above, grantees are restricted from using federal funds to attempt to influence deliberations or actions by Federal, state, or local legislative or executive branches. This includes communications to a legislator or executive official that refer to and reflect a view on specific measure (legislative or executive).

## What changed for FY 2012?

- While historical restrictions have applied only to legislative matters, the new language restricts the same kind of lobbying when directed to executive actions – including regulations, administrative actions, or Executive Orders.
- The restrictions were amended to specifically cover activities funded by appropriations transferred from the Prevention and Public Health Fund established by the Affordable Care Act.
- There are new statutory restrictions on lobbying at the local level. These have limited impact on CDC, since we have already imposed this restriction through policy. The provisions now prohibit lobbying directed at city councils, county commissions, and other local legislative bodies, and regulations and administrative orders issued by state and local executive branch officials.
- Congress in Section 503(c) made clear that the lobbying restrictions outlined above are intended to apply to advocacy related to proposed or future tax increases or restrictions on any legal consumer product. This provision reinforces the political sensitivity of these issues. Although impermissible types of lobbying activity (including those directed to these ends) were already restricted by other provisions in the newly revised Section 503, grantees and contractors should pay close attention to this new language.

## **Examples of Legally Allowable and Restricted Activities** ***Activities Conducted by CDC***

The discussion below provides a general overview of allowable and restricted activities. The interpretation and examples should not be regarded as definitive legal guidance, as the examples cover broad areas of activities and may not apply to the specific facts and circumstances of CDC's work.

### **General Allowable Activities**

- Educating the public on personal health behaviors and choices.
- Making recommendations on public health policy matters, including potentially those that may require some type of legislative or executive action to be implemented. In performing such activities, caution should be exercised that such recommendations do not involve express calls to engage in grass roots lobbying activities (see below under "Restricted" activities).
- Research on policy alternatives and their impact.
- Working with Federal executive branch entities to develop and express a view on science-based policy approaches. Note that in certain instances, recommendations on legislative changes may require Office of Management and Budget (OMB) approval and thus should be vetted through appropriate channels.
- Working with executive agencies in state and local governments in support of science-based policy approaches. Note that in turn, state and local grantees may be restricted in their own ability to use CDC funds to undertake related activities within their jurisdiction, discussed below.
- Educating the public on health issues and their public health consequences.
- Educating the public on potential policy solutions to health issues, when stopping short of grass-roots lobbying.
- Development of model laws, templates and menu of options which could include various state and local laws that serve as models. All other activities noted below under "Non-Government Grantees."

### **Restricted/Non-Allowed Activities**

- Grassroots lobbying directed to the Federal government level, i.e., expressly encouraging the public or other entities to contact their elected representatives to support or oppose the enactment of a specific action proposed or pending before the US Congress.
- Grassroots lobbying at the state or local level, i.e., expressly encouraging the public or other entities to contact their elected representatives to support or oppose a proposed or pending regulation, administrative action, or order issued by the executive branch of any state or local government or measures pending before a state or local legislature or legislative body.
- Providing administrative support for the lobbying activities of private organizations.
- Direct self-promotion or publicity to promote the agency or an official.
- Dissemination of public messages without indicating that CDC is the author or source (for example, ghost writing a letter to the editor to be submitted under the name of a non-Federal official).
- Communication that is purely partisan in character.

**Note:** This discussion addresses legal aspects of CDC policy work. Even when operating within what are thought to be legal limits, attention must be paid to appropriateness of policy positions, Congressional intent regarding the use of appropriations, and the appropriateness of our grantee activities.

## **Examples of Legally Allowable and Restricted Activities** ***State and Local Government Grantees***

The discussion below provides a general overview of allowable and restricted activities. The interpretation and examples should not be regarded as definitive legal guidance, as the examples cover broad areas of activities, and may not apply to the specific facts and circumstances of the work of CDC's state and local government grantees.

### **Allowable Activities Using CDC Appropriated Funding**

- Educating the public on personal health behaviors and choices.
- Research on policy alternatives and their impact.
- Working with other agencies within the executive branch of their state or local governments in support of policy approaches, and on implementation of policies.
- Educating the public on health issues and their public health consequences.
- Educating the public on potential policy solutions to health issues.
- Working with their own state or local government's legislative body on policy approaches to health issues, as part of normal executive-legislative relationships.
- All other activities noted below under "Non-Government Grantees."

### **Restricted/Non-Allowed Activities Using CDC Appropriated Funding**

- Encouraging the public or other entities to support or oppose specific action proposed or pending before the US government.
- Encouraging the public or other entities to support or oppose specific legislation or executive action proposed or pending before the state or local government.
- Direct lobbying of the US Congress.
- Direct lobbying of a state or local legislature, other than certain communications in the course of normal executive-legislative relationships.
- Advocacy to perpetuate or increase their own funding from the Federal government.

**Note:** This discussion addresses legal aspects of work by CDC state and local government grantees with CDC funding. Even when operating within what are thought to be legal limits, attention must be paid to appropriateness of policy positions, Congressional intent regarding the use of appropriations, and the appropriateness of our grantee activities.

Note also that grantee activities are not restricted under Section 503 if they are using funding sources other than Federal appropriations. At the same time, grantee activities may be limited by state law or other applicable restrictions.

## **Examples of Legally Allowable and Restricted Activities**

### ***Non-Government Grantees***

**(Note: includes non-government sub-grantees of state and local governments)**

The discussion below provides a very general overview of allowable and restricted activities. The interpretation and examples should not be regarded as definitive legal guidance, as they may not apply to the specific circumstances and facts surrounding the work of CDC's non-government grantees. Lastly, the below examples contain caveats and advice that may mirror regulations or rules governing tax-exempt organizations. These should only be viewed as examples and guidance concerning one settled understanding of what "lobbying" and "influencing legislation" mean.

#### **Allowable Uses of CDC Appropriated Funding**

Many non-profit grantees, in order to retain their tax-exempt status, have long operated under settled definitions of "lobbying" and "influencing legislation." These definitions are a useful benchmark for all non-government grantees, regardless of tax status. Under these definitions, grantees are permitted to prepare and disseminate certain (1) nonpartisan analysis, study, or research reports; (2) examinations and discussions of broad social, economic, and similar problems in conferences and reports; and (3) information provided upon request by a legislative body or committee for technical advice and assistance. Along these lines, analysis, study, or research should contain a balanced, objective exposition of the facts to enable the public or an individual to form an independent opinion or conclusion. Materials must be posted or circulated widely to a diverse and numerous audience on a nonpartisan basis and must not contain an overt "call to action."

Examples include:

- Educating the public on personal health behaviors and choices.
- Conducting research on policy alternatives and their impact.
- Educational campaigns that explain both the advantages and disadvantages of certain public policies or that demonstrate the efficacy and possible ineffectiveness of certain measures are generally permitted as long as those communications are widely disseminated, balanced in their analysis, and avoid an express call to action with respect to specific legislation.
- Compiling and communicating the results of research on health issues and policy approaches that have successfully addressed them ( e.g., presenting evidence on rates of injury associated with mandatory bike helmet laws and the extent to which different approaches may be more or less effective at preventing injuries based on the evidence). Such communication should contain a balanced view of the evidence that allows the public to form an independent opinion or conclusion.
- Upon formal, written request, providing public officials with technical advice or assistance concerning evidence of program or policy effectiveness (e.g., an NGO funded wholly by a CDC grant may respond to a county commission's written request to meet for the NGO to provide technical assistance to the county commission on a draft ordinance banning smoking in public buildings).
- Educating the public with examples of best practices or success stories across states or localities. Such communication should contain a balanced view of the evidence that allows the public to form an independent opinion or conclusion.

- Identifying and broadly disseminating balanced, objective evidence on options and alternatives for legislative or executive actions that would achieve a policy outcome (e.g., identifying and ranking effectiveness of policy options based on scientific evidence, thereby implicitly highlighting one option over another); provided the communications do not refer to specific legislation or administrative action, do not state a point of view on that legislation or action, and do not make an explicit “call to action” encouraging the public to contact the legislative or executive body responsible for passing the law or issuing the order. Identifying approaches for tracking and evaluating implementation of policy actions.
- Compiling and sharing best practices and success stories from jurisdictions adopting policy approaches, provided such tools are not designed as a call to action on a proposed or pending matter or are “how to guide” for lobbying.
- Broadly sharing balanced, objective information across large groups of interested parties (such as groups of other NGOs or state/local governments), e.g., meeting with an association of state or local education agencies to highlight evidence-based policy approaches (including model regulations) to improve healthy choices in school lunches, while avoiding a call that such policy or regulations be adopted.
- Developing information to inform the public on potential policy solutions and their impact (e.g., balanced, objective materials designed to educate community groups or the public on the extent to which policies such as healthy food choices and indoor air quality policies can lead to health improvements). Communications should be designed to allow individuals and the public to form an independent conclusion.
- Communicating with the public about health issues and potential policy solutions (e.g., undertaking community outreach, media, or other campaigns designed to broadly disseminate the information described in the preceding example).
- Working with private sector organizations to achieve institutional or systems changes that do not require governmental or executive action.
- Communicating with the public about health risks and their consequences, provided that they do not include in these communications a call for the public to engage in the policy process.

### **Restricted/Non-Allowed Uses of CDC Appropriated Funding**

- Direct lobbying in support (or in opposition) to a matter proposed or pending before a legislature or to a proposed or pending decision by an executive agency (including regulations, executive orders, or other administrative action).
- Presentation of materials relating to public policies that may require legislative or executive action that do not include an objective, balanced presentation of evidence.
- Presentation of materials relating to public policies that may require legislative or executive action that are only made available to allies or a narrow or selective audience.
- Development and/or dissemination of materials that exhibit *all* three of the following characteristics: (1) reference to specific legislation or other order; (2) reflecting a point of view on that legislation or other order; and (3) containing an overt call to action.
- Encouraging the public or other entities to support or oppose specific action proposed or pending before the US Congress.
- Encouraging the public or other entities to support or oppose specific legislation or executive action by a state or local government.
- Advocacy to perpetuate or increase their own funding from the Federal government.

**Note:** This discussion addresses legal aspects of work by CDC non-government grantees with CDC funding. Even when operating within what are thought to be legal limits, attention must be paid to appropriateness of policy positions, Congressional intent regarding the use of appropriations, and the appropriateness of our grantee activities.

The descriptions are a general summary based on tax law exceptions to the definition of “lobbying” and “influencing legislation.” Consequently, grantees are referred to the Internal Revenue Code and implementing regulations for a complete statement of applicable requirements. Grantees may wish to consult their tax and/or accounting advisors for assistance.

Note also that grantee activities are not restricted under Section 503 if they are using funding sources other than Federal appropriations. At the same time, grantee activities may be limited by state law or other applicable restrictions.

## Attachment

### Section 503, Division F, Title V, FY 12 Consolidated Appropriations Act

- (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.

## Attachment

### Revised CDC Grant Conditions: Additional Requirements 12 (AR-12)

Applicants should be aware that award recipients are prohibited from using CDC/HHS funds to engage in any lobbying activity. Specifically, no part of the federal award shall be used to pay the salary or expenses of any grant recipient, subrecipient, or agent acting for such recipient or subrecipient, 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.

Restrictions on lobbying activities described above also specifically apply to lobbying related to 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.

This prohibition includes grass roots lobbying efforts by award recipients that are directed at inducing members of the public to contact their elected representatives to urge support of, or opposition to, proposed or pending legislation, appropriations, regulations, administrative actions, or Executive Orders (hereinafter referred to collectively as "legislation and other orders"). Further prohibited grass roots lobbying communications by award recipients using federal funds could also encompass any effort to influence legislation through an attempt to affect the opinions of the general public or any segment of the population if the communications refer to specific legislation and/or other orders, directly express a view on such legislation or other orders, and encourage the audience to take action with respect to the matter.

In accordance with applicable law, direct lobbying communications by award recipients are also prohibited. Direct lobbying includes any attempt to influence legislative or other similar deliberations at all levels of government through communications that directly express a view on proposed or pending legislation and other orders and which are directed to members, staff, or other employees of a legislative body or to government officials or employees who participate in the formulation of legislation or other orders.

Lobbying prohibitions also extend to include CDC/HHS grants and cooperative agreements that, in whole or in part, involve conferences. Federal funds cannot be used directly or indirectly to encourage participants in such conferences to impermissibly lobby.

However, these prohibitions are not intended to prohibit all interaction with the legislative or executive branches of governments, or to prohibit educational efforts pertaining to public health that are within the scope of the CDC award. For state, local, and other governmental grantees, certain activities falling within the 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 are permissible. There are circumstances for such grantees, in the course of such a normal and recognized executive-legislative relationship, when it is permissible to provide information to the legislative branch in order to foster implementation of prevention strategies to promote public health. However, such communications cannot directly urge the decision makers to

act with respect to specific legislation or expressly solicit members of the public to contact the decision makers to urge such action.

Many non-profit grantees, in order to retain their tax-exempt status, have long operated under settled definitions of “lobbying” and “influencing legislation.” These definitions are a useful benchmark for all non-government grantees, regardless of tax status. Under these definitions, grantees are permitted to (1) prepare and disseminate certain nonpartisan analysis, study, or research reports; (2) engage in examinations and discussions of broad social, economic, and similar problems in reports and at conferences; and (3) provide technical advice or assistance upon a written request by a legislative body or committee.

Award recipients should also note that using CDC/HHS funds to develop and/or disseminate materials that exhibit *all* three of the following characteristics are prohibited: (1) refer to specific legislation or other order; (2) reflect a point of view on that legislation or other order; and (3) contain an overt call to action.

It remains permissible for CDC/HHS grantees to use CDC funds to engage in activities to enhance prevention; collect and analyze data; publish and disseminate results of research and surveillance data; implement prevention strategies; conduct community outreach services; foster coalition building and consensus on public health initiatives; provide leadership and training, and foster safe and healthful environments.

Note also that under the provisions of 31 U.S.C. Section 1352, recipients (and their sub-tier contractors and/or funded parties) are prohibited from using appropriated Federal funds to lobby in connection with the award, extension, continuation, renewal, amendment, or modification of the funding mechanism under which monetary assistance was received. In accordance with applicable regulations and law, certain covered entities must give assurances that they will not engage in prohibited activities.

CDC cautions recipients of CDC funds to be careful not to give the appearance that CDC funds are being used to carry out activities in a manner that is prohibited under Federal law. Recipients of CDC funds should give close attention to isolating and separating the appropriate use of CDC funds from non-CDC funds.

Use of federal funds inconsistent with these lobbying restrictions could result in disallowance of the cost of the activity or action found not to be in compliance as well as potentially other enforcement actions as outlined in applicable grants regulations.