



# Memo

To: Gary Bass, Bauman Foundation  
From: Beth Kingsley  
Re: Funding Advocacy Around the Census  
Date: April 16, 2018

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As you requested, this memo will provide guidance on legal considerations for the Bauman Foundation regarding advocacy around the upcoming census, both activities the Foundation carries out directly itself, or activities of its grantees who may engage in such advocacy. In addition, I will note the different issues that may arise for other public charity funders you work with (such as community foundations) to help avoid confusion about different approaches that these different types of funders may need to take.

In short, the only census activities the Bauman Foundation itself should avoid undertaking are those that involve lobbying, which is defined below. However, your grantmaking to public charities may include support to organizations that engage in lobbying activities as described in this memo. This can be done without incurring a taxable expenditure or requiring specialized grant monitoring.

## **Basic Legal Rules**

As a private foundation under IRC § 509(a), the Bauman Foundation is subject to an excise tax on any “taxable expenditure.” This includes any amount paid or incurred “to carry on propaganda, or otherwise to attempt, to influence legislation,” commonly referred to as “lobbying.” IRC § 4945(d). Regulations define what counts as legislation for this purpose, elaborate on what activities are treated as lobbying, and provide exceptions from those basic definitions.

Unlike private foundations, public charities (defined in IRC § 509(a)(1), (a)(2), or (a)(3)) are allowed to engage in a limited amount of lobbying without any penalty. Public charities likely include most of your grantee organizations, as well as funders such as community foundations.<sup>1</sup>

For public charities that have elected to follow the expenditure test of IRC § 501(h), the definitions of lobbying and available exceptions are the same as for private foundations.<sup>2</sup> Those charities that have not made the expenditure test election<sup>3</sup> are subject to a less well-defined “no substantial part” test to measure the allowable amount of lobbying, but it remains the case that they can lobby to a limited extent without penalty.

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<sup>1</sup> Sponsoring organizations of Donor Advised Funds, or DAFs, are also public charities. They are subject to different rules about distributions out of a sponsored DAF.

<sup>2</sup> Indeed, the regulations under § 4945 simply cross-reference the § 4911 regulations for the definitions of direct and grass roots lobbying communications.

<sup>3</sup> Most, but not all, public charities are eligible to make this election.



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Most of the discussion in this memo focuses on the rules for private foundations and public charities under the expenditure test, also known as electing public charities. Unless a charity engages in a large amount of grassroots lobbying, or has a very large annual budget (well into the tens of millions), electing the expenditure test is generally preferable. This test provides clear definitions of lobbying, which have the added benefit of being aligned with the definitions that apply to private foundations. It also sets clear limits for allowable amounts of lobbying, and the penalty for exceeding those limits is generally only an excise tax, not loss of exemption. In any case, a private foundation funder is entitled to rely on the definitions of lobbying that apply to private foundations, even if their grantee is a non-electing charity.

Lobbying is an attempt to influence legislation. Legislation, in turn, is action by a legislative body. “Action” is the introduction, amendment, enactment, defeat, or repeal of acts, bills, resolutions, or similar items at any level of government. Treas. Reg. § 56.4911-2(d)(2). And a legislative body explicitly does not include executive, judicial, or administrative bodies at any level of government. Treas. Reg. § 56-4911-2(d)(2).

More specifically, a lobbying expenditure (a taxable expenditure for a private foundation) is defined as an expenditure for a direct or grassroots lobbying communication. Direct lobbying is a communication to a legislator (or legislative body employee) that refers to and reflects a view on “specific legislation,” including a specific legislative proposal.<sup>4</sup> Grassroots lobbying is a communication to the public that refers to and reflects a view on specific legislation and includes one of four specific types of grassroots lobbying calls to action:

- state that the recipient should contact a legislator or other relevant government employee;
- state contact information such as the address, phone number, or similar information of a legislator or legislative body employee;
- provide a contact mechanism such as a petition or postcard to contact a legislator, legislative body employee, or other relevant government employee; or
- specifically identify a legislator(s) who will vote on the legislation as being:
  - opposed to or undecided about the organization's view on the legislation;
  - the recipient's legislator(s); or
  - a member of a legislative (sub)committee which will vote on the legislation.  
(However, identifying the sponsor(s) of a piece of legislation does not constitute a grassroots lobbying call to action.)

Finally, a communication with an electing public charity’s members (those people who commit more than a nominal amount of time or money to the organization) is considered direct lobbying

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<sup>4</sup> A communication with another government employee that refers to and reflects a view on specific legislation may also be direct lobbying, but only if the person is in a position to influence the formulation of legislation and if the principal purpose of the communication is to influence legislation. Communications with the public that reflect a view on ballot measures are also considered direct lobbying.



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if it includes one of the first three types of lobbying calls to action. Member communications are considered grassroots lobbying if they directly encourage the member to engage in grassroots lobbying – that is, if the communication encourages the members to urge their families, friends, or others to take lobbying action. The special rules for member communications do not apply to private foundations. However, where a private foundation makes a grant to an electing public charity, the funded activities will be determined to be lobbying or not under the rules that govern the public charity grantee, including the special member communications rules.

Applying these rules to the context of advocacy around the census, we can identify specific types of activities that would not be lobbying:

- Litigation over inclusion of the citizenship question (because litigation is not legislation);
- Encouraging the Secretary of Commerce not to include the question (because executive branch action is not legislation);
- Submitting comments on the census survey if the Census Bureau (or another executive branch agency) offers a public comment period (because executive branch action is not legislation);
- Broad public education about the importance and purpose of the census and general advocacy to “get out the count”; and
- Research related to the census or on specific aspects of the census such as the effect of asking certain questions.

Some activities that would be considered lobbying include:

- Asking Congress to pass legislation to remove the citizenship question or to increase funding for the census;
- Asking the Senate to support or oppose the confirmation of a Census Bureau political appointee;
- Encouraging state or local legislative bodies to adopt resolutions that call on the Commerce Department or Congress to remove the citizenship question (because resolutions of these legislative bodies are covered by the definition of legislation); and
- Urging the public to communicate with Congress, a state legislature, or a town council in support of such a bill or resolution.

Note that it is sometimes difficult at local governmental levels to distinguish between a legislative versus an executive body. For example, a county board may have both legislative and executive functions. In this case, asking the county board to adopt a resolution or to otherwise take action that is primarily legislative would be covered by the definition of legislation. However, calling attention to the negative impact adding a citizenship question to the census would have without referencing any such resolution or other legislation is not a lobbying activity.



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Any funder is free to make a grant earmarked for non-lobbying activities or to engage in that advocacy directly. Public charity funders, such as community foundations, may make grants for lobbying or engage in lobbying themselves provided the amounts spent are tracked for reporting on the 990 and do not exceed the applicable limit on permitted lobbying.

## **Funding Considerations**

### Private Foundations

It is an unfortunate misconception among many foundations that they are required to include an outright prohibition on using grant funds for any lobbying activity in a grant award letter to avoid making a taxable expenditure. In fact, this is absolutely not required by law or regulation in most cases. Specific regulatory provisions create a roadmap for funding advocacy organizations without incurring taxable expenditures due to the lobbying of a foundation's grantees.

In general, a grant by a private foundation to a public charity is not a taxable lobbying expenditure if it is not earmarked to be used for lobbying activity. Treas. Reg. § 53.4945-2(a)(5)(i). A grant is considered earmarked for lobbying if there is an agreement, oral or written, that the grant will be used for specific purposes. The funder may be aware that the grantee is planning to lobby and that their funds could be used for that purpose, but that fact alone does not cause the grant to be treated as a lobbying expenditure. On the other hand, a written grant agreement that disclaims earmarking will not protect a funder if there is an oral side agreement about use of funds. Thus, it is important to give the grantee discretion in how to carry out its activities without specifically committing to spend a foundation's grant in a specific way.

A general support grant to a public charity that lobbies is not a taxable expenditure so long as the grant is not earmarked to be used for lobbying. Treas. Reg. § 53.4945-2(a)(6)(i). In addition, special rules allow a private foundation to make a grant for a specific project that includes lobbying. Treas. Reg. § 53.4945-2(a)(6)(ii). The grant must not actually be earmarked for lobbying, and the amount of the grant must not exceed the amount budgeted by the grantee for non-lobbying activity within the project during that grant year. Thus, if a given project is expected to be 50% lobbying and 50% non-lobbying advocacy and other education, three different foundation funders could each provide 1/3 of the project budget without any one foundation being considered to have made a lobbying grant. No single foundation can provide more than 50% of the budget without incurring a taxable expenditure for a lobbying grant.

To take advantage of this rule, the funder must not include a prohibition in their grant award letter on using their funds for lobbying, although it would be fine to indicate that the grant is not earmarked for lobbying or for any specific portion of the project budget. A funder is entitled to rely on budgets provided by its grantee unless it has reason to doubt the accuracy or reliability of the grantee's representations. Where a funder is supporting a specific project, the project grant rule requires a little more work up front to make sure the necessary information has been provided, and that it supports treating the grant as non-lobbying. The up-front work involves



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obtaining a lobbying vs. non-lobbying budget for each year of the project. However, the bulk of this burden falls on the grantee, who must think through reasonable projections of the lobbying vs. non-lobbying expenditures within their planned project. Most grantees will be happy to do that work if it means they are not subject to unnecessary lobbying restrictions.

### Public Charities

For public charity funders, there are no such specific regulations available to determine the treatment of a grant as lobbying. As a general rule, the rules for private foundations are more restrictive than those for public charities, so it is considered reasonably safe if a public charity's actions are consistent with the foundation regulations. This approach was ratified and clarified in a 2011 ruling from the IRS to the Alliance for Justice ("AFJ").<sup>5</sup>

Regulations for electing public charities state that a grant will be considered a lobbying expenditure if it is earmarked for lobbying. Treas. Reg. § 56.4911-3(c)(1) and (2). A grant is earmarked if there is an oral or written agreement whereby the grantor may cause the grantee to expend the amount for a specified purpose, or whereby the grantee agrees to expend the amount for the purpose. Treas. Reg. § 56.4911-4(f)(4)(ii). The AFJ ruling confirmed that a general support grant from one public charity to another public charity is not a lobbying expenditure so long as the grant is not earmarked for lobbying. In addition, a public charity may make a specific project grant without that restriction being treated as an earmark for lobbying. Public charities may rely on an approach similar to the private foundation project grant rule, so that a project grant that does not exceed the non-lobbying portion of the project's budget is not a lobbying expenditure. Further, if the grant does exceed the non-lobbying project budget, only the excess amount will be considered a lobbying expenditure.

### Scenarios

You requested guidance on some specific factual scenarios that are likely to arise as you think about funding advocacy around the census. For the sake of simplicity, the discussion below will address the question of whether the described activity is lobbying. That is, whether it would be a taxable expenditure for a private foundation, or a lobbying expenditure that counts against the applicable cap for an electing public charity.

1. Advocacy organizations draft and circulate materials about the census and the citizenship question. Funders share these materials with their grantees as an FYI. Some of the materials include lobbying content.

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<sup>5</sup> PLR 200943042. A Private Letter Ruling is not guidance that can be relied upon by any organization other than the one to which it was issued. However, these rulings can provide useful insight into the analysis the IRS is likely to employ in addressing similar questions.



Redistribution of these materials would be considered lobbying by the funder. While the costs involved may be very small, there is still some element of paid staff time, overhead, or even internet service where an email is forwarded. A public charity may not be concerned to incur these small lobbying costs, of course. For a private foundation, this would be a taxable expenditure.

Rather than redistribute these materials that contain lobbying content, funders can distribute general information about the census and the citizenship question. They can also encourage their grantees and other constituents to engage with the stakeholder groups doing the work, without specifically directing them to any lobbying content.

2. A funder hosts a briefing on the citizenship question and one of the invited speakers talks about the status of efforts to get Congress to respond and prohibit the question. The speaker includes a grassroots lobbying call to action.

First, a funder may host a briefing on the citizenship question and discuss the status of congressional activities to remove the question. The potential problem only arises when a speaker includes a grassroots lobbying call to action.

In general, an organization is not absolutely liable for everything said by a speaker at its event. However, it is responsible for how it establishes and presents the event. To avoid possible problems, the event sponsor should take reasonable steps to ensure the event furthers appropriate purposes and does not include prohibited content. If a panel discussion is planned to focus on specific pending legislation it might be a good idea to explicitly ask speakers not to include a lobbying call to action in their remarks, and keep notes in your files (or retain email records) to document that request.

3. A foundation officer is approached by a reporter for a quote on pending legislation to remove the citizenship question, and is quoted in the resulting article saying, "This is a great bill and we are truly gratified by the quality of organizing being done by various groups to support it."

This is not lobbying, and not a problem. For both a private foundation and a public charity, a public communication that reflects a view on specific legislation is not lobbying unless it includes a lobbying call to action. (The one exception applies only to paid mass media ads so is not applicable here.)

Note, though, that the answer might be different for a non-electing public charity; that is, a charity operating under the "no substantial part" test. Since there is no definition of lobbying under the "no substantial part" test, it is possible that this communication might be considered lobbying for these organizations. However, any private foundation funder of a non-electing charity is still entitled to rely on its own regulations; an activity that





may be lobbying for a non-electing grantee will not be lobbying for the foundation funder unless it meets the definitions in those regulations (discussed above).

4. A foundation wants to support litigation in opposition to the citizenship question, either as a funder, as a party to the litigation, or by filing a friend of the court brief.

All of these are fine for any funder. Litigation is not lobbying, so any organization may participate directly or earmark grant funds for this purpose without making a lobbying expenditure.

5. A funder plans to submit comments to the Commerce Department, the Census Bureau, or another executive branch agency opposing the inclusion of the citizenship question. It also wants to make grants to groups who will write such letters.

Action by Commerce Department, the Census Bureau or another executive branch agency is not legislation, so submitting comments (or funding the submission of comments) will not be considered lobbying. This is true if there is an official notice and comment period, or if the organization simply submits comments on its own initiative in reaction to the announced plan to include the citizenship question.

6. An organization wants to write or talk to locally elected leaders to say that the citizenship question should not be part of the census. This may include an explicit ask for them to pass a town council resolution to opposing adding the citizenship question.

Just talking to elected leaders about the question and why it should not be included, or other matters relating to the census, would not be lobbying. However, reflecting a view on a legislative resolution in a communication to local elected officials would be direct lobbying.

7. A foundation wants to support a state or national “pooled fund,” which is housed at a public charity. The public charity (via the fund) engages in lobbying activities to increase state or federal funding for the census.

A private foundation may support the “pooled fund” as long as the grant is not earmarked for lobbying activities. In this case, the “pooled fund” is a specific project of the charity that houses it, so the private foundation should rely on the project grant rules (discussed above) to make sure its grant is not considered earmarked for the fund’s lobbying activities. It is also important that the foundation not include a prohibition on using grant funds for any lobbying activity in its grant award letter. A public charity funder, such as a community foundation, can also make a grant under similar conditions as the private foundation. However, it can also expressly fund lobbying activities if it chooses. Amounts earmarked for lobbying would count against the lobbying expenditure limits of both the community foundation funder and the charity sponsoring the “pooled fund.”



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8. There is an effort to get Congressional committees to have oversight hearings about the citizenship question. A funder wants to join the call for such hearings, and to pass the request on to grantees.

Although holding oversight hearings is an important Congressional function, it is not a legislative act. Calling on Congress to hold such hearings or asking others to do so is not lobbying, unless the message also includes a reference to the possible Congressional legislation to remove the citizenship question.

9. A letter from funders to state or local elected officials describes the problems with the citizenship question and says, "That is why I am asking you to do all you can to ensure that this question is removed from the 2020 census." The letter does not mention any specific legislative act, such as a resolution from the body the official sits on.

Based on this description, the letter is not lobbying because it does not refer to specific legislation or a specific legislative proposal. While supporting legislation (a resolution by the state legislature or town council) is one of the things the elected official could do to work to remove the question from the census, it is far from the only possible action. As an influential person in the community the official could call on the Secretary of Commerce to remove the question, write an op-ed, or otherwise speak out publicly. Without a reference to a legislative act this letter would not be a lobbying communication.