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MEMORANDUM

TO: Marice Ashe
Chief Executive Officer
ChangeLab Solutions

FROM: Edward T. Waters
Susannah Vance

DATE: June 8, 2012

SUBJECT: New Lobbying Restrictions in the Consolidated Appropriations Act, 2012

This memorandum responds to your request for an analysis of the expanded restrictions on the use of appropriated funds for lobbying activities in Section 503, Division F of the Consolidated Appropriations Act, 2012 (“CAA 2012”) and for guidance on how those restrictions may be interpreted by federal agencies or courts. We are providing this analysis so that you may determine what impact, if any, the restrictions will have on the work of nonprofit organizations and local government entities that perform public health policy research and other activities using federal grant funds (“public health organizations”).

Below, we summarize the federal laws that impose lobbying restrictions on grantees. Then, we examine the extent to which CAA 2012, Div. F, § 503 (“Section 503”) imposes new limits on the activities of federal grantees. Finally, we comment on hypotheticals that you have provided to illustrate types of activities commonly undertaken by public health organizations that you are concerned may be affected by the lobbying restrictions.

I. Executive Summary

- As a general matter, costs that are “ordinary and necessary” for achieving the purposes of a federal grant program as set forth in that program’s authorizing statute are allowable charges to a federal grant. For example, public health organizations may use federal grant funds (as grantees or subrecipients) to do research on public health issues and to conduct public education activities under the Community Transformation Grant (“CTG”) Program, as such activities are clearly within the ambit of that program.
- Notwithstanding the general principle of what is an allowable cost stated above, federal law does contain limits or prohibitions on the allowability of certain categories of cost. Most of these limitations can be found in the “cost principles” issued by the Office of Management and Budget (“OMB”) and, for a particular program, in that program’s authorizing statute. There are a few limits, however, that are regularly contained in

appropriation acts including limitations on using federal grant funds for lobbying activities.

- In that regard, since the early 1980's, Congress, through a variety of appropriation acts, has prohibited the U.S. Department of Health and Human Services ("HHS") and many other federal agencies from using appropriated dollars to fund expenditures (*i.e.*, the cost of staff time, goods and services) for lobbying activities incurred by recipients of financial assistance (grants and cooperative agreements). These restrictions which were eventually incorporated in the OMB Cost Principles barred the use of federal funds to directly or indirectly advocate for legislation (*i.e.*, lobbying) on a state or federal level.
- These longstanding restrictions barred the use of federal grant funds (including CTG funds) for either direct lobbying or for indirect, "grassroots lobbying," *i.e.*, making a direct appeal to the general public to advocate for or defeat a proposed or pending law. In addition, grant funds cannot be used for "legislative liaison" activities, *i.e.*, activities to prepare for lobbying.
- In the fiscal year ("FY") 2012 Consolidated Appropriations Act, Congress through Section 503 added to the longstanding restrictions on the use of federal funds for lobbying by expanding the reach of those restrictions to include lobbying on a local government level as it relates to legislative actions and lobbying on the state level as it relates to administrative (in addition to the already included legislative) actions.¹
- Key questions for any recipient of federal funds when trying to analyze the reach of Section 503 are as follows:
 - **First**, is the activity within the purposes of the grant program that the grantee wants to use as funding for the cost of that activity? This is a threshold question that must be answered in the affirmative before considering whether there is a restriction on the allowability of the cost of those activities. To state the obvious, if an activity does not further the purposes of a grant, no matter how laudable that activity is, the cost of the activity is not an allowable charge to that grant.
 - **Second**, if yes, then are the activities lobbying? Lobbying in its simplest formulation is advocacy to, usually, legislators to pass a law or take a course of action. Federal rules have long included both direct lobbying, indirect or grassroots lobbying and legislative liaison activities (that is, activities to prepare for lobbying) within the lobbying restrictions. However, an objective analysis of strategies affecting childhood obesity that includes and analysis of the effectiveness of reducing access to sugar sweetened beverages is not lobbying. The fact that such an analysis provides data that shows that some strategies are

¹ As explained in more detail below, the language of the revised Section 503 does not explicitly prohibit the use of appropriated funds for payment of the salary or expenses of a grant or contract recipient relating to advocacy before either a federal agency or a local executive branch agency.

more effective than others is also not lobbying. There must be advocacy for a particular point of view in order to fall within the definition of lobbying.

- **Third**, if yes, then does the lobbying activity fall within one of the exceptions to the restrictions. These exceptions are discussed below but, in short, it is an allowable cost (1) for any grantee to share information with legislative bodies at their request, or (2) in the case of a grantee that is a government entity, to provide input on policy issues to either legislative bodies or executive branch agencies within its own level of government (State, local or tribal), under circumstances where the input would, but for the exception, constitute “direct lobbying.”
- **Finally**, if the answers to the questions above indicate that the cost of the activity is not an allowable cost, it only means that the activity must be paid for out of a non-federal funding source. The fact that a cost cannot be charged to a grant does not mean the grantee cannot do the activity, it simply means that the grantee cannot seek federal reimbursement for the cost of that activity. Appropriate accounting and documentation procedures are necessary to demonstrate that federal funds are not being used to pay for or subsidize the lobbying activity but the OMB cost principles are clear that lobbying costs should be documented in the same manner as any other cost. There are not special documentation requirements for lobbying costs.
- The most comprehensive guidance on the reach of lobbying restrictions comes from a rulemaking issued by OMB in 1984 in which OMB, in reaction to appropriations riders similar to Section 503, modified the cost principles applicable to federal grants to prohibit the use of grant funds for lobbying. *See* 49 Fed. Reg. 18,260 (Apr. 27, 1984). The preamble to these then-new restrictions contained a number of important and useful points:
 - **Consistency:** OMB sought to construct the limitations on allowable costs for federal grant purposes to be consistent with various appropriation riders and with the definitions of lobbying, political activity and electioneering (OMB lumped these all together under the definition of “lobbying”) used by the Internal Revenue Service (“IRS”);
 - **Comparability:** OMB made clear that documentation and accounting requirements for lobbying costs are comparable to and no different than any other unallowable cost: that is, there is no heightened requirement for “proving” that federal grant funds are not being used to pay for lobbying costs;
 - **No Waiver:** By accepting federal funds, an entity does not surrender its right to engage in lobbying and other political activity.² In that respect, IRS rules may be stricter than the federal grant rules since they limit activities in

² Please note that in this memorandum, we are not discussing restrictions on campaign or political action committee contributions, or activities to influence the outcome of a political campaign.

exchange for tax exemption. In any event, a grantee is free to use its own funds to engage in lobbying.

- **No Tainting:** Goods and services such as employee time are not barred from the federal grant solely because some portion of that time is spent on lobbying. Thus, an employee who lobbies for a grant recipient (an unallowable cost) can also work on grant-funded activities so long as that employee meets time and effort documentation or other cost allocation requirements. In other words, the employee is not “off limits” for grant-funded activities simply because he or she spends part of his or her time lobbying.

I. Restrictions on Lobbying by Recipients of Federal Funds

Section 503 is an appropriations “rider” or restriction on how funds appropriated under the FY 2012 Consolidated Appropriations Act can be used. Appropriations riders such as Section 503 are not the only federal laws that restrict the use of federal funds for lobbying or “propaganda” purposes. In addition, there are federal tax laws that also restrict the activities of tax-exempt organizations like ChangeLab. We discuss some of the major sources of law below.

A. Appropriations Riders

Federal appropriations acts have included a restriction related to the use of appropriated funds for “publicity or propaganda” purposes for literally decades.³

1. Scope of Lobbying Prohibition in Appropriations Riders

While language in appropriations riders varies, most appropriations riders bar the use of federal funds “for publicity or propaganda purposes . . . designed to support or defeat legislation pending before the Congress. . . .” See Government Accountability Office (“GAO”), *Principles of Federal Appropriations Law*, Third Ed., vol. 1, GAO-04-261SP (hereinafter, “*Appropriations Law*”), p. 4-205; GAO 2012 *Supplement to Principles of Federal Appropriations Law*, 3d Ed., GAO-12-413SP, p. 4-21 (noting that appropriations acts have included restrictions on the use of appropriations for “publicity or propaganda” since 1951).

Many appropriations riders include exceptions from the publicity or propaganda bar for communications “for normal and recognized executive-legislative relationships”; and for communications “in presentation to the Congress or any State legislature itself.”

While Section 503 imposes more far-reaching restrictions on lobbying than most other appropriations riders, it shares with other recent riders the common features described above.

³ Appropriations statutes governing expenditures by multiple agencies, such as CAA 2012, generally include a separate appropriations rider in each division of the law, with each division relating to one agency or group of agencies. Section 503, the topic of this memorandum, is located in Division F (“Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2012”) of CAA 2012, Pub. L. No.112-74, 2011 H.R. 2055.

2. Application to Federal Grantees

The opinions of GAO and its Comptroller General are viewed as authorities in the interpretation of appropriations law.⁴ *See Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1074, 1084 (Fed. Cir. 2003) (noting that GAO's opinions, "while not binding, are 'expert opinions'"). The Comptroller General has concluded that the restrictions on "publicity or propaganda" in appropriations riders generally apply to use of appropriated funds through a federal grant. Opinion of the Comptroller General, B-202975(1) (Nov. 3, 1981). In addition, as noted below, some appropriations riders (including Section 503) specifically restrict the use of federal funds for payments to grant or contract recipients relating to lobbying.

3. GAO's Interpretation of "Publicity or Propaganda" Provisions

Because the terms "publicity" and "propaganda" are undefined in the appropriations statutes, the Comptroller General has interpreted these terms with deference to the federal agencies spending appropriated funds. This deference is intended to ensure that agencies can freely communicate information to the legislative branch and to the public. GAO has been "reluctant to find a violation [of the "publicity or propaganda" provisions] where the agency involved can provide reasonable justification for its action." Opinion of the Comptroller General, B-212069 (Oct. 6, 1983), p. 3.

Most Comptroller General opinions concerning "publicity or propaganda" provisions in appropriations riders address spending by federal agencies. We believe the same interpretations would likely apply to a private entity's expenditure of grant funds. Indeed, in one decision enforcing an appropriations rider provision against a grantee, the Comptroller General cited the same body of interpretive decisions concerning the scope of "publicity" and "propaganda" that apply to federal agencies expending appropriated funds. *See* Opinion of the Comptroller General, B-202975(1) (Nov. 3, 1981). Moreover, as explained below, OMB, in amending rules on grant cost principles to classify lobbying as an unallowable cost, explicitly endorsed (and applied to grantees) the same sort of narrow interpretation of the scope of lobbying that GAO had applied in interpreting "publicity" and "propaganda" in appropriations riders.⁵ This suggests that, unless there is specific language in the appropriations statute distinguishing between restrictions imposed on federal agencies and those imposed on grantees⁶, the statute should apply in the same manner to both.

Several basic limits on the reach of "publicity or propaganda" provisions in appropriations riders are apparent from Comptroller General opinions and GAO guidance:

First, these provisions do not bar the use of appropriated funds for "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the

⁴ GAO has no enforcement authority, beyond making recommendations to Congress on appropriations issues.

⁵ *See* Office of Management and Budget, Circular A-122; Cost Principles for Nonprofit Organizations— "Lobbying" Revision, 49 Fed. Reg. at 18,260, 18,268 (Apr. 27, 1984).

⁶ As explained below, CAA 2012, Div. F, § 503 includes such a distinction. Subsection (a) generally prohibits the use of appropriated funds for lobbying purposes, and subsection (b) applies slightly different standards to the use of appropriated funds "to pay the salary or expenses of any grant or contract recipient." *See generally Appropriations Law*, p. 4-224 (discussing appropriations provisions that apply separate, more rigorous anti-lobbying provisions to grantees and contractors); *see also* Opinion of the Comptroller General, B-202787 (May 1, 1981).

proper administration of the laws” for which an agency is responsible. GAO Report re: *Department of Education—Contract to Obtain Services of Armstrong Williams*, B-305368 (Sept. 30, 2005) (citing 31 Comp. Gen. 1311 (1952)). “Legitimate informational activities” include presentation of policies to the public and rebutting attacks on those policies. See Opinion of the Comptroller General, B-301022 (Mar. 10, 2004). The scope of “legitimate informational activities” is even broader where the agency has a statutory responsibility for promoting an issue or a position. See *id.* (concluding that the Office of National Drug Control Policy (“ONDCP”) did not violate the appropriations riders by issuing a letter to local prosecutors around the country urging them to “work with your legislators to update local laws impeding marijuana prosecutions,” in part on the ground that the legislation authorizing the ONDCP empowered the office to take “such actions as necessary to oppose any attempt to legalize the use of [controlled substances]”).

Second, GAO has declined to read broadly appropriations riders that prohibit the use of appropriated funds “for publicity or propaganda purposes . . . *designed to support or defeat legislation pending before the Congress*” – a common formulation.⁷ These provisions do not apply broadly to any “dissemination of views on pending legislation”; instead, they only bar “direct appeals to members of the public for them in turn to urge their representatives to vote on a particular matter.” B-212069 (Oct. 6, 1983). In this respect, GAO’s guidance is similar to OMB and IRS guidance, which both require that, in order for communication with the public to constitute grassroots lobbying, it specifically encourages the audience to take action to advance a legislative goal. See 49 Fed. Reg. at 18,269; 26 C.F.R. § 56-4911.2(b)(2)(ii).

Third, where a “publicity or propaganda” appropriations rider barring the use of funds to support or defeat legislation includes the words “except in presentation to the Congress itself,” or some version of that phrase, the rider does not prevent appropriated funds from being used for “direct presentation of [an agency’s] views to the Congress on legislation that affects their activities and policies.” Opinion of the Comptroller General, B-202787 (May 1, 1981). The provision, thus, would allow direct lobbying and would restrict only communication with the public – *i.e.*, grassroots lobbying.⁸

Section 503(a) and (b) both provide that appropriated funds can be used for advocacy pursuant to “normal executive-legislative relationships.” (Please see Section II.A.5 below for a discussion of this exception to the lobbying bars.) We did not find any interpretation by GAO, federal courts, or the HHS Departmental Appeals Board of this exception, which has also appeared in previous years’ HHS appropriation riders.

⁷ The GAO has concluded that while the language in recent appropriations riders barring publicity or propaganda on pending legislation is “more detailed than the prior governmentwide restriction [which simply referred to “publicity or propaganda purposes designed to support or defeat legislation pending before Congress”], . . . the language currently used has the same legal effect.” *Appropriations Law*, p. 4-204.

⁸ In this memorandum, we refer to direct contacts with government officials to support or oppose legislative or regulatory activity as “direct lobbying.” We refer to communication with members of the general public urging action to support or oppose legislative or regulatory activity as “grassroots lobbying.”

B. Office of Management and Budget Circular A-122

OMB in 1984 added a provision on lobbying to OMB Circular A-122, which sets forth allowable costs under federal grants and contracts for non-profit organizations.⁹ 49 Fed. Reg. 18,260 (Apr. 27, 1984) (revision of Circular A-122 adding lobbying provision); 70 Fed. Reg. 51,927 (Aug. 31, 2005) (relocating Circular A-122 to 2 C.F.R. Part 230).

1. Scope of Lobbying Prohibition in Circular A-122

Circular A-122 classifies as unallowable direct or grassroots lobbying by grantees concerning federal or state (but not local) legislative action. The Circular provides that costs associated with the following are unallowable:

- Attempts to “influence: (i) The introduction of Federal or State legislation; or (ii) the enactment or modification of any pending Federal or State legislation” through either of two means:
 - “communication with any member or employee of the Congress or State legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any Government official or employee in connection with a decision to sign or veto enrolled legislation”
 - “preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign”
- “Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.”

OMB Cir. A-122, 2 C.F.R. Part 230, App. B, ¶¶ 25.a.3-5. Circular A-122 provides that the following activities do not constitute unallowable lobbying:

- Providing a “technical and factual presentation of information on a topic directly related to the performance of a grant” through hearing testimony, statements or letters to Congress or a State legislature (or a member or employee thereof) in response to a documented request.

⁹ We are aware that many public health organizations that are CTG grantees are State or local governments. The grant cost principles that apply to these entities are in OMB Circular A-87, rather than in Circular A-122. Circular A-87 also lists lobbying as an unallowable cost. *See* Cir. A-87, 2 C.F.R. Part 225, App. B (incorporating by reference the restrictions on lobbying contained in 2 C.F.R. Part 220, App. A, ¶ 24). The lobbying provision 2 C.F.R. Part 220, App. A is substantially identical to the one in Circular A-122. Thus, while this memorandum references Circular A-122, the same principles would apply to government entities subject to Circular A-87.

The information offered in the presentation must be “readily obtainable and . . . readily put in deliverable form.”

- Lobbying (as defined in ¶ 25.a.3) “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.”
- “Any activity specifically authorized by statute to be undertaken with funds from the grant, contract, or other agreement.”

OMB Cir. A-122, ¶ 25.b.

In contrast, Circular A-122 imposes only very narrow limits on advocacy before federal agencies about regulatory matters. The Circular classifies as unallowable the “[c]osts incurred in attempting to improperly influence either directly or indirectly, an employee or officer of the Executive Branch of the Federal Government to give consideration or to act regarding a sponsored agreement or a regulatory matter. . . .” *Id.* ¶ 25.d. “Improper influence” means “any influence that induces or tends to induce a Federal employee or officer to give consideration or to act regarding a federally-sponsored agreement or regulatory matter on any basis other than the merits of the matter.” *Id.*

2. OMB Guidance on Scope of Lobbying Prohibition

In publishing the lobbying provision of Circular A-122, OMB appears to have been motivated by same types of concerns about free exchange of information evident in the GAO’s interpretation of appropriations riders.¹⁰ After publishing an initial version of the lobbying provision in January 1983, OMB revised the provision twice in order to ensure that it was not overbroad. When OMB published the final version of the provision in April 1984,

¹⁰ These concerns are particularly prominent with federal grantees, because of Supreme Court case law holding that some conditions on federal grants violate the First Amendment of the Constitution. The Supreme Court has held that Congress may further policy goals through its spending power, including by conditioning spending on restrictions of expression, even though such restrictions would (absent the use of the Spending Clause) violate the First Amendment. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding restriction on use of highway funds). However, under the “unconstitutional conditions” doctrine, the government cannot “deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech.” *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 59 (2006). Therefore, generally, while grantor restrictions on the use of grant funds for particular speech have been held constitutional, blanket restrictions on speech by the grantee (such that even private funds fall under the bar), have been stricken as unconstitutional. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). Courts have, however, upheld restrictions on speech by the grantee as a whole (not merely conditions on the use of grant funds for speech) in situations where the government ensures that “the recipients are left with adequate alternative channels for protected expression.” *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757,766 (2d Cir. 1999) (upholding bar on appropriation of funds to any Legal Services Corporation grantee “that attempts to influence the passage or defeat of any legislation,” on the ground that grantees were permitted to conduct lobbying through spin-off organizations); *but see Alliance for Open Soc. Int’l v. USAID*, 651 F.3d 218, 239 (2d Cir. 2011) (rejecting as unconstitutional USAID policies that required grantees receiving funding to provide HIV/AIDS prevention services to adopt a policy opposing prostitution, on the ground that in a case of compelled speech, creating “alternative channels for protected expression” did not cure the unconstitutional restriction on speech).

OMB emphasized the limited nature of the restriction. Of particular note, with respect to the grassroots lobbying restriction (§ 25.a.4), OMB stated that the restriction was

limited to efforts to obtain concerted actions on the part of the public and . . . does not include attempts ‘to affect the opinions of the general public,’ if such attempts are not intended or designed in such a fashion as to have the reasonably foreseeable consequence of leading to concerted action.

49 Fed. Reg. at 18,269. OMB noted that the “narrower reach” of the grassroots lobbying provision in Circular A-122 is “consistent with GAO’s interpretation of the provisions in appropriations riders on the use of funds for ‘publicity or propaganda.’” *Id.* GAO, as noted above, applies a very narrow definition of “publicity or propaganda” as that term is used in riders such as Section 503. OMB thus showed its intent to align Circular A-122 cost principles in this area with appropriations law principles.

OMB emphasized that nothing in Circular A-122 bars grantees from (1) using grant funds for lobbying at the local level¹¹; (2) lobbying to influence state legislation that would adversely impact the performance of the grant; (3) presenting factual information to legislative bodies at the legislative bodies’ request; or (4) communicating with executive branch officials, with a narrow exception (attempts to influence the signing or veto of legislation). 49 Fed. Reg. at 18,261.

With respect to direct lobbying, OMB made clear that the provision “will not restrict the legitimate flow of factual information requested by the legislators, who are in the best position to know what they need to discharge their functions in our system of government,” and stated that the Circular was not intended to limit “normal informational interchange” between legislators and grantees. *Id.* at 18,267.

OMB also made clear that the Circular does not burden grantees’ use of *non*-federal funds for lobbying purposes, since such a burden could infringe upon grantees’ free speech rights under the First Amendment of the U.S. Constitution. *Id.* at 18,265; *see id.* at 18,263 (“Requiring grantees and contractors to bear the costs of their own lobbying efforts does not infringe upon their constitutional rights.”).

C. Internal Revenue Code

The Internal Revenue Code (“IRC”) establishes two tests for determining the extent of allowable lobbying activities by nonprofit organizations that are tax-exempt under IRC § 501(c)(3). Under one test, an organization loses its exemption if a “substantial part” of its activities consists of carrying on propaganda or lobbying; under the other test, charitable

¹¹ OMB noted that “[s]ince there is no rigorous separation between legislative and executive authority at the local level, it would be difficult to enforce a rule regarding lobbying at the local level.” 49 Fed. Reg. at 18,269. OMB pointed out that in this respect, Circular A-122 imposes more limited restrictions than the Internal Revenue Code’s provision on lobbying, which does apply to local-level lobbying. *Id.*

organizations can elect to have their lobbying measured by the amount of funds they spend for lobbying purposes.¹²

While the extent of lobbying that 501(c)(3) organizations may undertake without losing their tax-exempt status is not relevant to this analysis, it is worth noting that the IRS defines lobbying in two categories: “direct lobbying” and “grass roots lobbying.” A “direct lobbying communication” is communication with a member or employee of a local, state, or federal legislative body for the principal purpose of influencing “specific legislation.” 26 C.F.R. § 56.4911-2(b)(1). The communication must refer to the specific legislation and reflect a view on it. *Id.* “Specific legislation” is defined as including “both legislation that has already been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes.” *Id.* § 56.4911-2(d).

A “grass roots lobbying communication” is defined as an attempt to influence legislation through an attempt to influence the opinions of the general public. A grass roots lobbying communication is one that refers to specific legislation, reflects a view on that legislation, and “encourages the recipient of the communication to take action with respect to such legislation.” *Id.* § 56.4911-2(b)(2).

The IRS lobbying rules serve a different purpose from the OMB Circulars and appropriations riders: the IRS rules “govern[] only the use of private funds,” and “th[eir] sole purpose . . . is to define the character and status of organizations that will be entitled to favorable tax treatment.” OMB, Preamble to Circular A-122, 49 Fed. Reg. at 18,266. Nonetheless, “in practice the information and accounting practices necessary to satisfy these two authorities [IRS rules and OMB Circulars] largely overlap so that it will generally be possible for both provisions to operate harmoniously.” *Id.*; *see also id.* at 18,269 (noting that OMB’s revisions to the direct lobbying rules were designed to “track[] more closely” the corresponding Internal Revenue Code provisions). Because OMB structured Circular A-122 in order to harmonize with the IRS rules, the latter can serve as useful (but not dispositive) guidance in determining what activities constitute allowable costs under grants law.

D. The Anti-Lobbying Act

18 U.S.C. § 1913 (the “Anti-Lobbying Act”), enacted in 1919, prohibits moneys appropriated by “any enactment of Congress” from being used “directly or indirectly” to pay for any of various forms of communication “intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation. . . .”¹³

¹² The purpose of this section is to note that there are IRS rules that organizations must comply with in order to keep and maintain their tax exempt status. These IRS rules do not apply to the expenditure of federal grant funds and should not be confused with the rules governing the use of such funds.

¹³ Another provision of federal law relating to lobbying, not addressed in detail in this memorandum, is the so-called “Byrd Amendment,” 31 U.S.C. § 1352, which prohibits recipients of federal contracts, grants, loans, and cooperative agreements from using federal funds “to pay any person for influencing or attempting to influence” a member or employee of Congress or an officer or employee of a federal agency, in connection with the awarding

The crucial question for purposes here is, who is covered by this criminal statute? We believe this statute is referring to the use of appropriated funds by federal agencies and officials, not to actions by federal grantees and contractors. We believe that this is the correct interpretation of the Anti-Lobbying Act for a number of reasons, starting with the fact that that section is found in Chapter 93 of Title 18 of the U.S. Code, which is entitled “Public Officers and Employees.” Moreover, the rest of the section that we did not quote above carves out exceptions to the prohibition for “officers and employees” and “departments and agencies” of the “United States.” In other words, 18 U.S.C. § 1913 on its face is directed at those individuals and entities. Consistent with our interpretation, a federal district court concluded in *dicta* in a 1982 decision that although 18 U.S.C. § 1913 contains “broad precatory language,” it “applies only to federal departments or agencies and officers or employees thereof” – not to grantees under federal programs. *Grassley v. Legal Servs. Corp.*, 535 F. Supp. 818, 826 n.6 (S.D. Iowa 1982). Similarly, the Comptroller General, based on instruction from the Department of Justice (which is charged with enforcing the Anti-Lobbying Act) opined in the 1980s that 18 U.S.C. § 1913 does not apply to federal contractors or grantees. *See* B-214455 (Oct. 24, 1984); B-202975 (Nov. 3, 1981). Thus, we believe that the reach of § 1913 is appropriately limited to federal actors.

Finally, it does bear noting that the Anti-Lobbying Act was amended in 2002 to make two changes: (1) extending the bar on lobbying to legislative activities conducted at all levels of government (the bar had previously applied only to lobbying Congress); and (2) revising the penalties for violations. While the Comptroller General opinions and judicial decision referenced above preceded the amendments to the statute in 2002, we do not believe that those changes modified the reach of the statute so that it would extend beyond federal employees and agencies.¹⁴

II. New Restrictions Imposed By Section 503

Section 503 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2012 provides as follows. We have emphasized in italics the words in the new appropriations rider that have not appeared in previous versions¹⁵:

of a contract, grant, loan, or cooperative agreement. *Id.* § 1352(a)(1)-(2). Under the implementing regulations, “influencing or attempting to influence” is defined as “making, with the intent to influence, any communication to or appearance before an officer or employee of an agency . . . or a member of Congress” in connection with a covered action. 45 C.F.R. § 93.105(h). Thus, the Byrd Amendment extends only to direct, not to grassroots, lobbying, and only to lobbying that specifically relates to the award of grants, contracts, *etc.* The Byrd Amendment imposes a requirement that federal contractors or grantees disclose any communications covered under the statute, even when the grantee or contractor uses its own funds. 31 U.S.C. § 1352(b).

¹⁴ Some appropriations riders enacted since 2002 have expressly incorporated the requirements of the Anti-Lobbying Act. *See, e.g.*, Pub. L. No. 109-162, 119 Stat. 2960, § 3 (Jan. 5, 2006) (Violence Against Women and Department of Justice Reauthorization of 2005). This indirectly supports the view that the Anti-Lobbying Act does not, by its terms, apply to grantees and contractors. We are aware that CDC’s AR-13, applicable to prior years’ CDC grants, incorporated into grant awards the requirements of the Anti-Lobbying Act; however, if Section 1913 does not independently impose liability on recipients of federal contracts and grants, CDC does not, in our opinion, have the authority to make the statute applicable through conditions on grant awards.

¹⁵ *See* Pub. L. No. 110-161, Div. G, § 503 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2008).

(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.*

Pub. L. No 112-74, Div. F, § 503 (emphasis added). The lobbying standard applicable to grantees is subsection (b), by virtue of its reference to the use of appropriated funds “to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient.”

A. Changes Effected by CAA 2012

Section 503, as it appears in in CAA 2012, Division F, includes the following changes as compared with the prior versions of the HHS appropriations rider.

1. Application to Advocacy Supporting or Opposing Measures That Are Not Formally “Pending”

Section 503(a) applies to the use of appropriations for publicity or propaganda activities “*designed to support or defeat the enactment* of legislation,” rather than (as in the previous version) “*designed to support or defeat pending* legislation.” Subsections (b) and (c), similarly, bar using federal funds to advocate for proposals or concepts that are not yet pending before the legislature or agency. See Section 503(b) (prohibiting use of appropriations “to pay

the salary or expenses of any grant or contract recipient, or agency acting for such recipient, related to any activity to influence the enactment of legislation . . . proposed or pending”; Section 503(c) (applying prohibitions in subsections (a) and (b) to activities “to advocate or promote any proposed, pending, or future Federal, State or local tax increase”).

The effect of each of the three subsections is to apply the lobbying restrictions to communication about prospective legislative or agency actions that are favored or disfavored by the speaker but are not formally pending before Congress, a State or local legislature, or a regulatory entity. For example, use of appropriated funds to publish a newsletter stating, “Tell your legislator to fight for a cigarette tax increase,” would constitute impermissible lobbying under Section 503(c) of CAA 2012, Division F. Under prior law, on the other hand, only a more specific statement referring to a pending bill, such as “Tell your legislator to vote for House Bill Number 101,” would meet the standard. Both statements contain a “direct appeal[] to members of the public for them in turn to urge their representatives to vote on a particular matter,” *see* B-212069 (Oct. 6, 1983), but the former refers to a more general proposal.

The obligation to avoid lobbying with respect to actions not yet formally pending is not new to grantees. OMB Circular A-122 already imposes a similar standard, including attempts to influence either “the introduction of” federal or State legislation, or the “enactment or modification of” pending legislation. *See* OMB Cir. A-122, ¶ 25.a; *see also* 49 Fed. Reg. at 18,269 (“[T]he costs of preparing, instigating or urging legislation not yet formally introduced are just as unallowable as lobbying with regard to bills that have already been introduced.”). However, the application of this standard to local-level legislative action in Section 503 is a new obligation.

Despite the variations in wording of the three subsections of Section 503, we believe that the three subsections impose substantively similar standards with respect to where, on the spectrum between promoting policy ideas and advocating measures formally pending before a government body, impermissible “lobbying” begins.¹⁶ Applying different standards to subsections (a) and (b) of Section 503 would be inconsistent with the guidance of OMB, which, in the preamble to Circular A-122, expressed its intent to align the standards applicable to grantees with those that apply to agencies under appropriations riders. (*See* Section I.A.3.)

2. Application to Administrative Processes

With CAA 2012, the lobbying restrictions of Section 503 apply for the first time to actions to influence regulations and other administrative processes.

However, Section 503 does not apply to all advocacy on agency issues. On the federal level, the law does not apply to advocacy to influence regulation and administrative activity before federal *agencies*; instead, the statute refers only to regulation, administrative actions,

¹⁶ Despite the fact that the three subsections impose similar standards, Section 503(c) may set a lower bar than the other subsections with respect to the necessary specificity of the regulatory or legislative action cited in a communication in order for it to constitute a “direct appeal.” For example, a flyer stating, “Tell your council member to take action against sugar-sweetened beverages in schools,” could fall within the bar of Section 503(c), whereas, for Section 503(b), a reference to a more specific proposed action would likely be required (“Tell your state legislator to support the emissions testing requirements developed by the XYZ Institute.”).

and orders before *Congress*. (Typically, of course, such actions are not taken by Congress, but by the President.)

In addition, at the local level, Section 503(b) – the provision that applies to use of appropriated funds for the salaries or expenses of grantees and contractors – on its face applies to advocacy relating to regulation and administrative activity before a local “legislature or legislative body,” but not before a local administrative agency. Therefore, in this analysis, we are assuming generally that advocacy by grantees on matters pending before local administrative agencies is not prohibited under Section 503. (Note, however, that since local entities such as zoning boards and school boards are sometimes regarded as quasi-legislative entities, we are assuming that communications relating to matters pending before them would fall under the scope of the statute.)

The new requirements in Section 503 relating to administrative actions do not duplicate obligations under existing law, and will require particular vigilance with respect to communications about issues pending or proposed before state agencies. With limited exceptions in the Byrd Amendment (which bars the use of federal funds for communications to influence “an offer or employee of any [federal] agency” with respect to the awarding of a federal contract, grant, or cooperative agreement, *see* 31 U.S.C. § 1352(a)(1)) and OMB Circular A-122, ¶ 25.d (making unallowable costs attempts to exert “improper influence” over federal agency processes), the federal anti-lobbying rules in general do not address attempts to influence rulemaking or other regulatory processes, and to the extent that they do, they impact only regulatory action on the federal (not state) level.

3. Application to Local Government

With CAA 2012, the lobbying restrictions of Section 503 apply for the first time to actions to influence local government entities.

As noted above, however, with respect to use of federal funds for activities of grantees and contractors, the prohibition on lobbying on its face applies only to advocacy before local legislative bodies, not local administrative agencies. *See* CAA 2012, Div. F, § 503(b).¹⁷ As explained further below in Section II.A.6, we interpret the bar on advocacy related to gun control and restrictions on legal consumer products in subsection (c) to impliedly include the same limitation.

The only other source of present federal law that imposes restrictions concerning lobbying local entities is the Internal Revenue Code, whose implementing regulations (for purposes of “lobbying” activities of nonprofit organizations that may imperil their tax-exempt status) define both “direct” and “grass roots” lobbying to include communications relating to action before local legislative bodies.¹⁸ *See* 26 C.F.R. § 56-4911.2(d)(1).

¹⁷ As noted above, OMB declined to expand the restrictions in the cost principles to local government matters in 1984, reasoning that “[s]ince there is no rigorous separation between legislative and executive authority at the local level, it would be difficult to construct or enforce a rule regarding legislative lobbying at that level.” 49 Fed. Reg. at 18,260. Unfortunately, Congress has ignored this admonition in the new Section 503.

¹⁸ We note, however, that the Public Health Institute’s CTG grant award indicates that as a matter of policy, the CDC applies its anti-lobbying restrictions to local legislative activities.

4. Reference to Appropriations “Transferred Pursuant to” PPACA Provisions

Section 503(a) begins, “No part of any appropriation contained in this Act *or transferred pursuant to section 4002 of Public Law 111-148* shall be used. . . .” Section 503(b) similarly refers to appropriations transferred pursuant to section 4002. The italicized language did not appear in previous versions of the rider. This addition does not appear to effect any substantive change in the law, other than ensuring that the lobbying bar applies to appropriations under the Prevention and Public Health Fund created under the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010). PPACA § 4002 refers to funds transferred by the Secretary of HHS to that Fund, and to funds transferred by Congressional committees from the Fund to “eligible activities under this section.”¹⁹ See PPACA §§ 4002(c), (d).

5. Exceptions Permitting Direct Lobbying By Government-Entity Grantees

In one respect, Section 503 permits *more* advocacy activity by grantees than previous versions of the appropriations rider. Section 503 adds two exceptions allowing grantees that are government entities to conduct direct lobbying.

Under the exceptions, the bar on lobbying does not apply to communications pursuant to “normal and recognized executive-legislative relationships” or to or “participation by an agency or officer of a State, local or tribal government in policymaking and administrative processes within the executive branch of that government.” Section 503(b). Collectively, these exceptions permit appropriated grant funds to be expended for exchanges of information or advice relating to proposed or pending laws and regulations between the government-entity grantee or its agent and (1) legislative bodies within its own government, or (2) other executive branch decision-makers within its own government.

Congress’ intent in including these exceptions in subsection (b) appears to have been to ensure that government entity grantees may communicate with their peers within the same government about policy issues to the same degree as federal agencies may communicate with members of Congress and other agencies under subsection (a).²⁰ Section 503(a) provides that publicity or propaganda activities designed to support or defeat the enactment of law may not be carried out by federal agencies except “in presentation to the Congress or State or local legislature itself,” “in presentation to the executive branch of any State or local government itself,” or “for normal and recognized executive-legislative relationships.” GAO has interpreted the “except in presentation” language broadly as indicating Congress’ intent not to inhibit the exchange of information between the executive and legislative branches. See *Appropriations Law*, pp. 4-205, 4-206. (We did not identify any GAO guidance on the third

¹⁹ The PPACA provision does not refer to the “transfer” of funds through grants, and thus, this provision does not substantively change the requirements of Section 503 by applying those requirements to grantees. (That is achieved separately by Section 503(b), which relates to use of appropriated funds “to pay the salary or expenses of any grant or contract recipient. . . .”)

²⁰ It bears noting that the exceptions in subsection (a) are more expansive than those that apply to government entity grantees under subsection (b), in that subsection (a) allows federal agencies to undertake communications that would otherwise constitute impermissible lobbying at *any* level of government. Subsection (a) essentially permits all direct lobbying, while subsection (b) permits direct lobbying within the same government as the government-entity grantee.

exception in subsection (a), which also appears in (b): “other than for normal and recognized executive-legislative relationships.”)

We believe it would be reasonable to interpret the exceptions in subsection (b) to encompass communications at different levels of government – for example, between State and local officials, or between local and county officials – only if the two entities are defined as being within the same government under applicable law.²¹ In that regard, an analysis of whether the federally-funded employees of state and local governments can discuss legislative changes which each other must be premised on the applicable state law and is beyond the scope of this memorandum.²²

6. Activities To Advocate or Promote a Tax Increase or Restriction on Legal Consumer Products

Subsection (c) to Section 503 provides:

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 . . . not limited to advocacy or promotion of gun control.

In general, we do not believe that Section 503(c) substantively expands the prohibitions on lobbying in subsections (a) and (b). Because of the first phrase in subsection (c) (“the prohibitions in subsections (a) and (b) shall include”), the exceptions in subsection (b) for “normal executive-legislative relationships” and “participation in policymaking and administrative processes” apply to the provisions in (c) concerning tax increases or restrictions on legal consumer products. Reading the statute in this manner is consistent with the canon of statutory construction that all words in a statute be given effect, if possible: if Congress had intended for the lobbying bars in subsection (c) not to be subject to the qualifications in the previous subsections, it would not have referred to the activities described in subsection (c) as “included in” the prohibitions of the previous subsections.

Similarly, any persuasive judicial or federal agency interpretations of appropriations language concerning “publicity or propaganda” riders, including GAO guidance emphasizing the breadth of allowable “legitimate informational activities,” would also apply to the prohibitions in subsections (b) and (c).

²¹ As an example of this principle, the Executive Order on Federalism, 64 Fed. Reg. 43,255 (Aug. 10, 1999), defines “States” as “State governments, including units of local government and other political subdivisions established by the States.” If State law establishes localities as instrumentalities of the State, then applicable federal law should be construed consistently with that arrangement.

²² You have referred to the logistical problems that will arise when local-government grantees need to communicate with county or State officials on policy issues, including discussion of specific pending legislation or regulations, in order to carry out programs involving state-local or state-county cooperation under the CTG grant. In our opinion, such communications may constitute unallowable activities under Section 503. Therefore, it may be worthwhile for organizations that are able to advocate on these issues before Congress to urge Congress to modify Section 503 in future appropriations bills, to provide that the exceptions applicable to government-entity grantees encompass not only advocacy within the same (local, county, federal, or tribal) government, but also among these governments.

In addition, in our opinion, Section 503(c) does not prevent public health organizations from engaging in advocacy before federal or local regulatory agencies relating to gun control issues or restrictions on consumer products. With respect to bars on advocacy relating to “restriction[s] on any legal consumer product” and “gun control,” referenced in subsection (c), the limitations in the scope of the lobbying bar contained in subsections (a) and (b) would apply, since these provisions in subsection (c) do not list the government entities to which the lobbying bar applies. As noted above, subsections (a) and (b) do not apply to advocacy concerning federal regulations pending before the executive branch of the U.S. government, and subsection (b) does not apply to advocacy before local administrative agencies. On the other hand, Section 503(c) explicitly bars advocacy in favor of *tax increases* at the federal, state, and local levels. Therefore, in the unusual situation in which a tax increase were proposed or pending before a federal or local administrative (as opposed to legislative) body, Section 503(c) would bar advocacy urging action by that body of government.

B. Conclusions Concerning the Impact of Section 503

Section 503 will impose some new restrictions on public health organizations’ mass communications and interaction with legislative or executive bodies, but the new requirements do not comprise a significant change from existing law. Section 503 will not prohibit grantees from continuing to use HHS grant funds to promote evidence-based solutions to public health problems. The most significant new consequences of the revised Section 503 are that, aside from the exceptions applicable to direct lobbying by State and local government grantees discussed in Section II.A.5, federal funds may not be used for advocacy concerning local legislative action or State administrative action.

1. Publications and Information Campaigns

With respect to “grassroots” communication, the GAO has interpreted the lobbying prohibitions in appropriations riders narrowly in order to preserve the free flow of information from the executive branch to the public. If these GAO interpretations apply to the use of federal funds by grantees the same as they apply to federal agencies (and we believe they should), then neither Section 503 nor the lobbying restrictions in OMB Circular A-122 limit grantees’ ability to conduct public information or public mobilization campaigns about health issues using appropriated funds, so long as (1) the campaigns advance the purposes of the grant, and (2) the campaigns do not include a “direct appeal” to influence legislative action at any level, or regulatory action at the State level.

Comptroller General opinions interpreting appropriations riders distinguish between improper propaganda and “legitimate informational activities.” Importantly, when an agency has a statutory responsibility to advance a policy, legitimate informational activities *include* promoting its views on that policy. *See* Opinion of the Comptroller General, B-301022 (Mar. 10, 2004). IRS rules set forth similar principles. *See* 26 C.F.R. § 56.4911-2 (providing that for IRS tax-exemption purposes, “examinations and discussions of broad social, economic, and similar problems are neither direct lobbying communications . . . nor grass roots lobbying communications”).

We understand that much of the public health work you are concerned will be impacted by Section 503 is carried out under the CTG program. The statutory provision authorizing the

CTG provides that each grantee shall submit to HHS a “community transformation plan” setting forth “policy, environmental, programmatic, and as appropriate infrastructure changes needed to promote healthy living and reduce disparities.” PPACA § 4201(c)(2), Pub. L. No. 111-148, 124 Stat. 119 (2010).

CDC’s funding opportunity announcement interpreting PPACA § 4201 provides examples of community transformation plan activities including providing educational programs at public hearings about health issues, organizing community mobilization events, and educating the public by sponsoring community forums and placing ads in local newspapers. CTG Funding Opportunity Announcement, App. E. In addition, a CDC guidance document describes evidence-based strategies that awardees are “expected to use” including, in the area of tobacco use, working toward the implementation of zoning restrictions, sales restrictions, and smoke-free policies. *See* CDC, MAPPs Intervention Strategies for Communities Putting Prevention to Work.

Thus, promoting “policy changes” is part of the statutory mandate for CTG grantees, and the CDC has interpreted that mandate aggressively to authorize grantees to articulate specific plans for influencing state and local laws. The CDC’s interpretation of the statutory mandate would be entitled to deference in GAO’s determination of whether a grantee had crossed the line between legitimate information activities and lobbying. Any public outreach campaign by public health organizations that falls short of a “direct call” to enact legislation or regulatory change, and that advances the purposes of the grant, would comprise a legitimate informational activity. This is confirmed by language that has appeared in past CTG grants (and in CDC’s AR-12, on Lobbying Restrictions), noting:

It remains permissible to use CDC funds to engage in activity to enhance prevention; collect and analyze data; publish and disseminate results of research and surveillance data; implement prevention strategies; conduct community outreach services; provide leadership training; and foster safe and healthful environments.

As discussed in Section II.A above, Section 503 covers communications by grantees concerning more types of government actions than did previous years’ versions of the rider. Despite this expansion in subject matter, however, the appropriated funds can still be spent to communicate with the public about policy issues and related governmental actions so long as the communications do not include a “direct appeal.” Therefore, in our opinion, with the qualifications discussed below, Section 503 will not impede grantees from disseminating to the public work associated with evidence-based solutions to public health problems. Such work might include developing coalitions, identifying and prioritizing problems, and describing potential solutions.

2. Communication with Government Decisionmakers

The chief new obligations imposed by Section 503 with respect to direct lobbying are the prohibitions on the use of federal grant funds for advocacy before local legislative bodies and before State regulatory bodies.

As with grassroots lobbying, we emphasize the wide spectrum of activities that fall short of “lobbying.” Under principles set forth by the GAO, OMB, and the IRS, communication with governmental officials is not “lobbying” (or improper “publicity or propaganda”) unless it is not designed to influence the enactment of legislation, regulation, or administrative action. If a grantee provides information to a government to advance the purposes of the grant award, and the activity does not constitute impermissible “lobbying,” then no analysis of the exceptions to lobbying restrictions under OMB cost principles and appropriations law is required. For example, a public health organization could submit to a legislator a research report on a public health topic. So long as sharing the report with the legislator falls within the purposes of the grant, and the organization does not – either in the publication itself, or in its communication to the government official transmitting it – make a “direct appeal” for action, then neither preparing nor sending the report is lobbying. *See* 26 C.F.R. § 56.4911-2(a)(3)(i) (Ex. 3) (providing research paper to a legislator, absent direct appeal, does not constitute lobbying). OMB has made clear that the key inquiry is whether the grantee displayed “intent or conduct with the reasonably foreseeable consequence of initiating [action by the government entity], or to support or facilitate such ongoing action. . . .” 49 Fed. Reg. at 18,269.

Even if an activity does constitute lobbying, an exception is available under OMB Circular A-122 that allows grantees to use grant funds to provide factual information to government entities at their request.²³ Circular A-122 specifies that the input may be provided in the form of “hearing testimony, statements, or letters”; formal hearing testimony is not required. The time associated with such a communication is allowable, OMB notes, even if the communication includes an “advocatory conclusion,” so long as the conclusion “clearly and naturally flows from the technical and factual data presented and is a distinctly minor aspect of the overall presentation.” 49 Fed. Reg. at 18,270. A similar exception to the definition of “lobbying” applies under the IRS regulations. *See, e.g.,* 26 C.F.R. § 56.4911-2(c)(3) (providing that communications responding to a government body’s request for technical advice are not “direct lobbying”). With respect to the necessary specificity of the request, OMB does not (as the IRS does) require that the request by the government body be in writing; however, the request “must be bona fide, may not be open-ended or indeterminate, and must not be made for the purpose of circumventing” the restrictions on lobbying as an allowable cost.²⁴ 49 Fed. Reg. at 18,270. In our opinion, activities that fall within this

²³ We note that the most useful guidance concerning the scope of a “direct lobbying” prohibition comes from OMB’s preamble to Circular A-122 and from the IRS regulations, rather than from the GAO. GAO guidance and Comptroller General opinions do not address the scope of impermissible “direct lobbying,” since for the most part, GAO has interpreted the appropriations riders as they apply to the activities of federal agencies, and most appropriations riders permit direct lobbying by federal agencies through the “except in presentation to the Congress itself” exception.

²⁴ You inquired whether, in the context of comments on a proposed rule, a notice of proposed rulemaking containing a request for comment, published in a government register, would suffice as a “request.” The OMB guidance does not answer this question, since Circular A-122 does not extend to regulatory activity (and indeed, OMB noted that it specifically sought to preserve grantees’ ability to comment on proposed rules, since these often have direct implications for the performance of the grant award, *see* 49 Fed. Reg. at 18,268). Circular A-122 specifies that with respect to Congressional testimony, notices in the Congressional Record suffice as a “request.” *See* Cir. A-122, ¶ 25.b.1. Arguably, by analogy, open requests for comment would under the same reasoning (in the agency context) qualify as a “request.” We note that this would be an issue only with respect to State agencies, since Section 503 does not place restrictions on advocacy before federal agencies.

exception in OMB Circular A-122 are impliedly excluded from the scope of the restrictions in Section 503.

III. Analysis of Hypotheticals

Here, we address the hypothetical situations you raised concerning types of activities commonly undertaken by public health organizations and their partners that you are concerned may fall within the lobbying restrictions. We emphasize that when evaluating whether the costs of any activity are allowable under a grant, the first inquiry is always whether the activity furthers the purposes of the grant award. Only then, does one proceed to analyze whether the activity is rendered unallowable by the specific categories of unallowable costs set forth by regulation (for example, Circular A-122) or statute (for example, appropriations riders). In addition, we note that with very limited exceptions, grantees are free to carry out the activities that we have identified as unallowable below, provided that they use non-federal funds.

A. Scope of Permissible Activities by a Local Government Grantee

You raised the following hypothetical question: *A city receiving federal funds wants to lower consumption of sugar sweetened beverages (SSBs) in its jurisdiction in order to address increasing childhood obesity rates.*

- *Can the city council direct their local health department to use federal funds to develop educational programs about the public health impact of SSBs if there is no mention of a proposed, pending or future restriction or requirement of any sort?*

Yes. These activities would be permissible under Section 503 whether or not the grantee is a government entity, and whether or not the activities are performed at the instruction of the city council. Public health education activities, as long as they do not involve a “direct appeal” for the public to take action on proposed legislative or regulatory changes, do not fall within the scope of the impermissible activities “designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order” referred to in Section 503(b).

- *Can any federal funds be expended to do economic research about the value of a SSB tax to the local community?*

Yes. A research analysis that includes a discussion of policy implications typically does not cross the line to “lobbying.” However, public health organizations should carefully review the research report to ensure that it does not contain recommendations for the public to support or officials to enact specific proposed laws or regulations.

On the other hand, public health organizations *can* – without crossing the line to “lobbying” – include in research reports conclusions about the effectiveness of taxes or other forms of government action in addressing public health problems. See 26 C.F.R. § 56.4911-2(c)(1)(vii) (Example 2) (providing that a research report on a policy issue that “sets forth conclusions that the disadvantages [of a policy] are greater than the advantages [of the policy] and that prompt legislative regulation of the [issue] is needed” does not constitute grass roots lobbying, so long as it presents

a full and fair exposition of the pertinent facts to enable the reader to form an independent opinion).

- *Can the city council request testimony from the local health officer, whose salary to work on childhood obesity issues is covered by federal funds, about the impact of SSBs on community health? About the health value of imposing a SSB tax?*

Yes. The testimony of a local health officer (an officer of the executive branch) before a local legislative body would constitute part of the “normal and recognized executive-legislative relationships” under whose auspices grantees can make communications designed to influence the enactment of legislation.

Moreover, even if the grantee were not a local government, the testimony would be an allowable activity, provided that it was factual in nature and provided at the legislative body’s request. This is true even if the testimony includes an advocacy conclusion, such as endorsing the positive effects of taxes or other government interventions. Cir. A-122, ¶ 25.b.1; *see* 49 Fed. Reg. at 18,267, 18,270.²⁵

- *If the answer is yes to any of these questions, does the local government itself need to do all the work or can the work be delegated to a subcontractor?*

In each case above, we believe that the activity (educating the public about a public health topic; testifying before a legislative body at its request) does not fall within the lobbying restriction in Section 503. The same conclusion would apply regardless of whether the entity conducting the activity is the local government grantee or a subcontractor.

To the extent that the activity is permissible only because of an exception, however (for example, legislative testimony that is primarily persuasive rather than factual in tone, or is not provided at the request of the governmental body), we believe that the exception would apply to subcontractors or subrecipients of a government grantee the same as to the grantee itself. Section 503(b) refers to restrictions on the use of appropriated funds “to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient. . . .” Thus, the requirements and exceptions that apply to subsection (b) also apply to a subcontractor or subgrantee “agent.” In this situation, that means that federal funds may be expended by the local government grantee on the costs of the contractor’s time spent testifying before a city council.

B. Scope of Permissible Activities by Grantee at Request of a Government Entity

You raised the following hypothetical question: *A state health department tobacco control program, which is fully funded by the CDC Office on Smoking and Health:*

²⁵ We note, however, two qualifications. First, Circular A-122 classifies as unallowable “legislative liaison activities, including attendance at legislative sessions or committee hearings,” when they are carried out in support of “unallowable lobbying” – *i.e.*, with the goal to influence the introduction, enactment or modification of legislation. OMB Cir. A-122 ¶ 25.a.5. Therefore, the tone of the presentation should be closely monitored. Second, expenditures relating to testimony are allowable so long as the information provided is “readily obtainable and can readily be put in deliverable form.” *Id.* ¶ 25.b.1. Staff time spent preparing new research for the purpose of presenting testimony would likely be unallowable.

- *Is directed to submit comments to the US Food & Drug Administration encouraging the FDA to regulate the use of menthol in tobacco products. Can federal funds be used for these comments?*

Yes. We believe that Section 503 is not implicated in this situation, because the lobbying prohibitions in Section 503 do not apply to the use of appropriated funds for communications concerning regulatory action taken by the executive branch of the U.S. government. Therefore, providing comments to a federal agency would not be a prohibited activity, regardless of whether the grantee submitting the comments is itself a government entity or a nonprofit organization.

- *Is directed to develop state-level regulations to disallow flavored smokefree tobacco products for consideration by the state-level Food and Drug agency. Can federal funds be used to develop draft state regulations?*

Probably. We do not see any obstacle under Section 503 or other applicable law to the use of appropriated funds for a state agency grantee to prepare draft regulations for another state agency, in light of the exception in Section 503(b) for “participation by an agency or officer of a State . . . in policymaking and administrative processes within the executive branch of that government.”

With respect to grantees that are *not* State governments or their agents, drafting regulations for presentation to the state agency would likely be an unallowable cost. (See Section III.E below.)

- *Would answers to the above change if, instead of regulating tobacco products, the subject was regulating a public service such as smoking cessation classes? What about smokefree apartments?*

No. The answers above would apply to any state-level regulatory activity. (As noted above, we interpret the prohibitions in Section 503(c) as being subject to the same exceptions and qualifications as those in Section 503(b).)

- *Would answers to the above change if the efforts related to local or state legislation rather than regulation?*

Yes, in the case of a State health department advocating on State legislation; not clear, in the case of a State health department advocating on local legislation. Section 503 contains an exception for communications “for normal executive-legislative relationships.” Interactions between a State agency and a State legislature (including providing model legislation to the State legislature) would fall within this exception. However, interactions between a State agency grantee and a local city council would fall within the exception only if State law defines localities as instrumentalities of State government. (As noted above, we believe this exception is likely intended to apply only to communications of officials within the same government.)

C. Scope of Permissible Activities Relating to Local Administrative Actions

You raised the following three hypothetical questions on this topic.

An existing local government zoning code requires a conditional use permit be approved before new liquor stores can be sited. The local health department has studied the relationship between liquor stores and violence in the community and has determined that much of the violence is attributable both to the illegal sales of alcohol to youth, and to the over-proliferation of alcohol outlets in the neighborhoods with the highest homicide rates. Using NIAAA federal funding, the health department is researching the viability of using community-based organizations as a vehicle to reduce alcohol-related violence in targeted neighborhoods. The health department informs the coalition members that the zoning board is holding a public hearing on whether a conditional use permit should be issued for yet another liquor store in one of the target neighborhoods.

- *Can the health department staff, whose salary is fully covered by the NIAAA grant, testify at the administrative hearing about illegal sales to youth and the over-proliferation of alcohol outlets?*

Yes. Even if the testimony did constitute lobbying (which it likely would not – see below), the exceptions in the statute for “normal and established executive-legislative relationships” and “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” would apply. The health department staff’s time spent testifying would be an allowable cost if the activity furthers the purpose of the grant.

- *Can the community coalition staff, whose salary is fully covered by the NIAAA grant, testify at the administrative hearing about the illegal sales to youth and the over-proliferation of alcohol outlets?*

Yes. Influencing a zoning board’s decision about a use permit is a type of activity that would fall within the scope of Section 503, in that the zoning board’s decision on a use permit could comprise an “administrative action” before a “local legislature.”²⁶ However, for the reasons described above, the activity of providing factual or technical information to the administrative board at its request – even if the testimony includes a recommendation or conclusion – would not constitute “lobbying.”

- *Can unpaid neighborhood residents’ testimony reference the research findings and activity of the NIAAA-funded coalition related to the illegal sales to youth and the over-proliferation of alcohol outlets?*

Yes; the neighborhood residents’ testimony would not involve the use of any appropriated federal funds and so would fall outside the scope of both the appropriations law and OMB Circular A-122. However, the grantee should ensure that any research findings it publishes using NIAAA funds do not include a direct appeal for government legislative or regulatory action, as this would constitute grassroots lobbying.

²⁶ We are assuming here that advocacy before planning and zoning boards and school boards falls within the prohibition in Section 503(b), on the ground that they are quasi-legislative entities.

A developer is planning a new housing subdivision in a rural area of the county, not served by a common sewer system. Each house lot is to accommodate its own septic tank, and the proposed subdivision is upgrade to a major water table for an adjacent economically depressed neighborhood served by well water. A committee of the planning and zoning department is reviewing the application. The matter will need the approval of the county zoning board. If there is a dispute, the county manager reviews the matter and makes a recommendation to the county commissioners, who have the final administrative decision-making authority.

- *Can the health department's environmental specialist, whose salary is paid by federal HHS grant funds, present information about potential water contamination risks and consequences to the various levels in this administrative decision-making county process (the planning and zoning staff, the zoning committee, the zoning board, the county manager, and the county commissioners)?*

This hypothetical addresses the sometimes-blurred relationship among legislative, executive, and judicial functions at the local level. For purposes of this hypothetical, we will assume that the county zoning board is a legislative or quasi-legislative entity, and therefore that communications with county officials about this proposed action fall within the ambit of Section 503(b).

We believe that the specialist's time advising local officials would be an allowable cost. Even if providing input on these issues constituted "lobbying," the activity would still be allowable because of the exception in Section 503(b) for "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."

- *Can the community coalition staff, whose salary is fully covered by HHS grants, provide information or advocate a position to these various levels of the administrative decision-making?*

With respect to communications with local legislative or quasi-legislative entities – for example, the zoning board – the community coalition staff can use grant funds to provide information at meetings or hearings whose purpose is to deliberate on the proposed development, but only if the information is requested by the government entity and the presentation is primarily factual or technical in content and tone. If advocacy and policy recommendations constitute more than a minor part of the presentation, then it would constitute lobbying and could be undertaken only with private funds.

At the local government level, where both the government entity's request for input and the forum for providing input are likely to be more informal than they would be in a matter before a legislature or federal or state agency, satisfying the criteria for the "requested input" exception to the bar on lobbying may be difficult. (See OMB Cir. A-122, ¶ 25.b.1, which does not encompass local government matters or administrative activity, but provides guidance on the scope of the exception.) Because of the lack of clarity on how the rules would apply in the local context, it may be best practice for grantees (1) to avoid using grant funds to provide such

input in private conversations (as opposed to formally convened meetings and hearings), and (2) when requested by local entities to appear at such a hearing or meeting, to ask that the request be made in writing.

Using federal funds, could groups urge school boards to remove soda machines from cafeterias? If not, what can they discuss with school boards?

- The rules applicable here are similar to those applicable to matters pending before a zoning board. If the school board is viewed as a quasi-legislative entity, then advocacy relating to matters before the school board would fall within the scope of Section 503.

For a grantee that is not a local government entity, allowable activities would be limited to providing factual or technical information to the school board at its request, as described in the preceding hypothetical concerning the zoning board.

D. The Scope of “Grassroots Lobbying”

You posed the following questions on this topic:

- *City Council is having a hearing on a smoke-free ordinance. With federal funds, can you let people know about the hearing and urge them to attend if they care about the issue?*

Not clear. Notifying the public of a hearing is not, by itself, lobbying. However, where the statement goes beyond notice and includes statements suggesting why the public should attend the hearing, the grantee runs the risk of engaging in grassroots lobbying. In multiple matters involving federal agencies’ public communications, GAO has found that appropriations riders prohibiting the use of federal funds for “publicity and propaganda” to support or defeat pending legislation were violated where federal agencies urged the public to “contact your representatives and make sure they are aware of your feelings concerning this important issue.” *Appropriations Law*, p. 4-209 (citing B-128938 (July 12, 1976)). GAO reasoned that in the context of the publication, it was clear what those “feelings” were supposed to be. *Id.* A notice urging the public to attend a hearing on the smoke-free ordinance would probably be viewed as a call to action if it also conveyed the grantee’s support of such a measure, and would definitely constitute improper lobbying if it urged the public to support the measure. If the flyer contains such statements, federal funds should not be spent preparing or distributing it.

- *May federally-funded groups share lists of interested persons with groups that do lobbying? May a grantee place a link on its website to the website of a nonprofit organization that conducts lobbying? Would either constitute lobbying?*

These activities do not in themselves constitute grass roots lobbying, since they do not involve a direct appeal for members of the public to take action. However, they are likely unallowable costs. The key consideration in each case would be whether the activity falls within the purposes of the grant. Sharing lists of members with

lobbying groups, for the purpose of advancing the groups' lobbying efforts, would not fall within the purposes of the CTG grant, since those purposes do not include lobbying. The time associated with preparing and sending this information would be an unallowable cost. On the other hand, a CTG grantee would likely have legitimate grant-related reasons (*e.g.*, promoting education of the public) to post a link on its website to an organization working in a related field that happens to conduct lobbying; therefore, the costs associated with this activity would probably be allowable.

* * * *

We hope that this memorandum is useful in clarifying the scope of the new restrictions imposed on public health organizations under Section 503. As described above, Section 503 will require a new level of vigilance with respect to public health organizations' grassroots communications and communications with officials about matters of local government and about State regulatory matters. Nonetheless, it does not impose significant new restrictions on grantees, over and above the obligations already imposed on grantees under grant cost principles and prior appropriations riders.