

Questions & Answers

Allen Mattison, J.D. | HIAs and IRS Lobbying Webinar | January 15, 2016

Helpful Hints and Pitfalls to Avoid

Creating Materials

- To anticipate—and avoid—problems that often face grantees, do not think of the Health Impact Assessment (“HIA”) as being a single publication written for an audience of policy experts. Instead, create a suite of materials in addition to the main HIA report. Develop materials you anticipate others will need; an executive summary of no more than two pages—using non-jargon language—that a reasonably educated lay person would find informative; a fact sheet briefly explaining the related legislation, regulation or business issue; your findings and recommendations; simple charts; talking points for other groups to use; and answers to frequently asked questions.
- Before you start writing, consult with other organizations in the nonprofit and policy arenas—along with the community or communities most likely to be impacted by the project—to ask what materials they would find helpful. Ask them to consider what materials they will need at different stages of their campaign—not just now, but 18 months from now. Create materials that can be used many ways. For many items, creating them at the front end could be permissible with the grant, while the grant restrictions would prevent you from creating those materials later for the purpose of distributing solely to legislators, which would be considered lobbying.
- At the recommendation stage, advocate for (or against) legislation, as long as you 1) distribute the materials broadly to the public; and 2) do not include language the IRS considers to be a “call to action,” as described in the attached two-page overview of the lobbying rules.

Distributing Materials

- By distributing educational materials broadly to the public early in the HIA process, grantees can increase their ability to use the materials for some lobbying later, using the IRS’s subsequent use rule (see attached two-page overview of the rules for details). Making an effort to broaden the initial distribution will pay dividends later. Consider opportunities in the following target audiences:
 - Peer organizations – Distribute the entire suite of materials to other nonprofit organizations, health experts, academics, government agencies and community advocacy groups;
 - Media – In addition to releasing the HIA with a press release, hold a press conference featuring researchers, advocates and members of the impacted community; distribute the broader suite of materials to reporters, as appropriate (i.e., FAQs and summary should go to reporters; the talking points should not); send sample social media posts to other organizations; conduct a briefing with editorial page editors, bloggers, and others; provide a tour of the affected location for TV and still photographers; pitch the story to talk radio producers; reach out to ethnic, neighborhood or other specialty media; draft letters-to-the-editor and op-eds related to the HIA; and post all of your public materials on your website.
 - New constituencies – Reach out with materials to groups you traditionally have not engaged, but which might have a stake in the issue, including physicians; parent-teacher associations; businesses and chambers of commerce; clergy and civic organizations; and sports or tourism organizations.

Q & A with Allen Mattison, continued

- Plan Ahead
 - Create a communications plan well ahead of your roll-out. But recognize that even if you have only a short window before your HIA will be released, it is better to produce and execute a short-term outreach plan than none at all.

Testifying

- Testimony at a legislative or other government hearing is not lobbying, if a person is **invited in writing by the committee chair and if** certain other formalities are followed. Pay attention to the legislative calendar, and work with the committee staff to secure an invitation if a hearing is upcoming. Consult your attorney to ensure your invitation will satisfy the specific formalities the IRS requires in order for this exception to apply.

Understand the Rules

- The following restrictions involve only the IRS lobbying rules; other federal, state or local laws may apply. Spending some time to familiarize yourself with the rules is an investment with a big payout. (See the attached two-page overview of the rules). The key is to recognize what activities the rules cover, and to structure your communications strategically to remain in the educational realm, while being as effective as possible. For example, if your HIA analyzes regulations or business actions, ask legislators to help attract media attention and to encourage adoption of your recommendations. But if your HIA relates to legislation instead of regulations or business actions, it would be lobbying to discuss the legislation with legislators.
- Keep the following two definitions in mind, and understand that **a communication will not be lobbying unless it exhibits all of the prongs of the applicable definition:**

Direct lobbying is:

- A communication directly to a legislator (or to legislative staffer or to executive branch officials or staff involved in formulating this legislation);
- That reflects a view (a term the IRS interprets very broadly; describing a bill's predicted health impact usually "reflects a view");
- On specific legislation or on a specific legislative proposal that has not yet been introduced.

Grassroots lobbying is:

- A communication to the public (e.g., speeches, tweets, advertisements, op-eds);
- That reflects a view;
- On specific legislation or on a specific legislative proposal that has not yet been introduced and;
- Includes a call to action (e.g., asking audience to contact a legislator; identifying a legislator as being the audience's representative; providing contact information for legislator; identifying a legislator's position on the legislation as being undecided or opposing the communication's viewpoint, etc.).

Remember, as long as you leave off at least one prong of the definition, an activity is not lobbying. So, a communication with a legislator that reflects a view on a regulation is not lobbying, because you are not discussing specific legislation. Similarly, a communication with the public that reflects a view on specific legislation is not lobbying, as long as you do not include a "call to action," as that term is defined by the IRS. Keep in mind that because the term "reflect a view" is interpreted broadly by the IRS, nearly all HIAs will "reflect a view" on their subject matter, even if you are presenting

a balanced assessment (i.e. include diverse perspectives and present the information in such a way that a reader can come to his or her own conclusions), so always assume your HIA satisfies that prong.

Frequently Asked Questions

Big-Picture Issues

Q: May we make recommendations about legislation in our HIA?

Allen Mattison: Yes, a grantee may use grant funds to advocate for the passage or defeat of legislation—including in the text of the HIA—and it may recommend amendments or other changes to legislation, as long as the grantee does not do so a.) in a direct communication with a legislator; or b.) in a communication to the public that includes what the IRS defines as a “call to action” (see definition of grassroots lobbying on page 2). If the HIA is broadly disseminated to the public, then copies may later be provided to legislators under the subsequent use rule, even if the HIA advocates for or against legislation. A grantee may testify for or against a bill before a committee considering legislation, if properly requested by the committee chair. Note that the *Minimum Elements and Practice Standards for HIA* require a balanced presentation of the data in your report including “evidence both supporting and refuting particular health impacts.” In other words, having the legal authority to advocate for the passage or defeat of legislation does not supersede the obligation to comply with HIA practice standards in your assessment and recommendations.

Q: May we testify or lobby legislators as “volunteers?”

Allen Mattison: Generally, no. If you are lobbying or testifying in your role as a policy expert due to your grant-funded work on the HIA, it will be difficult to credibly argue that you are lobbying in your role as a volunteer. At a minimum, doing so would require taking vacation time or unpaid time off, but even then, use of grant-funded research and materials may be restricted. If you are lobbying on the same topic as the HIA, charge the staff time associated with that activity to lobbying; if your salary is entirely grant-funded and you want to lobby, consult with your attorney.

IRS Rules vs. Other Rules

Q: Are the lobbying rules different for government employees?

Allen Mattison: The grant restrictions’ rules covered in this document involve only the IRS lobbying definitions. Governments often impose different sets of restrictions on their employees’ advocacy activities. Consult an agency attorney to determine which laws may apply in addition to the IRS restrictions on use of the Health Impact Project grant funds.

Q: As a county agency, we are governed by our local policymakers. Therefore, since they are our organizational leadership, do these rules apply if we are just providing information to our employer?

Allen Mattison: Under the IRS rules, a communication with an executive branch staffer or official who is involved in the formulation of legislation is lobbying if the principal purpose of the communication is to influence that legislation. If the Health Impact Project is providing your funding, it doesn’t matter that you work as part of the agency: it still counts as lobbying. Your local jurisdiction may have rules that apply separately, creating an exception from the local definition of lobbying. For example, a jurisdiction may allow an agency employee to communicate with the executive branch official writing the jurisdiction’s budget proposal, to explain the positive

Q & A with Allen Mattison, continued

health impacts of increasing funding for a particular program. But such a communication would be lobbying under the IRS rules and could not be paid for using Health Impact Project grant funds.

Q: If an activity is lobbying under state law, is it automatically lobbying under the IRS rules?

Allen Mattison: No. State lobbying laws do not necessarily align with the IRS lobbying definitions. State law definitions of “lobbying” are irrelevant to the restrictions imposed on Health Impact Project grants. For example, in many states, it’s lobbying to contact an agency official regarding proposed regulations; that is not lobbying under the IRS rules (because the IRS rules address only legislation, not regulations). On the other hand, the IRS restricts grassroots lobbying on legislation, while many state laws do not treat grassroots lobbying as regulated activity.

Q: May we use the grant for activities that are reportable as lobbying under state law?

Allen Mattison: Yes. State law definitions are irrelevant to Health Impact Project grant restrictions. If an activity is not lobbying under the IRS rules, it may be funded with the Health Impact Project grant, even if state law deems it to be reportable as lobbying.

The Rules

Q: The lobbying definitions above say a communication may be lobbying when it refers to *specific legislation* or to “a specific legislative proposal that has not yet been introduced.” When is a reference to policy a “specific legislative proposal”?

Allen Mattison: A communication is lobbying only if it refers to a “specific legislative proposal” and reflects a view on the legislative proposal. (The definitions’ other prongs must be present, too, but a communication that lacks a reference to specific legislation or a specific legislative proposal will never be lobbying). The term “specific legislative proposal” encompasses not only legislation that has been introduced, but also policy proposals that are so specific that the IRS believes them to be equivalent to suggesting legislation. “Specific legislative proposal” is defined very broadly. Generally, the IRS means communications that are specific enough that a legislator will know what to introduce, such as saying that another state passed a particular law, and that the legislator’s state should do the same. If legislation is pending in a state, and a communication mentions a policy issue with such specificity that it is clearly a reference to the pending bill, the IRS may view it as a specific legislative proposal.

Q: How biased does a communication have to be to “reflect a view” on legislation?

Allen Mattison: Under the lobbying definitions, the term “reflect a view” is very broad. A communication that supports or opposes a bill would “reflect a view” on the legislation—but so would a communication to a legislator telling them how a small, technical change would impact the legislation. A purely neutral explanation of the bill (e.g., “this bill lowers speed limits on state highways to 55 miles per hour”) would not “reflect a view” on legislation. But calculating the anticipated impact of a bill likely would reflect a view on the legislation. Because the term “reflect a view” is interpreted so broadly by the IRS, nearly all HIAs “reflect a view” on their subject matter, so always assume your HIA satisfies that prong.

Q: Is it lobbying if we just refer to a proposal as a “policy?”

Allen Mattison: The IRS definition of “specific legislative proposal” looks to the practical effect of your communication—not whether you call it a policy suggestion instead of naming the legislation. If the context makes clear that an HIA refers to a particular legislative proposal, then the lobbying rules will apply. But keep in mind that an HIA is still educational—and not lobbying—even if it refers to specific legislation, as long as it is a communication to the public without an IRS call to action, and not a direct communication to legislators.

Q: When can we refer directly to a bill?

Allen Mattison: A grant-funded HIA may make direct references to a bill—and the HIA may reflect a view on the bill—without triggering the IRS lobbying definition, as long as the HIA is released broadly to the public (see the subsequent use rule, explained in the attached two-pager). A communication directly to a legislator that refers to a bill, and reflects a view on the legislation, is lobbying.

Q: It's not lobbying if a legislator calls me about the bill, right?

Allen Mattison: A communication with a legislator that reflects a view on legislation is direct lobbying. Providing even technical expertise on a bill to a legislator generally is lobbying. Only if the request is part of an invitation from a committee chair to provide information to the entire committee could qualify as non-lobbying under the exception for technical advice and assistance (see below). But when an individual legislator, such as a bill sponsor, asks a policy expert to review a bill, the expert must pay for their time using non-restricted funds (i.e., not the Health Impact Project grant).

Q: What if the legislator asks for examples of other states that have done this well?

Allen Mattison: Providing a legislator with examples of other states that have adopted well-written legislation is lobbying, because it reflects a view on a “specific legislative proposal” to tell the legislator which state law to adopt. It might not be lobbying to provide a list of every state that has passed legislation on the topic, without adding commentary about the relative merit of various states’ laws, if there is significant variation among the different laws. Consult legal counsel before providing a legislator with examples from other states, unless you use lobbying funds to do so.

Q: May I use non-lobbying dollars to distribute the HIA to the public and ask for them to call their legislators to support the issue?

Allen Mattison: If the HIA refers to legislation, Health Impact Project grantees are prohibited from using non-lobbying funds to ask people to contact their legislators. However, if the HIA involves a non-legislative topic (e.g., regulatory proposal or business decision), the grantee may use non-lobbying funds to ask people to contact their legislator to weigh in on the issue. Grassroots lobbying is a communication that reflects a view on specific legislation and includes a call to action. Therefore, a public communication funded with a Health Impact Project grant either may reflect a view on legislation or it may include a call to action—but not both.

Exceptions to Lobbying Definition

Q: If we're just providing reputable expert analysis to legislators, why is it lobbying?

Allen Mattison: The IRS regulations provide an exception to the lobbying definition for “nonpartisan analysis, study and research.” Under this exception, a research report may advocate a particular viewpoint “so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion.” Only in rare cases will an HIA provide such a robust counterpoint to its own conclusions that readers could reach the opposite conclusion. By definition, even though HIAs broadly interpret health (to include for example economic and social determinants) there are some facts and data that would not be within the scope of an HIA. For example, an HIA studying the impact of new regulations might look at the public health benefits but would not look at potential negative impacts of those regulations on consumers’ rights (unless those rights were directly or indirectly related to health). Consult with an attorney familiar with the “nonpartisan analysis, study and research” exception if you believe it applies to your HIA.

Q & A with Allen Mattison, continued

Q: If we send out a press release and post to social media announcing the HIA, may we then send copies to legislators?

Allen Mattison: In order to take advantage of the subsequent use exception, a grantee must have a “substantial non-lobbying distribution” of the materials. The more broadly an organization can demonstrate that it disseminated the materials, the stronger its claim to this exception. Simply sending out a press release and posting to social media is unlikely to satisfy the IRS requirements. But if the HIA is distributed broadly to reporters, editorial writers, radio producers, nonprofits, academics, and community groups, then the organization may provide copies to legislators—even if the HIA reflects a view on specific legislation—without turning the HIA into a lobbying expense.

Q: May we have a legislator speak at the press conference releasing our HIA?

Allen Mattison: If the HIA reflects a view on legislation, then it is direct lobbying to communicate with a legislator about the HIA. The fact that you are distributing the HIA to reporters with the legislator does not mean the activity qualifies for the subsequent use rule. If the HIA refers to a regulatory action or to a business decision—and not to legislation—then the grantee may include legislators in the press conference regardless of the subsequent use rule, because the lack of a reference to legislation means it automatically is not lobbying.

Q: May we provide testimony at a hearing on legislation that relates to our HIA?

Allen Mattison: A grantee may use non-lobbying funds to testify about legislation at a hearing only if the grantee is invited by the committee chair (or otherwise receives an invitation on behalf of the entire governmental body before which the expert is testifying), and the invitation asks for the expert’s opinions and recommendations. The rules governing these invitations are very specific, so seek legal counsel when using this exception.

Strategies to Maximize Effectiveness

Q: May we provide our HIA to other organizations so that they may advocate for the legislation? What if they ask us to create a fact sheet for their lobby day?

Allen Mattison: The key issue is whether the materials are created for lobbying, or whether they are created as broadly available materials. This is true even if the materials endorse or oppose legislation, as long as they do not include an IRS “call to action.” If an HIA and its accompanying fact sheets and other materials are broadly distributed, and another organization independently uses those in its lobbying effort, the IRS will not treat your costs as being lobbying expenses. However, if an organization asks a Health Impact Project grantee to produce materials specifically for the organization’s lobby day, it would be a lobbying expense to create those materials, so the grantee would need to spend non-Health Impact Project lobbying funds. For this reason, grantees may find it provides greater benefits to the advocacy community when they plan strategically and create a suite of materials to support their HIA. If an organization asks a grantee for materials to use on a lobby day, the grantee may point the organization to the HIA website, with its suite of materials, and tell the organization that it may use any materials they choose. Because these materials are “public communications,” they may make recommendations regarding legislation, as long as they do not contain an IRS “call to action” (the call-to-action would turn a public communication into a grassroots lobbying expense).

Q: May we ask a newspaper to editorialize in support of legislation with non-lobbying funds?

Allen Mattison: Yes. Speaking to a newspaper editorial board counts as a public communication, so it is lobbying only if the grantee reflects a view on specific legislation **and** includes an IRS call to action. Asking the editors to write an editorial urging the legislature to pass legislation does not involve an IRS call to action. It would be

lobbying only if the grantee asked the editors to contact the legislators, identified the legislators who are neutral or opposed to the organization's position on the bill, or included some other form of a call to action.

Q: May we have legislators on our advisory committee?

Allen Mattison: If the HIA is examining legislation, it is difficult to include legislators (or their staff) on the advisory committee without its associated costs being lobbying expenses. Any communication with legislators or staffers that reflects a view on legislation is a direct lobbying expense. On the other hand, if the HIA focuses on a regulatory or business issue, legislators or staffers could be involved extensively without triggering the lobbying rules.