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March 18, 1993

To: Rick Allen
From: Susan Stroud
Subject: Issues regarding New World Foundation grant approval

The New World Foundation has raised the concern that a grant to the Office of National Service might be interpreted as a lobbying expenditure. Since the nature of my assignment is not a lobbying assignment, we have explored the options for resolving this concern. There appear to be two choices:

- (1) It seems that the grant would not be considered a lobbying expense if it is for technical assistance given as a result of knowledge or skill in a specific area. The Swearer Center at Brown, as well as my activities in the Office of National Service seem to me to meet this requirement.

In order for New World to treat this as technical assistance, the Office of National Service must submit a written request describing the nature of funded activities. A letter from ONS to Brown would meet this requirement.

- (2) New World has also suggested that the grant application could be resubmitted as a grant of general support to Brown which Brown could then use as it chooses. While this would shift the burden of review from New World to Brown, I suspect that the same standard would still apply, and it would still be necessary to satisfy the technical assistance requirement.

Please advise me how you would like me to proceed.

Just

Before you discuss this
with Cheryl Mills,
please discuss with me.

EQ

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*ALSO ADMITTED IN D.C.

March 8, 1993

Mr. Colin Greer
President
The New World Foundation
100 East 85th Street
New York, New York 10028

Re: Grant Proposal from Brown University
Regarding Office of National Service

Dear Colin:

You asked whether The New World Foundation ("New World") can provide funds for a project, described below (the "Project"), without being deemed to have made a lobbying grant and thereby running afoul of the taxable expenditure provisions of Code Section 4945.* The nature of the grant proposal (as more fully described below) makes it impossible for me to provide you with a legal opinion; rather this letter sets out a context for evaluating New World's possible funding of the Project and the questions to be asked of the Project.

The Project

New World has received a proposal from Brown University ("Brown"). Although the proposal is brief and not very detailed, it appears that the basic purpose of the grant is to support research and policy development to be undertaken by Brown staff members in conjunction with the Office of National Service ("ONS") on a national service plan whereby students who receive

* All Code references are to the Internal Revenue Code of 1986, as amended.

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loans to pay college tuition could repay all or part of such loans through community service. ONS is a newly-created office within the White House that has been charged by President Clinton with formulating a national service plan and presenting that plan to Congress this Spring for enactment. Susan Stroud, the Director of the Howard R. Swearer Center for Public Service at Brown (the "Swearer Center"), has been granted a leave of absence by Brown to work with ONS for the four-month period, February through May 1993. It is not clear from the proposal and accompanying letter whether Professor Stroud and her research assistants are employed by Brown or ONS during these four months.

The proposed activities to be funded by the grant are "outreach efforts" that will involve consulting with various public agencies and private organizations (such as the Commission on National and Community Service, ACTION, Peace Corps, all Federal Departments, community service programs, and the higher education community) in the development of a national service plan. The budget included in the grant proposal does not reflect the budget for the entire Project, but only that portion of the budget which New World has been asked to finance which includes funds for a research intern, a housing/living expense subsidy for Susan Stroud (her salary and benefits are to be paid for by a grant from another foundation), and travel, meeting, telephone, postage and copying expenses.

Although it is clear that the planned result of ONS's work is some action by Congress, the Project's activities as presented in the proposal can be interpreted under the relevant Treasury Regulations in different ways, i.e., as not to involve lobbying at all, to involve some lobbying, or to consist entirely of lobbying activities. Because: (1) ONS and the Project are operating on a very short time frame; (2) legislation is a stated outcome of ONS's work; and (3) the Project's activities, even if ostensibly not lobbying, could be deemed to be lobbying, it is important for New World to seek clarification of the limited information contained in the proposal and obtain any additional information necessary to determine how the Code and Treasury Regulations apply to the Project.

The Lobbying Regulations - Basic Concepts

The Treasury Regulations under Code Sections 4911 and 4945 govern the lobbying activities of public charities and the funding of such activities by private foundations (the "Regulations"). These Regulations were finalized in 1990, after years of debate, controversy, drafting and re-drafting. The Regulations are quite complex and are largely untested; there is

no case law, and fewer than a handful of interpretive rulings have been issued by the Internal Revenue Service.

Pursuant to the Code and the Regulations, any amount paid by a private foundation to attempt to influence "legislation", either through a direct activity of the foundation or through a grant to another entity, is a taxable expenditure which results in the imposition of excise taxes on the private foundation and on the foundation managers.

A "direct lobbying communication" is defined as any attempt to influence legislation through communication with a member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation but only if the principal purpose of the communication is to influence legislation. A communication is direct lobbying only if it: (1) refers to "specific legislation", and (2) reflects a view on such legislation. Treas. Reg. Section 56.4911-2(b)(1). The term "legislative body" does not include executive, judicial or administrative bodies. Treas. Reg. Section 56.4911-2(d)(3).

A "grass roots lobbying communication" is defined as any attempt to influence legislation through an effort to affect the opinion of the general public or any segment of the general public. A grass roots lobbying communication must (1) refer to specific legislation, (2) reflect a view on the legislation, and (3) encourage its recipient to take action with respect to such legislation (i.e., include a "call to action"). Treas. Reg. Section 56.4911-2(b)(2).

"Legislation" includes, inter alia, the introduction, enactment, or defeat of bills by Congress (or other legislative bodies). "Specific legislation" includes both legislation that has already been introduced in a legislative body and a "specific legislative proposal that the organization either supports or opposes." Treas. Reg. Section 56.4911-2(d)(1).

It is important to note that where a communication is directed only to the public (i.e., not directed to legislators, government officials, or their employees), refers to specific legislation, and reflects a view on the legislation, but does not contain a call to action, that communication is not a lobbying communication. Such a communication does not qualify as either a direct or a grass roots lobbying communication.

Private foundations, however, are not totally precluded from providing funds to a public charity that engages in permitted levels of lobbying activities, direct or grass roots. Under the Regulations, a general support grant to a public

charity that engages in lobbying activities does not constitute a taxable expenditure so long as the grant is not "earmarked", i.e., "given pursuant to an agreement, oral or written, that the grant will be used for specific purposes." Treas. Reg. Section 53.4945-2(a)(6)(i).

Thus, ordinarily, if New World made a general support grant to Brown and Brown also allocated funds to the Project, no taxable expenditure would result. However, in light of the existence of the current proposal, such a grant at this point would most likely be deemed to be earmarked for the Project.

Likewise, a grant for a specific project of a public charity is not a taxable expenditure if the grant is not earmarked for the lobbying portion of the specific project and the amount of the grant (combined with all other grants made during the year to the project by the particular foundation) is less than the amount budgeted for nonlobbying purposes. A foundation can rely upon the budget provided by the charity "unless the private foundation doubts, or in light of all the facts and circumstances, reasonably should doubt the accuracy or reliability of the documents." Treas. Reg. Section 53.4945-2(a)(6)(iii).

Therefore, if the Project were part of a larger program of either the Swearer Center or Brown, and assuming for the moment that the Project is involved in lobbying, New World could make a grant to Brown for that program in an amount that is not greater than the program's budgeted nonlobbying activities without making a lobbying grant.**

Applications of the Regulations to the Project Proposal

Direct Lobbying

It is unclear whether the Project may involve direct lobbying. The Proposal does not reference communication with members or employees of Congress. However, with respect to communications with government officials or employees who are participating in the formulation of national service legislation, the form and nature of such communications are not spelled out in the proposal. Again, the employment status of Professor Stroud and her assistants also may be relevant to the direct lobbying determination.

** Such a grant should be conditioned upon Brown's agreement not to use any of the grant funds for lobbying purposes.

and her assistants also may be relevant to the direct lobbying determination.

Specific Legislation/Specific Legislative Proposals

Even if it is determined that the communications involved in the Project are directed to the types of persons that would make the communication direct lobbying, the communication also must refer to "specific legislation" in order to cause it to be a direct lobbying communication. A reference to specific legislation can be made without using the actual name of a bill or without actually stating that the communication involves legislation or a specific legislative proposal. A communication may be deemed to refer to specific legislation by using a word or phrase that is widely identified with specific legislation. Thus, references to a national service plan may be sufficient to identify a specific legislative proposal of President Clinton's Administration.

As noted earlier, the definition of "specific legislation" also includes "specific legislative proposals", not just legislation that has already been introduced. However, there is no bright-line test as to when a legislative proposal is sufficiently formulated so as to qualify as specific legislation. At this point, the national service plan is inchoate, but may be sufficiently conceptualized now or within a few weeks to be characterized as a "specific legislative proposal." Although the purpose of any communications made by the Project may be simply to research and develop a legislative proposal concerning a national service plan and no specific legislative proposal may exist at this time, that conclusion is difficult to draw safely from the proposal.

The Regulations offer examples which illustrate the concept of identifying specific legislation and specific legislative proposals. In one example, a pamphlet distributed to the public and asking citizens to send a coupon to their legislators printed with the statement, "I support a drug-free America", is not a (grass roots) lobbying communication because: (1) the term "drug-free America" is not widely identified with any specific pending legislation on the issue; (2) the pamphlet itself doesn't refer to any pending legislation; and (3) the organization neither supports nor opposes a specific legislative proposal. Treas. Reg. Section 56.4911-2(b)(4)(ii)(A), Example 4.

Grass Roots Lobbying

Although the Project will be communicating with segments of the general public (e.g., community service programs and the higher education community) whose opinions concerning a national service plan may be important to the passage of any legislation concerning such a plan, the communications will not be grass roots lobbying unless they fulfill the three objective criteria of (1) referring to specific legislation, (2) reflecting a view on that legislation, and (3) containing a call to action. Thus, even if the purpose of the communications is not to influence legislation but is merely to conduct research and to obtain information concerning the viability of, and the best ways to proceed with, a national service plan, the communications will be grass roots lobbying communications if the three criteria are met.

The call to action requirement is set out in great detail in the Regulations. A communication encourages a recipient to take action if it:

- (1) states that the recipient should contact a legislator or employee of a legislative body or should contact any other government official or employee who may participate in the formulation of legislation;
- (2) states the address, telephone number or similar information about a legislator or employee of a legislative body;
- (3) provides a petition, tear-off postcard or similar material so that recipients may communicate their views to a legislator or employee of a legislative body or to any other government official or employee who may participate in the formulation of legislation; or
- (4) specifically identifies one or more legislators who will vote on the legislation and who are opposed to the communication's view of the legislation, are undecided with respect to the legislation, are the recipients' representatives, or are members of the legislative committee that will consider the legislation.

Thus, so long as the Project's communications with the general public do not contain any of the four specific types of calls to action listed above, then no grass roots lobbying is involved. In fact, as noted earlier, the absence of the "call to action" can liberate the communication from being a lobbying communication at all so long as its distribution does not make it a direct lobbying communication. Additional information regarding the Project's specific proposed activities is needed to

so long as the discussion does not address the merits of a specific legislative proposal or directly encourage lobbying actions.

Technical Advice or Assistance

Another exception to direct lobbying is the provision of technical advice or assistance to a governmental body, governmental committee or a subdivision of either in response to a written request by such body, committee or subdivision. Such a request must be made in the name of the requesting governmental body, committee or subdivision (rather than an individual member), and the response to the request must be available to all members of such body, committee or subdivision. If opinions or recommendations are specifically requested by the governmental body, committee or subdivision, or are directly related to the materials requested, then the communication may contain opinions and recommendations and remain within this exception.

Technical assistance may be given as a result of knowledge or skill in a specific area, and the Swearer Center is a likely source for the type of assistance needed by ONS to develop a national service plan. Therefore, New World could be assured that it is not funding direct lobbying expenses if Brown's participation was initiated by a letter from ONS requesting the assistance that will constitute the proposed activities of the Project.

Subsequent Lobbying Use of Nonlobbying Communications or Research Materials

Where communications or research materials are not initially grass roots lobbying communications but then are subsequently used for grass roots lobbying activities, the communications or research materials may be treated as grass roots (but not direct) lobbying communications. In order for this to occur, the materials must qualify as "advocacy communications or research materials" (i.e., materials that refer to and reflect a view on legislation, but initially do not incorporate a direct call to action). If a direct call to action is subsequently added, and the organization is unable to avail itself of the "primary purpose" safe harbor (i.e., the organization has not made a substantial nonlobbying distribution of the materials), the materials will be treated as a grass roots lobbying communication.

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If the materials are subsequently deemed to be a grass roots lobbying communication, the expenditures recharacterized as such are limited to those paid less than six months before the use of the materials with a direct call to action. Where a public charity uses a foundation grant for a nonlobbying communication that is subsequently used in lobbying and results in a recharacterization of the public charity's expenditures, the private foundation's grant ordinarily will not be recharacterized as a lobbying expenditure unless: (1) the private foundation's primary purpose was to make a lobbying grant, or (2) at the time of making the grant, the foundation knew or reasonably should have known that the public charity's primary purpose for the grant was lobbying.

Because legislative activity concerning a national service plan is likely to occur soon, the research conducted by the Project very possibly could be used in a grass roots lobbying communication within six months of New World's grant to Brown and, if it can be demonstrated that New World knew or reasonably should have known that the Project's primary purpose was lobbying, the grant amount could be recharacterized as a lobbying grant.

Conclusion

In summary, the Proposal is too general to draw any clear conclusions regarding its qualification as a lobbying project. Depending upon the additional information provided by Brown, there are several possible outcomes. For example, it may turn out that:

(1) The Project does not involve any lobbying because, for example, it does not meet the definitions of either direct or grass roots lobbying, or it falls within one of the exceptions to lobbying (e.g., as technical advice or assistance, or for nonpartisan analysis study or research); or

(2) The Project involves some lobbying, which can be discreetly identified and budgeted, so that New World can provide funding for the nonlobbying portions of the Project; or

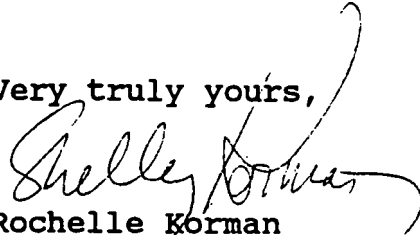
(3) The Project truly falls within the lobbying definitions and New World therefore cannot contribute to this effort, although Brown, as a public charity which presumably elected to operate under the Code Section 501(h) rules, certainly can undertake the Project from its general funds.

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I hope this preliminary analysis is helpful. Please call me with any additional questions.

Kind regards.

Very truly yours,


Rochelle Korman

RK/jb

RK\424\Greer.Ltr

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MEMORANDUM

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*ALSO ADMITTED IN D.C.

TO: Colin Greer, President
The New World Foundation

FROM: Rochelle Korman 

RE: Private Foundation Funding for Projects to Assist the
White House in Formulating New Policies and Programs

DATE: March 8, 1993

You have explained to me that the advent of a new Administration in Washington has resulted in numerous discussions between you and grantees of The New World Foundation ("New World") and between you and White House officials as to the possibilities of New World and other private foundations funding the policy and program work of nonprofit organizations (the "projects") which may be undertaken at the request of the Administration. Because of budget cuts at the White House, these requests for project help require either that the tax-exempt organization engaging in the work provide paid staff to the White House or raise funds to underwrite the requested projects.

I am assuming that none of these proposed projects involve electoral activities (which are prohibited), grants to individuals (which require advance approval by the Internal Revenue Service of the grant making procedure) or any activities which are not charitable, educational, scientific, literary, etc., under Code Section 501(c)(3).^{*} The key legal consideration then is the circumstances under which these types of

^{*} All Code references are to the Internal Revenue Code of 1986, as amended.

projects undertaken at the request of the White House, but not funded by the government, may be deemed to be lobbying activities, which activities cannot be funded by private foundations. Code Section 4945.

The Lobbying Regulations - Basic Concepts

The Treasury Regulations under Code Sections 4911 and 4945 govern the lobbying activities of public charities and the funding of such activities by private foundations (the "Regulations").

These Regulations were finalized in 1990, after years of debate, controversy, drafting and re-drafting. The Regulations are quite complex and are largely untested; there is no case law, and fewer than a handful of interpretive rulings from the Internal Revenue Service.

Pursuant to the Code and the Regulations, any amount paid by a private foundation to attempt to influence "legislation", either through a direct activity of the foundation or through a grant to another entity, is a taxable expenditure which results in the imposition of excise taxes on the private foundation and on the foundation's managers.

A "direct lobbying communication" is defined as any attempt to influence legislation through communication with a member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation but only if the principal purpose of the communication is to influence legislation. A communication is direct lobbying only if it (1) refers to "specific legislation", and (2) reflects a view on such legislation. Treas. Reg. Section 56.4911-2(b)(1). The term "legislative body" does not include executive, judicial or administrative bodies. Treas. Reg. Section 56.4911-2(d)(3).

A "grass roots lobbying communication" is defined as any attempt to influence legislation through an effort to affect the opinion of the general public or any segment of the general public. A grass roots lobbying communication must (1) refer to specific legislation, (2) reflect a view on the legislation, and (3) encourage its recipient to take action with respect to such legislation (i.e., include a "call to action"). Treas. Reg. Section 56.4911-2(b)(2).

"Legislation" includes, inter alia, the introduction, enactment, or defeat of bills by Congress (or other legislative bodies). "Specific legislation" includes both legislation that has already been introduced in a legislative body and a "specific

legislative proposal that the organization either supports or opposes." Treas. Reg. Section 56.4911-2(d)(1).

It is important to note that where a communication is directed only to the public, refers to specific legislation, and reflects a view on the legislation, but does not contain a call to action, that communication is not a lobbying communication; it neither qualifies as a direct nor a grass roots lobbying communication.

Even if a public charity engages in permitted levels of lobbying activities, direct or grass roots, private foundations are not totally precluded from providing funds to that charity. Under the Regulations, a general support grant to a public charity that engages in lobbying activities does not constitute a taxable expenditure so long as the grant is not "earmarked", i.e., "given pursuant to an agreement, oral or written, that the grant will be used for specific purposes." Treas. Reg. Section 53.4945-2(a)(6)(i). Thus, ordinarily, if a foundation makes a general support grant to a charity and that charity also allocates funds to a particular project, no taxable expenditure would result.

Likewise, a grant for a specific project of a public charity is not a taxable expenditure if the grant is not earmarked for the lobbying portion of the specific project and the amount of the grant (combined with all other grants made during the year to the project by the particular foundation) is less than the amount budgeted for nonlobbying purposes. Treas. Reg. Section 53.4945-2(a)(6)(ii). A foundation can rely upon the budget provided by the charity "unless the private foundation doubts, or in light of all the facts and circumstances, reasonably should doubt the accuracy or reliability of the documents." Treas. Reg. Section 53.4945-2(a)(6)(iii).

Therefore, if any of these projects are part of a larger program of the grantee charity, and assuming for the moment that a project is involved in lobbying, a foundation could make a grant to the charity for that program in an amount that is not greater than the program's budgeted nonlobbying activities without making a lobbying grant.**

** Such a grant also should be conditioned upon the charity's agreement not to use any of the grant funds for lobbying purposes.

Direct Lobbying

These projects may or may not involve direct lobbying. It is important for a proposal to state clearly, as best it can, the nature of any expected interaction with Congress as well as with other government officials. The employment status of staff working on these projects also may be relevant to the direct lobbying determination.

Specific Legislation/Specific Legislative Proposals

Even if it is determined that the communications involved in one of these projects are directed to the types of persons that would make the communication direct lobbying, the communication also must refer to "specific legislation" in order to cause it to be a direct lobbying communication. A reference to specific legislation may be made without using the actual name of a bill or without actually stating that the communication involves legislation or a specific legislative proposal. A communication may be deemed to refer to specific legislation by using a word or phrase that is widely identified with specific legislation. Thus, for example, references to a "national service plan" may be sufficient to identify a specific legislative proposal of President Clinton's Administration.

As noted earlier, the definition of "specific legislation" also includes "specific legislative proposals", not just legislation that has already been introduced. However, there is no bright-line test as to when a legislative proposal is sufficiently formulated so as to qualify as specific legislation. At this point, many of the Administration's proposals are inchoate, but may be sufficiently conceptualized now or within a few weeks to be characterized as a "specific legislative proposal." Although the purpose of any communications made by these projects may be simply to research and develop a legislative proposal and no specific legislative proposal exists at the present, that conclusion is difficult for a foundation to draw safely if a proposal is not sufficiently detailed.

The Regulations offer examples which illustrate the concept of identifying specific legislation and specific legislative proposals. In one example, a pamphlet distributed to the public which asked citizens to send a coupon to their legislators printed with the statement, "I support a drug-free America", is not a (grass roots) lobbying communication because: (1) the term "drug-free America" is not widely identified with any specific pending legislation on the issue; (2) the pamphlet itself doesn't refer to any pending legislation; and (3) the organization

neither supports nor opposes a specific legislative proposal.
Treas. Reg. Section 56.4911-2(b)(4)(ii)(A), Example 4.

Grass Roots Lobbying

Although many of these projects probably will be communicating with segments of the general public whose opinions concerning the policy at issue may be important to the passage of any legislation concerning such a policy, the communications will not be grass roots lobbying unless they fulfill the three objective criteria of (1) referring to specific legislation, (2) reflecting a view on that legislation, and (3) containing a call to action. Thus, even if the purpose of the communications is to conduct research and to obtain information concerning the viability of, and the best ways to proceed with, a particular national policy, the communications will be grass roots lobbying communications if the three criteria are met.

The call to action requirement is set out in great detail in the Regulations. A communication encourages a recipient to take action if it:

- (1) states that the recipient should contact a legislator or employee of a legislative body or should contact any other government official or employee who may participate in the formulation of legislation;
- (2) states the address, telephone number or similar information about a legislator or employee of a legislative body;
- (3) provides a petition, tear-off postcard or similar material so that recipients may communicate their views to a legislator or employee of a legislative body or to any other government official or employee who may participate in the formulation of legislation; or
- (4) specifically identifies one or more legislators who will vote on the legislation and who are opposed to the communication's view of the legislation, are undecided with respect to the legislation, are the recipients' representatives, or are members of the legislative committee that will consider the legislation.

Thus, so long as communications with the general public do not contain any of the four specific types of calls to action listed above, then no grass roots lobbying is involved. In fact, as noted earlier, where a communication refers to specific legislation and reflects a view on the legislation, but is not directed towards legislators or certain government officials, and

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does not contain a call to action, that communication is not a lobbying communication at all.

Exceptions to Lobbying

The Regulations set forth three exceptions to lobbying which are most relevant to these type of projects.

Nonpartisan Analysis, Study or Research

An exception to both direct and grass roots lobbying is "nonpartisan analysis, study or research", which is defined as an "independent and objective exposition" of a particular subject, including an activity that is "educational". Advocacy of a particular position is permitted so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the recipient of the communication to form an independent opinion or conclusion. In other words, while material must be "independent and objective", it does not have to be balanced in order to constitute nonpartisan analysis, study or research. Treas. Reg. Section 53.4945-2(d)(1).

A communication will not be considered nonpartisan analysis, study or research if it directly encourages the recipient to take action with respect to legislation. A communication directly encourages a recipient to take action if it contains one or more of the calls to action described in categories (1) through (3) of the grass roots lobbying definition, above.

Thus, projects can conduct research regarding the development of particular policies and not engage in lobbying so long as the presentation of the results of such research to the public, legislators and government officials presents a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent conclusion and does not contain a direct call to action. The material may express a point of view and still qualify as nonpartisan analysis, study or research. However, see below regarding subsequent lobbying use of nonlobbying materials.

Examination and Discussion of Broad Social, Economic and Similar Problems

Communications with members of legislative bodies or with government employees and public communications about issues, the general subject of which is also the subject of a legislative

proposal, are not direct or grass roots lobbying communications so long as the discussion does not address the merits of a specific legislative proposal or directly encourage lobbying actions. Treas. Reg. Section 53.4945-2(d)(4).

Technical Advice or Assistance

Another exception to direct lobbying is the provision of technical advice or assistance to a governmental body, governmental committee or a subdivision of either in response to a written request by such body, committee or subdivision. Treas. Reg. Section 53.4945-2(d)(2). Such a request must be made in the name of the requesting governmental body, committee or subdivision (rather than an individual member) and the response to the request must be available to all members of such body, committee or subdivision. If opinions or recommendations are specifically requested by the governmental body, committee or subdivision, or are directly related to the materials requested, then the communication may contain opinions and recommendations and remain within this exception.

Technical assistance may be given as a result of knowledge or skill in a specific area. The Regulations offer as an example of providing technical advice and assistance a situation where a State Department official makes an official written request to a foundation for information regarding a particular country's economic development and also seeks the foundation's advice regarding the proper position of the United States in pending negotiations with that country concerning a pending proposed treaty.

Subsequent Lobbying Use of Nonlobbying Communications or Research Materials

Where communications or research materials are not initially grass roots lobbying communications but then are subsequently used for grass roots lobbying activities, the communications or research materials may be treated as grass roots (but not direct) lobbying communications. See Treas. Reg. Section 53.4945-2(d)(1)(v) and Treas. Reg. Section 56.4911-2(b)(2)(v). In order for this to occur, the materials must qualify as "advocacy communications or research materials" (i.e., materials that refer to and reflect a view on legislation, but initially do not incorporate a direct call to action). If a direct call to action is subsequently added, and the organization is unable to avail itself of the "primary purpose" safe harbor (i.e., the organization has not made a substantial nonlobbying distribution

of the materials), the materials will be treated as a grass roots lobbying communication.

If the materials are subsequently deemed to be a grass roots lobbying communication, the expenditures recharacterized as such are limited to those paid less than six months before the use of the materials with a direct call to action. Where a public charity uses a foundation grant for a nonlobbying communication that is subsequently used in lobbying and results in a recharacterization of the public charity's expenditures, the private foundation's grant ordinarily will not be recharacterized as a lobbying expenditure unless: (1) the private foundation's primary purpose was to make a lobbying grant, or (2) at the time of making the grant, the foundation knew or reasonably should have known that the public charity's primary purpose for the grant was lobbying.

Because legislative activity concerning many of the Administration's plans is likely to occur soon, the research conducted by these projects very possibly could be used in a grass roots lobbying communication within six months of foundation funding. Therefore, if it can be demonstrated that the foundation knew or reasonably should have known that a project's primary purpose was lobbying, the grant amount could be recharacterized as a lobbying grant.

Conclusion

In summary, these projects may or may not involve lobbying, as defined in the Code and Regulations, and thus, various outcomes are possible. For example, it may turn out that:

(1) A project does not involve any lobbying because, for example, it does not meet the definitions of either direct or grass roots lobbying, or it falls within one of the exceptions to lobbying (e.g., as technical advice or assistance, or nonpartisan analysis, study or research); or

(2) A project involves some lobbying, which can be discreetly identified and budgeted, so that New World can provide funding for the nonlobbying portions of the project; or

(3) A project truly falls within the lobbying definitions and New World therefore cannot contribute to this effort, although the organizations, as public charities which presumably have elected to operate under the Code Section 501(h) rules, certainly can undertake the project from their general funds.

KALKINES, ARKY, ZALL & BERNSTEIN

I hope this analysis and overview is helpful. Please
let me know if you or others have additional questions.

RK\424\Greer.MM (3/93)

Jack - This just arrived -
we have a meeting with
~~the~~ Colin Greer tomorrow
at 3. Could you look at
this before then? Eqp.

pp 4 & 8. p. 8 - can
we draft a letter from ONS to
me requesting my services?
Susan

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*ALSO ADMITTED IN D.C.

March 8, 1993

Mr. Colin Greer
President
The New World Foundation
100 East 85th Street
New York, New York 10028

Re: Grant Proposal from Brown University
Regarding Office of National Service

Dear Colin:

You asked whether The New World Foundation ("New World") can provide funds for a project, described below (the "Project"), without being deemed to have made a lobbying grant and thereby running afoul of the taxable expenditure provisions of Code Section 4945.* The nature of the grant proposal (as more fully described below) makes it impossible for me to provide you with a legal opinion; rather this letter sets out a context for evaluating New World's possible funding of the Project and the questions to be asked of the Project.

The Project

New World has received a proposal from Brown University ("Brown"). Although the proposal is brief and not very detailed, it appears that the basic purpose of the grant is to support research and policy development to be undertaken by Brown staff members in conjunction with the Office of National Service ("ONS") on a national service plan whereby students who receive

* All Code references are to the Internal Revenue Code of 1986, as amended.

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loans to pay college tuition could repay all or part of such loans through community service. ONS is a newly-created office within the White House that has been charged by President Clinton with formulating a national service plan and presenting that plan to Congress this Spring for enactment. Susan Stroud, the Director of the Howard R. Swearer Center for Public Service at Brown (the "Swearer Center"), has been granted a leave of absence by Brown to work with ONS for the four-month period, February through May 1993. It is not clear from the proposal and accompanying letter whether Professor Stroud and her research assistants are employed by Brown or ONS during these four months.

The proposed activities to be funded by the grant are "outreach efforts" that will involve consulting with various public agencies and private organizations (such as the Commission on National and Community Service, ACTION, Peace Corps, all Federal Departments, community service programs, and the higher education community) in the development of a national service plan. The budget included in the grant proposal does not reflect the budget for the entire Project, but only that portion of the budget which New World has been asked to finance which includes funds for a research intern, a housing/living expense subsidy for Susan Stroud (her salary and benefits are to be paid for by a grant from another foundation), and travel, meeting, telephone, postage and copying expenses.

Although it is clear that the planned result of ONS's work is some action by Congress, the Project's activities as presented in the proposal can be interpreted under the relevant Treasury Regulations in different ways, i.e., as not to involve lobbying at all, to involve some lobbying, or to consist entirely of lobbying activities. Because: (1) ONS and the Project are operating on a very short time frame; (2) legislation is a stated outcome of ONS's work; and (3) the Project's activities, even if ostensibly not lobbying, could be deemed to be lobbying, it is important for New World to seek clarification of the limited information contained in the proposal and obtain any additional information necessary to determine how the Code and Treasury Regulations apply to the Project.

The Lobbying Regulations - Basic Concepts

The Treasury Regulations under Code Sections 4911 and 4945 govern the lobbying activities of public charities and the funding of such activities by private foundations (the "Regulations"). These Regulations were finalized in 1990, after years of debate, controversy, drafting and re-drafting. The Regulations are quite complex and are largely untested; there is

no case law, and fewer than a handful of interpretive rulings have been issued by the Internal Revenue Service.

Pursuant to the Code and the Regulations, any amount paid by a private foundation to attempt to influence "legislation", either through a direct activity of the foundation or through a grant to another entity, is a taxable expenditure which results in the imposition of excise taxes on the private foundation and on the foundation managers.

A "direct lobbying communication" is defined as any attempt to influence legislation through communication with a member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation but only if the principal purpose of the communication is to influence legislation. A communication is direct lobbying only if it: (1) refers to "specific legislation", and (2) reflects a view on such legislation. Treas. Reg. Section 56.4911-2(b)(1). The term "legislative body" does not include executive, judicial or administrative bodies. Treas. Reg. Section 56.4911-2(d)(3).

A "grass roots lobbying communication" is defined as any attempt to influence legislation through an effort to affect the opinion of the general public or any segment of the general public. A grass roots lobbying communication must (1) refer to specific legislation, (2) reflect a view on the legislation, and (3) encourage its recipient to take action with respect to such legislation (i.e., include a "call to action"). Treas. Reg. Section 56.4911-2(b)(2).

"Legislation" includes, inter alia, the introduction, enactment, or defeat of bills by Congress (or other legislative bodies). "Specific legislation" includes both legislation that has already been introduced in a legislative body and a "specific legislative proposal that the organization either supports or opposes." Treas. Reg. Section 56.4911-2(d)(1).

It is important to note that where a communication is directed only to the public (i.e., not directed to legislators, government officials, or their employees), refers to specific legislation, and reflects a view on the legislation, but does not contain a call to action, that communication is not a lobbying communication. Such a communication does not qualify as either a direct or a grass roots lobbying communication.

Private foundations, however, are not totally precluded from providing funds to a public charity that engages in permitted levels of lobbying activities, direct or grass roots. Under the Regulations, a general support grant to a public

charity that engages in lobbying activities does not constitute a taxable expenditure so long as the grant is not "earmarked", i.e., "given pursuant to an agreement, oral or written, that the grant will be used for specific purposes." Treas. Reg. Section 53.4945-2(a)(6)(i).

Thus, ordinarily, if New World made a general support grant to Brown and Brown also allocated funds to the Project, no taxable expenditure would result. However, in light of the existence of the current proposal, such a grant at this point would most likely be deemed to be earmarked for the Project.

Likewise, a grant for a specific project of a public charity is not a taxable expenditure if the grant is not earmarked for the lobbying portion of the specific project and the amount of the grant (combined with all other grants made during the year to the project by the particular foundation) is less than the amount budgeted for nonlobbying purposes. A foundation can rely upon the budget provided by the charity "unless the private foundation doubts, or in light of all the facts and circumstances, reasonably should doubt the accuracy or reliability of the documents." Treas. Reg. Section 53.4945-2(a)(6)(iii).

Therefore, if the Project were part of a larger program of either the Swearer Center or Brown, and assuming for the moment that the Project is involved in lobbying, New World could make a grant to Brown for that program in an amount that is not greater than the program's budgeted nonlobbying activities without making a lobbying grant.**

Applications of the Regulations to the Project Proposal

Direct Lobbying

It is unclear whether the Project may involve direct lobbying. The Proposal does not reference communication with members or employees of Congress. However, with respect to communications with government officials or employees who are participating in the formulation of national service legislation, the form and nature of such communications are not spelled out in the proposal. Again, the employment status of Professor Stroud and her assistants also may be relevant to the direct lobbying determination.

** Such a grant should be conditioned upon Brown's agreement not to use any of the grant funds for lobbying purposes.

and her assistants also may be relevant to the direct lobbying determination.

Specific Legislation/Specific Legislative Proposals

Even if it is determined that the communications involved in the Project are directed to the types of persons that would make the communication direct lobbying, the communication also must refer to "specific legislation" in order to cause it to be a direct lobbying communication. A reference to specific legislation can be made without using the actual name of a bill or without actually stating that the communication involves legislation or a specific legislative proposal. A communication may be deemed to refer to specific legislation by using a word or phrase that is widely identified with specific legislation. Thus, references to a national service plan may be sufficient to identify a specific legislative proposal of President Clinton's Administration.

As noted earlier, the definition of "specific legislation" also includes "specific legislative proposals", not just legislation that has already been introduced. However, there is no bright-line test as to when a legislative proposal is sufficiently formulated so as to qualify as specific legislation. At this point, the national service plan is inchoate, but may be sufficiently conceptualized now or within a few weeks to be characterized as a "specific legislative proposal." Although the purpose of any communications made by the Project may be simply to research and develop a legislative proposal concerning a national service plan and no specific legislative proposal may exist at this time, that conclusion is difficult to draw safely from the proposal.

The Regulations offer examples which illustrate the concept of identifying specific legislation and specific legislative proposals. In one example, a pamphlet distributed to the public and asking citizens to send a coupon to their legislators printed with the statement, "I support a drug-free America", is not a (grass roots) lobbying communication because: (1) the term "drug-free America" is not widely identified with any specific pending legislation on the issue; (2) the pamphlet itself doesn't refer to any pending legislation; and (3) the organization neither supports nor opposes a specific legislative proposal. Treas. Reg. Section 56.4911-2(b)(4)(ii)(A), Example 4.

Grass Roots Lobbying

Although the Project will be communicating with segments of the general public (e.g., community service programs and the higher education community) whose opinions concerning a national service plan may be important to the passage of any legislation concerning such a plan, the communications will not be grass roots lobbying unless they fulfill the three objective criteria of (1) referring to specific legislation, (2) reflecting a view on that legislation, and (3) containing a call to action. Thus, even if the purpose of the communications is not to influence legislation but is merely to conduct research and to obtain information concerning the viability of, and the best ways to proceed with, a national service plan, the communications will be grass roots lobbying communications if the three criteria are met.

The call to action requirement is set out in great detail in the Regulations. A communication encourages a recipient to take action if it:

- (1) states that the recipient should contact a legislator or employee of a legislative body or should contact any other government official or employee who may participate in the formulation of legislation;
- (2) states the address, telephone number or similar information about a legislator or employee of a legislative body;
- (3) provides a petition, tear-off postcard or similar material so that recipients may communicate their views to a legislator or employee of a legislative body or to any other government official or employee who may participate in the formulation of legislation; or
- (4) specifically identifies one or more legislators who will vote on the legislation and who are opposed to the communication's view of the legislation, are undecided with respect to the legislation, are the recipients' representatives, or are members of the legislative committee that will consider the legislation.

Thus, so long as the Project's communications with the general public do not contain any of the four specific types of calls to action listed above, then no grass roots lobbying is involved. In fact, as noted earlier, the absence of the "call to action" can liberate the communication from being a lobbying communication at all so long as its distribution does not make it a direct lobbying communication. Additional information regarding the Project's specific proposed activities is needed to

Exceptions to Lobbying

The Regulations set forth three exceptions to lobbying which may be relevant to the Brown situation. Treas. Reg. Section 53.4945-2(d).

Nonpartisan Analysis, Study or Research

An exception to both direct and grass roots lobbying is nonpartisan analysis, study or research which is defined as an "independent and objective exposition" of a particular subject, including an activity that is "educational". Advocacy of a particular position is permitted so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the recipient of the communication to form an independent opinion or conclusion. In other words, while material must be "independent and objective", it does not have to be balanced in order to constitute nonpartisan analysis, study or research.

A communication will not be considered nonpartisan analysis, study or research if it directly encourages the recipient to take action with respect to legislation. A communication directly encourages a recipient to take action if it contains one or more of the calls to action described in categories (1) through (3) of the grass roots lobbying definition, above.

The Project can conduct research regarding the development of a national service plan and not engage in lobbying so long as the presentation of the results of such research to the public, legislators and government officials presents a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent conclusion and does not contain a direct call to action. The material may express a point of view and still qualify as nonpartisan analysis, study or research. However, see below regarding subsequent lobbying use of nonlobbying materials.

Examination and Discussion of Broad
Social, Economic and Similar Problems

Communications with members of legislative bodies or with government employees and public communications about issues, the general subject of which is also the subject of a legislative proposal, are not direct or grass roots lobbying communications so long as the discussion does not address the merits of a specific legislative proposal or directly encourage lobbying actions.

so long as the discussion does not address the merits of a specific legislative proposal or directly encourage lobbying actions.

Technical Advice or Assistance

Another exception to direct lobbying is the provision of technical advice or assistance to a governmental body, governmental committee or a subdivision of either in response to a written request by such body, committee or subdivision. Such a request must be made in the name of the requesting governmental body, committee or subdivision (rather than an individual member), and the response to the request must be available to all members of such body, committee or subdivision. If opinions or recommendations are specifically requested by the governmental body, committee or subdivision, or are directly related to the materials requested, then the communication may contain opinions and recommendations and remain within this exception.

Technical assistance may be given as a result of knowledge or skill in a specific area, and the Swearer Center is a likely source for the type of assistance needed by ONS to develop a national service plan. Therefore, New World could be assured that it is not funding direct lobbying expenses if Brown's participation was initiated by a letter from ONS requesting the assistance that will constitute the proposed activities of the Project.

Subsequent Lobbying Use of Nonlobbying Communications or Research Materials

Where communications or research materials are not initially grass roots lobbying communications but then are subsequently used for grass roots lobbying activities, the communications or research materials may be treated as grass roots (but not direct) lobbying communications. In order for this to occur, the materials must qualify as "advocacy communications or research materials" (i.e., materials that refer to and reflect a view on legislation, but initially do not incorporate a direct call to action). If a direct call to action is subsequently added, and the organization is unable to avail itself of the "primary purpose" safe harbor (i.e., the organization has not made a substantial nonlobbying distribution of the materials), the materials will be treated as a grass roots lobbying communication.

If the materials are subsequently deemed to be a grass roots lobbying communication, the expenditures recharacterized as such are limited to those paid less than six months before the use of the materials with a direct call to action. Where a public charity uses a foundation grant for a nonlobbying communication that is subsequently used in lobbying and results in a recharacterization of the public charity's expenditures, the private foundation's grant ordinarily will not be recharacterized as a lobbying expenditure unless: (1) the private foundation's primary purpose was to make a lobbying grant, or (2) at the time of making the grant, the foundation knew or reasonably should have known that the public charity's primary purpose for the grant was lobbying.

Because legislative activity concerning a national service plan is likely to occur soon, the research conducted by the Project very possibly could be used in a grass roots lobbying communication within six months of New World's grant to Brown and, if it can be demonstrated that New World knew or reasonably should have known that the Project's primary purpose was lobbying, the grant amount could be recharacterized as a lobbying grant.

Conclusion

In summary, the Proposal is too general to draw any clear conclusions regarding its qualification as a lobbying project. Depending upon the additional information provided by Brown, there are several possible outcomes. For example, it may turn out that:

(1) The Project does not involve any lobbying because, for example, it does not meet the definitions of either direct or grass roots lobbying, or it falls within one of the exceptions to lobbying (e.g., as technical advice or assistance, or for nonpartisan analysis study or research); or

(2) The Project involves some lobbying, which can be discreetly identified and budgeted, so that New World can provide funding for the nonlobbying portions of the Project; or

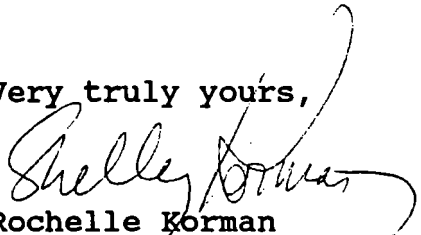
(3) The Project truly falls within the lobbying definitions and New World therefore cannot contribute to this effort, although Brown, as a public charity which presumably elected to operate under the Code Section 501(h) rules, certainly can undertake the Project from its general funds.

KALKINES, ARKY, ZALL & BERNSTEIN

I hope this preliminary analysis is helpful. Please call me with any additional questions.

Kind regards.

Very truly yours,


Rochelle Korman

RK/jb

RK\424\Greer.Ltr

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*ALSO ADMITTED IN D.C.

TO: Colin Greer, President
The New World Foundation

FROM: Rochelle Korman 

RE: Private Foundation Funding for Projects to Assist the
White House in Formulating New Policies and Programs

DATE: March 8, 1993

You have explained to me that the advent of a new Administration in Washington has resulted in numerous discussions between you and grantees of The New World Foundation ("New World") and between you and White House officials as to the possibilities of New World and other private foundations funding the policy and program work of nonprofit organizations (the "projects") which may be undertaken at the request of the Administration. Because of budget cuts at the White House, these requests for project help require either that the tax-exempt organization engaging in the work provide paid staff to the White House or raise funds to underwrite the requested projects.

I am assuming that none of these proposed projects involve electoral activities (which are prohibited), grants to individuals (which require advance approval by the Internal Revenue Service of the grant making procedure) or any activities which are not charitable, educational, scientific, literary, etc., under Code Section 501(c)(3).^{*} The key legal consideration then is the circumstances under which these types of

^{*} All Code references are to the Internal Revenue Code of 1986, as amended.

legislative proposal that the organization either supports or opposes." Treas. Reg. Section 56.4911-2(d)(1).

It is important to note that where a communication is directed only to the public, refers to specific legislation, and reflects a view on the legislation, but does not contain a call to action, that communication is not a lobbying communication; it neither qualifies as a direct nor a grass roots lobbying communication.

Even if a public charity engages in permitted levels of lobbying activities, direct or grass roots, private foundations are not totally precluded from providing funds to that charity. Under the Regulations, a general support grant to a public charity that engages in lobbying activities does not constitute a taxable expenditure so long as the grant is not "earmarked", i.e., "given pursuant to an agreement, oral or written, that the grant will be used for specific purposes." Treas. Reg. Section 53.4945-2(a)(6)(i). Thus, ordinarily, if a foundation makes a general support grant to a charity and that charity also allocates funds to a particular project, no taxable expenditure would result.

Likewise, a grant for a specific project of a public charity is not a taxable expenditure if the grant is not earmarked for the lobbying portion of the specific project and the amount of the grant (combined with all other grants made during the year to the project by the particular foundation) is less than the amount budgeted for nonlobbying purposes. Treas. Reg. Section 53.4945-2(a)(6)(ii). A foundation can rely upon the budget provided by the charity "unless the private foundation doubts, or in light of all the facts and circumstances, reasonably should doubt the accuracy or reliability of the documents." Treas. Reg. Section 53.4945-2(a)(6)(iii).

Therefore, if any of these projects are part of a larger program of the grantee charity, and assuming for the moment that a project is involved in lobbying, a foundation could make a grant to the charity for that program in an amount that is not greater than the program's budgeted nonlobbying activities without making a lobbying grant.**

** Such a grant also should be conditioned upon the charity's agreement not to use any of the grant funds for lobbying purposes.

Direct Lobbying

These projects may or may not involve direct lobbying. It is important for a proposal to state clearly, as best it can, the nature of any expected interaction with Congress as well as with other government officials. The employment status of staff working on these projects also may be relevant to the direct lobbying determination.

Specific Legislation/Specific Legislative Proposals

Even if it is determined that the communications involved in one of these projects are directed to the types of persons that would make the communication direct lobbying, the communication also must refer to "specific legislation" in order to cause it to be a direct lobbying communication. A reference to specific legislation may be made without using the actual name of a bill or without actually stating that the communication involves legislation or a specific legislative proposal. A communication may be deemed to refer to specific legislation by using a word or phrase that is widely identified with specific legislation. Thus, for example, references to a "national service plan" may be sufficient to identify a specific legislative proposal of President Clinton's Administration.

As noted earlier, the definition of "specific legislation" also includes "specific legislative proposals", not just legislation that has already been introduced. However, there is no bright-line test as to when a legislative proposal is sufficiently formulated so as to qualify as specific legislation. At this point, many of the Administration's proposals are inchoate, but may be sufficiently conceptualized now or within a few weeks to be characterized as a "specific legislative proposal." Although the purpose of any communications made by these projects may be simply to research and develop a legislative proposal and no specific legislative proposal exists at the present, that conclusion is difficult for a foundation to draw safely if a proposal is not sufficiently detailed.

The Regulations offer examples which illustrate the concept of identifying specific legislation and specific legislative proposals. In one example, a pamphlet distributed to the public which asked citizens to send a coupon to their legislators printed with the statement, "I support a drug-free America", is not a (grass roots) lobbying communication because: (1) the term "drug-free America" is not widely identified with any specific pending legislation on the issue; (2) the pamphlet itself doesn't refer to any pending legislation; and (3) the organization

neither supports nor opposes a specific legislative proposal. Treas. Reg. Section 56.4911-2(b)(4)(ii)(A), Example 4.

Grass Roots Lobbying

Although many of these projects probably will be communicating with segments of the general public whose opinions concerning the policy at issue may be important to the passage of any legislation concerning such a policy, the communications will not be grass roots lobbying unless they fulfill the three objective criteria of (1) referring to specific legislation, (2) reflecting a view on that legislation, and (3) containing a call to action. Thus, even if the purpose of the communications is to conduct research and to obtain information concerning the viability of, and the best ways to proceed with, a particular national policy, the communications will be grass roots lobbying communications if the three criteria are met.

The call to action requirement is set out in great detail in the Regulations. A communication encourages a recipient to take action if it:

- (1) states that the recipient should contact a legislator or employee of a legislative body or should contact any other government official or employee who may participate in the formulation of legislation;
- (2) states the address, telephone number or similar information about a legislator or employee of a legislative body;
- (3) provides a petition, tear-off postcard or similar material so that recipients may communicate their views to a legislator or employee of a legislative body or to any other government official or employee who may participate in the formulation of legislation; or
- (4) specifically identifies one or more legislators who will vote on the legislation and who are opposed to the communication's view of the legislation, are undecided with respect to the legislation, are the recipients' representatives, or are members of the legislative committee that will consider the legislation.

Thus, so long as communications with the general public do not contain any of the four specific types of calls to action listed above, then no grass roots lobbying is involved. In fact, as noted earlier, where a communication refers to specific legislation and reflects a view on the legislation, but is not directed towards legislators or certain government officials, and

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does not contain a call to action, that communication is not a lobbying communication at all.

Exceptions to Lobbying

The Regulations set forth three exceptions to lobbying which are most relevant to these type of projects.

Nonpartisan Analysis, Study or Research

An exception to both direct and grass roots lobbying is "nonpartisan analysis, study or research", which is defined as an "independent and objective exposition" of a particular subject, including an activity that is "educational". Advocacy of a particular position is permitted so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the recipient of the communication to form an independent opinion or conclusion. In other words, while material must be "independent and objective", it does not have to be balanced in order to constitute nonpartisan analysis, study or research. Treas. Reg. Section 53.4945-2(d)(1).

A communication will not be considered nonpartisan analysis, study or research if it directly encourages the recipient to take action with respect to legislation. A communication directly encourages a recipient to take action if it contains one or more of the calls to action described in categories (1) through (3) of the grass roots lobbying definition, above.

Thus, projects can conduct research regarding the development of particular policies and not engage in lobbying so long as the presentation of the results of such research to the public, legislators and government officials presents a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent conclusion and does not contain a direct call to action. The material may express a point of view and still qualify as nonpartisan analysis, study or research. However, see below regarding subsequent lobbying use of nonlobbying materials.

Examination and Discussion of Broad Social, Economic and Similar Problems

Communications with members of legislative bodies or with government employees and public communications about issues, the general subject of which is also the subject of a legislative

proposal, are not direct or grass roots lobbying communications so long as the discussion does not address the merits of a specific legislative proposal or directly encourage lobbying actions. Treas. Reg. Section 53.4945-2(d)(4).

Technical Advice or Assistance

Another exception to direct lobbying is the provision of technical advice or assistance to a governmental body, governmental committee or a subdivision of either in response to a written request by such body, committee or subdivision. Treas. Reg. Section 53.4945-2(d)(2). Such a request must be made in the name of the requesting governmental body, committee or subdivision (rather than an individual member) and the response to the request must be available to all members of such body, committee or subdivision. If opinions or recommendations are specifically requested by the governmental body, committee or subdivision, or are directly related to the materials requested, then the communication may contain opinions and recommendations and remain within this exception.

Technical assistance may be given as a result of knowledge or skill in a specific area. The Regulations offer as an example of providing technical advice and assistance a situation where a State Department official makes an official written request to a foundation for information regarding a particular country's economic development and also seeks the foundation's advice regarding the proper position of the United States in pending negotiations with that country concerning a pending proposed treaty.

Subsequent Lobbying Use of Nonlobbying Communications or Research Materials

Where communications or research materials are not initially grass roots lobbying communications but then are subsequently used for grass roots lobbying activities, the communications or research materials may be treated as grass roots (but not direct) lobbying communications. See Treas. Reg. Section 53.4945-2(d)(1)(v) and Treas. Reg. Section 56.4911-2(b)(2)(v). In order for this to occur, the materials must qualify as "advocacy communications or research materials" (i.e., materials that refer to and reflect a view on legislation, but initially do not incorporate a direct call to action). If a direct call to action is subsequently added, and the organization is unable to avail itself of the "primary purpose" safe harbor (i.e., the organization has not made a substantial nonlobbying distribution

of the materials), the materials will be treated as a grass roots lobbying communication.

If the materials are subsequently deemed to be a grass roots lobbying communication, the expenditures recharacterized as such are limited to those paid less than six months before the use of the materials with a direct call to action. Where a public charity uses a foundation grant for a nonlobbying communication that is subsequently used in lobbying and results in a recharacterization of the public charity's expenditures, the private foundation's grant ordinarily will not be recharacterized as a lobbying expenditure unless: (1) the private foundation's primary purpose was to make a lobbying grant, or (2) at the time of making the grant, the foundation knew or reasonably should have known that the public charity's primary purpose for the grant was lobbying.

Because legislative activity concerning many of the Administration's plans is likely to occur soon, the research conducted by these projects very possibly could be used in a grass roots lobbying communication within six months of foundation funding. Therefore, if it can be demonstrated that the foundation knew or reasonably should have known that a project's primary purpose was lobbying, the grant amount could be recharacterized as a lobbying grant.

Conclusion

In summary, these projects may or may not involve lobbying, as defined in the Code and Regulations, and thus, various outcomes are possible. For example, it may turn out that:

(1) A project does not involve any lobbying because, for example, it does not meet the definitions of either direct or grass roots lobbying, or it falls within one of the exceptions to lobbying (e.g., as technical advice or assistance, or nonpartisan analysis, study or research); or

(2) A project involves some lobbying, which can be discreetly identified and budgeted, so that New World can provide funding for the nonlobbying portions of the project; or

(3) A project truly falls within the lobbying definitions and New World therefore cannot contribute to this effort, although the organizations, as public charities which presumably have elected to operate under the Code Section 501(h) rules, certainly can undertake the project from their general funds.

KALKINES, ARKY, ZALL & BERNSTEIN

I hope this analysis and overview is helpful. Please
let me know if you or others have additional questions.

RK\424\Greer.MM (3/93)

23 February 1993

TO: Colin Greer
FROM: Susan Stroud
RE: Office of National Service

I have attached a very brief description of the work that I expect to do at the Office of National Service for the period of time from February - May 1993. Of course, one month into the work of the administration on this issue, it is difficult to predict accurately all of the things that will need to be done. Some flexibility, therefore, will be required from me and, I hope, from the New World Foundation.

The President of Brown has approved an unpaid leave of absence for me, effective February 8, 1993 for four months with the replacement costs of my salary and benefits being met by a grant from the Kellogg Foundation. The grant from New World will also be run through Brown. I appreciate that you are willing to contribute funds toward the outreach effort associated with my work and that you are willing to move this request quickly through the appropriate channels at the Foundation. I hope you will become more involved with the national service program.

My phone number at the Office of National Service is 202-456-6444. Please let me know if there is any additional information you need from me. Thanks very much for your support.

PROPOSAL TO THE NEW WORLD FOUNDATION

Brown University requests \$25,000 from the New World Foundation to support a project to do research and policy development on national service for the period February - May 1993. The project will be undertaken in conjunction with the Office of National Service to assist them with outreach efforts, especially among higher education, community service organizations and community-based groups.

Office of National Service

The Office of National Service is an office within the White House. National service was discussed widely during the presidential campaign and President Clinton has stated that it will be a signature program of his administration. The January 31 edition of the New York Times acknowledged that the three priority issues for the administration at this point are health care reform, deficit reduction and national service.

Eli Segal has been appointed by President Clinton as the Director of the Office of National Service and Assistant to the President. Mr. Segal is charged with formulating a national service plan and presenting that plan to Congress for enactment early in the new Congressional session.

Outreach Efforts

The Office of National Service recognizes the need for extensive consultation in developing the national service plan. Existing federal agencies with which ONS must work closely include the Commission on National and Community Service (established by Congress in 1990 to distribute federal funds to community service programs), the ACTION agency (administers VISTA and senior volunteer programs), Peace Corps, and all federal Departments (especially DOD, EPA, HUD, Education). President Clinton asked each member of the Cabinet to give serious attention to ways in which his/her Department will encourage and support service and coordinate those efforts with the Office of National Service.

In the past ten years a significant network of community service programs has developed, largely with support from foundations and state and local government. In effect, a national service network exists that should be drawn into the planning of a federally sponsored national service program. These organizations have the greatest capacity to employ the young people who will be supported through President Clinton's program, e.g. youth service corps, school-based community service programs, religiously affiliated programs such as the Jesuit Volunteer Corps. The Office of National Service must conduct extensive consultation with staff of organizations such as these regarding the design of the program.

Because President Clinton has linked the issues of national service with education and job training benefits, extensive consultations must also be undertaken with the higher education community and organizations able to provide job training and apprenticeships. Senator Nunn's proposal in 1990 to condition all federal student financial aid on a period of military or domestic service was extremely unpopular in the higher education community. This has left a legacy of skepticism that must be addressed by drawing the higher education community - college and university presidents, students, financial aid professionals - into the planning of the national service program.

Community-based organizations have an important role to play in the planning of a national service program. There are genuine concerns about what might be expected of their organizations to respond to the demands of large number of national service

participants seeking one or two year placements with community-serving organizations. The community organizations can help to educate ONS about realistic expectations that should inform the planning of the national service program - e.g., what skills might be expected in participants, what basic values are necessary for community-based work, what resources community organizations have to provide training, supervision and evaluation of participants' work.

Personnel and Expenses

Funds from the New World Foundation will be used at Brown University to support the outreach efforts of Susan Stroud, Director of the Swearer Center for Public Service and Director of Campus Compact, or some other member of staff. Brown University has been asked by the Office of National Service to undertake the outreach activities for a four month period of February - May 1993. This is the critical period of time during which the national service plan will be developed and submitted to Congress.

BUDGET (February - May 1993)

Personnel		\$8,000
Research Intern (\$2,000/month for 3 months)	6,000	
Housing/ living expense subsidy (\$500/month for four months)	2,000	
Program expense		\$17,000
Travel	12,000	
Meeting expense	3,500	
Phone/postage	500	
Copying	1,000	
TOTAL		\$25,000

**SWEARER CENTER FOR PUBLIC SERVICE
BOX 1974
BROWN UNIVERSITY
PROVIDENCE, RI 02912
401-863-2338**

31 January 1993

TO: Stephanie Clohesy
FROM: Susan Stroud
RE: Office of National Service

I have attached a very brief description of the work that I expect to do at the Office of National Service for the period of time from February - May 1993. Of course, ten days into the work of the administration on this issue, it is difficult to predict accurately all of the things that will need to be done. Some flexibility, therefore, will be required from me and, I hope, from the Kellogg Foundation. I want to repeat that I hope the Kellogg Foundation will allow you to spend time serving as a liaison with the Office of National Service regarding consultation with community organizations. The success of this effort will almost certainly depend on your involvement.

The President of Brown has approved an unpaid leave of absence for me, effective as soon as we are able to make arrangements for a grant to cover the replacement costs of my salary and benefits. I appreciate that you are willing to move this request quickly through the appropriate channels at the Foundation. I will ask President Gregorian to send a formal letter and proposal when you indicate the need for it.

I spoke with Eli Segal last night, and he told me that another member of the White House staff has contacted another foundation with the same request as Eli put to you at Kellogg. I do not know the status of that request. I'll keep you informed if there is anything to report.

On another topic - Freddye mentioned a Kellogg sponsored Salzburg Seminar this summer that I am very interested in - either to participate in or to be helpful in any way possible. For instance, if you are looking for international participants, I would be pleased to tell you about the individuals I am working with in South Africa on national service. In fact, a delegation of four people are coming to the States in April/May for two weeks to visit programs and meet with key individuals in the service community.

I will be in my office at 401-863-1825 Monday and Tuesday and look forward to hearing from you.

PROPOSAL TO THE W.K. KELLOGG FOUNDATION

Brown University requests \$65,000 from the W. K. Kellogg Foundation to support the outreach efforts of the Office of National Service for the period February - May 1993. These funds will support the outreach efforts of the Office of National Service, especially among higher education, community service organizations and community-based groups.

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Outreach Efforts

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Because President Clinton has linked the issues of national service with education and job training benefits, extensive consultations must also be undertaken with the higher education community and organizations able to provide job training and apprenticeships. Senator Nunn's proposal in 1990 to condition all federal student financial aid on a period of military or domestic service was extremely unpopular in the higher education community. This has left a legacy of skepticism that must be addressed by drawing the higher education community - college and university presidents, students, financial aid professionals - into the planning of the national service program.

Community-based organizations have an important role to play in the planning of a national service program. There are genuine concerns about what might be expected of

their organizations to respond to the demands of large number of national service participants seeking one or two year placements with community-serving organizations. The community organizations can help to educate ONS about realistic expectations that should inform the planning of the national service program - e.g., what skills might be expected in participants, what basic values are necessary for community-based work, what resources community organizations have to provide training, supervision and evaluation of participants' work.

Personnel and Expenses

Funds from the W.K. Kellogg Foundation will be used at Brown University to replace the costs of salary and benefits for Susan Stroud, Director of the Swearer Center for Public Service and Director of Campus Compact. Susan Has been asked by the Office of National Service to undertake the outreach activities for a four month period of February - May 1993. This is the critical period of time during which the national service plan will be developed and submitted to Congress. Susan has extensive experience in directing a campus-based public service effort, working with college and university presidents and higher education organizations, and with other national community service organizations. Brown University has agreed to allow Susan to take an unpaid leave of absence for this period of time.

Additional funds available from Kellogg will be used to convene staff of community-based organizations to consult on the design of the national service program, especially with respect to the impact that such a program might have on their organizations.

BUDGET (February - May 1993)

Personnel		\$32,000
Salary and benefits	27,130	
Housing/ living expense subsidy	4,870	
Program expense		\$33,000
Travel	28,000	
Meeting expense	3,500	
Phone/postage	500	
Copying	1,000	
TOTAL		\$65,000