

# Guidelines for Participation in Ballot Initiatives by Tax- Exempt Hospitals, Governmental Hospitals and Federally Qualified Health Centers in Missouri

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On September 4, 2019, a group known as Health Care for Missouri, with backing from the Missouri Hospital Association, the Missouri Primary Care Association and other interested people and organizations, publicly announced its intention to collect the 170,000 signatures necessary to put before the voters of the State of Missouri a ballot measure expanding the eligibility criteria for coverage under the Missouri Medicaid Program (known as Mo HealthNet) and obtaining the additional federal funds provided to states that do so.

Given the importance of Medicaid expansion to the hospitals in the State of Missouri, the Missouri Hospital Association (MHA) asked for our assistance in determining the extent to which a tax-exempt hospital or a governmental hospital in Missouri can support and actively assist Health Care for Missouri with its efforts. MHA also asked for our assistance in determining the extent to which a Federally Qualified Health Center (FQHC) in Missouri can support and actively assist Health Care for Missouri with its efforts.

Our findings on these questions are set forth below.<sup>1</sup>

## TAX-EXEMPT HOSPITALS

Tax-exempt hospitals (hospitals exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code (IRC)) are permitted to expend time and money on lobbying activities in support of legislation or proposed legislation, which could include direct or indirect expenditures, contributions to a Political Action Committee, use of hospital employees or volunteers to gather signatures (either at the hospital or elsewhere) and making public statements in support or opposition to legislation or proposed legislation (Lobbying).<sup>2</sup> Although a tax-exempt hospital is permitted to engage in Lobbying, the hospital's participation in Lobbying may not constitute a "substantial part" of the hospital's activities without jeopardizing the tax-exempt status of the hospital.

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<sup>1</sup>Please note that our findings are based on the application of the laws in question to a hypothetical tax-exempt hospital, governmental hospital, or FQHC located in the State of Missouri. In reality, there is no such thing as a hypothetical hospital or FQHC. Each hospital and FQHC is unique unto itself. Further, many hospitals and FQHCs already have policies and procedures in place addressing their ability to participate in lobbying activities of the type being undertaken by Health Care for Missouri. As a result, this information should only be used as an educational resource to help inform decision making on this issue. Before any final decision is made, a hospital or FQHC should review its own policies and procedures to determine whether it has a policy or procedure on this issue. Hospitals and FQHCs should also consult with their own attorneys and/or accountants to ensure that any action taken in support of Health Care for Missouri is properly considered in the context of other lobbying activities already being undertaken by the hospital or FQHC.

<sup>2</sup>Under IRS rules, Lobbying falls into two (2) categories: (1) Direct Lobbying which involves an attempt to influence legislation through communication with any member or employee of a legislative body; and (2) Grassroots Lobbying which involves an attempt to influence legislation through communications with the public. Support or opposition to a state-wide ballot initiative like the Medicaid Expansion Ballot Initiative is considered a form of Grassroots Lobbying under the IRS rules. Conversely, support or opposition to a state-wide ballot initiative like the Medicaid Expansion Ballot Initiative is not considered a form of lobbying for purposes of Missouri's state laws on lobbying. See R.S.Mo. 105.470.

The term “substantial part” has no precise definition, but instead is determined based on a review of the totality of the hospital’s activities, including both its actions and its expenditures. Although the term “substantial part” has no precise definition in the Internal Revenue Code, a case decided by the U.S. Court of Appeals for the 6th Circuit is regularly cited by the IRS in connection with this question. In that case, the Court held that attempts to influence legislation that constituted five percent (5%) of a tax-exempt organization’s total activities was not substantial.

In order to avoid the uncertainty created by the lack of a precise definition of “substantial part,” a tax-exempt hospital can elect to use a safe harbor for Lobbying. This safe harbor affords the hospital a clearly defined limit on permissible Lobbying expenditures and provides that Lobbying only occurs if there is an expenditure of money (the electing-hospital need not track and report time spent by volunteers engaging in Lobbying activities). This election can be made at any time during the tax year by filing IRS Form 5768.

The safe harbor differentiates between expenditures for Grassroots Lobbying and expenditures for all Lobbying (including both Direct Lobbying and Grassroots Lobbying) and imposes a separate and more restrictive limit on expenditures for Grassroots Lobbying. Under the safe harbor, an electing tax-exempt hospital’s total annual expenditures on Lobbying are limited to the lesser of (1) \$1,000,000, or (2) an amount calculated as set out below based on the hospital’s annual expenditures in furtherance of its tax-exempt purpose:

- an amount equal to 20% of the first \$500,000 of exempt-purpose expenditure; plus
- an amount equal to 15% of the next \$500,000 of exempt-purpose expenditures; plus
- an amount equal to 10% of the next \$500,000 of exempt-purpose expenditures; plus
- an amount equal to 5% of exempt-purpose expenditures over \$1,500,000.

Further, an electing tax-exempt hospital is only permitted to spend 25% of its total permissible Lobbying expenses on Grassroots Lobbying. Thus, for example, if an electing tax-exempt hospital is permitted to spend \$1,000,000 on Lobbying under the safe harbor, the electing tax-exempt hospital is only permitted to spend \$250,000 of that amount on Grassroots Lobbying.

Any Lobbying undertaken by a tax-exempt hospital in support of or in opposition to the Medicaid Expansion Ballot Initiative would constitute Grassroots Lobbying subject to the reduced limit on Lobbying expense described above.

In addition, a tax-exempt hospital may allow third-parties access to public areas of the hospital to collect signatures in support of or opposition to a ballot initiative. Given that a tax-exempt hospital is a private entity, the hospital generally has the right to determine who can have access to the public areas of the hospital and for what purposes they can access public areas of the hospital. Thus, the decision of a tax-exempt hospital to allow third-parties access to the public areas of the hospital for this purpose would not prevent the hospital from barring other third-parties from accessing the public areas of the hospital for other purposes. That said, there is a line of cases which hold that the public areas of a shopping mall can be considered defacto “public” space in some situations, thereby limiting the ability of the owner of that space to control who has access to such space and the purposes for which they can access such space.<sup>3</sup>

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<sup>3</sup>In some cases, governmental hospitals, as more fully discussed below, also obtain exemption from income tax under Section 501(c)(3). In the event that a hospital is both governmental and tax-exempt, the hospital should review the discussion below relating issues arising from a governmental hospital allowing third-parties access to public areas of the hospital to collect signatures in support of or opposition to a ballot initiative before allowing third-parties access to public areas of the hospital for that purpose.



## GOVERNMENTAL HOSPITALS

Governmental hospitals (county hospitals organized under Chapter 205 of the Missouri Revised Statutes, city hospitals organized under Chapter 96 of the Missouri Revised Statutes, district hospitals organized under Chapter 206 of the Missouri Revised Statutes and other hospitals organized by a governmental entity under Missouri law) are prohibited from expending time and money on state-wide ballot initiatives (like the Medicaid Expansion Ballot Initiative) under Section 115.646 of the Missouri Revised Statutes.

This prohibition prohibits governmental hospitals from making direct or indirect expenditures in support or opposition to the ballot initiative, contributing to a Political Action Committee that supports or opposes the ballot initiative, using employees or volunteers of the hospital to gather signatures in support or opposition to the ballot initiative and making similar expenditures and/or engaging in similar activities in support or opposition to the ballot initiative.

Section 115.664 does not prohibit directors and officers of governmental hospitals from making public appearances or issuing press releases concerning a ballot initiative on behalf of the hospital.

Section 115.646 also does not prohibit governmental hospitals from allowing third-parties access to public areas of the hospital to collect signatures in support or opposition to a ballot initiative. If a governmental hospital decides to allow third-parties access to public areas of the hospital for this purpose, however, the hospital should be mindful that it will be opening itself up to the argument that the public areas of the hospital are a public forum and, as a result, other people/organizations should also be allowed access to the public areas of the hospital to communicate their message. Further, as a governmental entity, a governmental hospital will be prohibited from approving or denying such access based on the content of the proposed communication. If the hospital were to do so, it could be argued that the hospital is denying such people's/organization's Constitutional rights under the 1st Amendment to the U.S. Constitution.

If a governmental hospital is also tax-exempt under Section 501(c)(3) of the Internal Revenue Code, the hospital will also be subject to the requirements list above relating to Lobbying by tax-exempt hospitals to the extent that the governmental hospital is otherwise permitted to engage in Lobbying under Section 115.646.

## HOSPITAL FOUNDATIONS

If a hospital foundation is a part/division of a tax-exempt hospital or governmental hospital (not separately incorporated), the hospital foundation is a part of the hospital and subject to the same prohibitions and limitations on Lobbying/participating in a state-wide ballot initiative as the hospital (as described in the preceding sections).

If a hospital foundation is incorporated separately from the hospital under applicable state law (i.e., not simply a part/division of a tax-exempt hospital or governmental hospital) and also independently exempt from income tax under Section 501(c)(3) of the Internal Revenue Code, the hospital foundation will be subject to prohibitions and limitations on Lobbying identical to, but generally applied separately from, those applied to the tax-exempt hospital the foundation supports (Supported Hospital). It is important to understand, however, that, if the Supported Hospital is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code then, depending on the degree of corporate control of the foundation by the Supported Hospital, a foundation making the safe harbor election may be limited in its ability to include certain amounts it has paid/contributed to the Supported Hospital in its exempt purpose expenditures when calculating permissible Lobbying expenditures. A foundation that has made the safe harbor election should seek professional advice before engaging in Lobbying in order to be sure that it has properly identified the permissible amount of Lobbying expense.

It is also important to recognize that if the foundation was created to aid or assist a governmental hospital, the hospital foundation is not subject to the prohibitions and limitations on participation in Lobbying that are applicable governmental hospitals. As a separately incorporated entity, the hospital foundation is not a governmental hospital. As a result, the prohibitions and limitations to which a governmental hospital is subject do not apply to the hospital foundation.



## FEDERALLY QUALIFIED HEALTH CENTERS

By federal law, Federally Qualified Health Centers (FQHCs) either must be organizations exempt from income taxation under Section 501(c)(3) of the IRC or governmental entities. All FQHCs currently operating in the State of Missouri are exempt from income taxation under Section 501(c)(3) of the IRC.

A FQHC, similar to other organizations exempt from income taxation under Section 501(c)(3) of the IRC, is permitted to engage in Lobbying activities subject to the following limitations:

- Under federal law specifically applicable to FQHCs, a FQHC is prohibited from using any federal grant funds for Lobbying activities; and
- Under Section 501(c)(3) of the IRC, lobbying activities cannot constitute a “substantial part” of the FQHC’s total activities. In making this determination, the FQHC is subject to the same rules discussed above relating to Lobbying by tax-exempt hospitals (including the right to make the safe harbor election described above).



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