

June 29, 2007

Eddie Gordon
Wild American Shrimp, Inc.
Charleston Maritime Center
10 Wharfside Street
Charleston, SC 29401

RE: Lobbying Restrictions and Board Member Conflicts

Dear Eddie,

Amber Von Harten recently forwarded us your question regarding the concerns of some board members about serving on both the boards of the Southern Shrimp Alliance and Wild American Shrimp, Inc. This letter contains the results of our research into the applicable law. Please be aware that the National Sea Grant Law Center does not offer formal legal advice, and that this letter is intended for informational purposes only.

Lobbying and 501(c)(3) Organizations

A 501(c)(3) organization cannot maintain its tax-exempt status and devote a “substantial part” of its activities to “carrying on propaganda, or otherwise attempting, to influence legislation.”¹ This principal issue of concern to NAML is what activities constitute “influencing legislation” or lobbying.

“Influencing legislation” means:

- (A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and
- (B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.²

Legislation “includes action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.”³

¹ 26 U.S.C. § 501(c)(3).

² *Id.* § 4911(d)(1).

³ *Id.* § 4911(e)(2).

On its face, this broad definition would seem to prohibit a 501(c)(3) organization from approaching a legislative body or governmental employee regarding any policy matter. It is very important to note, however, that the definition of “legislative body” does not include executive, judicial, or administrative bodies⁴ and the IRS only treats a communication with a legislator or governmental official as a prohibited direct lobbying communication if the communication (1) refers to specific legislation and (2) reflects a view on such legislation.⁵ 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.”⁶

The IRS website states that

An organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation.

Organizations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, organizations may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.⁷

The Southern Shrimp Alliance may conduct lobbying activities as long as those activities do not constitute a substantial part of the organization’s overall activities.

Lobbying and Federally Funded Organizations

Wild American Shrimp is an organization separate from, but affiliated with, SSA which promotes and markets wild domestic shrimp through a quality standards certification program. As we understand it, WASI receives federal money to carry out its programs.

Recipients of federal funds are subject to restrictions on lobbying activities. OMB Circular A-122 prohibits grant recipients from using federal funds for lobbying or political activities (electioneering). The “Byrd Amendment” (31 U.S.C. § 1352) prohibits recipients of federal grants, contracts, loans or awards from using any federal funds to lobby for a grant or renewal of a grant. WASI, therefore, should refrain from spending any funds on lobbying activities.

Conclusion

Several individuals serve on boards of both SSA and WASI to facilitate and enhance communication and cooperation between the two organizations. I understand some concerns have been raised regarding whether it is wise for WASI board members to serve as board members of SSA, given the restrictions on lobbying. Unless WASI funds are used to send the shared board members to DC to undertake lobbying efforts (which I know is not the case), I see no problem with this relationship. Individuals wear many different types of hats in the course of their daily lives, and membership on multiple boards does not necessarily mean that responsibilities overlap. A SSA board member traveling on SSA funds could partake in a Congressional visit (as long as these visits are not a substantial part of SSA’s activities, see above). The fact that this SSA member also serves on the WASI board is of no import. The lobbying restrictions focus on the funds, not the people.

⁴ *Id.* § 56.4911-2(d)(3).

⁵ *Id.* § 56.4911-2(b)(1)(ii).

⁶ *Id.* § 56.4911-2(d)(1)(ii).

⁷ <http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html>

The reverse would also hold true for an individual primarily affiliated with WASI, but serving on the SSA board. For example, I see no problem with the Executive Director of WASI holding a non-voting seat on the WASI board and a voting seat on the SSA board. First, with respect to the WASI Board, this is a very common arrangement in non-profit organizations. The Executive Director is on the Board to provide input and feedback to the Board, but cannot vote. With respect to the SSA board, even though WASI requests funding from the SSA, there is no legal problem with the WASI Director holding a voting seat. Florida law allows board members with potential conflicts of interest to participate in board meetings as long as the adverse interest is known or disclosed.⁸ Because the interest of the WASI Director should be obvious to the SSA board, there is no legal restriction on the Director's participation. Furthermore, because the WASI Board of Directors sets the budgets and the Director's salary, a vote to approve or disapprove funding for WASI does not automatically translate into increased or decreased compensation for the Executive Director.

The IRS has published guidance pertaining to individual activity by organization leaders for nonprofits. The guidance states:

The political campaign activity prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy. However, for their organizations to remain tax-exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions.

To avoid potential attribution of their comments outside of organization functions and publications, organization leaders who speak or write in their individual capacity are encouraged to indicate clearly that their comments are personal and not intended to represent the views of the organization.⁹

It is always prudent for individuals undertaking lobbying efforts to follow the above guidance to ensure that their activities are not ascribed to organizations they are affiliated with.

Overall, as long as federal funds are not used to support lobbying efforts and SSA operates below the lobbying threshold for non-profit organizations, a few shared board members is not any reason for concern. In light of the two organizations' activities, it seems very reasonable that some individuals would overlap.

I hope you find this information useful. Please contact me if you have any follow-up questions or concerns. If the board members would like additional information on board of director responsibilities, conflicts of interest, and/or best practices for non-profit organizations, I would be happy to give a presentation at an upcoming board meeting.

Sincerely,

Stephanie Showalter
Director, National Sea Grant Law Center

⁸ Since both organizations are incorporated in Florida, the Boards of Directors must comply with Florida law.

⁹ <http://www.irs.gov/charities/charitable/article/0,,id=163396,00.html>