Lobbying and Politics for Nonprofits
The Rules Aren't Red and Blue
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Learning Objectives

At the end of this session, you will be able to:

- Identify what activities constitute lobbying
- Identify what constitutes political activity
- Discuss how the lobbying and political activity rules apply to public charities, private foundations, and other nonprofit organizations

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Should WE be Lobbying?

- Sparks public debate
- Connects policymakers to ideas
- Enfranchises and empowers individuals
- Brings about change
- Advocates client's mission/issues

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Lobbying– What is it?

Legislation

- The introduction, amendment, enactment, defeat or repeal of
  - Acts, bills, resolutions, referendums, ballot initiatives, petitions, or Constitutional Amendments by
    - Federal, state, or local legislatures
- Senate confirmation of treaties and of nominees to the executive or judicial branches

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Lobbying– What is it?

The Foundational Association for MiracleCorn Education (FAME) is a 501(c)(3) organization

- It's mission is to alleviate hunger and illness by promoting MiracleCorn as a nutrition source
- It conducts research, educational symposiums, and various other activities to educate the public about the benefits of MiracleCorn
- It desires to influence the use of MiracleCorn by engaging in lobbying and political activity to the extent permissible

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Lobbying– What is it?

- FAME contacts members of the state legislature to support a budget resolution that provides funding for MiracleCorn research
- FAME contacts the President encouraging him to issue an executive order mandating that all federal agencies will serve MiracleCorn in the office cafeteria
- FAME urges the local zoning board to deny a zoning request that would allow a coal mine to open near where MiracleCorn's secret water source is located
- Oklahoma passes the MiracleCorn Omnibus Act. FAME contacts members of the Texas legislature to encourage them to draft a similar bill.

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Lobbying– What is it?

Grassroots Lobbying:

- A call to action that attempts to motivate the public to contact legislators to support or oppose legislation

Direct Lobbying:

- Contacting the federal, state, or local legislative branch in an attempt to affect the passage or defeat of legislation
- Encouraging the organization's members to contact legislators to support or oppose legislation
- Attempting to influence the public's support or opposition to a referendum or ballot initiative

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Lobbying– What is it?

Direct or Grassroots?

FAME wants Congress to pass the MiracleCorn Omnibus Act

- FAME's CEO meets with Senator Goodpill and tells him that it is a great bill
- FAME emails all of its members asking them to write to Senator Goodpill
- FAME takes out a newspaper ad encouraging the public to write to Senator Goodpill
- FAME's volunteers go door-to-door handing out educational flyers explaining the Act and asking for donations to help get it passed
- FAME's volunteers go door-to-door handing out educational flyers and asking people to sign a petition in support of the Act
- FAME's volunteers go door-to-door explaining the importance of the Act and mentioning that Senator Goodpill hasn't made up his mind yet

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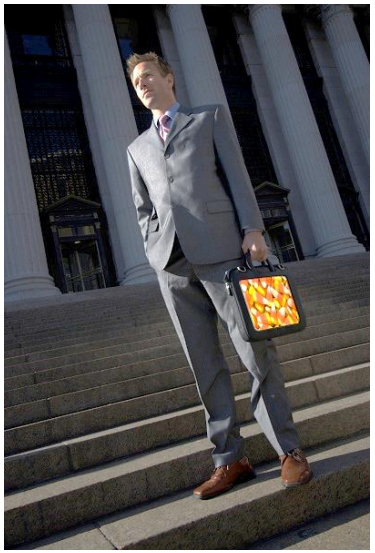
Lobbying– What it is not

Communications Regarding



- Executive orders
- Administrative rules
- Court opinions
- Agency decisions
- Actions by nongovernmental organizations
- EXCEPTION: 501(c)(4), (5), and (6) organizations that attempt to influence a covered executive branch official (CEBO)

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Lobbying– What is it?

Who is a CEBO?

- The President of the United States
- The Vice President of the United States
- Cabinet Secretaries and immediate deputies
- Any officer or employee of the White House Executive Office
- The 2 most senior officials at all Executive agencies
- Level I individuals of the Executive Schedule and immediate deputies

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Lobbying– What it is not

Communications With Members

- If the majority of the recipients are members of the organization, the communication can support or oppose legislation as long as it does not contain a call to action (encouraging members to engage in direct or grassroots lobbying) and it will not be considered lobbying.

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Lobbying– What it is not

Member Communications: Direct or Grassroots?

FAME wants Congress to pass the MiracleCorn Omnibus Act

- FAME's newsletter explains the organization's support for the MiracleCorn Omnibus Act and describes the efforts to get the bill passed
- FAME's newsletter urges all of its members to write to Senator Goodpill
- FAME's newsletter urges members to get their friends and family to write to Senator Goodpill
- 75% of the recipients of the newsletter are nonmembers

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Lobbying– What it is not

Member Communications: Direct or Grassroots?

FAME wants the public to pass Prop 42

- FAME distributes a flyer door-to-door that says "Proposition 42 asks voters whether MiracleCorn should be mandated for school lunch programs. FAME believes this will curb childhood obesity."
- FAME distributes the same flyer only to members
- The flyer is distributed only to members, and encourages members to vote for Prop 42
- The flyer is distributed only to members, and encourages members to get their friends and families to vote for Prop 42

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Lobbying– What it is not

Nonpartisan Analysis, Study, or Research

- Content Test: Provide a full and fair explanation of the issues so the reader can form an independent conclusion
- Distribution Test: Widely disseminate the communication to interested persons, not just to those who agree with the organization's viewpoint
- Must not include a Call to Action in support or opposition to the legislation
- May later be treated as lobbying if it is subsequently used for grassroots lobbying purposes

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Lobbying– What it is not

Nonpartisan Analysis, Study, or Research

- FAME publishes a research pamphlet revealing that a daily diet of Lavender MiracleCorn can improve life-expectancy by 3.5 days.
  The pamphlet also describes conflicting research that says that MiracleCorn causes blindness in lab animals.
  FAME sells the pamphlet to the general public.

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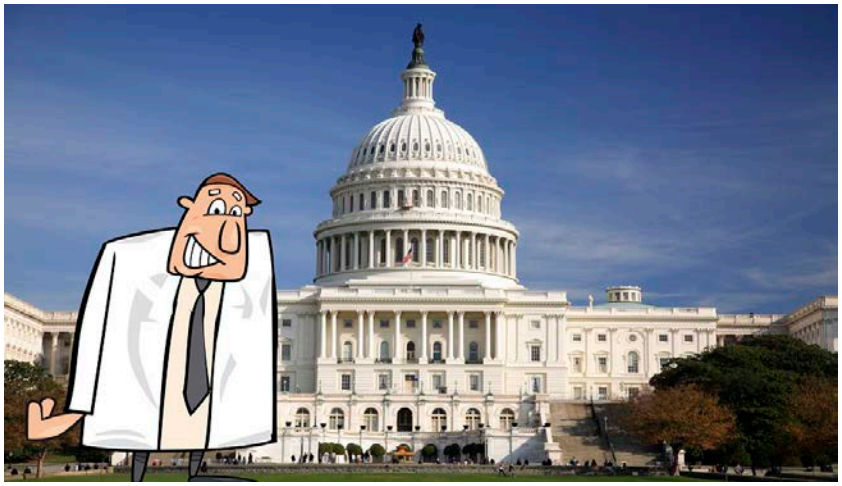
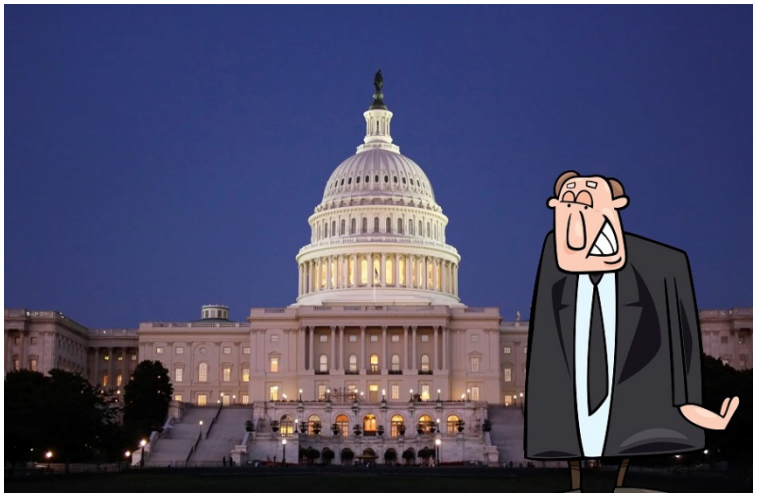
Lobbying– What it is not

Nonpartisan Analysis, Study, or Research

- The pamphlet discusses the MiracleCorn Omnibus Act, and mentions that Senator Goodpill is undecided, but that Congressman Naysayer opposes it.





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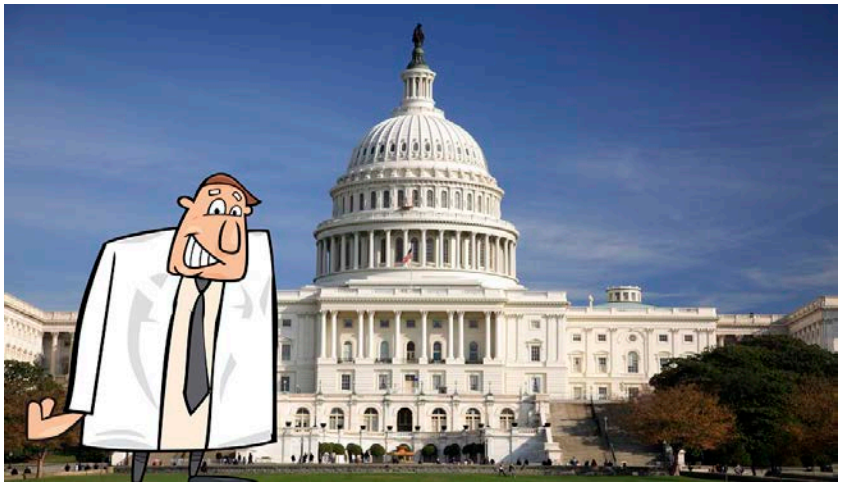
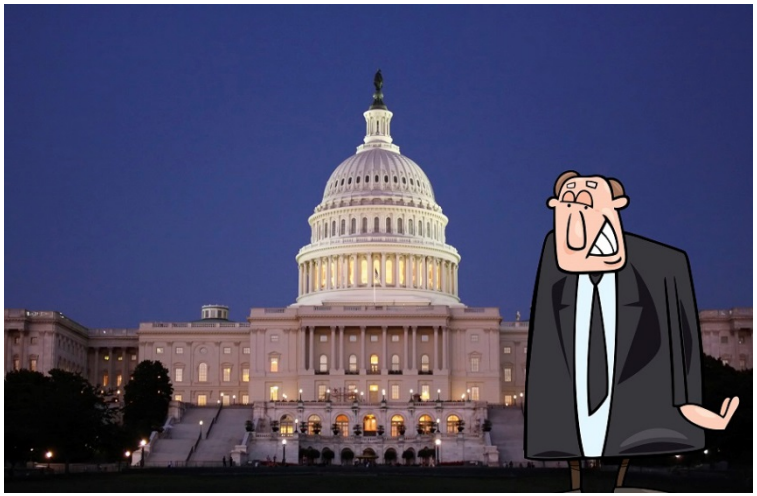
Lobbying– What it is not

Nonpartisan Analysis, Study, or Research

- The pamphlet asks readers to contact Senator Goodpill and Congressman Naysayer and express support for the bill.





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Lobbying– What it is not

Nonpartisan Analysis, Study, or Research

- The pamphlet is subsequently used to encourage grassroots lobbying
- The pamphlet is subsequently used to encourage grassroots lobbying, but more than six months have passed since the expenses were incurred for the initial use
- The original pamphlet omitted any reference to the MiracleCorn Omnibus Act

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Lobbying– What it is not

Examination of Broad Social or Economic Problems

- Discussions with legislators, the public and other interested parties on topics which are the subject of legislation
- Must not refer to the legislation
- Must not include a call to action

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Lobbying– What it is not

Examination of Broad Social or Economic Problems

- FAME's CEO participates in a panel discussion at a nearby Think Tank. Members of the panel include Senator Goodpill, pharmaceutical representatives, and healthcare professionals, who have gathered to discuss the nutritional qualities of MiracleCorn. The CEO does not refer to the MiracleCorn Omnibus Act nor does she directly encourage the audience to do anything.

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Lobbying– What it is not

Requested Technical Advice

- In response to a written request by the legislative body or legislative committee
- Communication is provided to all members of the requesting body
- The request can not be from a particular legislator acting alone

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Lobbying– What it is not

Self-Defense

- Communication with a legislative body with regard to actions that would threaten the organization's existence, tax-exempt status, or deductibility of contributions
- Must not include a grassroots call to action

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Lobbying– What it is not

Self-Defense

- Congressman Naysayer introduces a bill that would revoke the public charity status of any organization designed to promote the use of a particular pharmaceutical product
- Congressman Naysayer introduces a bill that would raise the postage rates for all nonprofit organizations

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The Lobbying Disclosure Act (LDA)

Important differences

- Includes federal lobbying only, not state and local
- Includes Direct lobbying only, not grassroots
- Includes communications with CEBOs
- Registration requirements based on time (20%) and expenses ($12,500 in-house, $3,000 for an outside professional) for lobbying in a 3-month period
- Quarterly and Semi-Annual reporting requirements

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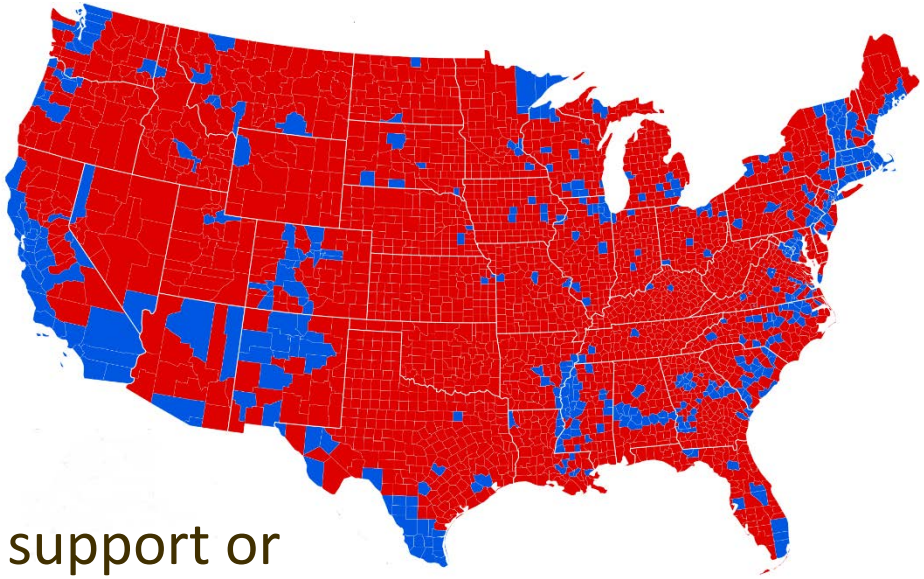
What is Political Activity?

Political Campaign Intervention



- Activities that support or oppose the election of a candidate for public office
- Contributions to political campaign funds
- Public statements made on behalf of an organization in support or opposition to a candidate
- Distribution of information that clearly supports or opposes a candidate

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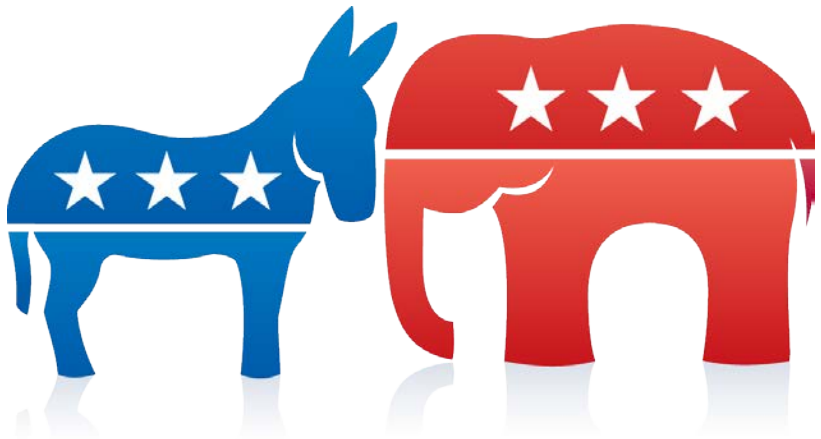
What is Political Activity?

Candidate Appearances and Debates

- Incumbent officials may appear in their official capacity
- All candidates must be invited to the event and given an equal opportunity to speak
- Questions must be balanced and nonpartisan
- Organization may not make comments regarding the questions and answers provided by the candidates
- Candidates should not ask for contributions



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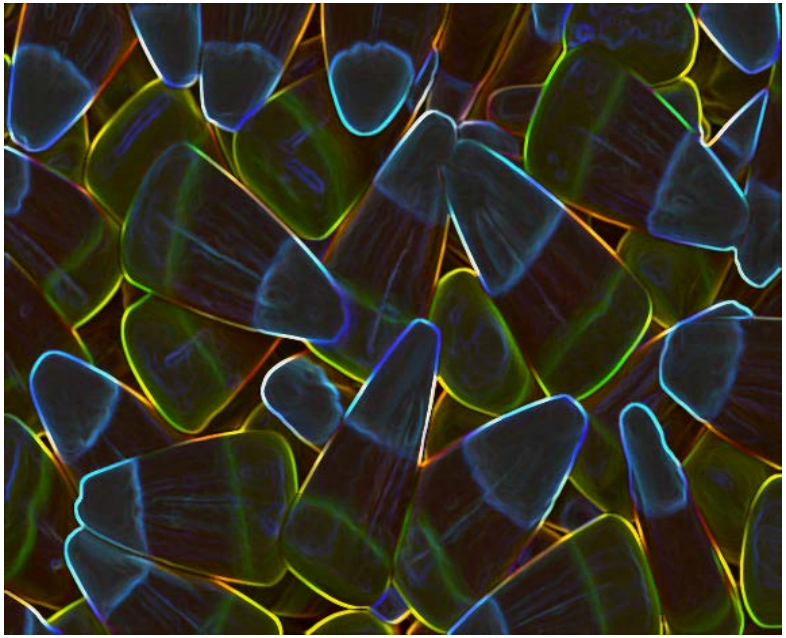
What is Political Activity?

Candidate Appearances and Debates

Congressman Naysayer decides to run against Senator Goodpill for the Senate seat this November.



- FAME rents its ballroom to Senator Goodpill to conduct a fundraising event.
- If FAME invites Senator Goodpill to speak at its annual meeting, must Congressman Naysayer also be invited?
- Does it matter whether or not Senator Goodpill has a B.S. in Nutrition?

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What is Political Activity?

Candidate Appearances and Debates

When the CEO addresses the annual meeting, can she say:

- "We thank Senator Goodpill for his tireless efforts in behalf of improved nutrition."
- "We wish him luck in his re-election campaign."
- "I encourage all of you to vote to re-elect Senator Goodpill."
- What if the CEO made those same comments at another event unconnected to FAME, and not speaking in any official capacity?
- What if the same comments were included in FAME's newsletter, but the CEO paid all the newsletter expenses for that month?

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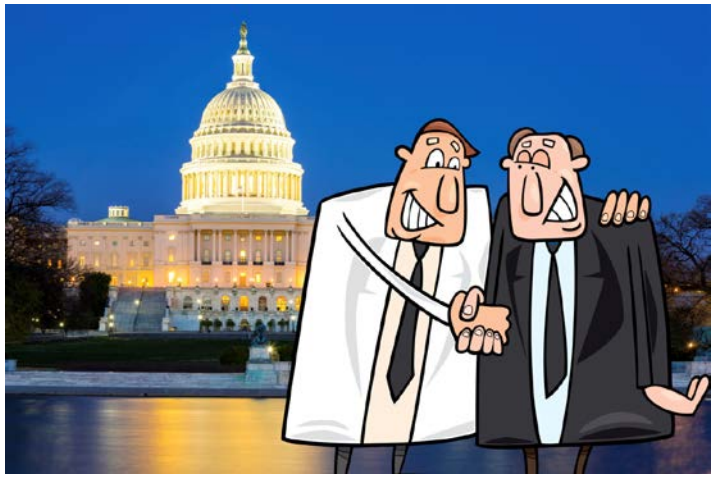
What is Political Activity?

Candidate Appearances and Debates

FAME invites the candidates to a public debate moderated by the CEO.

- During the debate, the moderator asks Congressman Naysayer, “Congressman, does your opposition to MiracleCorn come from your hatred of America or from your own sense of self-loathing?”
- Senator Goodpill is allowed to exceed his time limit, but Congressman Naysayer is constantly interrupted.
- The moderator smiles during Senator Goodpill’s comments, but sneers during Congressman Naysayer’s.
- A third party candidate is running for Senator Goodpill’s Senate seat, but she is not invited to the debate.



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Current Development

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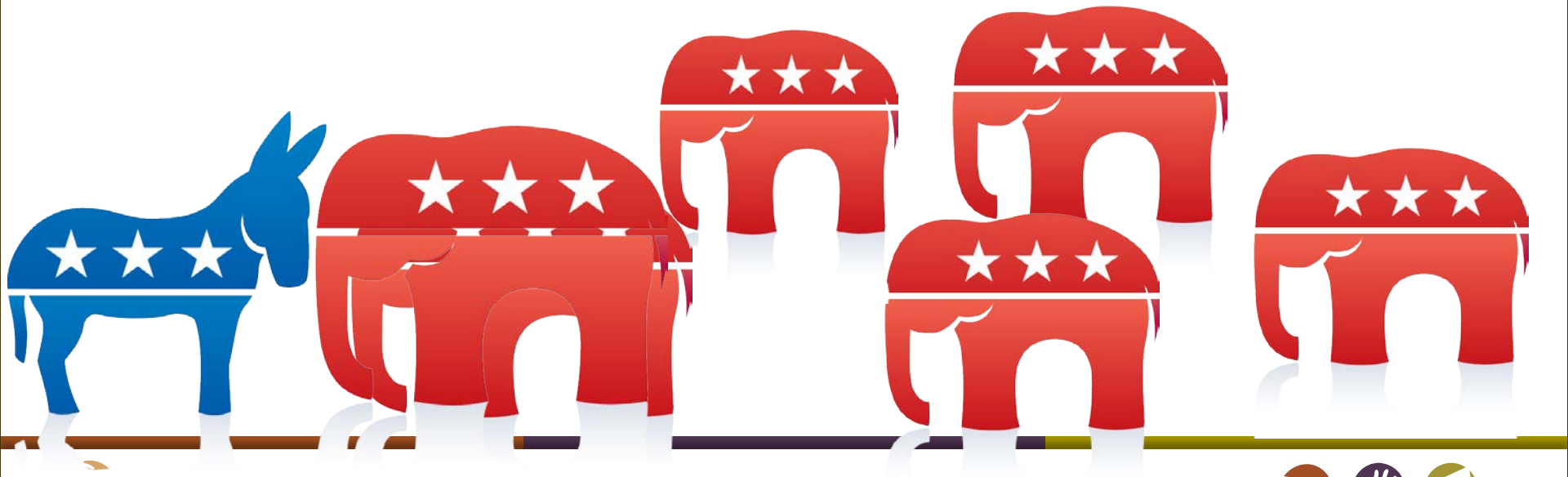
Charitable organization

- Creates educational symposiums of “thinkers, statesmen, and opinion leaders”
- Attendees would share their perspectives with politicians
- All conference speakers were of the same political party



What is Political Activity?

Voter Education and Registration

- FAME sets up a voter registration booth that promotes the election but does not mention either candidate or party.
- FAME sets up a telephone bank to call contact registered voters regarding MiracleCorn. Those in favor are reminded about the upcoming election and offered free rides to the polls. Those opposed are thanked for their time. No mention is made of either candidate.
- A voter guide is prepared that outlines both candidates' views on MiracleCorn, but does not refer to any other issue in the race.
- The voter guide refers to other issues, but shows a preference for Goodpill's positions.
- The voter guide is online, and contains hotlinks to each candidates' website.

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Political Activity by Private Foundations

- As a 501(c)(3) organization, political activities are prohibited
  - Results in excise tax of 20%
- Continued activities may result in revocation of tax-exempt status

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Current Development

Loren E. Parks, et al. v. Commissioner, 145 T.C. No. 12

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Private Foundation Radio Ad

- I'll bet you thought Oregon prisoners would be working 40 hours a week by now. Back in 1994, that's what voters overwhelmingly told the politicians to do. But the governor and attorney general have said, NO, we're not gonna do it. Attorney General Hardy Myers says the federal government doesn't like the way Oregon pays it's prisoners. And so, he and the Governor have decided to shut down the program entirely. Some people just don't think criminals should spend much time in jail. They think they can be rehabilitated. If they really wanted prisoners to work, they'd just change the way we to pay them. When Hardy Myers was Speaker of the House, he took credit for changing Oregon's criminal statutes. Those changes resulted in the average convicted murderer spending less than 7 years in jail. That's why Oregon Voters had to step in and take control. We said it loudly and clearly, “Put criminals in jail. Make `em do their time, and work `em while they're there.” What Oregon voters didn't say was, “Make a bunch of whiney excuses why you can't do what we want done.”

Lobbying by Private Foundations

- Strictly prohibited
  - Results in excise tax of 20%
- General support grants to organizations that lobby are permissible and are not considered taxable expenditures
- May not “earmark” the grant for lobbying
- Language within Foundation grant agreements often indicate the funds may not be used for lobbying activities

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Political Activity by Charities

Prohibited

- May result in revocation of tax-exempt status
- Report on Form 990 Schedule C Part I-B
- Excise tax is 10% on the organization and 2.5% on the manager if corrected
- Additional excise tax of 100% on the organization and 50% on the manager if not corrected
- Correction means recovery and prevention

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Lobbying by Charities

The "No Substantial Part" Test

- Measured by time, attention and energy, cost, volunteer efforts, etc.
- Large organizations or affiliated groups may benefit from higher limits under this test
- Exceeding this vague standard for even 1 year can mean loss of exempt status
- Penalty taxes on the organization and individual managers if will or not due to reasonable cause
- Higher risk of IRS examination?

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Lobbying by Charities

The 501(h) Election

- Unlimited volunteer activities
- Most charities (those with $17 million or less in exempt purpose expenditures) will benefit from higher limits by making the election
- Loss of exemption based on exceeding limits by 50% over a 4-year period
- Penalty taxes on the organization only, not individual managers
- Lower risk of IRS examination?

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Lobbying by Charities

The 501(h) Election

- Form 5768, “Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation”
- Election may be made and revoked at any time
- Election applies retroactively to beginning of tax year
- Revocation applies prospectively

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Lobbying by Charities

Who cannot make 501(h) Election

- Churches and integrated auxiliaries
- Private foundations (prohibited from lobbying)
- Supporting organizations of business leagues, unions, and civic associations

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Lobbying by Charities

The 501(h) Election - Expenditure Limits

- Total lobbying (direct and grassroots)
  - 20% of the first $500,000 +
  - 15% of the next $500,000 +
  - 10% of the third $500,000 +
  - 5% of the remaining exempt purpose expenditures
  - Not to exceed $1 million
- Grassroots lobbying only
  - Can not exceed 25% of the limit on total lobbying, regardless of the actual amount of total lobbying

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Lobbying by Charities

The 501(h) Election – Exempt Purpose Expenditures

- Includes all expenditures (program, G&A, and fundraising) EXCEPT for:
  - Expenses deducted on Form 990-T
  - Taxes paid on Form 990-T
  - Capitalized expenditures
  - Professional fundraisers
  - Transfers to affiliates

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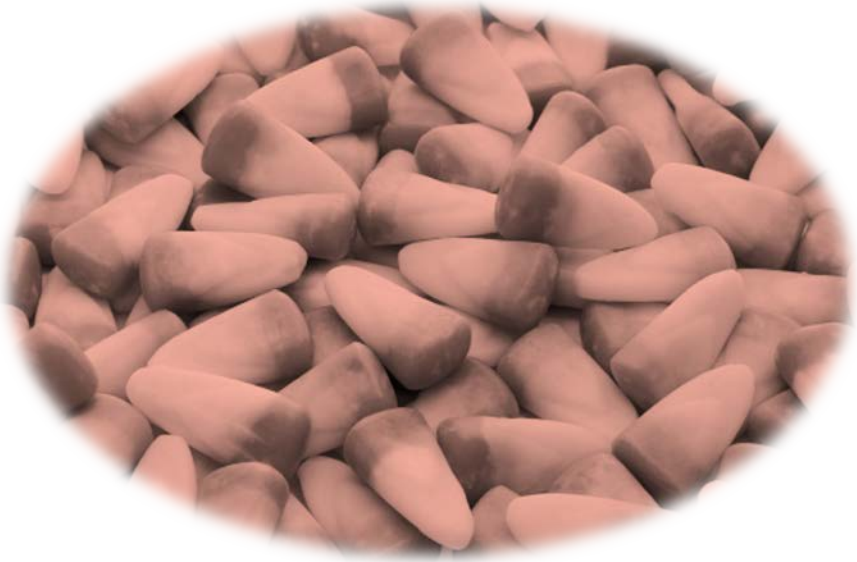
Lobbying by Charities

The 501(h) Election

- FAME has a lobbying budget of $2 million for 2016. The organization spends over $100 million each year on its programs and mission. Should it make the 501(h) election?



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Lobbying by Charities

The 501(h) Election – Excise Tax

- If organization exceeds its lobbying expenditure limit in a particular year, a 25% excise tax paid on the excess
- Excise tax is reported on Form 4720
- If an organization exceeds its lobbying limit of 150% of the nontaxable amount over a four-year period, tax-exempt status may be revoked
  - PLANNING OPPORTUNITY: Lobbying limits may be exceeded in a particular year with the excise tax being paid as long as the four-year period does not exceed the 150% threshold

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Lobbying by Charities

Affiliated Organizations

- If one charity controls other charities, the affiliates are treated as a single organization when calculating the expenditure limits.
- All members are proportionately liable for any tax liability.
- Charities that make transfers to noncharitable organizations who engage in lobbying will be treated as having made a lobbying expenditure.

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Political Activity by 501(c)(4), (5), and (6) Organizations

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- Must not be primary purpose
- Report on Form 990 Schedule C Part I-A and I-C
- Voter registration and education efforts may be partisan or nonpartisan
- Must report political contributions or member dues earmarked for a separately segregated fund, even if they are promptly and directly transferred to that fund.
- Must file Form 1120-POL if it made over $100 in political expenditures and pay tax on the lesser of the expenditures or its net investment income

Lobbying by 501(c)(4), (5), and (6) Organizations

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Member Dues

- Lobbying cannot be primary purpose
- Federal and state lobbying expenditures reduce the deductibility of members' dues (local is exempt)

Lobbying by 501(c)(4), (5), and (6) Organizations

Proxy Tax

- Organizations may inform members that a portion of the dues are nondeductible as lobbying
  - Include an estimate of the nondeductible percentage on the invoice when dues are assessed
  - Determine the actual nondeductible lobbying expenditures at the end of the year
  - Carry the excess or deficit over to the subsequent year
- Organizations may inform members that 100% of the dues are deductible
  - Report lobbying expenditures on Form 990-T and pay a proxy tax of 21%

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Lobbying by 501(c)(4), (5), and (6) Organizations

Proxy Tax

- Does not apply when
  - The organization spent less than $2,000 in-house on lobbying
  - At least 90% of the members can't deduct the dues as a business expense anyway
- Estimated payments are not required

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Lobbying by 501(c)(4), (5), and (6) Organizations

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- Imagine FAME is a 501(c)(6) organization. It sends out dues notices to its members at the beginning of 2014. There are 10,000 members, annual dues are $1,000, and FAME estimates that it will spend $900,000 on lobbying. What portion of its dues are nondeductible to its members?
- At the end of 2014, FAME has $9,000,000 of membership dues revenue and has actual lobbying expenditures of $962,548. What is the excess portion?
- What options does FAME have for treating the excess portion?
  - Raise the nondeductible percentage next year
  - Pay the proxy tax of $32,035 (21% of the excess portion, no deductions allowed)

Accounting for Lobbying Activities

Adequate Records

- Documentation of all lobbying activities
- Retention of all lobbying communications
- Use of timesheets in support of compensation and overhead allocations
- Maintenance of cost logs (postage, copying, delivery services)

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Accounting for Lobbying Activities

Tracking Expenditures

- Cost of research, drafting, reviewing, copying, printing, publishing, mailing, etc.
- Identify the audience (members, nonmembers)
- Identify mixed-purpose communications (e.g., a fundraising appeal that also includes grassroots lobbying)
- Track direct vs. grassroots activities

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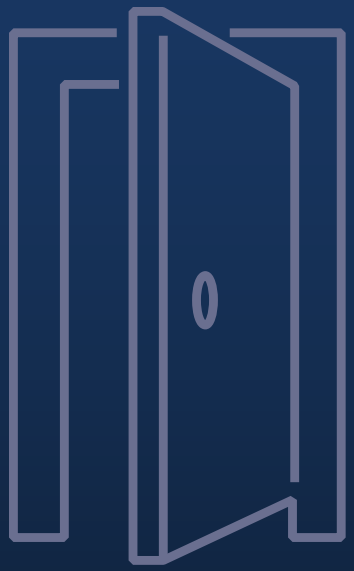

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