

Effective Board Leadership

A P R E G N A N C Y R E S O U R C E M A N U A L



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SECTION 8

Legal Issues

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Legal Aspects of Board Membership

Board Membership and the Law

Being a member of the Board of Directors of a pregnancy center carries with it legal responsibility and potential legal liability. It is essential that potential and current board members clearly understand their legal responsibilities as board members. To fully understand all the legal ramifications of Care Net board membership, board members must be familiar with the Care Net Legal Manual. We strongly recommend that each center have a copy of the manual available and that all potential and current board members read the manual.

In general, to fulfill their legal responsibilities, board members must exercise the duty of due care. The duty of due care consists of three basic requirements:

- 1) Board members must always act in *good faith*. They must act with honesty and integrity in all board decisions. For example, when fundraising for a special project, board members should accurately apprise potential donors of the proposal and avoid exaggeration with the purpose of making the project more attractive. This would include representation of the timeline for completion, the scope of the project, the current progress, and the need for the project.
- 2) Board members must act in the *best interests of the center*. This means they must exercise loyalty and make their decisions based on what is objectively best for the center and not any individual. For example, if the majority of the board agrees on an employment action and one board member dissents, the dissenting member cannot express his or her disagreement outside the forum of the board meeting when doing so would create liability or discredit the center in any way.
- 3) Board members must act *prudently* when they are making decisions. This requires that they demonstrate common sense, good judgment, and wisdom. For example, if the board is considering a capital expenditure, such as the purchase of a computer system, every board member should pray, consider all the pertinent information regarding the needs of the center and the available products, compare multiple competitive bids, and insist the transaction be fair and reasonable to the corporation. Board members demonstrate that they are upholding their duty of due care when they fulfill the following essential duties of board members:
 - Board members must be active in the affairs of the organization.
 - Board members must be committed to attending meetings.



There are several specific legal issues that are particularly pertinent to board members.

- Boards must maintain accurate and complete minutes of meetings.
- Board members must require adequate information to be provided for all decisions, and must review that information and all other information they receive (not attending meetings and not reviewing financial affairs may create liabilities for neglecting corporate affairs).
- Board members should monitor the organization's progress in program and financial goals.

Important Legal Issues for Board Members

In addition to exercising the duty of due care and fulfilling board member responsibilities, there are several specific legal issues that are particularly pertinent to board members.

Board Members Must Avoid Conflicts of Interest

Avoiding the appearance of evil is a familiar warning for most Christians. In a pregnancy ministry, which relies on a good reputation in the community for continued support of all kinds, allowing conflicts of interest can be a damaging mistake. Briefly, a conflict of interest arises when a board member is influenced by opposing factors in decision-making or by considerations other than simply the good of the center. For example, if a board member owned a catering business and the board was voting on which catering company to hire for the center's fundraising banquet, it would be a conflict of interest for that board member to participate in that particular vote. Each board member must strive to make all decisions based on what would be best for the ministry. In order to prevent conflicts of interest, it is prudent for the board to adopt a formal policy. *A sample policy is located in the Appendix.*

The responsibility of every board member is to serve the best interest of the center - a ministry in the name of Jesus Christ. A potential conflict of interest is realized when a decision is made by a board member for a competing interest rather than for the best interest of the center. When there is a potential conflict of interest, the board should require the following:

- 1) **Disclosure:** The full board must be informed of the potential conflict by the member with the competing interest. For example, disclosure can be made through an audited financial statement.
- 2) **Abstention:** The board member with competing interests should not participate in voting or discussion regarding the issue. It may be wise for he or she to be absent from the board meeting(s) when the issue is discussed and resolved.

- 3) Decision must be in the best interests of the center: The final decision must have all the earmarks of propriety. The decision must result in action or inaction that is fair and reasonable to the center. Competitive bids or second opinions must have been obtained. There must also be proof of a thorough evaluation of the matter by the board. Documentation of this evaluation, in the minutes, for example, should include a cost/benefit analysis.

Certain transactions between board members and centers are presumed unfair. For example, when a board member purchases or leases property owned by a center, the transaction is assumed to be unfair. In this case, the board member must be able to prove the fairness of the transaction and the absence of fraud. However, a board member may sell property to the center but may not represent the center in the sale, and the price must reflect the fair market value of the items sold.

When a board member acts in his or her own interest, such as if he or she co-mingles personal and center funds, the act is voidable by the full board and the board member must be able to prove the fairness of the act to the center. Similarly, a board member cannot take personal advantage of a business opportunity that is intended for the center.

Sample conflict of interest policy¹:

- Board members agree to place the welfare of the center above personal interests, interests of family members, and any other competing interest.
- Board members agree to disclose to the full board their interests or involvement when participating in any transaction for the center in which another party to the transaction includes himself or herself; a member of his or her immediate family; or an organization with which he or she, or an immediate family member, is affiliated. Board members agree to disclose to the full board all relationships, both professional and personal, that may result in a conflict of interest between the board member and the center.
- Board members who have a conflict of interest regarding a proposed matter will not participate in consideration of the proposal nor will they participate in voting on the matter.
- Board members will not accept gifts or other valuable items from persons or organizations desiring to transact business with the center.
- Violations of this policy may result in immediate removal of board members.

The Board Should Avoid Nepotism

Centers often struggle to meet the demands for an adequate number of board members, volunteers and staff. Sometimes husbands and wives will both be drawn to the ministry and want to offer their time and talent. Care Net recommends that centers draft policies to address how husbands and wives, and other close relatives, may and may not serve the center.

First, it is the recommendation of Care Net that husbands and wives not serve on the board at the same time. A husband and wife are likely to be a built-in voting block that may hinder, rather than enhance, the free exchange of ideas that is an integral part of a healthy board. Second, if a board member and a volunteer or other staff member are closely related, the board member must abstain from all voting regarding his or her spouse. This is necessary to avoid conflicts of interest. Even if this recommendation is followed, Care Net cautions board members whose relatives serve on the staff of their center to guard against bias in favor of the impressions of their relatives. Third, Care Net strongly discourages husbands and wives from serving as board chair and director. It would be impractical for the board chair to abstain from all voting regarding the director. Furthermore, it would be impossible for the board chair to carry out the necessary duties of supervising the director without the appearance of conflict of interest.

Sample Nepotism Policy:

- Close relatives are precluded from serving concurrently on the Board of Directors of _____.
- Board members whose close relatives serve on the staff of _____, either as volunteers or employees, shall abstain from all discussion and voting related to that staff member or volunteer.
- In no event shall the board chair be an immediate relative of the Executive Director of _____.

Insurance and the Board

One of the most commonly asked questions by potential board members is whether they will be covered by insurance for their actions as board members. Centers that are struggling to recruit new board members may want to consider whether lack of, or insufficient, insurance coverage may be contributing to their difficulty.

Care Net recommends that all centers carry professional and general liability insurance. One of the most important benefits of coverage is that the center as a corporation, volunteers, paid staff, and board members -

individually and as a group - will be protected from personal liability arising from counseling, advertising, and general operation of the center. The insurance company absorbs all the costs of legal defense, including paying judgment up to policy limits. Without this protection, the center and the individual volunteers, paid staff, and board members may have to absorb these costs.

Centers should also consider obtaining directors and officers (D&O) coverage. This type of policy does not cover lawsuits brought by clients or pro-abortion organizations for counseling or advertising, however, D&O insurance covers board members for the following “wrongful acts”: fundraising indiscretions, wrongful termination, demotion, failure to promote, libel, slander, defamation of character, copyright infringement, invasion of privacy, wrongful entry, plagiarism, and misappropriation of ideas. This is in contrast to professional liability insurance which covers the board for “negligent acts and/or actions”, such as improper supervision of a director who harms a client with his or her words.

Each board must decide what type of coverage is appropriate for their center. Potential board members, particularly professionals such as doctors and lawyers, may be reluctant to join the board unless they are assured of coverage for directors and officers. On the other hand, the coverage is expensive and applies to legal actions which historically have only rarely been brought against pregnancy center boards.

Patriot Insurance provides insurance coverage for pregnancy centers with yearly discounts given to Care Net affiliates. The toll free number for Patriot Insurance is 800-859-2724.

Practicing Due Diligence

by Kurt Entsminger

The wisdom of the prudent is to give thought to their ways... Proverbs 14:8. NIV

The plans of the diligent lead to profit as sure as haste leads to poverty. Proverbs 21:5. NIV

As board members, you owe a legal duty, individually and collectively, to exercise due diligence in managing the activities and operations of your center. In simple terms, due diligence means giving the attention and care to a particular matter that reasonable persons would be expected to give under those circumstances.

A recent case illustrates the problems that can arise when board members fail to take their fiduciary responsibilities seriously. Eighteen former trustees of Adelphi University in New York agreed to pay a \$1.5 million settlement for neglecting their duties. The trustees were accused of approving an excessive salary for the university's former president. The trustees were also accused of failing to properly review the president's performance. In short, the trustees were charged with failing to exercise due diligence.

Periodically, your board will be required to make decisions that may have a significant impact upon your ministry. These may involve the selection and compensation of executive employees. They may involve the proposed purchase of property or the selection of a new business location. Or, your center may face the possibility of adding new client services such as medical services. When these situations arise, steps should be taken to assure that each board member is reasonably informed of relevant facts so that a prudent decision can be made and implemented.

Also, unexpected problems may arise at your center which require board intervention and action. These problems may come in various forms such as management difficulties and financial shortfalls. In these situations, due diligence requires taking prompt and appropriate steps to investigate and resolve these problems.

The specific steps to be taken by your board in addressing a situation will obviously depend upon the particular circumstances. However, in each situation, the exercise of due diligence should include five basic ingredients: (1) Proper participation; (2) Proper recognition; (3) Proper investigation; (4) Proper decision making; and, (5) Proper action. Each of these is discussed below.

1) Proper Participation

The first ingredient of due diligence is regular participation. Board meetings should be regularly conducted and each board member should regularly attend. Also, each board member must devote the necessary attention and effort to any committee or other board responsibilities that are specially assigned. A board member's lack of participation does not excuse him or her from having a continuing responsibility to properly manage the center's operations.

A person should not agree to serve on a pregnancy care center board unless he or she is able to commit the necessary time and effort to serve the ministry. Occasional absences from board meetings may be necessary and acceptable. However, when a pattern of repeated absences occurs, this problem should be addressed. Many centers have bylaws that specifically provide for the removal of board members who are excessively absent from board meetings or who otherwise chronically fail to participate in board management.

2) Proper Recognition

Another ingredient of due diligence is proper recognition of problems and needs. Your board must continuously monitor the operations and status of your center so that any significant problems and needs can

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be promptly identified and addressed. Often, it is relatively easy to determine that some sort of problem or need exists. The more difficult task may be to determine the precise nature of the problem or issues that must be addressed. There is an old adage that you cannot arrive at the right answers until you ask the right questions.

For example, assume a center, which is currently renting cramped office space, is suddenly presented with a favorable opportunity to purchase a building that is much more suitable for the center's operations. Faced with this situation, the center's board may be inclined to confine its analysis to a comparison of the suitability and costs of these respective sites. Such an analysis, however, may exclude consideration of larger questions that should be addressed in this situation. If the center is going to pursue a new location, shouldn't other potential sites also be explored? Also, should the center commit to investing a large share of its monies in a fixed asset rather than having such monies available for client services?

3) Proper Investigation

The duty of each board member to exercise due diligence encompasses the responsibility to be reasonably informed in making board decisions. Before taking action on any important matter, your board should undertake a thorough investigation of the relevant facts that are reasonably necessary to make an informed and prudent decision.

The nature and scope of the desired investigation will depend on the particular matter being addressed. Your board should initially determine what information is necessary and the steps that should be taken to obtain such information. Your board may consider appointing a special committee to gather the necessary information. When technical issues are involved, the exercise of due diligence may require obtaining advice and input from outside consultants such as accountants, lawyers, and appraisers. Once the appropriate information is gathered, it should be made available to each board member before deliberations on any final decision are undertaken.

4) Proper Decision Making

The process of deliberation used in arriving at a board decision is also an important ingredient of due diligence. Sound decisions are more likely to occur when they are based upon the collective wisdom of all board members. This means that each board member should be given adequate time to reflect upon the decision at hand as well as an opportunity to offer individual input in the deliberation process.

Most board bylaws allow for decisions by majority vote. However, your board should always strive for unity, especially on crucial issues. Working toward a consensus is preferable to taking a vote when significant disagreements remain among board members. If some board members have serious objections to a proposed decision, this may be a signal to pray and further consider the issue.

5) Proper Action

Once a decision is made, it remains your responsibility as a board to see that it is properly implemented. In most instances, your center's staff will be the persons who implement the decision. As a board, you should assure that the authority and responsibility to carry out any particular action item is clearly delegated. Also, it may be wise to establish timetables and deadlines to help assure that action items are carried out in a prompt fashion. Your board should continue to monitor these situations until it is satisfied that any decisions have been fully and satisfactorily implemented.

Conclusion

God calls you as board members to be good stewards of the ministry resources entrusted to your care. Practicing due diligence is one of the primary ways to fulfill that responsibility. Care Net encourages each member to devote the time, care and attention necessary for the proper management of your center.

Avoiding Conflicts of Interest

By Kurt Entsminger

The Bible records the story of Eli's two wicked sons. Hophni and Phinehas were priests entrusted with the responsibility of receiving the sacrifices offered each year by the Israelite people. Instead of following the proper practices of their priesthood, Hophni and Phinehas fattened themselves on the choicest parts of the offerings. They put their own selfish desires ahead of the purposes and interests of their God-given ministries.

The same principles which led to the condemnation of Eli's sons apply in prohibiting conflicts of interest in modern ministries. When you accept the calling to become a member of a CPC board of directors, you are committing to place the best interests of the ministry ahead of your own interests. As a corporate director, you are not allowed to abuse your position of trust to further your own personal gain.

Situations will likely arise when the interests of your CPC come into potential conflict with your own personal interests or the personal interests of other members of your board. The fact that such situations arise is not necessarily a problem. The important question concerns how you and the remaining board members respond to these situations.

Interested Director Transactions

The law closely scrutinizes transactions entered into between a director and the corporation which he serves. Such transactions should only be pursued when the best interests of the CPC will clearly be served.

If a transaction is pursued with an interested director, three crucial requirements must be met:

- 1) **Disclosure:** The board must be fully informed of the nature of the potential conflict by the interested member. In such a situation, each board member has a right to make full inquiry to ascertain the details surrounding such a potential conflict.
- 2) **Abstention:** The interested member must not participate in the deliberations or vote concerning the proposed transaction. It must be approved by a majority of non-interested members.
- 3) **Fairness:** The fairness of the transaction must be verifiable by objective and independent information, such as appraisals and competitive bids. Mere good faith on the part of the remaining board members is not sufficient to render the transaction valid.

For example, assume that your CPC is looking for a new location and you personally own a professional building that you would like to sell. Also assume that your property is one of several possible properties which will suit the needs of the center. Would it be appropriate for you to propose selling your building to the center?

Such a proposed sale should be made with great caution, especially since there are other properties for the board to consider. The sale would be permissible only if the remaining board members would determine that purchasing your property is in the best interest of the CPC. Even then, it would be necessary to obtain an independent appraisal to assure that your asking price was not greater than the fair market value of the property.

Another sensitive situation may arise when a CPC's employee is the spouse of a board member. Care Net generally recommends that these situations should be avoided. While this situation does not automatically present an impermissible conflict of interest, the board member will be required to abstain from voting on all matters, such as salary issues, which directly affect his or her spouse.

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The law does not recognize that every remote or contingent personal benefit constitutes a conflict of interest. For example, assume your board, which includes an obstetrician, is addressing whether to provide ultrasound services at your center. Also assume that an affirmative vote may indirectly result in the center making an increased number of referrals to obstetricians in your community. These circumstances should not prohibit the obstetrician from participating in this decision. Indeed, he or she may be the only board member who can provide valuable technical input on this issue.

On the other hand, if your board is voting to determine which obstetricians in the community should be placed on the CPC's referral list, the obstetrician director should properly abstain. This is because a direct benefit may be promoted by the decision.

Usurpation of Corporate Opportunities

A board member's duty of loyalty to the corporation prohibits the usurpation of corporate opportunities for self or others. If, while serving upon a CPC's board, you learn of an opportunity being considered for the CPC, you cannot take advantage of that opportunity for yourself. Similarly, it is inappropriate for you to assist another party in taking advantage of that opportunity.

For example, assume that your board has identified an ideal property for relocating your center. However, because of financial concerns, the board has voted to defer taking any action to pursue the purchase of this property. In the meantime, you realize that this property would be perfect for your professional practice. Can you properly pursue the purchase of this property?

A board member's pursuit of such a purchase would constitute an impermissible usurpation of a corporate opportunity. The board member's knowledge of this opportunity arose in connection with his board service. Moreover, merely because the board has deferred action does not mean that it has surrendered this opportunity. Such a purchase could only be properly pursued if the remaining board adopted a resolution expressly confirming that the corporation had permanently abandoned this property.

Conclusion

Protecting your pregnancy center from improper conflicts of interest is an important duty of every board member. This duty extends not only to your own dealings with the ministry, but also to the dealings of your fellow board members.

The failure to adhere to these principles may cause serious consequences. An individual board member who derives improper personal gain by such abusive dealings can be held personally liable to the corporation, its contributors and its creditors. The remaining board members may also be held personally liable if they have wrongfully allowed such abusive practices to occur. Further, such abusive practices can place the center's tax exempt status in jeopardy.

If you have questions concerning the propriety of a particular transaction, you should strongly consider consulting an attorney. Also, Care Net will be glad to assist you in addressing any such questions.

Political Activity: Knowing Your Limits

by Kurt Entsminger

At your fall banquet, Congressman Frank Smith steps to the podium. Awaiting his talk, you quietly relish the thought of having persuaded such a well-known politician to come to your fundraising event. You especially appreciate that he has taken time off from his rigorous reelection campaign to come talk to your supporters about the importance of your center's work. Soon, however, your delight turns to concern. After sharing a few remarks about the fine work being done at your center, Congressman Smith launches into a political speech exhorting the audience to vote for him in the upcoming election. Your concern turns to alarm when your Executive Director concludes the evening by publicly thanking the Congressman and assuring him that the center and all of its supporters will help him win another term in Congress.

Every 501(c)(3) organization should be aware of the limitations that are placed upon its involvement in political activities. There are two basic limitations. First, the law strictly prohibits any 501(c)(3) organization from directly or indirectly participating in, or intervening in, any political campaign on behalf of, or in opposition to, any candidate for public office. The penalty for violating this rule is loss of tax-exempt status. Second, the law prohibits any 501(c)(3) organization from devoting a substantial part of its activities to carrying on propaganda or attempting to influence legislation. The penalty for violating this rule is the imposition of a 25% excise tax on any improper expenditure.

Uncertainty about how these rules apply to real life situations can lead to many questions. Here are some of the questions Care Net frequently receives from pregnancy centers:

Can our center invite a politician to speak at our banquet?

Can we use our monthly newsletter to discuss politically related issues?

Can we have a politician sign one of our fundraising letters?

Can we state our center's support for positive steps being taken by the current administration?

Can center personnel appear at state legislative hearings to speak for or against legislation?

Can our director appear in her individual capacity to speak in support of a political candidate?

The remainder of this article seeks to answer these and other related questions.

Political Campaigns

The IRS strictly prohibits giving direct or indirect support to any political candidate. Therefore, a pregnancy center must not make any official statements supporting or opposing a political candidate. Nor can a pregnancy center provide any other forms of direct or indirect support to a political candidate.

Because of this prohibition, pregnancy centers should exercise great caution when inviting a political candidate to speak at a banquet or other event. If such an invitation is made, the speaker should not be introduced as a candidate and the speaker should be asked to refrain from using his talk to promote his campaign. The safer course of action is to avoid inviting politicians to banquets during times when they are actively running for office.

Remember, there is nothing inherently wrong with having a politician offer support to a pregnancy center, even when that politician is running for office. The problem only arises when the support can be viewed as going in the other direction. Thus, allowing a political candidate to visit a center or to issue statements supporting a center's work will only become problematic if some sort of reciprocal support can be seen to be offered by the center to the candidate. Similarly, there is nothing wrong with having a candidate sign a fundraising letter supporting the center so long as the letter remains free of campaign talk.

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Improper support of candidates may also occur in other forms. Allowing a candidate to use any resources of a pregnancy center at less than fair market value is inappropriate (e.g., office equipment, meeting rooms, mailing lists, staff assistance). Moreover, even when offered at fair market value, it is inappropriate to rent the center's mailing list or facilities unless the center is also willing to make these rentals available on the same terms to any opposing candidates.

Timing is a critical factor that the IRS considers when looking at these situations. The closer in time to an election that a questionable activity occurs, the more likely that it will obtain IRS scrutiny. Further, the prohibition against supporting or opposing political candidates only applies when an active election campaign is underway. Therefore, a pregnancy center is not prohibited from praising or criticizing a particular political incumbent when there is no ongoing campaign for reelection.

Generally, a 501(c)(3) organization is free to engage in issue advocacy. Speaking out for or against given political positions is a form of protected political expression. Thus, for example, to state in a newsletter the center's views supporting informed consent laws would generally be permissible. However, a center that does not regularly engage in issue advocacy must be careful about engaging in such advocacy only during an election season. If the issue involved is closely identified with one or more of the candidates, such selectively timed issue advocacy may be viewed by the IRS as a form of indirect support or opposition of a political candidate.

Although the IRS generally permits 501(c)(3) organizations to publish voter guides stating the candidates' positions on issues, there are several legal traps that must be avoided. First, the guide must be written to avoid any indication of which candidate the organization may prefer. And second, the guide must address a broad range of campaign issues and not just those issues about which the organization has a particular concern. Because of these traps, Care Net generally recommends that pregnancy centers stay away from publishing voter guides.

The political restrictions placed upon 501(c)(3) organizations do not affect what center employees or volunteers may do during their own time. For example, a pregnancy center leader may support or oppose candidates so long as he or she does so in a private capacity. In these situations, it is not improper to refer to the leader's center job position so long as it is understood that he or she is not purporting to speak on behalf of the center. While personal political expression should be encouraged outside the center, Care Net generally recommends that centers prohibit their employees and volunteers from distributing or displaying any political materials inside the center.

Political Lobbying

The rules relating to political lobbying are less strenuous than those relating to involvement in political campaigns. A 501(c)(3) organization is permitted to engage in lobbying activities so long as those activities are not "substantial". Neither Congress nor the IRS has provided a precise definition for what constitutes "substantial" activities. However, in 1976, Congress enacted a special provision that allows 501(c)(3) organizations to elect to have their lobbying expenditures governed by a special formula. This formula allows up to 20% of the organization's first \$500,000 to be used for lobbying efforts. Smaller increments of additional revenues may also be used for lobbying expenses. To take advantage of this election, a 501(c)(3) organization must file special paperwork with the IRS confirming its intention to be governed by this formula.

For most pregnancy centers, the restrictions relating to lobbying efforts present no serious concerns. It is rare for pregnancy centers to engage in lobbying efforts. For instance, most of the educational information that centers send to supporters about legislative issues does not constitute lobbying. Generally, only when there is some "call to action" is this activity deemed to be lobbying. Further, even in those instances when some lobbying does occur, the activity is usually minimal and does not involve any "substantial" devotion of the

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center's resources. However, when a pregnancy center does intend to engage in any significant lobbying efforts, it should consult an attorney in advance to help determine its legal limitations.

Conclusion

Having opted to advance the pro-life mission through compassionate outreach and not legal reform, pregnancy centers have freed themselves from many political concerns that face other more activist-oriented organizations. However, even as ministries focused on helping women one by one, pregnancy centers must continue to interact with politicians, political issues and the political system in a number of meaningful ways. To preserve tax-exempt status, pregnancy centers must carefully navigate these political waters in compliance with IRS restrictions.

Summary of Political Dos and Don'ts

Permissible Activity

Support to center by a candidate

Individual support of candidates

Criticism or praise of incumbents outside election campaign time

Impartial voter guides that broadly address all campaign issues

Year round issue advocacy

Insubstantial lobbying efforts

Impermissible Activity

Center statements supporting or opposing candidates

Offering center resources to candidate at less than fair market value

Posting of campaign literature at center

Partial voter guides that only address limited campaign issues

Issue advocacy at election time that translates to support/opposition

Substantial lobbying efforts

Notes