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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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April 13, 2005

MEMORANDUM

AGENDA ITEM
For Meeting of: 4-21-05

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Cheryl A.F. Hemsley *CAH*
Attorney

Subject: Draft AO 2005-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 21, 2005.

Attachment

1 ADVISORY OPINION 2005-03
2 Michael J. Kurman, Esq.
3 Arent Fox, PLLC
4 1050 Connecticut Avenue, N.W.
5 Washington, D.C. 20036-5339

DRAFT

6
7 Dear Mr. Kurman:

8
9 We are responding to your advisory opinion request on behalf of the American
10 College of Obstetricians and Gynecologists (“ACOG”) regarding whether, under the
11 Federal Election Campaign Act of 1971, as amended (the “Act”), ACOG and Ob-Gyns
12 for Women’s Health (“OGWH”) are affiliated. If ACOG and OGWH are affiliated, you
13 ask whether OGWH or its separate segregated fund (“SSF”), Ob-Gyn PAC, may solicit
14 ACOG’s members for contributions to Ob-Gyn PAC; and if such solicitations are
15 permissible, whether, specifically, ACOG’s Fellows and Junior Fellows qualify as
16 solicitable members of ACOG.¹

17 The Commission concludes that ACOG and OGWH are affiliated membership
18 organizations. As such, OGWH or Ob-Gyn PAC may solicit ACOG’s members for
19 contributions to Ob-Gyn PAC. The Commission also concludes that both Fellows and
20 Junior Fellows qualify as solicitable ACOG members.

21 ***Background***

22 The facts of this request are presented in your letter of February 17, 2005, as
23 supplemented by your letter of March 2, 2005.

¹ OGWH has represented to ACOG that it fully joins in ACOG’s request for an advisory opinion and has reaffirmed its stated intent to solicit ACOG members – via the potential sale by ACOG, and purchase by OGWH or Ob-Gyn PAC, of ACOG’s membership lists – if the Commission advises that such solicitation is legally permissible.

1 1. ACOG

2 ACOG is a private, voluntary membership group incorporated without capital
3 stock. It operates as a nonprofit, tax-exempt educational and charitable organization
4 under the Internal Revenue Code section 501(c)(3), and is dedicated to the advancement
5 of women's health. You indicate that ACOG's membership consists of over 46,000
6 individuals spread across several membership categories. Your request, however, is
7 limited to two of ACOG's "membership categories" – Fellows and Junior Fellows.

8 2. OGWH

9 OGWH is a private, voluntary membership group, established in 2000 by a vote
10 of ACOG's Executive Board and incorporated without capital stock. OGWH operates as
11 a nonprofit, tax-exempt social welfare organization under the Internal Revenue Code
12 section 501(c)(4), advocating laws and public policies that support the field of obstetrics
13 and gynecology, and quality healthcare for women, generally. OGWH works to increase
14 awareness among its members and the public of the changing public policies and
15 legislation related to women's health care.

16 In January 2001, OGWH created an SSF called Ob-Gyn PAC. Ob-Gyn PAC
17 currently only solicits contributions from OGWH members. ACOG intends to sell its
18 member list to OGWH or Ob-GYN PAC for fair market value in order for OGWH or Ob-
19 GYN PAC to solicit ACOG Fellows and Junior Fellows for contributions to Ob-Gyn
20 PAC.

21 *Questions Presented*

22 *Are ACOG and OGWH affiliated? If so, may OGWH or Ob-Gyn PAC solicit*
23 *ACOG's members for contributions to Ob-Gyn PAC? If such solicitations are*

1 *permissible, do ACOG Fellows and Junior Fellows qualify as solicitable ACOG*
2 *members?*

3 ***Legal Analysis and Conclusions***

4 **Question 1. Are ACOG and OGWH affiliated?**

5 The Commission concludes that both ACOG and OGWH are membership
6 organizations under the Act and Commission regulations, and because ACOG established
7 OGWH, they qualify as affiliated membership organizations under 11 CFR 100.5(g)(4).²
8 *See also* 114.5(g)(1) and 11 CFR 114.7(g).

9 ACOG satisfies the Commission's requirements for membership organization
10 status. ACOG Fellows have the right to select ACOG's governing Executive Board and
11 to vote on other matters. ACOG Bylaws, Articles IV and XI; *see* 11 CFR 114.1(e)(1)(i).
12 ACOG's Bylaws set forth specific professional requirements that applicants must meet to
13 be accepted as members. ACOG Bylaws, Articles III-VIII; *see* 11 CFR 114.1(e)(1)(ii).
14 ACOG's formal organizational documents are available to members upon request, and on
15 ACOG's website.³ *See* 11 CFR 114.1(e)(1)(iii). ACOG actively solicits members
16 through its website and at ACOG-sponsored meetings, and acknowledges the applicants'
17 acceptance of the invitation to membership with a Certificate for Fellows and a Letter of
18 Election for Junior Fellows. *See* 11 CFR 114.1(c)(1)(iv)-(v). Finally, ACOG is
19 dedicated to the advancement of women's health, and is not organized primarily for the
20 purpose of influencing Federal elections. ACOG Bylaws, Article II; *see* 11 CFR
21 114.1(e)(1)(vi).

² Commission regulations provide for a case-by-case examination of ten circumstantial factors found at 11 CFR 100.5(g)(4)(ii)(A) – (J) to determine whether two entities are affiliated.

³ www.acog.org.

1 OGWH also satisfies the Commission's requirements for membership
2 organization status. OGWH's Board of Directors, which is made up entirely of OGWH
3 members in good standing, exercises exclusive policy-making and governance authority
4 of OGWH. OGWH Bylaws, Articles II and III; *see* 11 CFR 114.1(e)(1)(i). OGWH's
5 Bylaws state that membership in OGWH is open to anyone who pays the required dues.
6 OGWH Bylaws, Article III; *see* 11 CFR 114.1(e)(1)(ii). OGWH's formal organizational
7 documents are available to members upon request. *See* 11 CFR 114.1(e)(1)(iii). OGWH
8 actively solicits members. OGWH Bylaws, Article III; *see* 11 CFR 114.1(e)(1)(iv).
9 OGWH acknowledges acceptance of membership with a membership card or by adding
10 the member's name to a newsletter list. OGWH Bylaws, Article III; *see* 11 CFR
11 114.1(e)(1)(iv). Finally, OGWH's purpose is advocating laws and public policies
12 supporting quality healthcare for women, and the field of obstetrics and gynecology, and
13 is not organized primarily for the purpose of influencing Federal elections. OGWH
14 Bylaws, Articles I and V; *see* 11 CFR 114.1(e)(1)(vi).

15 The Act and Commission regulations provide that a membership organization
16 may solicit contributions for a separate segregated fund from its members. 2 U.S.C.
17 441b(b)(4)(C); 11 CFR 114.7(a). The Commission's regulations at 11 CFR 114.7(g)
18 further provide that an incorporated membership organization is subject to the rules at 11
19 CFR 114.5, which, in turn, provides that for purposes of determining affiliation, the rules
20 at 11 CFR 100.5(g)(4) apply. 11 CFR 114.5(g)(1). Accordingly, in this instance, factors
21 such as whether an organization had a significant role in the formation of another
22 organization become determinative. *See* 11 CFR 100.5(g)(4)(ii)(I).

23

1 Accordingly, the Commission finds that because ACOG established OGWH,
2 and because you have presented no other facts regarding the relationship between ACOG
3 and OGWH that would lead to a contrary conclusion, ACOG and OGWH are affiliated.

4 Question 2. May OGWH or Ob-Gyn PAC solicit ACOG's members for contributions
5 to Ob-Gyn PAC?
6

7 The Act permits an incorporated membership organization, or its SSF, to solicit
8 its noncorporate members and executive and administrative personnel, and their families,
9 for contributions to the SSF. *See* 2 U.S.C. 441b(b)(4)(A) and (4)(C); *see also* 11 CFR
10 114.7(a). Additionally, a membership organization or its SSF may solicit the executive
11 and administrative personnel, and their families, of the membership organization's
12 affiliates. *See* 11 CFR 114.5(g)(1). The Commission has extended this allowance to the
13 solicitation of members. *See* Advisory Opinion 2003-29.

14 Therefore, because ACOG and OGWH are affiliated membership organizations,
15 OGWH or Ob-Gyn PAC may solicit ACOG's noncorporate members and executive and
16 administrative personnel, and their families, for contributions to Ob-Gyn PAC.

17 Question 3. Do ACOG Fellows and Junior Fellows qualify as solicitable ACOG
18 members?
19

20 Commission regulations define "members" of a membership organization as
21 including all persons who are currently satisfying the requirements for membership,
22 affirmatively accept the membership organization's invitation to become a member and,
23 either have a significant financial attachment to the organization, pay annual dues set by
24 the organization, or have significant organizational ties to the membership organization.
25 11 CFR 114.1(e)(2). Both Fellows and Junior Fellows must satisfy the requirements for
26 membership stated in ACOG's Bylaws. ACOG Bylaws, Articles IV and V. Fellows and

1 Junior Fellows must accept the invitation to become members, and must pay annual dues.
2 *Id.* Therefore, both Fellows and Junior Fellows are members of ACOG under the
3 Commission's regulations and, as such, may be solicited by OGWH or Ob-Gyn PAC for
4 contributions to Ob-Gyn PAC.

5 The Commission expresses no opinion regarding the applicability of the Internal
6 Revenue Code, or of regulations promulgated by the Internal Revenue Service, to the
7 status of ACOG or OGWH and the transactions contemplated in this request because
8 those questions are outside the Commission's jurisdiction.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity.

15

16

Sincerely,

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Scott E. Thomas
Chairman

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22 Enclosure (AO 2003-29)

23