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AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey
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For Meeting of 6/15/11

Subject: Draft AO 2011-08 (American Society of Anesthesiologists)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 15, 2011.

Attachment

1 ADVISORY OPINION 2011-08

2 Glenn Willard, Esq.
3 Patton Boggs LLP
4 2550 M Street, NW
5 Washington, DC 20037-1350
6

DRAFT

7 Dear Mr. Willard:

8 We are responding to your advisory opinion request on behalf of the American Society of
9 Anesthesiologists (“ASA”), concerning the application of the Federal Election Campaign Act of
10 1971, as amended (the “Act”), and Commission regulations to the status of ASA’s Retired
11 Members and Life Members.¹ The Commission concludes that Life Members and Retired
12 Members are “members” of ASA for the purposes of the Act and Commission regulations.
13 Therefore, ASA may solicit Life Members and Retired Members for contributions to its separate
14 segregated fund (the “SSF”), the American Society of Anesthesiologists Political Action
15 Committee (“ASAPAC”).

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on April 28,
18 2011.

19 ASA is a non-profit medical society incorporated in New York, and described in section
20 501(c)(6) of the Internal Revenue Code. ASA’s purpose is “to associate and affiliate into one
21 organization all of the reputable physicians in the U.S., its territories and possessions, who are
22 engaged in the practice of or otherwise especially interested in anesthesiology” ASA
23 Bylaws, sec. 1.00. ASA is the connected organization of ASAPAC.

¹ That ASA regards these individuals as members pursuant to their own governing documents does not resolve the question of whether such members qualify as “members” as that term is used in Commission regulations. To avoid

1 ASA’s membership consists of approximately 45,000 physicians and other professionals
2 who engage in, or are especially interested in, the medical practice of anesthesiology. ASA has
3 multiple geographically based Component Societies. These Component Societies are chartered
4 by ASA’s Board of Directors. ASA Bylaws, sec. 1.31. Generally, to become an ASA member,
5 an individual must be a member of a State Component Society.² ASA Bylaws, sec. 1.34.

6 ASA’s highest governing body is its House of Delegates. The House of Delegates
7 comprises delegates who are elected by the Component Societies, members of the Board of
8 Directors, officers of ASA, past presidents of ASA, section chairs, and other delegates of
9 subspecialty societies and resident societies. ASA Bylaws, sec. 1.12. Delegates are elected by
10 the Component Societies, and must be voting members in the Component Society they represent.
11 ASA Bylaws, sec. 1.61.

12 ASA’s Bylaws expressly state the qualifications and requirements of each type of
13 membership. ASA Bylaws, sec. 3. ASA makes its bylaws and administrative procedures
14 available to its members on request and on the “members only” page of its web site. ASA
15 expressly solicits persons to become members by advertising on its web site, and by direct mail
16 communications to anesthesiologists. ASA acknowledges an individual’s acceptance of
17 membership by sending written confirmation in the form of a membership card, as well as listing
18 the new member on the ASA Directory of Members on the “members only” section of ASA’s
19 web site.

confusion, in this advisory opinion the Commission will employ the term “members” in quotation marks to mean “members” as defined by Commission regulations.

² Certain individuals may be Active Members “at large” or Affiliate Members of ASA without being members of a Component Society. *See* ASA Bylaws, secs. 1.341 and 1.342. The status of these individuals was not raised by ASA and is not addressed in this advisory opinion.

1 ASA has eight categories of membership, including Life Members and Retired Members.
2 *See* ASA Bylaws, sec. 3.00. Life Members are the past presidents of ASA. Life Members may
3 hold office in ASA and have the right to vote for ASA’s delegates and directors. ASA Bylaws,
4 secs. 3.14 and 3.19. Life Members have no dues obligation. ASA Bylaws, sec. 3.22. Each
5 president-elect witnesses the administration of affairs of ASA for a year in anticipation of his or
6 her term of office as president, which begins after the next annual meeting. ASA Bylaws, sec.
7 1.533. Additionally, each immediate past president must be available for consultation with the
8 current president. ASA Bylaws, sec. 1.537. Finally, Life Members serve as members of the
9 House of Delegates. ASA Bylaws, sec. 1.121.4.

10 Like Life Members, Retired Members of ASA are not required to pay dues. Unlike Life
11 Members, they do not have a vote in ASA. *See* ASA Bylaws, sec. 3.19. Retired Members may
12 be: 1) individuals who have been Active or Affiliate Members of ASA for 20 years or more and
13 who have retired from practice; 2) individuals who have been Active or Affiliate Members for 20
14 years or more and have reached the age of 70; or 3) individuals who are Active Members and
15 who are disabled, and therefore are unable to engage in the practice of their profession, for one
16 year or more. These Retired Disabled Members must be reinstated as Active Members should
17 they resume active practice. ASA Bylaws, secs. 3.161, 3.162 and 3.163. All Retired Members
18 continue to have access to ASA resources, and are eligible to serve on advisory committees.

19 Both Life Members and Retired Members are required to confirm their membership with
20 ASA annually. All members, including Life Members and Retired Members, are subject to the
21 same sanctions and disciplinary procedures. ASA Bylaws, secs. 3.35 and 8.201.

1 ***Question Presented***

2 *Do ASA's Life Members and Retired Members qualify as "members" under Commission*
3 *regulations, such that they may be solicited by ASA for contributions to ASAPAC?*

4 ***Legal Analysis and Conclusions***

5 Yes, because ASA is a membership organization, and its Life Members and Retired
6 Members qualify as "members" under Commission regulations, ASA may solicit them for
7 contributions to ASAPAC.

8 The Act prohibits corporations from making any contributions in connection with a
9 Federal election. 2 U.S.C. 441b(a). The Act states, however, that "contribution" does not
10 include "the establishment, administration, and solicitation of contributions to a separate
11 segregated fund to be utilized for political purposes by a . . . membership organization."
12 2 U.S.C. 441b(b)(2)(C). *See also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v).

13 The Act and Commission regulations delineate the types of persons who may be solicited
14 for contributions to SSFs such as ASAPAC. Such persons comprise the membership
15 organization's "solicitable class." 2 U.S.C. 441b(b)(4); *see also* 11 CFR 114.1(j). The
16 solicitable class of an incorporated "membership organization," which is a type of organization
17 that is membership-based rather than stockholder-based, such as a trade association, cooperative,
18 corporation without capital stock, or a local, national, or international labor organization,
19 includes its "members," as well as its executive and administrative personnel, and their families.
20 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.7 and 114.8.

21

22

1 1. *ASA is a "Membership Organization"*

2 In determining whether an organization's members qualify as "members" under
3 Commission regulations, the Commission must first determine whether the organization itself is
4 a "membership organization" under the Act and Commission regulations.³ *See* 11 CFR 100.134
5 and 114.1(e)(1).

6 A "membership organization" is a trade association, cooperative, or corporation without
7 capital stock that:

8 (1) Is composed of members, some or all of whom are vested with the power and
9 authority to operate or administer the organization, pursuant to the organization's articles,
10 bylaws, constitution or other formal organizational documents;

11 (2) Expressly states the qualifications and requirements for membership in its articles,
12 bylaws, constitution or other formal organizational documents;

13 (3) Makes its articles, bylaws, constitution, or other formal organizational documents
14 available to its members upon request;

15 (4) Expressly solicits persons to become members;

16 (5) Expressly acknowledges the acceptance of membership, such as by sending a
17 membership card or including the member's name on a membership newsletter list; and

18 (6) Is not organized primarily for the purpose of influencing the nomination for election,
19 or election, of any individual for Federal office.

³ In previous advisory opinions, the Commission did not determine whether ASA is a membership organization. Rather the Commission treated ASA as a membership organization in Advisory Opinion 2000-03 (American Society of Anesthesiologists), and determined ASA to be both a trade association and a federation of trade associations in Advisory Opinion 1994-19 (American Society of Anesthesiologists); *see also* Advisory Opinion 1988-43 (American Society of Anesthesiologists).

1 11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134.

2 The facts presented indicate that ASA qualifies as a membership organization under the
3 Commission’s regulations. ASA is a trade association⁴ composed of eight types of members,
4 two of which (Life Members and Active Members) are vested with the power and authority to
5 operate or administer the organization as elected members of the House of Delegates pursuant to
6 ASA’s Bylaws. *See* ASA Bylaws, sec. 1.00. The requirements of each category of membership
7 are clearly set forth in the ASA Bylaws, Section 3.00, which are available to members on the
8 “members only” section of ASA’s web site. ASA invites prospective members to join the
9 organization, and these prospects must affirmatively accept that invitation. Upon acceptance of
10 membership, ASA sends a confirmation of membership in the form of a membership card and
11 lists the new member in the Member Directory on the “members only” section of ASA’s web
12 site. Finally, ASA is not organized primarily for the purpose of influencing the nomination for
13 election or election of any individual to Federal office. ASA’s purpose is to associate and
14 affiliate into one organization physicians who are engaged or interested in the practice of
15 anesthesiology; to encourage specialization in the field; to raise the standards of the specialty; to
16 protect the public against irresponsible and unqualified practitioners in the field; to edit and
17 publish publications in the field; and to further the specialty of anesthesiology. *See* ASA Bylaws,
18 sec. 1.00. Accordingly, the Commission concludes that ASA is a membership organization
19 within the meaning of 11 CFR 100.134 and 114.1(e).

⁴ *See* Advisory Opinion 1994-19 (American Society of Anesthesiologists) (ASA is both a trade association and a federation of trade associations).

1 2. *ASA's Life Members Are "Members" Under Commission Regulations and May Be*
2 *Solicited for Contributions to ASAPAC.*

3 Although the Act does not define the term "member," Commission regulations at 11 CFR
4 100.134(f) and 114.1(e)(2) provide that the term "members" includes all persons who are
5 currently satisfying the requirements for membership in a membership organization,
6 affirmatively accept the membership organization's invitation to become a member, and either:

7 (1) Have some significant financial attachment to the membership organization, such as a
8 significant investment or ownership stake; or

9 (2) Pay membership dues at least annually, of a specific amount predetermined by the
10 organization; or

11 (3) Have a significant organizational attachment to the membership organization which
12 includes: affirmation of membership on at least an annual basis; and direct participatory
13 rights in the governance of the organization. For example, such rights could include the
14 right to vote directly or indirectly for at least one individual on the membership
15 organization's highest governing board; the right to vote directly for organization
16 officers; the right to vote on policy questions where the highest governing body of the
17 membership organization is obligated to abide by the results; the right to approve the
18 organization's annual budget; or the right to participate directly in similar aspects of the
19 organization's governance.

20 11 CFR 114.1(e)(2)(i)-(iii); *see also* 11 CFR 100.134.

21 Life Members are former presidents of ASA, and must annually confirm their acceptance
22 of membership in ASA. Life Members have the right to vote in ASA's elections for delegates to

1 the House of Delegates, ASA's highest governing body. ASA Bylaws, sec. 3.19. Life Members
2 are, themselves, nonvoting members of the House of Delegates. ASA Bylaws, sec. 1.12.
3 Additionally, each immediate past president is a voting member of the Board of Directors, and
4 must be available for consultation to the current president. ASA Bylaws, secs. 1.21 and 1.537.

5 Accordingly, Life Members qualify as "members" under Commission regulations because
6 they (1) currently satisfy the requirements for membership in a membership organization,
7 (2) affirmatively accept membership in ASA, and (3) have a significant organizational
8 attachment to the membership organization. *See* 11 CFR 114.1(e)(2) and (e)(2)(iii) and
9 100.134(f) and (f)(3).

10 3. *ASA's Retired Members Are "Members" of ASA Under Commission Regulations and*
11 *May Be Solicited for Contributions to ASAPAC*

12 Like Life Members, Retired Members currently satisfy ASA's membership requirements,
13 annually accept the invitation to maintain membership in ASA, and have no further dues
14 obligation to ASA. *See* ASA Bylaws, sec. 3.22. Unlike Life Members, however, Retired
15 Members do not have the right to vote in elections to the ASA's House of Delegates. As such,
16 Retired Members do not have the same organizational attachment to ASA as Life Members, nor
17 do they pay dues on a regular basis, or have another significant financial attachment such as an
18 ownership stake in ASA. Accordingly, Retired Members do not satisfy the criteria to be
19 "members" set out at 11 CFR 114.1(e)(2) and 100.134(f).

20 However, the regulations at 11 CFR 100.134(g) and 114.1(e)(3) permit the Commission
21 to determine on a case-by-case basis that persons who do not precisely meet the requirements of
22 sections 100.134(f) and 114.1(e)(2) nevertheless qualify as "members" because those persons

1 have a relatively enduring and independently significant financial or organizational attachment to
2 the organization. For example, the rules recognize that long-term dues paying members who
3 qualify for lifetime membership status with little or no dues obligation, and retired members,
4 may be considered “members.”

5 The requirements for two of the three types of ASA’s Retired memberships are very
6 similar: an individual must have paid dues for at least 20 years and must either 1) be retired from
7 the practice of anesthesiology; or 2) have reached age 70. Because these types of Retired
8 Members are “long term dues paying members,” the Commission determines that they qualify as
9 “members” under 11 CFR 100.134(g) and 114.1(e)(3) and that they may be solicited by ASA for
10 contributions to ASAPAC.

11 The third type of Retired Members are “Active Members who are disabled and therefore
12 unable to engage in the practice of their profession for one year or more” and who, at their
13 request, are placed in Retired membership status. Once they become Retired Members, these
14 individuals no longer have the right to vote in elections to ASA’s House of Delegates, nor are
15 they required to continue to pay dues while they are retired. They have, however, the same
16 access to the member benefit resources that they had as Active Members. These resources
17 include: 1) access to the “members only” section of ASA’s web site; 2) access to a searchable
18 online Member Directory; 3) online access to ASA’s peer-reviewed monthly journal;
19 4) discounted access to ASA’s annual meeting; 5) representation and updates on Federal and
20 State legislative and regulatory issues; and 6) library services and literature searches. Further,
21 these individuals are subject to sanction by ASA, even while they are retired. Additionally,
22 these, like all Retired Members, are eligible for appointment to ASA’s advisory committees. The

1 decisions of the committees, while subject to approval by the House of Delegates, are often
2 approved as a matter of course. When such members resume active practice, they must notify
3 ASA and be reinstated as Active Members. *See* ASA Bylaws, sec. 3.163.

4 In Advisory Opinion 2008-21 (CME Group, Inc.), the Commission determined that even
5 when a member of the Chicago Board of Trade ("CBOT") had temporarily transferred to certain
6 other entities his seat on CBOT, that individual remained a solicitable "member" of CBOT for
7 the purposes of Commission regulations. The Commission reasoned that "while they do not
8 exercise most of the prerogatives of membership . . . they have reversionary interests in the
9 membership and may reacquire those prerogatives." The Commission concluded that the
10 "ownership interests, the reversionary interests and their ability to exercise certain prerogatives
11 associated with membership even while the transfers remain in effect," demonstrated a relatively
12 enduring and independently significant financial attachment.

13 Similarly, in this instance, while the disabled Retired Members have given up their
14 Active Memberships in ASA, they have a reversionary interest in that they must be reinstated as
15 Active Members if they return to practice and wish to maintain membership in ASA. Further,
16 while these members are retired, they continue to be eligible to serve on ASA's Advisory
17 Committees, have full access to ASA membership benefits described above and remain subject
18 to sanction by ASA. Accordingly, given these facts, the Commission concludes that these
19 disabled Retired Members maintain relatively enduring and independently significant
20 organizational attachments to ASA. *See* Advisory Opinions 2008-21 (CME Group, Inc.) and
21 2003-13 (OPHTHPAC). Thus, ASA may solicit these members for contributions to ASAPAC.

1 This response constitutes an advisory opinion concerning the application of the Act and
2 Commission regulations to the specific transaction or activity set forth in your request. *See*
3 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
4 assumptions presented, and such facts or assumptions are material to a conclusion presented in
5 this advisory opinion, then the requester may not rely on that conclusion as support for its
6 proposed activity. Any person involved in any specific transaction or activity which is
7 indistinguishable in all its material respects from the transaction or activity with respect to which
8 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
9 Please note that the analysis or conclusions in this advisory opinion may be affected by
10 subsequent developments in the law, including, but not limited to, statutes, regulations, advisory
11 opinions and case law. The cited advisory opinions are available on the Commission's website,
12 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at
13 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly

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Chair

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