

**AGENDA DOCUMENT NO. 12-26**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

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April 19, 2012

**MEMORANDUM**

**AGENDA ITEM**

TO: The Commission

For Meeting of 4/26/12

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KD*  
Acting Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Tony Buckley *TB*  
Attorney

Subject: Draft AO 2012-13 (Physician Hospitals of America)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 26, 2012.

Attachment

2  
3 Edward M. Shack, Esq.  
4 814 San Jacinto Boulevard  
5 Suite 202  
6 Austin, TX 78701

7  
8 Dear Mr. Shack:

9 We are responding to your advisory opinion request on behalf of Physician  
10 Hospitals of America (“Physician Hospitals”), concerning the application of the Federal  
11 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to  
12 the proposal of Physician Hospitals and persons affiliated with it to make contributions to  
13 independent expenditure only political committees. The Commission concludes that  
14 Physician Hospitals and persons affiliated with it may make contributions to independent  
15 expenditure-only political committees.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on  
18 March 5, 2012.

19 Physician Hospitals is an association of physician-owned hospitals operating in  
20 Texas. It does not have any contracts with the Federal government or receive any  
21 payments from the Federal government under any Federal program, and does not  
22 administer any part of its member hospitals’ dealings with the Federal government  
23 concerning any Federal program.

24 The member hospitals are owned by various legal entities, including limited  
25 partnerships, limited liability corporations, professional associations, trusts, and  
26 individuals. The hospitals provide service to patients through the following Federal

1 programs: Medicare, Medicaid, TRICARE and CHAMPUS. The hospitals take  
2 assignments of such patients' claims against the Federal government for services  
3 rendered and are then directly reimbursed by the Federal government pursuant to the  
4 relevant Federal program. The physicians who treat these patients own the hospitals  
5 either wholly or in conjunction with non-physician partners.

6 Physician Hospitals asks whether it, its member hospitals, and the physician-  
7 owners of its hospitals, may make contributions to independent expenditure-only political  
8 committees in light of their involvement with Medicare, Medicaid, TRICARE and  
9 CHAMPUS.

10 ***Question Presented***

11 *Are associations of physician-owned hospitals, and/or the physician-owned*  
12 *hospitals themselves, and/or the individual physicians who own the hospitals, prohibited*  
13 *under 2 U.S.C. 441c(a)(1) from contributing to political action committees that make*  
14 *only independent expenditures, if the physician-owned hospitals and/or physicians*  
15 *provide services to patients enrolled in government sponsored healthcare programs like*  
16 *Medicare, Medicaid, TRICARE, and CHAMPUS and, due to a valid assignment of*  
17 *benefits form executed by the respective patients, are reimbursed directly by the federal*  
18 *government through the Medicare, Medicaid, TRICARE, and CHAMPUS programs?*

19 ***Legal Analysis and Conclusions***

20 No, associations of physician-owned hospitals, the physician-owned hospitals  
21 themselves, and individual physicians who own the hospitals, are not prohibited under  
22 2 U.S.C. 441c(a)(1) from making contributions to political committees that make only  
23 independent expenditures under the circumstances you describe.

1 Pursuant to 2 U.S.C. 441c(a)(1), it is unlawful for any person who enters into a  
2 contract with the United States, or any department or agency of the United States, for the  
3 rendition of personal services, if payment is to be made from funds appropriated by the  
4 Congress, to make a contribution to any political party, political committee, or candidate.  
5 *See also* 11 CFR 115.2(a). This prohibition does not apply when a person contracts with  
6 an entity other than the United States or a department or agency of the United States,  
7 even if the entity is funded in whole or in part from funds appropriated by the Congress.  
8 *See* 11 CFR 115.1(d). The third party beneficiary of a Federal contract is not subject to  
9 the prohibition. *Id.*

10 The Explanation and Justification for 11 CFR 115.1(d), which relies in turn on the  
11 legislative history of section 441c, makes clear that the regulation excludes from  
12 coverage service providers who receive payments from Medicare or Medicaid. *See* H.R.  
13 Doc. No. 95-44, COMMUNICATION FROM THE CHAIRMAN, FEDERAL ELECTION  
14 COMMISSION, TRANSMITTING THE COMMISSION'S PROPOSED REGULATIONS GOVERNING  
15 FEDERAL ELECTIONS, PURSUANT TO SECTION 316(C) OF THE FEDERAL ELECTION  
16 CAMPAIGN ACT OF 1971, AS AMENDED, at 120, available at  
17 [http://www.fec.gov/law/cfr/ej\\_compilation/1977/95-44.pdf#page=43](http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=43) (quoting from the  
18 1974 Conference Report on the coverage of 18 U.S.C. 611, *S. Conf. Report* 93-1237, 93d  
19 Congress, 2d Session, 68-69 (1974)). Congress recognized that, under Medicare, the  
20 "basic contractual relationship is between the Federal Government and the individual  
21 receiving the medical services[, who] may assign his claim against the Federal  
22 Government to the doctor who rendered the services, but in [that] case the doctor merely  
23 stands in the shoes of the claimant for payment." *Id.* Under Medicaid, "doctors . . . have

1 specific contractual agreements . . . with State agencies and not with the Federal  
2 Government. The House committee did not believe that the [Federal contractor  
3 prohibition] has any application to doctors rendering medical services pursuant to a  
4 contract with a State agency.” *Id.*

5 Although the Commission has never had occasion to address the specific question  
6 presented here, in past advisory opinions it has stated that service providers under  
7 Medicare and Medicaid do not qualify as “Federal contractors.” *See* Advisory Opinion  
8 1975-31 (Shapp); Advisory Opinion 1975-110 (Treen); Advisory Opinion 1985-12  
9 (American Health Care Association PAC). TRICARE and CHAMPUS are  
10 programmatically similar to Medicare and Medicaid.<sup>1</sup>

11 Accordingly, Physician Hospitals, its member hospitals, and the physician owners  
12 of its hospitals, are not prohibited by 2 U.S.C. 441c(a)(1) from making contributions to  
13 independent expenditure-only political committees by virtue of their involvement with  
14 the Medicare and Medicaid programs and TRICARE and CHAMPUS.

15 This response constitutes an advisory opinion concerning the application of the  
16 Act and Commission regulations to the specific transaction or activity set forth in your  
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
18 of the facts or assumptions presented, and such facts or assumptions are material to a

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<sup>1</sup> “TRICARE is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors and certain former spouses worldwide.” TRICARE Management Activity, What is TRICARE?, <http://tricare.mil/mybenefit/home/overview/WhatIsTRICARE> (last modified March 6, 2012). TRICARE is the successor program to CHAMPUS, the Civilian Health and Medical Program of the Uniformed Services. Authorized TRICARE providers operate similarly to either (1) Medicaid providers by engaging in a contractual relationship with a contractor who manages the program on behalf of the Federal government, or (2) Medicare providers by agreeing to accept payment on behalf of beneficiaries, who assign claims to the providers. *See* TRICARE Management Activity, Types of TRICARE Providers, <http://www.tricare.mil/providers/typesofproviders.aspx> (last accessed April 18, 2012).

1 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity. Any person involved in any specific  
3 transaction or activity which is indistinguishable in all its material aspects from the  
4 transaction or activity with respect to which this advisory opinion is rendered may rely on  
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
6 conclusions in this advisory opinion may be affected by subsequent developments in the  
7 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.  
8 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
9 directly from the Commission's Advisory Opinion searchable database at  
10 <http://www.fec.gov/searchao>.

11 On behalf of the Commission,

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13  
14 Caroline C. Hunter  
15 Chair