



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

FEDERAL ELECTION  
COMMISSION  
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May 21, 2012

MEMORANDUM

**AGENDA ITEM**

TO: The Commission

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KD*  
Acting Associate General Counsel

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Assistant General Counsel

Joshua Blume *JB*  
Attorney

For Meeting of 5-24-12

**SUBMITTED LATE**

Subject: Draft AO 2012-15 (American Physical Therapy Association)

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 May 24, 2012.

Attachment

1  
2 ADVISORY OPINION 2012-15

3  
4 John J. Bennett, Esq.  
5 General Counsel  
6 American Physical Therapy Association  
7 1111 North Fairfax Street  
8 Alexandria, VA 22314-1488

**DRAFT**

9  
10 Dear Mr. Bennett:

11 We are responding to your advisory opinion request on behalf of the American  
12 Physical Therapy Association (“APTA”). Your request concerns the application of the  
13 Federal Election Campaign Act (the “Act”), and Commission regulations to APTA’s  
14 proposed plan to use payroll deduction for members who are employed by corporations  
15 owned wholly or partly by APTA members, to make contributions to the APTA Physical  
16 Therapy Political Action Committee (“PT-PAC”), APTA’s separate segregated fund.  
17 The payroll deductions would be administered by the corporations, and APTA would pay  
18 the corporations for their costs.

19 The Commission concludes that APTA may implement its proposed payroll  
20 deduction plan and that the corporations may administer the payroll deduction system  
21 provided that APTA makes advance payment for the payroll deduction services the  
22 corporations would provide.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on  
25 February 10, 2012, and on an e-mail received on March 29, 2012.

26 APTA is a non-profit, Illinois corporation without capital stock. It is registered as  
27 a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code. APTA

1 is the national professional organization representing physical therapists, physical therapy  
2 assistants, and students who anticipate entering these fields. APTA has no corporate  
3 members. APTA actively solicits individuals to join as members, and when new  
4 members join, APTA mails them a membership card. APTA also mails membership  
5 cards to existing members when they renew their membership.

6 According to its Bylaws,<sup>1</sup> which APTA makes available to its members on  
7 request and posts on its website, the goal of APTA is “to represent and promote the  
8 profession of physical therapy and to meet the needs and interests of its members in order  
9 to address the physical therapy needs of members of society and to develop and advance  
10 the art and science of physical therapy, including practice, education, and research.”

11 *Bylaws of the American Physical Therapy Association (“APTA Bylaws”)*, Art. II.

12 APTA does not itself engage in the practice of physical therapy, but rather fulfills its  
13 mission by performing professional support functions, such as: accrediting physical  
14 therapy education programs; certifying physical therapist practitioners who have special  
15 knowledge, skills, and experience; sponsoring educational meetings and offering  
16 continuing education courses; publishing articles in a peer-reviewed journal; and  
17 providing members with on-line access to physical therapy literature. APTA also  
18 advocates and lobbies on behalf of its members before governmental and non-  
19 governmental bodies.

20 APTA’s Bylaws vest all legislative and elective powers, as well as the authority to  
21 determine APTA’s policies, in a House of Delegates. *APTA Bylaws*, Art. VIII, Sec. 1.  
22 The House of Delegates may repeal or modify both the Bylaws and the standing rules,

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<sup>1</sup> APTA’s Bylaws are included in the advisory opinion request as Attachment 1.

1 and may also adopt the ethical standards of conduct that govern members' professional  
2 practice. *Id.* The House of Delegates elects the Board of Directors. *APTA Bylaws*, Art.  
3 IX, Sec. 4.A.

4 The Board of Directors, in turn, carries out the mandates and policies established  
5 by the House of Delegates. *APTA Bylaws*, Art. IX, Sec. 5.A. The duties of the Board  
6 include: (1) directing APTA's financial and business affairs; (2) making personnel  
7 policies; (3) creating committees and councils as needed; (4) publishing APTA's journal;  
8 and (5) prescribing and publishing qualifications for each category of membership.<sup>2</sup> *See*  
9 *APTA Bylaws*, Art. IX, Sec. 5.

10 Only individuals who have been physical therapist members of APTA for at least  
11 two years immediately preceding the beginning of the session in which they serve may  
12 vote in the House of Delegates. *APTA Bylaws*, Art. VIII, Sec. 3.A.(1). Likewise, only  
13 individuals who have been physical therapist members of APTA for at least five years  
14 immediately preceding their election or appointment may serve on the Board of  
15 Directors. *APTA Bylaws*, Art. IX, Sec. 2.

16 Some APTA members practice through corporations that they either wholly or  
17 partly own. In addition to the owner-members, some of these corporations also employ  
18 physical therapists who are APTA members. APTA would like to solicit members who  
19 are employed at these corporations for contributions to PT-PAC, and some of the owner-  
20 members have expressed interest in establishing a payroll deduction system that would  
21 facilitate the employees' making of contributions to PT-PAC.

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<sup>2</sup> Qualifications for each category of APTA membership are prescribed by the Board of Directors and are included in the advisory opinion request as Attachment 2. APTA represents that under Illinois law, these prescribed qualifications are considered part of the Bylaws.

1            APTA proposes to establish four requirements for corporations that elect to  
2 participate in the payroll deduction system. First, the participating corporation must be  
3 owned wholly or partly by an APTA member. Second, the participating corporation must  
4 have requested in writing for APTA's permission to participate. Third, the participating  
5 corporation must approve APTA's solicitation of its employees. Fourth, the participating  
6 corporation must agree that it will not allow its employees to be solicited by another  
7 association or another association's separate segregated fund in the same calendar year.<sup>3</sup>

8            Corporations electing to permit payroll deduction would provide APTA the names  
9 of all of their employees who are physical therapists or physical therapy assistants. Using  
10 this information, APTA would identify those employees who are also its members and  
11 would contact them to invite them to participate in the payroll deduction plan. The  
12 solicitation would inform the employee of PT-PAC's political purpose and of the  
13 employee's right to refuse to contribute without incurring any reprisal in accordance with  
14 11 CFR 114.5(a)(3)-(5).<sup>4</sup>

15            Employees would have to authorize the deductions in advance in writing,  
16 demonstrating their specific and voluntary intent to contribute. The employee would be  
17 required to certify that he or she is an American citizen and that he or she is not a Federal  
18 contractor. Employees would be able to cancel their authorizations at any time.

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<sup>3</sup> APTA represents that participating corporations will also be required to provide requesting labor organizations with equal access to the payroll deduction system on the terms specified under 2 USC 441b(b)(6).

<sup>4</sup> APTA represents that it, and not the participating corporations, will send all the solicitations to its members.

1 Under the proposal, a participating corporation would periodically deduct  
2 contributions from the participating employee-member's salary or wages. The  
3 corporation will remit a single check to PT-PAC that represents the entire aggregate  
4 amount of contributions made by all employees along with a document providing the  
5 names of each individual contributor and the amount of each individual's contribution.  
6 The corporation will then transmit this check within ten days of making the authorized  
7 deductions, as required under 11 CFR 102.8. Corporations will continue to hold  
8 contributions in their payroll accounts until they are transmitted to APTA.

9 APTA would assume the costs of administering the payroll deduction system. It  
10 would pay the corporations an amount sufficient to reimburse the corporations for the  
11 actual expense they incur in administering the system, and this actual expense would  
12 include the value of the lists of employees the corporations provide. APTA would either  
13 pay this amount in advance based on a reasonable estimate of the future costs or  
14 reimburse the corporations for their expenses, including the value of the lists.

15 ***Question Presented***

16 *May APTA and the corporations implement, and the corporations administer,*  
17 *APTA's proposed payroll deduction plan without causing a prohibited corporate*  
18 *contribution to be made, or knowingly accepted, and without violating the prohibition on*  
19 *corporate facilitation?*

20 ***Legal Analysis and Conclusions***

21 Yes, APTA and the corporations may implement, and the corporations may  
22 administer, the proposed payroll deduction plan without causing a prohibited corporate

1 contribution to be made, and without violating the prohibition on corporate facilitation,  
2 provided that they adhere to certain conditions described below.

3           The Act and Commission regulations prohibit corporations from making  
4 contributions in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR  
5 114.2(b)(1). A “contribution” includes “any direct or indirect payment, distribution, loan,  
6 advance, deposit, or gift of money, or any services, or anything of value . . . to any  
7 candidate, campaign committee, or political party or organization, in connection with any  
8 [Federal] election .” 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 431(8); 11 CFR 100.52(a).  
9 “Anything of value” includes all in-kind contributions, including the provision of goods  
10 and services without charge or at less than the usual and normal charge. *See* 11 CFR  
11 100.52(d)(1).

12           The definition of “contribution” does not include expenses paid by a corporation  
13 for “the establishment, administration, and solicitation of contributions to” the  
14 corporation’s separate segregated fund (“SSF”). 2 U.S.C. 441b(b)(2)(C); 11 CFR  
15 114.1(a)(2)(iii). A corporation or its SSF may solicit contributions to the SSF from a  
16 restricted class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). A  
17 corporation’s restricted class generally consists of its executive or administrative  
18 personnel, its stockholders, and the families of those persons. 11 CFR 114.5(g)(1),  
19 114.1(j). While corporations are generally permitted to solicit contributions only from  
20 these restricted categories of persons, 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1),  
21 membership organizations, cooperatives, and corporations without capital stock are  
22 permitted to solicit contributions from their members as well as from their executive or  
23 administrative personnel. 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.7(a).

1           Solicitations by SSFs or by their connected organizations, including non-profit  
2 corporations that are membership organizations, must conform to certain requirements  
3 under Commission regulations. The solicitation must inform the solicitees of the SSF’s  
4 political purpose and of their right to refuse to contribute to the SSF without reprisal.  
5 11 CFR 114.5(a)(3)-(5). In addition, if the SSF or connected organization suggests  
6 guidelines for contribution amounts, the solicitation must inform the solicitee that the  
7 guideline is merely a suggestion, that the solicitee is free to contribute more or less than  
8 the guideline suggests, and that the corporation will not favor or disadvantage anyone  
9 because of the amount of their contribution or their decision not to contribute. 11 CFR  
10 114.5(a)(2), (5). Further, political committees generally are required to make their “best  
11 efforts” to gather information about contributors, and to include in solicitations “a clear  
12 request for the contributor’s full name, mailing address and name of employer, and . . . an  
13 accurate statement of Federal law regarding the collection and reporting of individual  
14 contributor identifications.” 11 CFR 104.7(b)(1)(i).

15           Every person who receives a contribution for a political committee that is not an  
16 authorized committee must forward such a contribution of \$50 or less to the treasurer of  
17 that committee no later than 30 days after receiving the contribution; for contributions of  
18 \$50 or more, the person must forward the contribution and the required information no  
19 later than ten days after receiving the contribution. 2 U.S.C. 432(b)(2)(A), (b)(2)(B);  
20 11 CFR 102.8(b)(1), (b)(2).

#### 21 Membership Organization Status and Solicitation of Members

22           A “membership organization” is a trade association, cooperative, or corporation  
23 without capital stock that: (1) is composed of members, some or all of whom are vested

1 with the power and authority to operate or administer the organization, pursuant to the  
2 organization's articles, bylaws, constitution or other formal organizational documents; (2)  
3 expressly states the qualifications and requirements for membership in its articles,  
4 bylaws, constitution or other formal organizational documents; (3) makes its articles,  
5 bylaws, constitution, or other formal organizational documents available to its members  
6 upon request; (4) expressly solicits persons to become members; (5) expressly  
7 acknowledges the acceptance of membership, such as by sending a membership card or  
8 including the member's name on a membership newsletter list; and (6) is not organized  
9 primarily for the purpose of influencing the nomination for election, or election, of any  
10 individual for Federal office. 11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134.

11 APTA, a corporation without capital stock, satisfies all six criteria, and therefore  
12 qualifies as a membership organization under Commission regulations. First, APTA is  
13 composed of "members," at least some of whom are empowered to operate or administer  
14 APTA pursuant to APTA's Bylaws. A House of Delegates establishes APTA's policies,  
15 while day-to-day administrative oversight is provided by a Board of Directors. The  
16 House of Delegates is thus APTA's highest policymaking and governing body. *See*  
17 Advisory Opinion 1995-28 (American Health Care). The Bylaws provide that voting  
18 delegates to the House of Delegates must be APTA physical therapist members who have  
19 had that status for at least two years. The delegates who operate and administer APTA  
20 appear to qualify as "members" under 11 CFR 114.1(e)(2), because, in addition to  
21 satisfying APTA's requirements for membership and having accepted APTA's invitation

1 to become members, they pay annual dues of a predetermined amount.<sup>5</sup> 11 CFR  
2 114.1(e)(2)(ii). *See also* Advisory Opinion 2011-08 (American Society of  
3 Anesthesiologists).

4 Second, APTA expressly states the qualifications and requirements for  
5 membership in its Bylaws and, more specifically, in the Board of Directors' addendum to  
6 the Bylaws. *See APTA Bylaws*, Art. IV, Sec. 1; *Membership Qualifications Prescribed*  
7 *by the Board of Directors, BOD Y10-09-08-18*. Third, APTA makes its Bylaws available  
8 to members upon request and on its website. Fourth, APTA expressly solicits persons to  
9 become members on its website. Fifth, APTA expressly acknowledges the acceptance of  
10 membership by sending membership cards. Sixth, and finally, the Bylaws show that  
11 APTA is primarily organized for the purpose of promoting the practice of physical  
12 therapy and for supporting those who are engaged in that practice, rather than for the  
13 purpose of influencing Federal elections. *APTA Bylaws*, Arts. II-III. Thus, APTA  
14 qualifies as a membership organization, and it may solicit its members who work at the  
15 corporations.

#### 16 Corporate Facilitation of Contributions

17 In addition to the general prohibition on corporate contributions, Commission  
18 regulations prohibit corporations from facilitating the making of contributions to  
19 candidates or political committees, other than to the SSFs of the corporations themselves.  
20 *See* 11 CFR 114.2(f)(1). "Facilitation" means using corporate resources to engage in  
21 fundraising activities in connection with any Federal election. *Id.* Fundraising activity

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<sup>5</sup> In accordance with the representation made in the advisory opinion request, the Commission assumes for the purpose of this advisory opinion that all members whom APTA would solicit will qualify as "members" under 11 CFR 114.1(e)(2) or (3).

1 includes “[p]roviding materials for the purpose of transmitting or delivering  
2 contributions, such as stamps, envelopes addressed to a candidate or political committee  
3 other than the corporation’s or labor organization’s [SSF], or other similar items which  
4 would assist in transmitting or delivering contributions, but not including providing the  
5 address of the candidate or political committee.”<sup>6</sup> 11 CFR 114.2(f)(2)(ii). *See also* 11  
6 CFR 114.2(f)(2)(i)(A) (An example of corporate facilitation is “officials or employees of  
7 the corporation . . . ordering or directing subordinates or support staff (who therefore are  
8 not acting as volunteers) to plan, organize or carry out the fundraising project as a part of  
9 their work responsibilities using corporate . . . resources, unless the corporation . . .  
10 receives advance payment for the fair market value of such services.”).<sup>7</sup>

11 Under APTA’s proposal, the participating corporations would use corporate labor,  
12 resources, and work time to deduct employees’ contributions from their payrolls and to  
13 transmit them to PT-PAC. Because the corporations would be using corporate resources  
14 to transmit contributions to SSFs other than their own, they would be facilitating the  
15 making of contributions to a political committee under 11 CFR 114.2(f)(1).

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<sup>6</sup> In explaining the regulation concerning permissible corporate communications, 11 CFR 114.3, the Commission stated in 1977 that while corporations are permitted to communicate with their restricted classes on any subject, they may not facilitate the making of contributions to a particular candidate or political committee, other than their own SSFs, “as by providing envelopes addressed to the candidate or committee or enrolling persons in a payroll deduction plan for contributions to that candidate or committee.” *See* Explanation and Justification of Regulations, H. Doc. No. 95-44, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 104-105 (1977). *See also* Advisory Opinion 1987-29 (Life Underwriters), n.2; Advisory Opinion 1986-04 (Armstrong Industries), n.5; and Advisory Opinion 1982-02 (National Radio Broadcasters Association).

<sup>7</sup> Section 114.2(f)(1) also provides, however, that “[a] corporation does not facilitate the making of a contribution to a candidate or political committee if it provides goods or services in the ordinary course of its business as a commercial vendor in accordance with 11 CFR Part 116 at the usual and normal charge.” Here, the corporations that would administer the payroll deductions do not offer payroll processing services to other persons or entities in their ordinary course of business. Their ordinary course of business is the provision of physical therapy services and thus they are not commercial vendors for the services they will provide to APTA and PT-PAC. *See, e.g.* Advisory Opinion 2011-10 (POET PAC).

1            APTA, however, is a membership organization. Membership organizations may  
2 solicit their members and their members' families for contributions.

3    11 CFR 114.7(a).<sup>8</sup> And under Commission regulations, “[t]here is no limitation . . . on  
4 the method of solicitation or the method of facilitating the making of voluntary  
5 contributions which may be used.” 11 CFR 114.7(f).

6            The Commission concludes that the express and unlimited authorization that  
7 11 CFR 114.7(f) gives to membership organizations to facilitate contributions to their  
8 SSFs permits APTA and the corporations to implement APTA’s proposal so long as  
9 APTA or PT-PAC pays the corporations in advance for all the costs the corporations  
10 incur in making payroll deduction plans available to their employees.<sup>9</sup>

11            Because APTA will bear the costs of payroll deduction, APTA’s or PT-PAC’s  
12 resources will be used to engage in fundraising activity, not the corporations’ resources,  
13 if APTA or PT-PAC pays the corporations in advance for all attributable costs. Unlike  
14 other corporations, membership organizations like APTA are expressly permitted to  
15 engage in any method of facilitating the making of voluntary contributions. 11 CFR  
16 114.7(f).

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<sup>8</sup> In addition to being a membership organization, APTA is a trade association. *See* 11 CFR 114.8(a). As both, APTA’s solicitations are governed by both 11 CFR 114.7 (membership organizations) and 114.8 (trade associations). A trade association that is a membership organization may solicit its non-corporate members under the provisions of 11 CFR 114.7.

<sup>9</sup> Because PT-PAC is APTA’s SSF, and because the payroll deduction plan is a means of obtaining contributions from its restricted class, and therefore may be regarded as an “establishment, administration, and solicitation” cost of PT-PAC, either PT-PAC or APTA may pay the corporations. *See* 11 CFR 114.1(b) (“establishment, administration, and solicitation” costs include cost of fundraising). *See also* Advisory Opinion 2009-30 (Tech Net) (payments by corporations and trade associations to help their SSFs increase their fundraising are “establishment, administration, and solicitation” costs); Advisory Opinion 1994-33 (VITEL); Advisory Opinion 1984-45 (KFC).

1           Given the express and unlimited authorization for facilitation of contributions by  
2 membership organizations in section 114.7(f), APTA and the corporations<sup>10</sup> may  
3 implement APTA's proposal if APTA pays the corporations for the fair market value of  
4 the services they will provide to PT-PAC. *See also* Advisory Opinion 2011-10 (POET  
5 PAC) (reaching same conclusion with respect to POET Plants facilitating the making of  
6 contributions to POET PAC). Because corporations will be providing the services,<sup>11</sup> and  
7 APTA or PT-PAC must pay them in advance for those services, APTA or PT-PAC must  
8 ensure that the advance payment is not less than the anticipated value of those services,  
9 lest the advance result in prohibited corporate contributions. *See* Advisory Opinion  
10 1984-37 (AMA) (separate segregated fund must determine and pay in advance the full  
11 value of consulting services to be provided by its corporate connected organization in  
12 order to avoid receiving corporate contribution). Because the corporations are not  
13 commercial vendors, any amount of the actual value of the services greater than APTA's  
14 or PT-PAC's payment would be considered an advance or extension of credit to PT-PAC  
15 from the participating corporation, and, therefore, a contribution. 2 U.S.C. 431(8)(A)(i);  
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<sup>10</sup> The Commission notes that the participating corporations are prohibited from using coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activities on behalf of PT-PAC.  
11 CFR 114.2(f)(2)(iv).

<sup>11</sup> Corporations are prohibited from soliciting employees outside their restricted classes for contributions to their own SSFs. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1).

1 11 CFR 100.52(a).<sup>12</sup> APTA's payments to the corporations therefore must be in advance,  
2 not through later reimbursement.

3 Finally, on receipt of a written request from a labor organization representing any  
4 of their employees, participating corporations will need to make the payroll deduction  
5 service provided to APTA available to the labor organization at cost, as required by 2  
6 USC 441b(b)(6). *See also* Advisory Opinion 1990-25 (Community Psychiatric). If they  
7 do so, as the request indicates, their participation will not violate this provision of the  
8 Act.

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. Any person involved in any specific  
15 transaction or activity which is indistinguishable in all its material aspects from the  
16 transaction or activity with respect to which this advisory opinion is rendered may rely on  
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
18 conclusions in this advisory opinion may be affected by subsequent developments in the  
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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<sup>12</sup> The reasoning in Advisory Opinion 2003-22 (American Bankers), relied on by APTA in its request, is not directly relevant here because it involved methods of solicitation by member corporations within a trade association, *i.e.*, solicitations *wholly within* a trade association. The corporations participating in APTA's payroll deduction plan are owned wholly or partly by one or more APTA members, but are not themselves members.

1 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
2 directly from the Commission's Advisory Opinion searchable database at  
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter

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Chair