



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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May 23, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman
General Counsel

For Meeting of 5-24-12

Kevin Deeley
Acting Associate General Counsel

SUBMITTED LATE

Robert M. Knop
Assistant General Counsel

Joshua Blume
Attorney

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

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. We have been asked to indicate that this draft is not intended to change the substance of the response provided in the May 21, 2012 Blue Draft but only to track more closely the questions posed by the requestor.

Attachment

1 ADVISORY OPINION 2012-15

2

3 John J. Bennett, Esq.

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General Counsel

DRAFT B

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American Physical Therapy Association

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1111 North Fairfax Street

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Alexandria, VA 22314-1488

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Dear Mr. Bennett:

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We are responding to your advisory opinion request on behalf of the American

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Physical Therapy Association (“APTA”). Your request concerns the application of the

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Federal Election Campaign Act (the “Act”), and Commission regulations to APTA’s

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proposed plan to use payroll deduction for members who are employed by corporations

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owned wholly or partly by APTA members, to make contributions to the APTA Physical

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Therapy Political Action Committee (“PT-PAC”), APTA’s separate segregated fund.

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The payroll deductions would be administered by the corporations, and APTA would pay

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the corporations for their costs.

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The Commission concludes that APTA may implement its proposed payroll

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deduction plan and that the corporations may administer the payroll deduction system

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provided that APTA makes advance payment for the payroll deduction services the

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corporations would provide.

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Background

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The facts presented in this advisory opinion are based on your letter received on

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February 10, 2012, and on an e-mail received on March 29, 2012.

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APTA is a non-profit, Illinois corporation without capital stock. It is registered as

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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,¹ 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,

¹ 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.² *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.

² 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.³

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).⁴

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.

³ 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).

⁴ 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 PT-PAC.

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 ***Questions Presented***

- 16 1. *Is the APTA a membership organization under Commission regulations?*
17 2. *Would the APTA's solicitation of Member-Employees to participate in the payroll*
18 *deduction system violate 2 U.S.C. 441b(b)(4)(A)(i)?*
19 3. *Is the APTA's proposed payroll deduction system authorized under 11 CFR*
20 *114.7?*
21 4. *Would participation in the payroll deduction system by a participating*
22 *corporation or the APTA violate either of the prohibitions in 2 U.S.C. 441b(a) against*
23 *making or knowingly accepting a contribution?*

1 5. *Would a participating corporation's participation in the payroll deduction system*
2 *violate 11 CFR 114.2(f)(1)?*

3 6. *Would a participating corporation's participation in the payroll deduction system*
4 *violate 2 U.S.C. 441b(b)(6)?*

5 ***Legal Analysis and Conclusions***

6 1. *Is the APTA a membership organization under Commission regulations?*

7 Yes, the APTA is a membership organization under Commission regulations.

8 A “membership organization” is a trade association, cooperative, or corporation
9 without capital stock that: (1) is composed of members, some or all of whom are vested
10 with the power and authority to operate or administer the organization, pursuant to the
11 organization’s articles, bylaws, constitution or other formal organizational documents; (2)
12 expressly states the qualifications and requirements for membership in its articles,
13 bylaws, constitution or other formal organizational documents; (3) makes its articles,
14 bylaws, constitution, or other formal organizational documents available to its members
15 upon request; (4) expressly solicits persons to become members; (5) expressly
16 acknowledges the acceptance of membership, such as by sending a membership card or
17 including the member’s name on a membership newsletter list; and (6) is not organized
18 primarily for the purpose of influencing the nomination for election, or election, of any
19 individual for Federal office. 11 CFR 114.1(e)(1)(i)-(vi); *see also* 11 CFR 100.134.

20 APTA, a corporation without capital stock, satisfies all six criteria for qualifying
21 as a membership organization under Commission regulations. First, APTA is composed
22 of “members,” at least some of whom are empowered to operate or administer APTA
23 pursuant to APTA’s Bylaws. A House of Delegates establishes APTA’s policies, while

1 day-to-day administrative oversight is provided by a Board of Directors. The House of
2 Delegates is thus APTA's highest policymaking and governing body. *See* Advisory
3 Opinion 1995-28 (American Health Care). The Bylaws provide that voting delegates to
4 the House of Delegates must be APTA physical therapist members who have had that
5 status for at least two years. The delegates who operate and administer APTA appear to
6 qualify as "members" under 11 CFR 114.1(e)(2), because, in addition to satisfying
7 APTA's requirements for membership and having accepted APTA's invitation to become
8 members, they pay annual dues of a predetermined amount.⁵ 11 CFR 114.1(e)(2)(ii). *See*
9 *also* Advisory Opinion 2011-08 (American Society of Anesthesiologists).

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

⁵ 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 2. *Would the APTA's solicitation of Member-Employees to participate in the payroll*
2 *deduction system violate 2 U.S.C. 441b(b)(4)(A)(i)?*

3 3. *Is the APTA's proposed payroll deduction system authorized under 11 CFR*
4 *114.7?*

5 Because the APTA is a membership organization, the APTA's solicitation of
6 Member-Employees would not violate 2 U.S.C. 441b(b)(4)(A)(i), and its solicitation of
7 Member-Employees would be governed by 11 CFR 114.7.

8 The Act and Commission regulations permit a corporation to pay for "the
9 establishment, administration, and solicitation of contributions⁶ to" its separate
10 segregated fund ("SSF"). 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A
11 corporation or its SSF may solicit contributions to the SSF from a restricted class of
12 persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). A corporation's restricted class
13 generally consists of its executive or administrative personnel, its stockholders, and the
14 families of those persons. 11 CFR 114.5(g)(1), 114.1(j).

15 While corporations are generally permitted to solicit contributions only from these
16 restricted categories of persons, 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1),
17 membership organizations, cooperatives, and corporations without capital stock are
18 permitted to solicit contributions from their members as well as from their executive or
19 administrative personnel, and the families of each. 2 U.S.C. 441b(b)(4)(C); 11 CFR
20 114.7(a). And under Commission regulations, "[t]here is no limitation . . . on the method

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

1 of solicitation or the method of facilitating the making of voluntary contributions which
2 may be used.” 11 CFR 114.7(f). APTA is a membership organization. Thus, APTA
3 may solicit its members who work at the corporations pursuant to 11 CFR 114.7 without
4 violating 2 U.S.C. 441b(b)(4)(A)(i).

5 4. *Would participation in the payroll deduction system by a participating*
6 *corporation or the APTA violate either of the prohibitions in 2 U.S.C. 441b(a) against*
7 *making or knowingly accepting a contribution?*

8 5. *Would a participating corporation’s participation in the payroll deduction system*
9 *violate 11 CFR 114.2(f)(1)?*

10 No, participation in the payroll deduction system would neither cause the
11 participating corporations to violate the prohibition on making a contribution in 2 U.S.C.
12 441b(a) nor the prohibition on corporate facilitation in 11 CFR 114.2(f)(1) provided that
13 they adhere to certain conditions described below. Further, PT-PAC would not violate
14 the prohibition on knowingly accepting a contribution in 2 U.S.C. 441b(a) provided that
15 it adheres to the conditions described below.

16 The Act and Commission regulations prohibit corporations from making
17 contributions in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR
18 114.2(b)(1). As noted above, however, the Act and Commission regulations permit a
19 corporation to pay for “the establishment, administration, and solicitation of contributions
20 to” its separate segregated fund (“SSF”). 2 U.S.C. 441b(b)(2)(C); 11 CFR
21 114.1(a)(2)(iii).

22 In addition to the prohibition on corporate contributions, Commission regulations
23 prohibit corporations from facilitating the making of contributions to candidates or

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

14 Under APTA’s proposal, the participating corporations would use corporate labor,
15 resources, and work time to deduct employees’ contributions from their payrolls and to
16 transmit them to PT-PAC. Because the corporations would be using corporate resources

⁷ 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, 95th Cong., 1st 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).

⁸ 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 to transmit contributions to SSFs other than their own, they would be facilitating the
2 making of contributions to a political committee under 11 CFR 114.2(f)(1).

3 As explained above, however, membership organizations like APTA may solicit
4 their members and their members' families for contributions, 11 CFR 114.7(a),⁹ and
5 "[t]here is no limitation . . . on the method of solicitation or the method of facilitating the
6 making of voluntary contributions which may be used." 11 CFR 114.7(f).

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

12 Because APTA will bear the costs of payroll deduction, APTA's or PT-PAC's
13 resources will be used to engage in fundraising activity, not the corporations' resources,
14 if APTA or PT-PAC pays the corporations in advance for all attributable costs. Unlike
15 other corporations, membership organizations like APTA are expressly permitted to
16 engage in any method of facilitating the making of voluntary contributions. 11 CFR
17 114.7(f).

⁹ 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.

¹⁰ 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 corporations¹¹ 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,¹² 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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¹¹ 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).

¹² Corporations are generally 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).¹³ APTA's payments to the corporations therefore must be in advance,
2 not through later reimbursement.

3 The Commission notes that solicitations by SSFs or by their connected
4 organizations, including non-profit corporations that are membership organizations, must
5 conform to certain requirements under Commission regulations. The solicitation must
6 inform the solicitees of the SSF's political purpose and of their right to refuse to
7 contribute to the SSF without reprisal. 11 CFR 114.5(a)(3)-(5). In addition, if the SSF or
8 connected organization suggests guidelines for contribution amounts, the solicitation
9 must inform the solicitee that the guideline is merely a suggestion, that the solicitee is
10 free to contribute more or less than the guideline suggests, and that the corporation will
11 not favor or disadvantage anyone because of the amount of their contribution or their
12 decision not to contribute. 11 CFR 114.5(a)(2), (5). Further, political committees
13 generally are required to make their "best efforts" to gather information about
14 contributors, and to include in solicitations "a clear request for the contributor's full
15 name, mailing address and name of employer, and . . . an accurate statement of Federal
16 law regarding the collection and reporting of individual contributor identifications."
17 11 CFR 104.7(b)(1)(i).

18 Also, every person who receives a contribution for a political committee that is
19 not an authorized committee must forward such a contribution of \$50 or less to the
20 treasurer of that committee no later than 30 days after receiving the contribution; for

¹³ 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 contributions of \$50 or more, the person must forward the contribution and the required
2 information no later than ten days after receiving the contribution. 2 U.S.C.
3 432(b)(2)(A), (b)(2)(B); 11 CFR 102.8(b)(1), (b)(2).

4 6. *Would a participating corporation's participation in the payroll deduction system*
5 *violate 2 U.S.C. 441b(b)(6)?*

6 No, a participating corporation's participation in the payroll deduction system
7 would not violate 2 U.S.C. 441b(b)(6), so long as, as APTA has indicated they will do, on
8 receipt of a written request from a labor organization representing any of their employees,
9 participating corporations will make the payroll deduction service provided to APTA
10 available to the labor organization at cost. *See also* Advisory Opinion 1990-25
11 (Community Psychiatric).

12 This response constitutes an advisory opinion concerning the application of the
13 Act and Commission regulations to the specific transaction or activity set forth in your
14 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
15 of the facts or assumptions presented, and such facts or assumptions are material to a
16 conclusion presented in this advisory opinion, then the requestor may not rely on that
17 conclusion as support for its proposed activity. Any person involved in any specific
18 transaction or activity which is indistinguishable in all its material aspects from the
19 transaction or activity with respect to which this advisory opinion is rendered may rely on
20 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
21 conclusions in this advisory opinion may be affected by subsequent developments in the

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
2 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
3 directly from the Commission's Advisory Opinion searchable database at
4 <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