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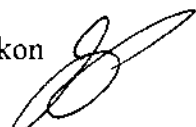
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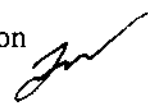
June 2, 2003


**AGENDA ITEM**  
For Meeting of: 06-12-03


**MEMORANDUM**


TO: The Commission


THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Cheryl A.F. Hemsley   
Staff Attorney

Subject: Draft AO 2003-13

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 12, 2003.

Attachment

**DRAFT**

ADVISORY OPINION 2003-13

Mr. Steven L. Miller, Director  
OPHTHPAC and Political Affairs  
OPHTHAC Political Committee  
Suite 700  
1101 Vermont Avenue NW  
Washington, D.C. 20005-3570

Dear Mr. Miller:

This responds to your letter dated February 19, 2003, as supplemented by Ms. Mara  
Pearse Burke's letter of April 9, 2003, requesting an advisory opinion on behalf of the American  
Academy of Ophthalmology ("AAO") concerning the application of the Federal Election  
Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the member  
status of AAO's Members-in-Training.

***Background***

You state that AAO is incorporated under section 501(c)(6) of the Internal Revenue Code  
and has a membership of 27,000 physicians worldwide specializing in ophthalmology. You state  
that the majority of AAO members are practicing physicians who are comprehensive eye M.D.s.  
AAO's purpose is to promote and advance the science and art of medicine related to the eye and  
related structures, to support and enhance education in ophthalmology in allied fields, to  
facilitate and improve prevention, diagnosis, and treatment of disorders affecting the eye and  
related structures. *Articles of Incorporation of the American Academy of Ophthalmology, Inc.*,  
Article II.

You state that AAO has 16 categories of membership, from which AAO's separate  
segregated fund, OPHTHPAC, solicits 14,988 eligible, domestic, dues paying members.

Under AAO's Bylaws, Members-in-Training are physicians holding a degree of Doctor of Medicine, Doctor of Osteopathy (or equivalent medical degree as determined by the Board of Trustees), and either:

- 1) Are engaged on a full-time basis in an ophthalmology residency training program conducted either in the United States or in Canada that is acceptable to the Board of Trustees; or
- 2) Have successfully completed such training and are engaged in a full-time ophthalmology fellowship training program conducted in the United States or Canada or in a postgraduate educational course of training leading to an advanced degree at an accredited college or university in the United States or in Canada; or
- 3) Are foreign medical graduates<sup>1</sup> who are otherwise eligible for International Membership and are engaged on a full time basis in a postgraduate ophthalmology training program in the United States or in Canada.

Members-in-Training are not granted voting rights under AAO's bylaws, nor are they required to pay dues. However, Members-in-Training are subject to AAO's Code of Ethics and are subject to sanctions thereunder. You state that eighty percent (80%) of ophthalmology residents within the United States are Members-in-Training of AAO and that ninety-three percent (93%) of all ophthalmologists within the United States are AAO members. You state that candidates for membership must affirmatively accept the invitation to become a member. You

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<sup>1</sup> Under 2 U.S.C. 441e, foreign nationals are prohibited from directly or indirectly making (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee or a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communications (within the meaning of 2 U.S.C. 434(f)(3)). It is unlawful for a person to solicit, accept, or receive a contribution or donation described in (A) or (B), above, from a foreign national.

further state that references to “member” or “member of the Academy” in AAO’s Bylaws refer to members and Members-in-Training unless otherwise specified.

#### ***Question Presented***

Do the Members-in-Training of AAO qualify as “members” of AAO under Commission regulations and, as such, may they be solicited by AAO to make contributions to AAO’s separate segregated fund, OPHTHPAC? For the reasons addressed below, the Commission answers this question in the affirmative.

#### ***Legal Analysis and Conclusions***

##### ***Act and Commission Regulations***

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act states, however, that the term “contribution and expenditure” does not include “the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative or corporation without capital stock.” 2 U.S.C. 441b(b)(2)(C). *See also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v).

Under 2 U.S.C. 441b(b)(4)(A), a corporation, or a separate segregated fund established by a corporation, may only solicit contributions to such a fund from the corporation’s stockholders and their families and the corporation’s executive or administrative personnel and their families. An exception set forth in 2 U.S.C. 441b(b)(4)(C) allows a corporation without capital stock, or a separate segregated fund established by such a corporation, to solicit contributions to the fund from the members of the nonstock corporation.

*Status of AAO as membership organization*

Commission regulations define a "membership organization" as a trade association, cooperative, or corporation without capital stock that:

- (i) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution or other formal organizational documents;
- (ii) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;
- (iii) Makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request;
- (iv) Expressly solicits persons to become members;
- (v) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and
- (vi) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office.

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

AAO is a voluntary organization composed of sixteen types of members, of which six have the right to vote on any matter or to attend any annual or special business meeting of AAO. Governance of AAO is vested in the Board of Trustees, which is made up of Active Fellows, Active Osteopathic Fellows, and Life Fellows. *Bylaws of the American Academy of Ophthalmology, Inc.*, Article I, Section 1.20. The requirements of each category of membership are clearly set forth in the *Bylaws*, Article I. The *Articles of Incorporation*, *Bylaws*, *Code of Ethics*, and *Procedural Rules* are available on AAO's web site, [www.AAO.org](http://www.AAO.org). You state that

AAO invites prospective members to join the organization and that these prospects must affirmatively accept that invitation. You state that upon the affirmative vote of the Board of Trustees and the payment of any dues required for the appropriate membership type, each accepted invitee is recognized with a certificate of membership status. *Bylaws*, Article I, Section 1.24. Therefore, the Commission concludes that AAO is a membership organization within the meaning of 11 CFR 100.134 and 114.1(e).

*Status of Members-in-Training as "members"*

The Act does not define the term "member." However, Commission regulations provide that the term "members" includes all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:

- (i) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
- (ii) Pay membership dues at least annually, of a specific amount predetermined by the organization; or
- (iii) Have a significant organizational attachment to the membership organization which includes: affirmation of membership on at least an annual basis; and direct participatory rights in the governance of the organization. For example, such rights could include the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote directly for organization officers; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the

organization's annual budget; or the right to participate directly in similar aspects of the organization's governance.

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

You ask whether Members-in-Training qualify as members under the Act and Commission regulations. First, since all prospective members (including Members-in-Training) must apply and be accepted by the Board of Trustees, the Commission accepts as conclusive that AAO evaluates each person and only accepts those who meet AAO's requirements for Members-in-Training set forth in the *Bylaws*, Article I, Section 1.13, and as described in this opinion, below. You state in your February 19, 2003, letter that "[c]andidates for membership within the Academy must affirmatively accept the invitation to become a member." *See also*, *Bylaws*, Article I, Section 1.17. Thus, Members-in-Training meet the first two requirements set forth in 11 CFR 114.1(e)(2).

In addition to the above two requirements, prospective members must also meet one of the three requirements listed above as 11 CFR 114.1(e)(2)(i), (ii) or (iii). Under the facts you present, Members-in-Training do not meet any of these requirements. Members-in-Training are not required to pay dues and have no other significant financial attachment to the organization, such as an investment or ownership stake. Further, Members-in-Training do not have the right to vote or to participate in the governance of the organization and, therefore, do not meet the organizational attachment requirement in 11 CFR 114.1(e)(2)(iii).

Thus, the Members-in-Training do not qualify as "members" of AAO under the general rule in 11 CFR 100.134(f) and 114.1(e)(2). However, under 11 CFR 100.134(g) and 114.1(e)(3), the Commission may, on a case-by-case basis, determine that persons who do not precisely meet the requirements of the general rule, but who do have a "relatively enduring and independently

1 significant financial or organizational attachment to the organization” may be considered  
2 members for the purposes of corporate communications and solicitations. *See, e.g.*, AO 1997-5.

3 The Commission regulations regarding what constitutes membership for the purposes of  
4 the Act were promulgated in 1999 in response to the Court of Appeals decision in *Chamber of*  
5 *Commerce v. FEC*, 69 F.3<sup>rd</sup> 600 (D.C. Cir. 1995). The *Chamber* case determined that the  
6 Commission’s previous membership regulations, which had been adopted in 1993, *see* 58 Fed.  
7 Reg. 45770 (Aug. 30, 1993), were too restrictive.

8 The Commission notes that in this instance, while Members-in-Training have no  
9 significant financial attachment and you state that they are not required to pay dues to AAO, they  
10 are subject to sanctions. In *Chamber*, the issue was whether members of the American Medical  
11 Association who paid dues and were subject to professional sanctions by the AMA, but who had  
12 no vote in the governance of the organization, could be considered members for the purposes of  
13 the Act. The Court noted that “[i]t might be thought, that for a professional, placing oneself in  
14 such a position [i.e., subject to sanctions] is the *most* significant organizational attachment.” 69  
15 F.3d at 605 (emphasis in original).<sup>2</sup>

16 You state that eighty percent of all ophthalmology residents are Members-in-Training of  
17 AAO. Moreover, upon successful completion of the residency program, a Member-in-Training  
18 is invited to become an Active Member/Fellow of the Academy, and ninety-three percent of all  
19 ophthalmologists in the U.S. are members of AAO. These statistics indicate that, as a population,  
20 Members-in-Training are very likely to have an enduring relationship with the AAO.

21 Therefore, the Commission determines that, given that Members-in-Training are subject  
22 to sanctions by AAO, (*see Chamber* 69 F.3d at 605) and, given that the overwhelming majority

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<sup>2</sup> The Commission quoted this statement in the Explanation and Justification of the 1999 membership rules, but did not include sanctions as one of the organizational attachments in the general rules. *See* 64 Fed. Reg. 41266-41273 (July 30, 1999).



1 of Members-in-Training are likely to become Members of AAO, Members-in-Training have a  
2 relatively enduring and independently significant organizational attachment to AAO, and qualify  
3 as members under the Act. 11 CFR 100.134(g), 114.1(e)(3).

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

10  
11 Sincerely,

12  
13 Ellen L. Weintraub  
14 Chair  
15

16  
17 Enclosure: (AO 1997-5)  
18