



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 8, 1993

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-41

Jon C. Perry
Brobeck, Phleger & Harrison
Spear Street Tower
One Market Plaza
San Francisco, CA 94105

Dear Mr. Perry:

This responds to your letters dated December 10, November 17, and October 21, 1992, requesting an advisory opinion on behalf of The Insurance Coalition of America ("INCA"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed method of obtaining members and soliciting contributions to INCA's separate segregated fund ("INCA-PAC") from INCA members.

INCA is a non-profit corporation organized under the laws of the State of Texas. It was established in 1983 for the purpose of protecting the interests of those who buy or sell any type of life, health, or annuity insurance product. You state that INCA's members have an interest in the insurance industry as policyholders or insurance agents and, as INCA members, they become eligible for a number of benefits. These include eligibility for certain group life insurance or annuity policies,^{1/} receipt of the INCA newsletter which is issued periodically and informs them as to legislative and regulatory issues affecting them, and representation in Washington, D.C. by INCA's Board of Directors and lobbyists.

You state that the only duty imposed upon INCA's members is that they make a one-time contribution to INCA in an amount no less than \$25, as stated in the By-Laws. In lieu of paying the lump sum, INCA members have the option of having the fee deducted at a rate of one dollar per month from the cash value of a member's life insurance or annuity policy purchased through INCA for the life of the policy. This deduction only applies to those policies obtained through insurers offering group policies to INCA members. The insurance company that issues the policy

deducts one dollar per month from the policies and transfers the deductions to INCA each quarter in a lump sum. Records of the deductions are kept by the insurance carrier and forwarded quarterly to INCA.

The deductions are authorized for the life of the contract and therefore will be made for more than 25 months unless the contract is terminated. You state that INCA is preparing, for action by the Board of Directors, the adoption of a policy for members who authorize the monthly deduction but terminate their policies.^{2/} Such members would be required to pay the \$25 lump sum or have their membership terminated. Until receipt of the \$25 payment, such persons would be deleted from the INCA mailing list and thus receive no solicitations.

INCA's Articles of Incorporation provides that the "full and complete management and control of the corporation shall be vested in the Board of Directors." INCA's By-Laws also provide that members may vote to elect the Board of Directors. You state that, under Article V of the By-Laws, it is INCA's intent and practice that each director stands for re-election on an annual basis. You state that a proxy and ballot for the election of directors, which occurs at the annual April membership meeting, is mailed in conjunction with the March issue of the INCA newsletter, and that members receive the proxy at least 20 days prior to the annual meeting.^{3/}

You state that INCA recognizes the potential for abuse if a corporation were routinely permitted to seek new members and simultaneously solicit for PAC contributions. INCA proposes to use a "two-step solicitation procedure" to ensure that solicitation of members occurs "only after the members have paid their dues and become members in good standing."

You propose to use a membership solicitation form that makes no reference to the PAC.^{4/} To solicit contributions to the PAC, INCA would mail a separate form to be sent only to people who have signed a membership application and who have previously paid their dues or agreed to a procedure whereby \$1 a month would be deducted from the cash value of a member's life insurance or annuity policy for the life of the contract. Along with the solicitation form, INCA will include an INCA introduction letter and a membership card. The solicitation would occur generally at least one week after the effective membership date, i.e., the date of the receipt of the signed membership application with either the \$25 payment or the written authorization for the one dollar monthly deduction. You have enclosed a copy of both the proposed membership solicitation and the proposed PAC solicitation.^{5/}

You ask whether the membership application and separate solicitation form process accords with the requirements of the Act. In view of the membership requirements as set out in the By-Laws and membership application, the Commission must discuss the solicitability of INCA "members" as well as the timing of the solicitation.

Commission regulations provide that an incorporated membership organization, or cooperative, or any corporation without capital stock, or the separate segregated fund of such a corporation, may solicit voluntary contributions to the fund from the organization's individual members and executive or administrative personnel, and their families. 11 CFR 114.7(a). Payments for solicitations which are limited to this class of persons will avoid treatment as a prohibited corporate contribution. 2 U.S.C. 441b(b)(4)(C).

Commission regulations define members to mean all persons who are currently satisfying the requirements for membership in a membership organization or cooperative. 11 CFR 114.1(e). Drawing on the legislative history of the Act, the United States Supreme Court has stated that members of non-stock corporations "were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions." Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 204 (1982). Using this standard, the Court stated that this analogy "suggests that some relatively enduring and independently significant financial or organizational attachment" is required to be a "member" under 441b(b)(4)(C). In making this determination, the Commission considers whether such persons have a right to participate in the governance of the organization and an obligation to help sustain the organization through regular financial contributions of a predetermined minimum amount, such as the payment of dues. Advisory Opinions 1988-39, 1987-31, 1987-13, 1985-11, and 1984-33.

From the facts presented, it appears that members have a sufficient right to participate in the governance of INCA. The Commission reaches its conclusion on the condition that the powers of the Board of Directors are not used to nullify substantially the governance rights of the members. As stated above, the Board of Directors is the governing body of the organization. Although many members may not be able to attend the annual meeting at which the directors are elected, the proxy form permits the members to cast their votes for the Board of Directors by mail.^{6/} Compare Advisory Opinions 1987-13, 1985-11, and 1984-33.

The Commission concludes, however, that the dues requirement is, in certain respects, not sufficient to satisfy the definition of membership. The deduction of one dollar per month from the cash value of the member's policy (and the transmission of three dollars per quarter to INCA from the insurance provider) would constitute the equivalent of the regular payment of dues to the organization. See Advisory Opinions 1989-18 and 1988-39. Compare Advisory Opinion 1987-13. The payment of a one-time, lifetime membership fee of \$25, however, is not an obligation to help sustain the organization through a regular financial contribution.

This payment is distinguishable from the situation in which the Commission considered a one-time payment to be sufficient to enable solicitation of the member. In Advisory Opinion 1987-5, a membership organization desired to continue soliciting those persons who had been granted "life member" status. This class of persons was composed of individuals who had paid regular dues for at least 10 consecutive years immediately preceding the year they attained 65 years of age or older. At that point, they were no longer required to pay annual dues, but retained all the privileges of regular members, including the "right to full voting participation." The Commission concluded that these individuals had "made a substantial financial commitment to the Association, effectively prepaying a lifetime dues obligation by the payments they made in the ... qualifying period." Advisory Opinion 1987-5.

The situation in the above-cited opinion is not applicable to INCA's lifetime membership payment. In INCA, membership is granted for a one-time payment, as opposed to recognition for long-time periodic payments, and the amount paid is insubstantial. In view of the alternative method providing for a payment of one dollar per month for the life of the contract, the

Commission concludes that a \$25 payment would be sufficient for solicitable membership status for 25 months and that this status may be renewed for a like payment every 25 months. Of course, INCA is not constrained to use this method if it wishes to implement some other method of dues payment, as long as that method involves an obligation to help sustain the organization through the regular financial contribution of a predetermined minimum amount. For example, a yearly dues contribution of \$12 a year (which equals the alternative rate of one dollar a month) would be permissible.

With respect to the timing of the solicitation for contributions to the PAC, the Commission agrees with your proposition that the Act and Commission regulations preclude simultaneous solicitation of membership and contributions to the PAC. As stated above, the term members means those who are currently satisfying the requirements for membership in a membership organization. 11 CFR 114.1(e). The Commission has stated that "a person can only be considered a member of an organization if he or she knowingly has taken some affirmative steps to become a member of the organization." Advisory Opinion 1977-67. In that context, the Commission premised the right of solicitation "on the existence of a membership relationship between the organization and the person solicited pursuant to 2 U.S.C. 441b(b)(4)(C)." *Id.*⁷⁷ Simultaneous solicitation would, in effect, evade the parameters on the solicitable class by leading to a process that is, in reality, a solicitation of a broader group, e.g., insurance policy holders and agents, for contributions. INCA should wait until it has received the indicia of the individual's affirmative steps to become a member and the organization has accepted that individual's membership. In the absence of any indication that the authorization to make the first deduction is legally enforceable by INCA, the obligation to help sustain the organization through continuing financial contributions will not become sufficient for solicitable membership until a first deduction or first payment is made.

In conditionally approving the method of solicitation proposed, the Commission also notes that if a member fails to make the required periodic payment or cuts off the authorization, that individual may not be solicited until he or she continues payment.

The Commission notes, for your information, that it is engaged in a rulemaking project for the amendment of regulations on membership.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Scott E. Thomas
Chairman for the Federal Election Commission

Enclosure (AOs 1989-18, 1988-39, 1987-31, 1987-13, 1987-5, 1985-11, 1984-33, and 1977-67)

ENDNOTES

1/You state that, with few exceptions, persons who join INCA also participate in the group insurance products available to INCA members, but a member is not required to participate in such products.

2/You state that a small percentage of the membership had done so in the past and INCA has continued their membership.

3/The By-Laws also provide that special elections may be called by the president or the Board at any time to enable the Board to fill vacancies or increase the Board's membership, that the Board may determine to reduce the number of Directors, that a majority vote of the Board may remove a Director, and a majority vote of the Board may fill a Board vacancy.

4/ You state that solicitation for membership is done by insurance industry professionals and that, in addition to mailings of membership applications, such solicitation may occur face-to-face or by phone.

5/You state that INCA-PAC information will be included in the INCA newsletter, which is sent on a quarterly or semi-annual basis. Although this newsletter may be sent to non-members, the PAC materials would only be included in the newsletters sent to members.

6/The proxy form lists eight names and ten spaces for "Other." It asks the member to "select not less than 3 and not more than 10 members of the Board in the space provided," and allows the member to indicate any other candidates in the spaces labeled "Other." In addition, the proxy form provides that the proxy, if designated by the member, has the power to vote on behalf of the member "with respect to all other matters which come before the meeting."

7/It should be noted that, although Advisory Opinion 1977-67 stands for the proposition that an affirmative membership relationship is required, it has since been superseded with respect to what constitutes such a membership relationship. See discussion above.