

*Ellis
Engle*



FEDERAL ELECTION COMMISSION JAN 27 AM 9:55
WASHINGTON, D.C. 20463

January 27, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director *[Signature]*

FROM: Lawrence M. Noble
General Counsel *[Signature]*

N. Bradley Litchfield
Associate General Counsel *[Signature]*

Michael E. Marinelli *m m.*
Staff Attorney

SUBJECT: Draft AO 1993-24

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for February 3, 1994.

Attachment

AGENDA ITEM
For Meeting of: FEB 3 1994

DRAFT

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-24

Richard E. Gardiner, Legislative Counsel
National Rifle Association of America
11250 Waples Mill Rd.
Fairfax, VA 22030

Dear Mr. Gardiner:

This refers to your letters of January 11, 1994 and December 15, December 6 and November 23, 1993, concerning application of the Federal Election Campaign Act of 1971 ("the Act"), as amended, and Commission regulations to contribution solicitations that the National Rifle Association ("NRA") wishes to make to persons it regards as its members.

The specific focus of your request is the application to the NRA of new and revised Commission regulations defining "members." The relevant regulations were published in the Federal Register on August 30, 1993, (58 Fed. Reg. 45770) with an effective date of November 10, 1993 (58 Fed. Reg. 59641). The rules will be published in the 1994 edition of the Code of Federal Regulations at 11 CFR 100.8(b)(4)(iv), 114.1(e), and 11 CFR 114.7(k).

You state that the NRA is a membership organization with a separate segregated fund, the NRA Political Victory Fund ("NRA/PVF"). As background to your request, you state that on October 23, 1984, the Commission determined in an enforcement case (MUR 1765) that the NRA's solicitation of its members for contributions to the NRA/PVF did not violate

4
5 2 U.S.C. §441b. Since that determination, the NRA has
6 solicited its members for contributions and wishes to
7 continue to do so. You note, however, that the cited
8 regulations define the term "membership organization" and
9 "members" under 2 U.S.C. §441b(b)(4)(C). You wish to know
10 whether these new regulations would allow the continued
11 solicitations.

12 THE NRA MEMBERSHIP STRUCTURE

13 Included in your request are a membership brochure and
14 the Bylaws of the NRA which you state have not changed
15 substantially since the Commission's resolution of MUR 1765.
16 These provide factual background as to the classes of
17 membership available and the benefits and rights for each
18 class.

19 Classes of Membership

20 The NRA's Bylaws outline the organization's various
21 classes of membership. The membership classes can be divided
22 into two groups, those that have voting rights and those that
23 do not. The obligation to pay dues varies with each
24 membership class.^{1/}

25 1/ Article III, section 4 of the NRA Bylaws also permits
26 State associations, nonprofit organizations and other groups
27 to become affiliated with the NRA. The original complaint
28 filed in MUR 1765, however, concerned the solicitation of
29 contributions to NRA/PVF from individual NRA members.
30 Therefore, the Commission assumes that the NRA's proposed
contribution solicitations for NRA/PVF would be directed only
toward individual members. Under 11 CFR 114.7(b)
corporations which are members of the NRA may not make
contributions to NRA/PVF. Furthermore, the separate
segregated fund of a corporate member of the NRA may not be
solicited for contributions to NRA/PVF. See 11 CFR 114.7(j).

*Change
MUR
1765*

*all
October 8*

4 Nonvoting Classes-- The nonvoting classes are all
5 variations of the basic NRA annual membership. Annual
6 members have a tenure of only one year. The annual
7 membership group includes: adult members, associate members
8 (spouses of persons who are in any other membership
9 category), junior members (individuals under age 21) and
10 senior members (individuals over age 65). Annual adult
11 members pay \$25 per year; associate members pay \$15 per year,
12 junior and senior adult annual members pay \$20 per year.^{2/}

13 Voting classes-- The voting classes consist of two basic
14 groups: annual members who have held membership for more than
15 five consecutive years and members who hold various types of
16 lifetime membership.^{3/} The lifetime membership group includes
17 life members who, in effect, prepay their dues for a 20 year
18 period (\$500) at the same rate as an annual adult membership.
19 A discounted adult lifetime membership is available to
20 individuals over the age of 65. The dues payments for the
21 other lifetime members are significantly greater than life

22
23 (Footnote 1 continued from previous page)
24 The same prohibitions would also apply to any corporate
25 affiliate of the NRA.

26 ^{2/} Other dues payment options available to adult members
27 are a three year membership for \$68, or a five year
28 membership for \$100. The rights that attach to these
29 payment options are the same as the basic annual membership.

30 ^{3/} At the Commission's December 9, 1992, hearings which
solicited testimony regarding the proposed revisions to the
regulations, a witness representing the NRA stated that a
third of the membership of the NRA has voting rights. Of the
voting members, one third are life members and two thirds are
individuals who have held annual membership for five years or
more.

4 members, except for honorary life members who have no dues
5 obligation to the NRA.^{4/}

6 Benefits and Rights of Members

7 Under Article III, section 6, of the Bylaws all members
8 possess certain privileges. For example, they may compete in
9 competitions conducted by the NRA or affiliated groups.
10 Members, at a reasonable charge, may receive advice and
11 assistance from the NRA on NRA related issues. All members,
12 with the exception of junior members, also receive the
13 official NRA journal. All members may receive certain types
14 of insurance through the NRA such as ArmsCare Firearms
15 insurance. Some participation rights in the NRA are also
16 shared by all classes of membership. All members may attend
17 membership meetings and may attend sessions of the Board of
18 Directors, Executive Committee and other committees "except
19 during executive sessions thereof."^{5/} All members may
20 circulate and submit petitions for nomination to the Board of
21 Directors. Membership on most committees, excepting the
22 nominating and executive committees, (is open to all members
23 as appointed by the NRA President.

24 However, greater participation rights accrue to those

25
26 ^{4/} The higher rates for other lifetime members are
27 Endowment (\$1,000), Patron (\$1,500) and Benefactor (\$2,500).
28 Under Article III, Section 3, the Board of Directors may
elect up to three individuals per calendar year as honorary
life members. These individuals have all the rights of life
members but pay no dues. According to information informally
given this Office, the Board has granted this honor
sparingly. Currently, there are only four of these members.

30 ^{5/}Article III, section 6(d) of the NRA Bylaws.

*VOTING RIGHTS
MEMBERS*

*→ BOB
VOTING MEMBERS
→ vice pres
PRESIDENT*

4 classes of membership possessing the power to vote. Only
5 these members have the power to vote for the Board of
6 Directors which, in turn, chooses the NRA President, other
7 executive officers, and members of both the Executive
8 Committee and the Nominating Committee.^{6/} Further, only *lifetime*
9 voting members may qualify for election to the Board of
10 Directors, sign petitions for nominations to the Board of
11 Directors and initiate and vote for the recall of directors
12 and officers.^{7/} *more
clearly*

13 REVISED REGULATIONS

14 Under 2 U.S.C. §441b(b)(4)(A), a corporation, or a
15 separate segregated fund established by a corporation, may
16 only solicit contributions to such a fund from its

17
18 6/ The NRA Bylaws delineate two institutions which play
19 roles in the governance of the NRA--the Board of Directors
20 and the Executive Committee. For purposes of the analysis
21 below, the Commission concludes that the Board of Directors
22 rather than the Executive Committee is the highest governing
23 body of the NRA. The Commission notes that under the NRA
24 Bylaws, the Executive Committee, while responsible for the
25 day to day running of the organization, has important
26 limitations to its power. For example, under Article IV,
27 section 2, the Executive Committee may "exercise all the
28 powers of the Board when the Board is not in session,"
29 but may not purchase, sell, mortgage or lease NRA property,
30 present legal petitions, authorize indemnification, or "adopt
and disseminate a fundamental change of view or basic policy
of the Association." It is also precluded from formulating
"such other corporate policy decisions or perform[ing]
corporate activities of the [NRA] of such major significance
as to warrant action by the full [Board]." All these powers
instead are reserved by the Board.

28 7/ According to the NRA Bylaws, a person may be nominated
29 for the Board of Directors by either the Nominating Committee
30 or by the circulation of a petition which garners a
sufficient number of signatures. Only members of the Board
may serve as NRA President, Vice President, or on the
Nominating or Executive committees.

4 stockholders and their families and its executive or
5 administrative personnel and their families. An exception
6 set forth in 2 U.S.C. §441b(b)(4)(C) allows a corporation
7 without capital stock or a separate segregated fund
8 established by a corporation without capital stock, including
9 a membership association, to solicit contributions to the
10 fund from members of the nonstock corporation.

11 "Membership Association" is defined, in part, under 11
12 CFR 114.1(e)(1) as a membership organization that (i)
13 expressly provides for "members" in its articles and by-laws;
14 (ii) expressly solicits members; and (iii) expressly
15 acknowledges the acceptance of membership, such as by sending
16 a membership card or inclusion on a membership newsletter
17 list.

18 The revised Commission regulations provide guidance as
19 to the definition of the term "members."^{8/} Under 11 CFR
20 114.1(e)(2), "members" means all persons who are currently
21 satisfying the requirements for membership in a membership
22 association, who affirmatively accept the membership

23
24 ^{8/} While your request asks the application of three revised
25 provisions of the Commission's regulations, 11 CFR 100.8, and
26 114.1, and 114.7 to the NRA's solicitations, the discussion
27 below will concern revised section 114.1. This provision
28 applies to a membership association's solicitation of
29 contributions from its members for its separate segregated
30 fund. Section 100.8 relates to an association's right to
make partisan communication to its members. However, the
wording of the revised portions of sections 100.8 and 114.1
are identical so that the analysis of section 114.1 will, to
that extent, be applicable to section 100.8 as well. Revised
section 114.7 is not addressed in this opinion since the
revisions to that section relate to a cooperative's right to
solicit its members.

4 association's invitation to become a member, and who meet one
5 of the following requirements:

6 (1) (i) Have some significant financial attachment to the
7 membership association, such as a significant investment or
8 ownership stake (but not merely the payment of dues);

9 (2) (ii) Are required to pay on a regular basis a specific
10 amount of dues that is predetermined by the association and
11 are entitled to vote directly either for at least one member
12 who has full participatory and voting rights on the highest
13 governing body of the membership association, or for those
14 who select at least one member of those on the highest
15 governing body of the membership association; or

16 (3) (iii) Are entitled to vote directly for all of those on
17 the highest governing body of the membership association.^{9/}

18 (4) The regulations also provide that the Commission "may
19 determine, on a case by case basis, that persons seeking to
20 be considered members of a membership association for
21 purposes of this section have significant organizational and
22 financial attachment to the association under circumstances
23 that do not precisely meet the requirements of the general

24
25 ^{9/} Previously section 114.1 had required that "members" of
26 a membership association be persons who satisfy that
27 particular organization's definition of member and that the
28 requirement of membership include more than simply the making
29 of a contribution to that organization's separate segregated
30 fund. See 11 CFR 114.1(e) (1977). The revisions to this
rule were intended to take notice of developments in the
definition of membership reflected both in the Supreme Court
decision in FEC v. National Right to Work Committee, 459 U.S.
196 (1982) and in advisory opinions which followed. See 58
Fed. Reg. 45770 (August 30, 1993).

rule." See 11 CFR 114.1(e)(3).

5 THE NRA AS A MEMBERSHIP ASSOCIATION

6 The facts and background to this request indicate that
7 the NRA is a membership association for purposes of the Act.
8 For example, article III of the NRA's Bylaws meets the
9 requirements of 11 CFR 114.1(e)(1). It expressly provides
10 for several membership groups within the NRA and specifies a
11 membership admission process which includes issuing a
12 membership card, certificate, or insignia to all those who
13 are admitted to the membership. The request indicates that
14 the NRA uses membership promotional materials that expressly
15 solicit members and include a membership application form.
17 It appears that individuals solicited for NRA membership
18 affirmatively accept the invitation to join before the NRA
19 considers them members. In this regard, the Bylaws provide
20 that any applicant for membership may be refused admission by
21 the Board of Directors for any reason deemed by the Board to
22 be sufficient. See 11 CFR 114.1(e)(2). OK

22 DETERMINATION OF NRA MEMBERSHIP

23 Voting Members

24 Under the revised regulations, individuals who are
25 lifetime members or have been annual members for five years
26 or more would be considered "members" of the NRA for purposes
27 of the Act. Because of their obligation to pay dues and
28 their extensive voting rights, these individuals would meet
the membership requirements under both sections
114.1(e)(2)(ii) and (iii). Likewise, honorary lifetime ↑

30
↓ next page

4 members also would be considered "members" under section
5 114.1(e)(2)(iii) because, while they do not pay dues, they
6 are entitled to vote directly for all candidates for the
7 Board of Directors who run in any particular year.

8 Nonvoting Members

9 A different situation exists for those individuals who
10 are associate members, or junior members, or who have been
11 annual members of the NRA for less than five years. While
12 these individuals pay dues and have certain participatory
13 rights, they do not have the right to vote for any director
14 Therefore, they do not meet the requirements of sections
15 114.1(e)(2)(ii) or (iii).^{10/}

*or any person who
has a vote
for a director*

16 *all* The Commission also concludes that individuals who hold
17 nonvoting NRA memberships do not meet the requirements of
18 section 114.1(e)(2)(i). In explaining what is meant by a
19 "significant financial attachment" or a "significant
20 investment or ownership stake" in the membership organization
21 beyond the payment of dues, the Commission cited, as an
22 example, the tens of thousand of dollars necessary to acquire
23 nonvoting membership seats in stock and commodity exchanges.
24 See 58 Fed. Reg. 45771 (August 30, 1993) and Advisory

25
26 ^{10/} It is clear that the nonvoting members of the NRA
27 possess certain rights of participation in policy matters but
28 this, in and of itself, is not sufficient to meet the
29 requirements of section 114.1(e)(2)(ii) and (iii). The
30 Explanation and Justification for these provisions of the new
regulations notes that "The Commission stresses that
so-called 'governance' voting is required, as opposed to
voting for the association's policies or positions." 58 Fed.
Reg. 45771 (August 30, 1993).

3
4 Opinions 1988-38 and 1988-39. While members receive certain
5 benefits from their membership in the NRA for which they pay
6 nominal or modest fees, these benefits taken together do not
7 equal a "significant financial attachment" or a "significant
8 investment or ownership stake" in the NRA as stated in the
9 above standard. *↳ stupid! NRA is non profit!*

10 Lastly, the Commission addresses the application of the
11 revised regulation's definition of "members" under the case
12 by case approach of section 114.1(e)(3). Of importance here
13 is whether the nonvoting members of the NRA have a
14 "significant organizational and financial attachment to the
15 association under circumstances that do not precisely meet
16 the requirements of the general rule." Id. The Explanation
17 and Justification for the regulations indicates that while
18 the application of section 114.1(e)(3) provides certain
19 leeway, its application should take into account the same
20 factors and elements stressed in the prior paragraphs. The
21 importance of voting rights is reaffirmed under section
22 114.1(e)(3) when considering what constitutes a "significant
23 organizational attachment." For example, section 114.1(e)(3)
24 elaborates on possible "case by case" situations. It states
25 "student members who pay a lower amount of dues while in
26 school or long term dues paying membership status with little
27 or no dues obligations may be considered members if they
28
29
30

4 retain voting rights in the association."^{11/}

5 Since, again, associate members, junior members, senior
6 members, and annual members of less than five years
7 membership have no voting rights at all, the Commission
8 concludes that they do not meet the definitional requirement
9 for "members" under section 114.1(e)(3).

10 *conclusion* The Commission, therefore, concludes that the NRA may
11 solicit contributions to the NRA/PVF from lifetime members, ↑
12 honorary lifetime members and annual members who have voting ↑
13 rights. The NRA may also solicit contributions to the
14 NRA/PVF from its executive and administrative personnel and
15 their families. Of course, these solicitations and the
16 resulting contributions must otherwise comply with the Act
17 and Commission regulations. See 11 CFR 114.5 and 114.7.
18 However, the NRA may not solicit contributions for the
19 NRA/PVF from any category of "members" who have no voting ↓
20 rights. The Commission recognizes its conclusions regarding
21 which "members" may not be solicited are at variance with the
22 result in MUR 1765. However, the Commission notes that its
23 conclusions here would have been the same prior to the
24 effective date of the revised regulations. Prior advisory
25 opinions decided after the disposition of MUR 1765 would also
26 have permitted only the solicitation of the NRA's voting

27
28 ^{11/} The explanation and justification for the revised
29 regulations discusses these examples further and notes that
30 that individuals in these categories could be considered
members under section 114.1(e)(3) only if they have "some
voting rights in the association." See 58 Fed. Reg. 45773.
(August 30, 1993).

4 membership. See Advisory Opinions 1989-18, 1988-39, 1988-38,
5 1987-13 and 1984-33.^{12/}

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

10
11 For the Commission,

12
13 Trevor Potter
14 Chairman

15 Enclosures (AOs 1989-18, 1988-39, 1988-38, 1987-13 and
16 1984-33)

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^{12/} Furthermore, MUR 1765 was was decided prior to the
promulgation of the recent rules and, therefore, is not a
controlling or persuasive precedent under the circumstances.

ha!