



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 9 5 10 PM '94

June 9, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Hitchfield
Associate General Counsel

Michael Marinelli
Staff Attorney

SUBJECT: Draft AO 1994-12

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for June 16, 1994.

Attachment

AGENDA ITEM
For Meeting of: JUN 16 1994

1
2 CERTIFIED MAIL
3 RETURN RECEIPT REQUESTED

4 ADVISORY OPINION 1994-12

5 James S. Todd, M.D.
6 Executive Vice President
7 American Medical Association
8 515 North State Street
9 Chicago, Illinois 60610

10 Dear Mr. Todd:

11 This refers to your letters of June 3, April 21, March
12 23 and February 23, 1994, concerning the application of the
13 Federal Election Campaign Act of 1971 ("the Act"), as
14 amended, and Commission regulations to the governing and
15 membership structure of the American Medical Association (the
16 "AMA").

17 You state that the AMA is an Illinois corporation
18 governed by the Illinois Not-For-Profit Corporation Act. It
19 is a federation of 50 State medical societies and the
20 medical societies of the District of Columbia, Guam, Puerto
21 Rico and the United States Virgin Islands.^{1/} Its membership
22 constitutes approximately 290,000 physicians and medical
23 students. The AMA is the connected organization of the
24 American Medical Association Political Action Committee
25 ("AMPAC"), a separate segregated fund which you state is
26 registered with the Commission as a multi-candidate
27 committee.

28 Specifically, you request an advisory opinion to

29 ^{1/} You state that these constituent medical associations
30 are organized separately from the AMA and are not bound by
31 AMA decisions. See AMA bylaws 2.115.

determine whether the House of Delegates of the AMA (the "House") is the highest governing body of the AMA within the meaning of Commission regulations and whether "direct members" of the AMA have sufficient organization and financial attachments to the AMA to qualify as members under the regulations.^{2/}

You provide various AMA documents with your request including its articles of incorporation, its constitution, its bylaws, a membership brochure and various policy statements approved by the House. These materials identify two bodies, the House and the Board of Trustees (the "Board"), that play a role in governing the AMA. In order to understand which institution should be considered the AMA's highest governing body, the main responsibilities of each is reviewed below. The materials also provide information regarding the membership structure of the AMA which is also analyzed.

THE AMA GOVERNING BODIES

The House of Delegates

The House is made up of delegates from all of the organizational members of the AMA--the State medical associations and the special sections of the AMA. It also has delegates specially appointed by various medical divisions of the United States armed forces and medical

^{2/} The relevant regulations are found at 11 CFR 100.8(b)(4) and 114.1(e).

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2 speciality organizations.^{3/} All House delegates must be AMA
3 members. AMA bylaws 2.101.

4 The House of Delegates is described in article VI. of
5 the AMA constitution as the "legislative and policy making
6 body" of the AMA. It passes policy statements and approved
7 the dues and assessments (AMA constitution art. XI.) and
8 alone posses the right to amend the AMA constitution. It
9 also appoints members to all committees, elects most members
10 of AMA councils, elects almost all the members of the Board
11 of trustees.

12 The Board of Trustees

13 The Board of Trustees consists of 17 members. These
14 are: 12 trustees elected by the House; the Resident Physician
15 Member, President and President elect, all of whom are
16

17 3/ Of importance is the method by which delegates to the
18 House are selected. As you indicate in your request, the
19 method of election is up to each organization that belongs to
the AMA.

20 The vast majority (79%) of House delegates are chosen by
21 State societies. You state that in all but two cases,
22 California and Oregon, the delegates are chosen by the State
23 association's own house of delegates. California and Oregon
24 have direct election of AMA House delegates by a secret
25 ballot among all AMA members of those two associations. You
26 have informally provided information that the specialty
27 organizations which provide the next largest bloc of
28 delegates (19%) have their delegates appointed by each head
of the organization. The various surgeon generals of the
armed forces also appoint the House delegates (1%) allotted
to the military. Finally, the last group of delegates (1%),
those allotted to the five AMA special sections (resident
physicians, medical student, hospital medical staff, medical
schools and young physicians sections) are chosen at a
business meeting of the representatives of each section. You
state that AMA section members select the representatives to
the section business meetings by direct elections.

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2 elected separately by the House; the immediate past
3 president, and the medical student member who is elected at a
4 business meeting of the medical student section. AMA bylaws
5 3.40.^{4/} Members of the Board must have been AMA members for
6 at least two years. AMA bylaws 3.20

7 According to the AMA constitution, the Board "shall have
8 charge of the property and financial affairs of the property
9 of the Association and shall perform such duties as are
10 prescribed by law governing directors of corporation or as
11 may be prescribed in the By-laws." AMA constitution art.
12 VIII. The bylaws, in turn, delineate this power further, by
13 giving the Board veto power over any House resolution which
14 pertains to the expenditure of money. AMA bylaws 2.101.

15 Various House resolutions have given the Board certain
16 limited policy prerogatives. The Board may enact policy in
17 emergency situations when the House is not in session and
18 there is no standing AMA policy. The House may, however,
19 reverse the Board decision. The Board may also enact policy
20 that differs from standing policy. In that case, the new
21 policy must be presented at the next House meeting for House
22 approval. In non-emergency situations and on specific
23 issues, the House may delegate policy making power to the
24 Board with no subsequent House approval required. However,

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^{4/} While the AMA constitution and bylaws are silent on
28 whether the House may also remove Board members, you believe
that under the Illinois Not-for-Profit Corporation Act-805
ILCS 105/108.35 & 108.55, the House could remove a Board
member for cause.

3 the House always retains the right to change the policy and
4 revoke the delegation.

5 The Board also possesses limited appointment powers.
6 It may appoint a limited number of committee members and
7 nominate some council members. It also appoints the
8 secretary-treasurer and the executive vice president who acts
9 as the AMA's chief executive officer.

10 THE AMA MEMBERSHIP STRUCTURE

11 Classes of Membership

12 As outlined by the AMA bylaws, the organization's
13 various classes of membership are: active constituent, active
14 direct, affiliate and honorary. Active constituent members
15 are AMA members of its constituent associations (State
16 medical associations) who are entitled to exercise the rights
17 of membership in their constituent associations, including
18 the right to vote and hold office as determined by their
19 respective constituent associations. Active direct members
20 are individuals who chose to join the AMA directly and not
21 through any constituent association. Both these classes also
22 require identical professional credentials. AMA bylaws 1.11
23 and 1.12.^{5/}

24 Affiliate membership is open to four classes of
25 individuals: physicians in foreign countries, American
26 physicians located aboard, dentists holding certain degrees

27 _____
28 ^{5/} Hereinafter, these two classes of active constituent and
active direct members will be cited without the use of the
term "active."

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2 and pharmacists. AMA bylaws 1.14. Honorary membership is
3 open to physicians of foreign countries who have achieved
4 pre-eminence in medicine and who have attended an AMA
5 convention. AMA bylaws 1.15. Honorary and affiliate
6 membership is bestowed by vote of the House, while
7 constituent and direct are attained through application to
8 the AMA.

9 Obligations and Benefits of Members

10 Constituent members and direct members are required to
11 pay dues and assessments. In the membership brochure
12 provided in your request, the range of dues varies
13 corresponding to one's status as a physician, resident
14 physician or intern, the length of time served in each
15 capacity, and the time duration of the membership term one
16 wishes to purchase.^{6/} Honorary and affiliate members do not
17 pay dues or assessments.

18 Constituent and direct members are both eligible to
19 be elected and serve as delegates or as trustees and
20 officers. They both may serve on various committees, if
21 other qualifications are met.^{7/} Both receive the various
22 newsletters and journals and may take advantage of various
23

24 ^{6/} The highest payment is \$420 for a one year regular
25 membership for physicians, while the lowest is \$20 for a one
26 year membership for medical students.

27 ^{7/} Membership in the House of Delegates is required for
28 membership on House committees. The only exceptions are
special committees of the House where non-delegate committee
members may participate in the discussions, but may not cast
a vote in committee. See AMA bylaws 2.702.

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2 AMA professional programs and insurance policies. The
3 distinction between constituent and direct members lies in
4 the ability of direct members to participate in election to
5 the House. Since most direct members do not belong to a
6 constituent society, most do not participate in the process
7 to elect delegates to the House.^{8/} Honorary and affiliate
8 members do not have any rights in the AMA beyond the
9 privilege to attend AMA meetings. They are also expressly
10 prohibited from holding any AMA office.

11 THE ACT AND COMMISSION REGULATIONS

12 The Act prohibits corporations from making any
13 contribution or expenditure in connection with a Federal
14 election. 2 U.S.C. §441b(a). The Act states, however, that
15 the term "contribution or expenditure" does not include "the

16
17 8/ The actual number of AMA direct members who do not
18 participate in the election of members to the House (what you
19 refer to in your request as voting rights in the AMA) is
indeterminate.

20 You have estimated that the total number of direct
21 members in 1993 was 89,000 (or 31% of total AMA membership).
22 However, some of these members do nonetheless have voting
23 rights. You state that 21,000 (or 24% of the direct members)
24 are individuals who obtained AMA membership and membership in
25 a constituent society at different points in time.
26 Therefore, while they are still apparently considered direct
27 members, they nonetheless exercise the same AMA voting rights
28 as constituent members through their current membership in a
constituent association. Of the remaining 67,000 direct
members (23% of total AMA membership), a further
indeterminate amount are members of the special AMA sections
that also elect representatives to the House. Medical
students who can cross several different membership
categories also elect their own representative trustee.
However, even with all these additional subtractions, you
estimate that a majority (over 44,500) of direct members do
not have voting rights.

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2 establishment, administration, and solicitation of
3 contributions to a separate segregated fund to be utilized
4 for political purposes by a corporation, labor organization,
5 membership organization, cooperative or corporation without
6 capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.
7 §431(8)(B)(vi) and (9)(B)(v).

8 The general prohibition of 2 U.S.C. §441b(a), however,
9 has the additional exception that allows an incorporated
0 membership organization to communicate with its members on
1 "any subject" including partisan electioneering messages. 2
2 U.S.C. §441b(b)(2)(A). See also 2 U.S.C. 431(9)(B)(iii).
3 Commission regulations expressly permit incorporated
4 membership organizations to make partisan communications to
5 their individual members. See 11 CFR 114.3(a)(2), 114.3(c),
6 and 114.7(h).

7 Under 2 U.S.C. §441b(b)(4)(A), a corporation, or a
8 separate segregated fund established by a corporation, may
9 only solicit contributions to such a fund from its
10 stockholders and their families and its executive or
11 administrative personnel and their families. An exception
12 set forth in 2 U.S.C. §441b(b)(4)(C) allows a corporation
13 without capital stock or a separate segregated fund
14 established by a corporation without capital stock, including
15 a trade association, to solicit contributions to the fund
16 from members of the nonstock corporation. A "Membership
17 Association," a classification which includes trade
18 associations and other corporations without stock is defined,

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2 in part, under 11 CFR 100.8(b)(4)(iv) and 114.1(e)(1) as a
3 membership organization that (i) expressly provides for
4 "members" in its articles and bylaws; (ii) expressly solicits
5 members; and (iii) expressly acknowledges the acceptance of
6 membership, such as by sending a membership card or inclusion
7 on a membership newsletter list.

8 The Commission regulations provide guidance as to the
9 definition of the term "members." Under 11 CFR
10 100.8(b)(4)(vi)(B) and 114.1(e)(2), "members" means all
11 persons who are currently satisfying the requirements for
12 membership in a membership association, who affirmatively
13 accept the membership association's invitation to become a
14 member, and who meet one of the following requirements:

15 (i) Have some significant financial attachment to the
16 membership association, such as a significant investment or
17 ownership stake (but not merely the payment of dues);

18 (ii) Are required to pay on a regular basis a specific
19 amount of dues that is predetermined by the association and
20 are entitled to vote directly either for at least one member
21 who has full participatory and voting rights on the highest
22 governing body of the membership association, or for those
23 who select at least one member of those on the highest
24 governing body of the membership association; or

25 (iii) Are entitled to vote directly for all of those on
26 the highest governing body of the membership association.

27 The regulations also provide that the Commission "may
28 determine, on a case by case basis, that persons seeking to

be considered members of a membership association for purposes of this section have significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule." See 11 CFR 100.8(b)(4)(vi)(B) and 114.1(e)(3).

APPLICATION OF MEMBERSHIP REGULATIONS TO THE AMA

The AMA as a Membership Association.

The facts and background to this request indicate that the AMA is a membership association for purposes of the Act. For example, article V of the AMA constitution and section 1.00 of the AMA bylaws meets the requirements of 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1) by expressly providing for membership. The AMA has various journals and a newsletter which are sent to members, therefore, the requirement that membership be expressly recognized is also met. See 11 CFR 11 CFR 100.8(b)(4)(iv)(A) and 114.1(e)(1)(iii). The facts of the request and materials such as the membership brochure suggest that the AMA expressly solicits members. See 11 CFR 100.8(b)(4)(iv) and 114.1(e)(2).

The AMA's highest governing body

Both the Board and the House have significant roles regarding the governance of the AMA. However, it appears that the power of the Board is derived from or delegated by the House. It is significant that the House retains supreme policy-making powers within the AMA and can overrule or retake any policy incentive it delegates to the Board. Further, while it appears that the House elects and can

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2 remove members of the Board in certain instances, the Board
3 has no similar power to remove delegates. The one area in
4 which the Board enjoys a veto right over the House is in
5 financial matters. This power, while significant, must be
6 contrasted with the power of the Board to approve dues and
7 assessments and the ability of the House, not shared with the
8 Board, to amend the bylaws and alter the powers of the Board.
9 Therefore, after weighing these factors the Commission
10 concludes that the AMA House of Delegates, rather than the
11 AMA Board of Trustees, is the highest governing body of the
12 AMA for purposes of the Commission Regulations.^{9/}

13 Status of AMA Direct Members

14 Under the membership regulations, AMA constituent
15 members would be considered "members" of the AMA for purposes
16 of the Act. Because of their obligation to pay dues and
17 their voting rights, these individuals could meet the
18 membership requirements of section 100.8(b)(4)(iv)(B) and
19 114.1(e)(2)(ii), albeit under different clauses.^{10/}

20
21 9/ This conclusion is consistent with the Commission's
22 advice in Advisory Opinion 1993-24, where the Commission
23 concluded that the requester's board of directors, rather
24 than its executive committee, was the highest governing body
25 of the organization. The executive committee was responsible
26 for the day to day operations of the organization, but did
27 not hold final power since, among other restrictions, it was
28 limited in its ability to alter policy. See Advisory Opinion
1993-24.

10/ For example, AMA constituent members from California and
Oregon would qualify as members since they vote directly for
at least one delegate to the AMA House. AMA constituent
members from other state associations would qualify since
they vote directly for members of the state associations'
house of delegates which, in turn, elect the delegates to the

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2 Similarly direct members who are also members of AMA
3 constituent associations and members of AMA sections would
4 also be considered members of the AMA since they may
5 participate in the election process of delegates to the
6 House.^{11/}

7 A different situation exists for those remaining direct
8 members. While these individuals pay dues and have certain
9 participatory rights, they do not have the right to vote for
10 any House delegate or any person who can vote for a House
11 delegate. Therefore, they do not meet the requirements of
12 sections 114.1(e)(2)(ii) and (iii) or 100.8(b)(4)(iv)(B)(2)
13 and (3).^{12/}

14 The Commission also concludes that these direct members
15 do not meet the requirements of sections 114.1(e)(2)(i) and
16 100.8(b)(4)(iv)(B)(1). In Advisory Opinion 1993-24, as an
17 example of a "significant financial attachment" or a

18
19 (Footnote 10 continued from previous page)
20 AMA House.

21 ^{11/} The Commission notes the possibility that some direct
22 members of the AMA may also be the members of various
23 speciality organizations that send delegates to the House.
24 If direct members have the right to elect these delegates to
25 the AMA House, or elect those that select the delegates, then
26 those direct members would also be considered members of the
27 AMA for purposes of the Act.

28 ^{12/} It is clear that the nonvoting members of the AMA
possess certain rights of participation in policy matters but
this, in and of itself, is not sufficient to meet the
requirements of section 114.1(e)(2)(ii) and (iii). The
Explanation and Justification for these provisions of the
regulations notes: "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).

"significant investment or ownership stake" in the membership organization beyond the payment of dues, the Commission cited the amounts (tens of thousand of dollars) necessary to acquire nonvoting membership seats in stock and commodity exchanges. See Advisory Opinion 1993-24, see also 58 Fed. Reg. 45771 (August 30, 1993). The factual material submitted in this opinion request indicates that direct members do not have this type of connection to the AMA.

Lastly, the Commission addresses the application of the regulation's definition of "members" under the case by case approach of sections 114.1(e)(3) and 100.8(b)(4)(iv)(C). In Advisory Opinion 1993-24, the Commission determined that 114.1(e)(3) required the presence of some level of voting rights. Since, again, the remaining direct members have no voting rights, they cannot be considered members under sections 114.1(e)(3) or 100.8(b)(4)(iv)(C).^{13/}

Therefore, the Commission concludes that the AMA may not solicit contributions to AMPAC from direct members who lack the right to participate directly or indirectly in the election of delegates to the House. Similarly, the AMA may not make partisan communications to such members. However, AMPAC may under 11 CFR 114.5(i) use voluntary contributions to communicate with the general public (including all its

^{13/} While your request concerns the status of direct members of the AMA, the conclusions contained in the opinion would apply to other classes of AMA membership that lack the ability to participate in the selection of House delegates, that is, the honorary and affiliate AMA members.

direct members) as long as such communications do not solicit contributions to the PAC. 11 CFR 114.5(i).

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.

For the Commission,

Trevor Potter
Chairman

Enclosure (AO 1993-24)