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JUN 14 4 12 PM '94

AGENDA ITEM

For Meeting of: 6-16-94

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Trevor Potter *TP*
Scott E. Thomas *ST*

DATE: June 13, 1994

RE: Possible revision to OGC AO 1994-12 Draft

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We have spent some time wrestling with the issues contained in the Office of General Counsel's AO 1994-12 Draft. For discussion purposes only, we are putting forward some potential changes in the draft AO, in the hope that this will stimulate Commission discussion of the issues. These changes would begin after line 7 on page 12 of the OGC Draft and conclude with the second line on page 14 of that draft.

For those remaining direct members, the Commission does not view them as meeting Sections 100.8(b)(4)(iv)(B)(2) or (3) or (C), or 114.1(e)(2)(ii) or (iii) or (3). The Commission concludes, nonetheless, that they would meet the requirements of Sections 100.8(b)(iv)(B)(1) and 114.1(e)(2)(i) because they have a "significant financial attachment" to the AMA. Aside from paying annual dues, these members have certain opportunities to regulate those in their chosen profession and thereby enhance their own economic security. These self-regulation functions are achieved through AMA mechanisms and therefore provide a strong, enduring inducement to join the AMA independent of any political or ideological considerations.

First, the AMA has a substantial role in regulation of medical profession ethics through the issuance of ethical guidelines and involvement in disciplining members. This unique function protects the profession and discourages nonapproved practice in the field. It provides a significant reason to join the AMA.

Second, the AMA has a central role in the accreditation of medical education programs (medical schools, residency programs, and continuing education). It also participates actively in accreditation of hospitals, long term care facilities, health maintenance organizations, ambulatory care facilities, and home health care providers. This distinct function also regulates access to the profession and provides a significant reason to join the AMA.

The unique ability to participate in a substantial way in deciding who can participate in the profession, and how they must perform, in an enduring and independently significant inducement to become a member of the AMA. By paying annual dues that support these functions and by subjecting themselves to such self-regulation, direct members have an intangible economic stake in the AMA. Because of these special characteristics, direct members have the type of "significant financial attachment" to the AMA required in the Commission's regulations.

We, therefore, conclude that direct members of the AMA constitute the type of fact - specific situation the Commission contemplated when it allowed for a case-by-case review of membership classes under the new membership rules. The rules were designed to ensure that there is a significant organizational and/or financial attachment of the member to the membership organization. This attachment is necessary to ensure that membership entities are not turned into vehicles to solicit the general public, contrary to Congressional intent. We believe the AMA has demonstrated such an attachment with its direct members. There is a clear nexus between those members' position in the medical profession and the work of the association in that profession; the rigorous qualifications for direct membership ensure that only a limited group of persons meeting objective standards are eligible for that membership; and direct members are eligible to participate in important aspects of the governance of the profession through the AMA.

Status of AMA Honorary and Affiliate Members

Honorary and affiliate members, however, do not meet the standards contained in the membership regulations. Most significantly, honorary and affiliate members do not pay any dues or assessments, and in some cases may be elected to membership without any significant action on their

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part. Since they do not meet the most minimal attachment qualifications, we need not proceed to analyze their status under Sections 100.8(b)(4)(iv)(C) and 100.8(b)(4)(iv)(B)(1).

Therefore, the Commission concludes that the AMA may not solicit contributions to AMPAC, or any of its affiliated committees, and it may not make partisan communications to honorary or associate members, but may do so for constituent or direct members.

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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
0 any House delegate or any person who can vote for a House
1 delegate. Therefore, they do not meet the requirements of
2 sections 114.1(e)(2)(ii) and (iii) or 100.8(b)(4)(iv)(B)(2)
3 and (3).^{12/}

4 The Commission also concludes that these direct members
5 do not meet the requirements of sections 114.1(e)(2)(i) and
6 100.8(b)(4)(iv)(B)(1). In Advisory Opinion 1993-24, as an
7 example of a "significant financial attachment" or a

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9 (Footnote 10 continued from previous page)
10 AMA House.

11 ^{11/} The Commission notes the possibility that some direct
12 members of the AMA may also be the members of various
13 speciality organizations that send delegates to the House.
14 If direct members have the right to elect these delegates to
15 the AMA House, or elect those that select the delegates, then
16 those direct members would also be considered members of the
17 AMA for purposes of the Act.

18 ^{12/} It is clear that the nonvoting members of the AMA
19 possess certain rights of participation in policy matters but
20 this, in and of itself, is not sufficient to meet the
21 requirements of section 114.1(e)(2)(ii) and (iii). The
22 Explanation and Justification for these provisions of the
23 regulations notes: "The Commission stresses that so-called
24 'governance' voting is required, as opposed to voting for the
25 association's policies or positions." 58 Fed. Reg. 45771
26 (August 30, 1993).

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

10 Lastly, the Commission addresses the application of the
11 regulation's definition of "members" under the case by case
12 approach of sections 114.1(e)(3) and 100.8(b)(4)(iv)(C). In
13 Advisory Opinion 1993-24, the Commission determined that
14 114.1(e)(3) required the presence of some level of voting
15 rights. Since, again, the remaining direct members have no
16 voting rights, they cannot be considered members under
17 sections 114.1(e)(3) or 100.8(b)(4)(iv)(C).¹³

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

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27 ^{13/} While your request concerns the status of direct
28 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.

