



FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-39

J. Martin Huber, Executive Vice President
National Association of Surety Bond Producers
5301 Wisconsin Avenue, N.W.
Suite 450
Washington, DC 20015-2015

Dear Mr. Huber:

This refers to your letters of November 21, and December 2, 1994, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed solicitation for contributions by the National Association of Surety Bond Producers ("NASBP") on behalf of its political committee, the National Association of Surety Bond Producers Political Action Committee ("SuretyPAC").

You state that on November 21, 1994, NASBP filed a statement of organization on behalf of SuretyPAC.^{1/} NASBP and SuretyPAC wish to begin to solicit members for contributions. You state that you plan to make a written request to your 560 members for permission to solicit the restricted personnel class of these members. However, in addition to your 560 members, NASBP also has 105 fee paying "affiliates" who are mostly the surety companies that underwrite the surety bonds sold by NASBP members.

The annual fees for affiliates is either \$5,000 or \$2,250, depending on the volume of policies issued. The annual dues for members is either \$2,250 or \$1,500, depending upon the volume of policies obtained. Because the NASBP affiliates pay significantly higher dues than its members, you argue that these companies are "thus making a serious financial investment in the association and may meet the FEC 'restricted class' requirements..." You state that affiliates receive "virtually all the benefits of membership except the right to vote."^{2/} You therefore wish to include affiliates in the planned solicitation for SuretyPAC and wish to know whether this is permissible under the Act and Commission regulations.

DETERMINING THE STATUS OF NASBP AFFILIATES

The 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 or 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 its stockholders and their families and its 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 a corporation without capital stock, including a trade association, to solicit contributions to the fund from members of the nonstock corporation. Further, under 11 CFR 114.8(c), a trade association, if granted prior permission by a corporate member, may solicit contributions for its separate segregated fund from that corporation's stockholders and their families and its executive or administrative personnel and their families.

The term "Membership Association," as used in Commission regulations, includes membership corporations, trade associations and other corporations without stock. The term is further defined to mean a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list. 11 CFR 114.1(e)(1)

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

- (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);
- (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- (iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

The regulations also provide that the Commission "may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have a significant organizational and financial attachment to the association under

circumstances that do not precisely meet the requirements of the general rule." See 11 CFR 114.1(e)(3).

NASBP as a Membership Association.

The facts and background to this request indicate that NASBP is a membership association for purposes of the Act. For example, Article II of NASBP bylaws meets the requirement of 11 CFR 114.1(e)(1) by expressly providing for membership. NASBP has mailings, newsletters and a certificate of membership which are sent to members. Therefore, the requirement that membership be expressly recognized is also met. See 11 CFR 114.1(e)(1)(iii). The request materials indicate that NASBP uses membership promotional materials that expressly solicit members. Article II, section 3 of NASBP bylaws indicates that membership in NASBP is by invitation only and that firms solicited for NASBP membership must affirmatively accept the invitation to join before NASBP considers them members. See 11 CFR 114.1(e)(2).^{3/}

Status of Affiliates Within NASBP

Before considering whether the "serious financial investment" of NASBP affiliates may permit them to be included in the proposed solicitation, there is a preliminary issue of whether the membership regulations allow for recognition of the affiliates, given the status accorded to them by NASBP itself.

Your December 2, 1994, letter states that the "affiliates are not a class of membership." This characterization is supported by NASBP's bylaws. For example, Article II, section 1 of the NASBP bylaws states that "the Association shall have one class of member." The NASBP bylaws state that membership in this one class is open to a firm described as a "corporation, partnership or proprietorship including any qualifying division, branch office or other entity" which:

is continuously and actively engaged on a commission basis as agent-producer or broker of surety bonds representing two or more surety companies; [and] has produced a minimum volume of surety premiums during the twelve months prior to submission of an application for membership of \$200,000 in two or more surety companies, with the predominant portion of the applicant firm's total surety premiums produced by serving as a retail agent or broker directly representing the principals named in the bonds produced.

NASBP bylaws, Article II, section 2.^{4/}

By contrast, according to the information contained in your request, there are less stringent requirements to qualify as an "affiliate" of NASBP. The request materials state that this group is open to all surety companies, reinsurance companies, reinsurance brokers, managing general agencies and underwriting managers on the "Approved List of Companies for Attendance at NASBP Meetings." Companies not on this list may also become affiliates, but must be sponsored by NASBP members and other affiliates.

The NASBP bylaws provide for a certain flexibility regarding the qualification for members. The Board of Directors has the power to waive the conditions of membership "if such waiver is deemed to be in the best interests of [NASBP]." Id. Furthermore, the Board may also "prescribe such further requirements and qualifications for membership, not inconsistent with the forgoing." Id. However, the facts of your request indicate that the NASBP Board chose not to exercise any of these options regarding affiliates. You state that affiliates were "intentionally...not made a membership category because of concerns of several potential affiliates of antitrust issues."

Therefore, given NASBP's own treatment of its affiliates as non-members, the Commission concludes that the affiliates cannot be considered members of NASBP for purposes of the Act and Commission regulations. NASBP may not solicit their affiliate group or any personnel who are employed by, or stockholders of, corporations in the group for contributions to SuretyPAC.^{5/} In view of this determination, the Commission does not reach the question whether the purported "financial investment" of affiliates would otherwise qualify them as members under Commission regulations.

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,

Danny L. McDonald
Chairman

Enclosure (AO 1991-24)

1/ According to the information contained in your request, NASBP is a national organization of 560 insurance agencies and brokerages specializing in providing surety bonds and insurance to construction contractors. You state that NASBP is a 501(c)(6) trade association and is incorporated in the District of Columbia.

2/ According to the materials included in your request, affiliates receive all NASBP mailings, are permitted to attend annual and regional association meetings, may purchase NASBP publications, attend NASBP educational programs and receive NASBP legislative and government affairs information. However, affiliates, unlike members, may not vote or serve on NASBP's Board of Directors; nor may they serve as chairs or vice chairs of standing committees. They may serve on all regular committees except the executive, planning, membership and nomination committees, and may chair ad hoc committees.

3/ It also appears that NASBP meets the definition of "trade association" under 11 CFR 114.8(a). NASBP is "a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member." 11 CFR 114.8(a), see also Advisory Opinion 1991-24.

4/ Commission regulations provide that an association's articles of incorporation, bylaws or similar governing documents should be used in determining membership status. See 11 CFR 114.1(e)(1) and 58 Fed. Reg. 45771 (August 30, 1993). Therefore, the other documents in this request which discuss the benefits and fees as to the affiliates is not controlling in determining their status as members of NASBP.

5/ The Commission notes that NASBP may not solicit any of the described personnel under the trade association federation rules at 11 CFR 114.8(g) because none of the affiliates are themselves trade associations at the state or regional level.