

FEDERAL ELECTION COMMISSION
JUN 1 4 55 PM '95



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20543

June 1, 1995

MEMORANDUM

TO: The Commission
THROUGH: John C. Surina
Staff Director
FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1995-13

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for June 8, 1995.

AGENDA ITEM
For Meeting of: JUN 8 1995

Attachment

2505 / 451 .3

DRAFT

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-13

R. William Taylor, President
American Society of Association Executives
1575 Eye Street, N.W.
Washington, D.C. 20005-1168

Dear Mr. Taylor:

This refers to your letters of May 8, and March 29, 1995, on behalf of the American Society of Association Executives ("ASAE") regarding application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to its proposed solicitation of its membership for contributions to its political committee, A-PAC.

You inquire as to the application of Commission regulations to those (22,250) persons whom ASAE claims as its members, and you ask whether the organization may solicit all such "members" for contributions to A-PAC.¹ You state that ASAE, a not-for-profit, District of Columbia corporation, is "an umbrella organization organized to serve and represent associations." You explain that its membership includes association executives and staff, as well as representatives of suppliers of goods and services to the association

¹ You state that ASAE's political activities are limited to the funding, maintenance and operation of A-PAC. ASAE does not engage in any partisan political communication within the meaning of 11 CFR 114.8(h). As such, you state that your advisory opinion request is directed solely at ASAE's solicitation of contributions to A-PAC.

4 community. Membership in ASAE is by individual only.^{2/}

5 You provide various ASAE documents with your request
6 including its bylaws, and portions of a membership brochure.
7 These materials provide information, which is analyzed below,
8 regarding the membership structure of ASAE.

9 ASAE MEMBERSHIP STRUCTURE

10 Classes of Membership

11 As outlined by its bylaws, ASAE's various classes of
12 membership are: regular, associate, section and life.^{3/}

13 Regular membership is "limited to full-time staff
14 personnel devoting 50 percent or more of their working time
15 to the management of voluntary trade, professional,
16 educational, philanthropic, technical, or similar type
17 organizations which have either members or donors or both, or
18 to persons who meet the criteria for Life Membership but who
19 are consulting to associations on a part-time basis." ASAE
20 Bylaws, Article III, section 2.

21 Associate membership is open to "any person representing
22 a firm or corporation engaged in selling products or services

23 ² The ASAE Bylaws state that among the organization's
24 purposes is to "promote the arts and sciences of association
25 management and educate members and the public in the
26 advancement, improvement and uses of voluntary associations."
27 ASAE Bylaws, Article II. You state that approximately
28 one-third of ASAE's member association executives and staff
29 manage charitable and philanthropic societies and trade
30 associations. The remaining two-thirds manage professional
societies and trade associations.

31 ³ Your request indicates that ASAE has 22,250 members in
32 four categories: 29% (6,411) regular members, 16% (3,490)
33 associate members, 52% (11,705) section-only members, 3%
34 (644) life members.

3 to members of ASAE; persons employed by governmental agencies
4 and educational institutions; individuals in salaried
5 positions working less than 50 percent in association duties;
6 lawyers, certified public accountants, and other members of
7 learned professions who provide services to associations; and
8 individuals formerly holding Regular Membership who no longer
9 qualify for such membership." ASAE Bylaws, Article III,
10 section 3.

11 Regarding section membership, ASAE Bylaws state: "in
12 addition to, or as an alternative to Regular Membership in
13 ASAE, association executives and Associate Members may hold
14 membership in sections of the Society as may be established
15 by the Board of Directors." Id. You state that there are
16 currently 10 sections in ASAE, each related to a different
17 functional area of association management. While some
18 regular and associate members hold section membership, your
19 request identifies a large class of members in ASAE, referred
20 to as "section-only" members, who belong only to a section
21 and do not hold any other membership in the ASAE. See
22 footnote 3.

23 Regarding life members, ASAE Bylaws state that "Life and
24 Honorary Membership without voting rights may be conferred
25 upon members of the Society at such time and under such terms
26 as the Board of Directors shall determine." ASAE Bylaws,
27 Article III, section 4.

28 Duties Rights and Powers of Members

29 Membership dues for all classes of membership are
30

3 established by the Board. ASAE Bylaws, Article V, section 1.
4 The system of annual dues, as of March 1995, has the
5 following three levels: chief executive officer from an
6 association, \$195; association staff or association
7 management company executive, \$165; associate member from a
8 for-profit company, \$295. For all classes of membership,
9 membership in additional sections is \$100 for each section.^{4/}

10 Certain benefits and rights of membership pertain to all
11 classes of membership. All members may serve on certain
12 committees. However, rights of governance are reserved to
13 regular members; chief among these is the power to vote.
14 Only the regular members may vote for the elected officers of
15 ASAE and the ASAE board of directors; may nominate directors
16 by petition; may be appointed to the nominating committee;
17 and may vote to amend certain core articles of the bylaws.^{5/}
18 ASAE Bylaws, Article III, section 1; Article XI, section 1;
19 and Article XVI, section 2.

20 The right to be elected to office is, for the most part,
21 reserved to regular members. Only a regular member may be
22 elected to serve as an officer.⁶ ASAE Bylaws, Article VII,
23 section 2. Associate members, however, may be elected to two
24

25

4 The materials you have provided are silent as to whether
26 life members also pay dues.

27 5/ Either the Board of Directors or the regular members may
28 propose amendments by petition. ASAE Bylaws, Article XVI,
section 1.

29 6/ The elected officers of ASAE consist of a Chairman of
30 the Board, a Chairman-Elect, four Vice Chairmen, and a
Secretary-Treasurer.

3 (of 34) positions on the ASAE Board which are reserved for
4 them.^{7/} Regular members occupy all other positions on the
5 Board. ASAE Bylaws, Article IX, section 2.^{8/} Members of
6 sections also have "a vote in all affairs of that section
7 subject to overall Board of Directors' control." ASAE
8 Bylaws, Article III, section 3.

9
10 7/ Your request identifies four committees which represent
11 the interests and views of the associate membership. These
12 committees are the Associate Member Advisory Committee, the
13 Exhibitors Advisory Committee, the Associate Member Past
14 Directors Committee, and the Associate Member Fellows. You
15 further state that these committees are among the sources
16 solicited by the nominating committee for names of possible
17 associate director candidates. However, the voting for the
18 directors, including the associate directors, is still
19 limited to regular members.

20 8/ ASAE Bylaws delineate two institutions which play roles
21 in the governance of ASAE-- the Board and the Executive
22 Committee. For purposes of the analysis below, the
23 Commission concludes that the Board, rather than the
24 Executive Committee, is the highest governing body of ASAE.
25 In the past, the Commission has based such determinations on
26 which governing institution of a membership organization
27 holds pre-eminent power. See Advisory Opinions 1994-12 and
28 1993-24.

29 The Commission notes that under ASAE Bylaws, the Board
30 is specifically entitled the governing body of the society.
It "shall have supervision, control and direction of the
affairs of the Society, its committees and publications;
shall determine its policies or changes therein; shall
actively prosecute these objectives, supervise the
disbursement of its funds, and shall be responsible for the
interpretation of these bylaws." ASAE Bylaws, Article IX,
section 1. The Board is permitted to delegate some of its
powers to the Executive Committee. Id.

The Executive Committee may act in place and instead of
the Board between Board meetings on all matters, except those
specifically reserved to the Board by the bylaws. ASAE
Bylaws, Article X, section 1. Among the powers reserved to
the Board is the distribution of ASAE assets and the
proposal of amendments to the bylaws (shared with the regular
membership) as well as the power to amend certain articles of
the ASAE Bylaws. ASAE Bylaws, Article XIV, section 1.

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)(i), a corporation, or a separate segregated fund established by a corporation, may solicit contributions to such a fund only from its stockholders and their families and its executive and administrative personnel and their families. An exception set forth in 2 U.S.C. §441b(b)(4)(C) and 11 CFR 114.7(a) allows a membership organization (among other corporations without capital stock), or its separate segregated fund, to solicit contributions to the fund from the members of the organization and their families. The Commission's regulations use the term "membership association" to implement this exception. It is defined, in part, as 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)(i), (ii), and (iii).

Commission regulations define 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

3 the general rule." See 11 CFR 114.1(e)(3).^{9/}

4 APPLICATION OF MEMBERSHIP REGULATIONS TO ASAE

5 The ASAE as a Membership Association.

6 The facts and background to this request indicate that
7 ASAE is a membership association for purposes of the Act.
8 For example, Article III of ASAE Bylaws meets the
9 requirements of 11 CFR 114.1(e)(1)(i) by expressly providing
10 for membership. The facts of the request and materials, such
11 as the portions of the membership brochure included in your
12 request, suggest that ASAE expressly solicits members. See
13 11 CFR 114.1(e)(1)(ii). ASAE also sends membership cards and
14 publications to members. Therefore, the requirement that
15 membership be expressly acknowledged is also met. See 11 CFR
16 114.1(e)(1)(iii).¹⁰

17 Status of ASAE Members

18 Under the membership regulations, regular members of

19
20 9 Your request only concerns solicitation of contributions
21 to ASAE's separate segregated fund. Therefore, the
22 discussion below will concern section 114.1(e). The
23 Commission notes that sections 100.8(b)(4)(iv)(A), (B) and
24 (C) relate to an association's right to make partisan
25 communication to its members, and the wording of sections
26 100.8(b)(4)(iv) and 114.1(e) dealing with membership are
27 identical. Therefore, the analysis of section 114.1(e) will,
28 to that extent, be applicable to section 100.8(b)(4)(iv) as
29 well.

30 10 It also appears that ASAE meets the definition of "trade
association" under 11 CFR 114.8(a). ASAE 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.

3 ASAE would be considered "members" of ASAE for purposes of
4 the Act. Because of their obligation to pay dues and their
5 voting rights in the governance of ASAE, these individuals
6 meet the membership requirements of section 114.1(e)(2)(ii).

7 A different situation exists for the remaining classes
8 of members, including associate members. While individuals
9 holding associate membership pay dues and have certain
10 participatory rights, they do not have the right to vote for
11 any ASAE officer, director or for any person who can vote for
12 an officer or director.^{11/} Therefore, they do not meet the
13 requirements of sections 114.1(e)(2)(ii) and (iii).^{12/}

14
15
16 ^{11/} According to ASAE Bylaws, the elected officers of the
17 association are members of the Board and have full voting
18 rights. ASAE Bylaws Article IX, section 1. In this
19 situation any class of membership that could vote for an
20 elected officer, even if they could not vote for at-large
21 board members, would meet the requirements of 114.1(e)(2)(ii)
22 and (iii) since they would be voting for members of the
23 highest governing body of the association. In the
24 circumstances here, only regular ASAE members have power to
25 elect its officers.

26
27 ¹² It is clear that the nonvoting members of ASAE possess
28 certain rights of participation in policy matters, but this,
29 in and of itself, is not sufficient to meet the requirements
30 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).

As noted in footnote 7, committees comprised of
associate members are solicited for their suggestions
regarding candidates for the two associate director
positions. However, even these committees have no actual
voting power regarding the selection process. Furthermore,
your request indicates that there is no requirement that the
selection of nominations for the associate directorships be
limited to persons endorsed or proposed by these committees.

3 Section-only members and life members would also not
4 meet the requirements of sections 114.1(e)(2)(ii) and (iii).
5 Section-only members and life members do not vote for any
6 ASAE officer, any director or any person who can vote for an
7 officer or director. They are even further removed from the
8 governance of ASAE than the associate members, since these
9 classes of members do not have any directorship positions set
10 aside to represent their interests even if they could not
11 themselves vote for those positions.

12 The Commission also concludes that associate,
13 section-only and life classes of members do not meet the
14 requirements of section 114.1(e)(2)(i). In Advisory Opinions
15 1995-2 and 1994-34, the Commission considered examples of a
16 "significant financial attachment" or a "significant
17 investment or ownership stake" in the membership organization
18 beyond the payment of dues. The Commission cited the
19 monetary value (well over \$10,000) and interests linked to
20 holding a seat and membership in a commodity exchange. See
21 Advisory Opinions 1995-2 and 1994-34, see also 58 Fed. Reg.
22 45771 (August 30, 1993). The factual material submitted in
23 this opinion request indicates that associate, section-only
24 and life members do not have this type of connection to ASAE.

25 Lastly, the Commission addresses the application of the
26 regulation's definition of "members" under the case by case
27 approach of section 114.1(e)(3) and 100.8(b)(4)(iv)(C). In
28 Advisory Opinion 1993-24, the Commission concluded that
29 section 114.1(e)(3) requires the presence of some level of
30

3 voting rights. Since, again, the membership classes (other
4 than regular members) have no voting rights, those belonging
5 to these classes cannot be considered members under section
6 114.1(e)(3).^{13/}

7 Therefore, with respect to its various membership
8 classes, the Commission concludes that ASAE may only
9 solicit contributions to A-PAC from its regular members. The
10 Commission also concludes that ASAE and A-PAC may not solicit
11 contributions to A-PAC from the other membership classes who
12 lack the right to vote for ASAE officers or other members of
13 the ASAE Board of Directors.

14 This response constitutes an advisory opinion concerning
15 application of the Act, or regulations prescribed by the Com-
16 mission, to the specific transaction or activity set forth in
17 your request. See 2 U.S.C. §437f.

18
19
20 Sincerely,

21
22 Danny L. McDonald
Chairman

23 Enclosures (AOs 1995-2, 1994-34, 1994-12, 1993-24 and
24 1991-24)

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^{13/} While your request concerns the status of regular,
29 associate, and life members, the conclusions in this opinion
30 would apply to any other class of ASAE membership that also
lack voting rights; specifically the ASAE honorary class.