



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 19, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-14

Colleen M. Nolan, Secretary
Oral and Maxillofacial Surgery Political Action Committee
9700 West Bryn Mawr Avenue
Rosemont, IL 60018-5701

Dear Ms. Nolan:

This refers to your letters of May 23, May 16, May 8, April 17 and March 26, 1995, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a fundraising proposal of the Oral and Maxillofacial Surgery Political Action Committee ("OMSPAC").

Specifically, you ask whether a proposed booth display by OMSPAC at a convention, and the fundraising activity conducted at the booth, is permissible under Commission regulations. If not, you request an opinion as to "what modifications would bring the booth display into compliance with FEC guidelines."

OMSPAC is the separate segregated fund established by its connected organization, the American Association of Oral and Maxillofacial Surgeons ("AAOMS"). AAOMS is a not-for-profit corporation, chartered under the laws of the State of Illinois.^{1/}

Your proposal raises the issue of the classes of individuals at the convention who may be solicited for contributions to OMSPAC. The resolution of this question first requires the determination of AAOMS membership (a group that could be solicited), and a related analysis dealing with AAOMS' organizational structure. These determinations will be made before the specifics of your fundraising proposal are addressed.

Your request includes the AAOMS governing documents: its Constitution, Bylaws, Articles of Incorporation and Manual of the House of Delegates. These materials identify two

bodies, the House of Delegates (the "House") and the Board of Trustees (the "Board"), that play a role in governing AAOMS. The materials also provide information regarding the membership structure of AAOMS.

AAOMS GOVERNING BODIES

House of Delegates

The House is made up of delegates from all of the organizational units of AAOMS- the state component societies and the Federal counterparts representing the five Federal dental services.^{2/} Members of the House must be fellows or life fellows of AAOMS. AAOMS Bylaws, Chapter V, section 10.

The House of Delegates is described in Article V of the AAOMS Bylaws as the "legislative and governing body" of the AAOMS. It determines the policies which govern the Association, has the power to repeal the AAOMS Constitution, Bylaws and Code of Professional Conduct and Judicial Procedures. It may grant or retract component/Federal counterpart status and it approves the annual budget. It also elects all categories of membership to the Association, as well as the members of the Board and all AAOMS officers.^{3/} AAOMS Bylaws, Chapter V, sections 40 and 50.

The Board of Trustees

The Board of Trustees consists of 11 members. These are: 6 trustees elected by the House; the AAOMS president and president elect, the immediate AAOMS past president, the vice president and the AAOMS treasurer.^{4/} Members of the Board must be fellows or life fellows. AAOMS Bylaws, Chapter VI, section 10 and 20.

According to the AAOMS Bylaws, the Board is "the administrative body of the Association vested with full power to conduct all business of the Association subject tothe mandates of the House of Delegates." AAOMS Bylaws, Chapter IV, section 80. The Board may enact policy in emergency situations when the House is not in session. The House may, however, later reverse the Board decision. Id. The Board also provides for the maintenance of AAOMS property, prepares Association audits and proposes the AAOMS yearly budget. Id.

The Board possesses certain appointment powers as well. It must approve the selection of (non-House) committee and section members. It also appoints the executive director of the Association and the editor and assistant editor of the Association journal. Id.

AAOMS MEMBERSHIP STRUCTURE

Classes of Membership

As outlined by the AAOMS Bylaws, the organization's various classes of membership are: fellow, member, affiliate, and honorary. There are the additional categories of inactive status for fellows and members; and life and retired status for fellows, members and affiliates.^{5/}

The requirements for fellow and membership status in the AAOMS are almost identical and require various professional qualifications, including membership in the component oral and maxillofacial surgery society in the state in which the individual maintains his primary place of practice. Members, unlike fellows, need not have certification by the American Board of Oral and Maxillofacial Surgeons. AAOMS Bylaws, Chapter 1, Section 20.^{6/}

Affiliate membership is open to individuals in foreign nations who are recognized professionally in that nation as an oral and maxillofacial surgeon. Id.

Honorary membership is granted to those holding no other class of membership or to AAOMS non-USA members who have made distinguished contributions to the speciality of oral and maxillofacial surgery. Nominations are made by the AAOMS Board and are approved by the AAOMS House.

Life membership in the above categories is granted upon reaching the age of 65 or upon completion of 35 dues paying years. Retired status is granted to individuals in membership categories who retire from their practice and have paid dues for 20 years or are disabled and unable to continue in their profession. Members and fellows who attain life or retired status are no longer required to maintain membership in a component state society and are exempted from the requirement to pay dues. Id.

Inactive membership is open to those members and fellows who derive no income from the active practice of oral and maxillofacial surgery. Id.

Duties, Rights and Powers of Members

Fellows, members and affiliates are required to pay dues and assessments. According to the AAOMS Bylaws, fellows and members each pay \$750 a year, while affiliates pay \$190 a year. Honorary, retired, life and inactive members do not pay dues. AAOMS Bylaws, Chapter XII, section 20.

Fellows and life fellows may serve in the House of Delegates, as a voting member of the AAOMS Board of Trustees, or as one of the other elected officers of the Association. Fellows, life fellows, members and life members may serve on various committees. However, only fellows and life fellows may serve on the House committees since these must be occupied by House delegates. Fellows, alone, are permitted to serve on the Committee on Residency Education and Training.

As noted above, the right to be elected to office is reserved to fellows and life fellows. Only these classes of membership may serve in the House of Delegates, as Board members or be elected as officers. (7) The right to vote for members of the House of Delegates is, by contrast, expansive. Voting for the House delegates is open to all fellows and members, including life and retired fellows and members though the auspices of the component societies and Federal counterparts. The only classes that cannot vote for House delegates are affiliate, honorary and inactive members.

OMSPAC CONVENTION PROPOSAL

You state that OMSPAC proposes to set up an exhibit booth at the scheduled February 1996 AAOMS Midwinter Conference. The booth would display various items identifying OMSPAC and would also be used to collect contributions from those attending the conference. You further explain that this conference will be a joint meeting with the American Association of Orthodontists ("AAO"). You state that there is no overlapping or common membership between AAOMS and AAO. Further, you say that the two organizations do not share any common directors, trustees, officers or key employees.^{8/}

You expect that approximately 900 qualified, professional AAOMS and AAO members will attend the convention, with the number expected to be equally divided between the two associations. You also estimate that 1,325 additional persons, not professional members of either organization, will attend.^{9/} The booth would be accessible to all attendees since it would be located in the exhibit hall facility used for the event.

You state that the booth would consist of a simple draped counter with a backdrop. The backdrop would display an OMSPAC banner, PAC newsletters and pictures from volunteer visits to Capitol Hill. The counter will display additional copies of the newsletter, brochures, OMSPAC hats and T-shirts. You also affirm that OMSPAC has followed a policy, since its creation, to reject contributions from individuals who are not qualified AAOMS members or executive level employees of AAOMS. Contributions from non-qualified AAOMS members, or non-executive level AAOMS employees, are returned with a letter explaining the reason(s) the contribution could not be accepted.

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 the general rule." See 11 CFR 114.1(e)(3).^{10/}

DETERMINING MEMBERSHIP OF AAOMS.

AAOMS as Membership Association.

The facts and background to this request indicate that AAOMS is a membership association for purposes of the Act. For example, Chapter I, of AAOMS Bylaws meets the requirements of 11 CFR 114.1(e)(1)(i) by expressly providing for membership. The facts of the request and materials, such as the portions of the AAOMS governing materials included in your request, suggest that AAOMS expressly solicits members. See 11 CFR 114.1(e)(1)(ii). AAOMS also sends publications to members. Therefore, the requirement that membership be expressly acknowledged is also met. See 11 CFR 114.1(e)(1)(iii).^{11/}

AAOMS Highest Governing Body

Both the Board and the House of Delegates have significant roles regarding the governance of the AAOMS. 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 AAOMS and can overrule any prior policy action taken by the Board when the House was not in session. Further, the House elects and can remove members of the Board. In financial matters, the House retains its superiority since the budget proposed by the Board must be approved by the House. After considering these and the other powers enjoyed by the House over the Board, the Commission concludes that the AAOMS House of Delegates, rather than the AAOMS Board of Trustees, is the highest governing body of the AAOMS for purposes of the Commission regulations.^{12/}

Status of AAOMS Members

Under the membership regulations, AAOMS fellows and members would be considered "members" of the AAOMS for purposes of the Act. Because of their obligation to pay dues and their voting rights, these individuals could meet the membership requirements of section 114.1(e)(2)(ii).

Retired and life fellows and members would also be considered members of AAOMS for purposes of the Act under the case by case basis of 11 CFR 114.1(e)(3). According to your request, these individuals do not pay dues, but they do have the power to vote for members of the House. The case by case rule of section 114.1(e)(3) provides that "long term dues paying members who qualify for lifetime membership status with little or no dues obligation may be considered members if they retain voting rights in the association."

A different situation exists for honorary members and inactive members. These two classes do not pay dues. The governing documents indicate that these classes have no voting rights or governance or participatory rights. Therefore, they do not meet the requirements of sections 114.1(e)(2)(ii) or (iii), nor 100.8(b)(4)(iv)(B)(2) or (3).

The Commission also concludes that honorary members and inactive members do not meet the requirements of section 114.1(e)(2)(i). In Advisory Opinions 1995-2 and 1994-34, the Commission considered examples of a "significant financial attachment" or a "significant investment or ownership stake" in the membership organization beyond the payment of dues. The Commission cited the monetary value (well over \$10,000) and interests linked to holding a seat and membership in a commodity exchange. See Advisory Opinions 1995-2 and 1994-34, see also 58 Fed. Reg. 45771 (August 30, 1993). The factual material submitted in this opinion request indicates that honorary and inactive members do not have this type of connection to AAOMS.^{13/}

Lastly, the Commission addresses the application of the regulation's definition of "members" under the case by case approach of section 114.1(e)(3) and 100.8(b)(4)(iv)(C). In past opinions the Commission has considered this approach. See Advisory Opinion 1993-24. Given the facts presented as to the above two membership classes, those who belong to them cannot be considered members under section 114.1(e)(3).

Therefore, the Commission concludes that AAOMS may solicit contributions to OMSPAC from fellows, members, life fellows, life members, retired fellows and retired members. The Commission also concludes that AAOMS and OMSPAC may not solicit contributions to OMSPAC from the honorary and inactive membership classes who lack the right to vote for the House of Delegates.^{14/}

Given this conclusion, the class of individuals attending the convention who may engage in the fundraising activities of the proposed OMSPAC booth would include fellows, life fellows, retired fellows, members, life members and retired members.^{15/}

The Commission considered the status of affiliate members, but was unable to reach a conclusion on their membership status by the required affirmative vote of four Commission members.^{16/} See 2 U.S.C. 437c(c).

CONDUCT OF CONVENTION BOOTH AND RELATED ACTIVITIES

In several advisory opinions, the Commission has examined the issues surrounding the operation of PAC booths and related PAC fundraising activities at trade association conventions. See Advisory Opinions 1976-27, 1976-96, 1978-17, 1978-83, 1981-41 (booths at conventions); see also Advisory Opinion 1992-9 (fundraising raffles at conventions).^{17/}

The basic principle applied in these opinions is that the requirements for permissible solicitations apply to the convention environment. The Commission has concluded that PAC booths and the related fundraising activities, as well as publication efforts, will be considered solicitations for contributions if they do more than simply give factual information regarding the PAC. See the above cited opinions.^{18/} Since these convention activities are solicitations, they can only be directed to qualified AAOMS members and personnel who are AAOMS executive and administrative personnel and their families.

Of vital importance here, is the AAOMS policy to reject contributions from non-members or non-executive level employees. The Commission has concluded that compliance with a self-imposed policy of refusing contributions from persons who may not be lawfully solicited for contributions achieves the underlying purpose of section 441b's restrictions on contribution solicitation. Thus, the Commission has taken a less restrictive view of what constitutes an improper solicitation where a separate segregated fund follows a policy such as described in your request. See Advisory Opinion 1978-17.

Advisory Opinion 1978-17 is especially relevant to the situation here. In that opinion, a trade association, with a contribution rejection policy similar to the AAOMS policy, wished to set up a PAC booth with the intention to raise funds by selling PAC related items. The requesting trade association expected that numerous non-members would attend its convention and have access to the area where the PAC booth would be located. The requester listed various steps that would be taken to prevent impermissible solicitations.^{19/} The Commission concluded that, if the trade association and its PAC followed these safeguards, the operation of the booth would be permissible under the Act and Commission regulations.

Compliance with similar steps would also permit the operation of OMSPAC's proposed booth. Specifically, the booth should contain signs clearly stating OMSPAC's policy to reject contributions from non-members or non-executive level employees of AAOMS. The policy should be followed and enforced by booth personnel. A method of identifying the qualified AAOMS members from whom OMSPAC proposes to accept contributions should be maintained. OMSPAC would already be obligated by the record keeping requirements of the Act and Commission regulations to create records of all contributions accepted at the booth. See 2 U.S.C. 432(c).^{20/}

The Commission notes that while the requester in Advisory Opinion 1978-17 planned to avoid any pre-convention and convention publicity of the booth, this step is not necessary. What is required is that such publicity be directed only toward solicitable individuals. Therefore, any pre-convention mailings and convention registration packets that contain advertisements regarding OMSPAC booth fundraising activities must be directed only to solicitable members of AAOMS and their families, or to AAOMS executive and administrative personnel and their families.

Regarding convention presentations, in Advisory Opinion 1976-96, the Commission stated that "if an announcement of PAC activities is made at the meeting, or if the PAC sets up and informs the attendees of a booth on the premises where the solicitation materials are available, either event would be a 'solicitation' within the meaning of the Act..." Advisory Opinion 1976-96. See also Advisory Opinions 1992-9, 1981-41, and 1978-83. Therefore, any presentation to any group of convention attendees, which includes persons who are not solicitable by OMSPAC or AAOMS, may not include an invitation to visit the OMSPAC booth or a similar message that promotes OMSPAC. If these steps are followed, then the proposed booth display, and restricted fundraising activity at the booth by OMSPAC, would be permissible under the Act and 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,

(signed)

Danny L. McDonald
Chairman

Enclosures (AO 1995-2, 1994-34, 1994-39, 1994-12, 1993-24 1992-9, 1991-24, 1988-2, 1983-38, 1981-41, 1979-13 1978-83, 1978-17, 1976-96 and 1976-27)

1 The AAOMS Articles of Incorporation set forth, among the purposes of the Association, the goal of contributing to "the public welfare by advancement of the specialty of oral and maxillofacial surgery." AAOMS Articles, section 3.

2 According to the AAOMS Bylaws, the method of election is up to each component society and Federal counterpart. AAOMS Bylaws Chapter III, sections 10, 20 and 40. The information included in your request indicates that all AAOMS fellows, life fellows, retired fellows, members, life members and retired members participate in the election of delegates by their state component societies, regardless of whether they are members of that state society. However, members of state societies, who are not AAOMS members, are not permitted to participate. AAOMS Bylaws, Chapter III, sections 30 and 40; and Chapter V, section 10 and AAOMS Manual of House Delegates, Chapter V.

3 In addition to the trustees, the elected officers of AAOMS are a president-elect, an immediate past president, a vice-president, a speaker of the House and a treasurer.

4 According to the AAOMS Bylaws, the House may remove Board members. AAOMS Bylaws, Chapter VI, section 40.

5 You state in your request that AAOMS does not include any corporate members; the Association membership is exclusively made up of individuals. Your request indicates that AAOMS has 5,990 members and 183 candidates for membership. The membership is distributed as follows: 69% (3,977) fellows, 10% (630) members, 3% (209) affiliates, 16% (987) retired or life members and fellows, and less than 1% (35) honorary/inactive. There are currently no retired or life affiliates in AAOMS.

6 However, while membership in a component state association seems to be a prime requirement for these two categories, there is also a grandfather clause in the Bylaws which provides that no individual, who was a fellow or member of the Association and was not an active member of a component oral and maxillofacial surgery society on September 27, 1991, should have his or her membership discontinued solely as a result of failure to hold membership in a component society. AAOMS Bylaws, Chapter I, Section 60. The information in your request indicates that the class of members and fellows covered by this provision is 283 which is 5% of the current number of fellows and members.

7 The nomination process is also limited to fellows and life fellows. The AAOMS Bylaws do not identify a nominations committee. The nominations to the board of trustees are made by House delegates divided into caucuses representing the different multi-state districts which make up the Association. Each district must be represented on the Board by one trustee. After the nominations are made, the entire House votes on the candidates. AAOMS Bylaws, Chapter IV, Section 50. Officers are nominated and elected in the House. The nomination must be signed by ten fellows or life fellows in good standing. AAOMS Bylaws, Chapter VII, Section 30.

8 While AAOMS and AAO are two distinct organizations, you state that the professional similarities between the organizations provide the rationale for the joint convention. Oral and maxillofacial surgeons and orthodontists share similar educational backgrounds and interests, and often collaborate to offer state of the art patient care. The two organizations, you state, believe there are mutual benefits in sharing knowledge between the fields of oral and maxillofacial surgery and orthodontia. In past years, the AAOMS and the AAO have held four joint meetings -- in 1980, 1983, 1986 and 1991.

9 You allocate the expected 1,325 non-member attendees into the following categories: 30 are employees of either AAOMS or AAO; 200 are residents and graduate students; 15 are non-members of related dental specialties; 200 are professional and allied staff persons employed in the offices of oral and maxillofacial surgeons and orthodontists; 180 are persons employed by businesses which offer goods and services of interest to oral and maxillofacial surgeons and orthodontists; and 700 are spouses and other guests/family members.

10 Your request only concerns solicitation of contributions to OMSPAC through use of its convention booth. Therefore, the discussion below will concern section 114.1(e). The Commission notes that section 100.8(b)(4)(iv) relates to an association's right to make partisan communication to its members, and the wording of sections 100.8(b)(4)(iv) and 114.1(e) dealing with membership are identical. Therefore, the analysis of section 114.1(e) will, to that extent, be applicable to section 100.8(b)(4)(iv) as well.

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

12 This conclusion is consistent with the Commission's advice in Advisory Opinion 1994-12, which concluded that the AMA's House of Delegates, rather than its Board of Trustees, was the highest governing body of the organization. The question was somewhat closer in that the AMA Board held certain veto rights in financial matters over the AMA House; such powers are not granted to the AAOMS Board. See Advisory Opinion 1994-12.

13 In the case of inactive members, lack of a current financial attachment either to the organization or to the profession is the requirement for this category.

14 Your May 16, 1995, submission states that 183 individuals are candidates for membership to the AAOMS. An association's governing documents are used to interpret membership status. See 11 CFR 114.1(e)(1) and 58 Fed Reg. 45771 (August 30, 1993); see also Advisory Opinion 1994-39. Under the AAOMS Bylaws, candidates are not regarded as members of the association, they pay no dues and have no participatory rights other than the privilege of subscribing to the AAOMS journal. See AAOMS Bylaws, Chapter II. Given AAOMS treatment of candidates as non-members, the Commission concludes that candidates cannot be considered members of the AAOMS for purposes of the Act and Commission regulations.

15 The Commission assumes that your policy of rejecting contributions from non-qualified AAOMS members means that you reject contributions made by honorary or inactive members. The wording of your policy also seems to imply that you reject contributions made by the families of AAOMS members or the families of AAOMS executive level employees. The Commission notes that family members of AAOMS members and AAOMS executive level employees are solicitable so that a policy rejecting contributions from nonsolicitable individuals need not exclude them. See 11 CFR 114.7(a), (e), (g).

16 The Commission notes that some affiliate members and honorary members may be prohibited from contributing to OMS PAC by 2 U.S.C. 441e if they are also foreign nationals. As noted above, a qualification for affiliate status is residence abroad and recognition and training by another nation's oral and maxillofacial surgery organization. Honorary status is reserved for, among others, non-USA members.

17 In these convention booth opinions, the PAC booths were set up to obtain permission to solicit the restricted class of the trade association's corporate members, give out PAC information and to solicit contributions to the PAC. Since AAOMS has no corporate members, your booth would not have the first purpose. This distinction does not alter the relevance of the above opinions. The basic issue remains the conduct of PAC solicitation in convention environments where nonsolicitable individuals will be present.

18 The Commission has previously concluded that a communication regarding a separate segregated fund's activity is not a solicitation under section 441b where the information provided would neither encourage readers or listeners to support a separate segregated fund's activities, nor facilitate making contributions to it. See Advisory Opinions 1992-9, 1991-3, 1988-2, 1983-38, 1981-41, and 1979-13.

19 These steps were as follows:

The booth will not be publicized prior to or during the convention in any [trade association] release or publicity. The operation of the booth would include: (1) the posting of signs on the booth which will clearly state that only stockholders and employees of the designating [trade association]

member companies using personal funds can purchase articles and that the funds collected will go to [the PAC] (2) the maintenance of a list of member companies who have authorized [PAC] solicitations for 1978; (3) the instructions of personnel operating the booth to advise employees of non-member companies or non-designating member companies that their purchase cannot be legally accepted and (4) the maintenance of records of each purchase, the amount and type of purchase and company affiliation of the purchaser.

20 Under section 432(c), OMSPAC is required to maintain records of all contributions received; the name and address of any person who makes any contribution in excess of \$50, together with the date and amount of such contributions; and the identification of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution. See also 11 CFR 102.9(a).