

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

SEP 21 10 51 AM '95

September 21, 1995

**MEMORANDUM**

TO: The Commission *[Signature]*  
THROUGH: John C. Surina *[Signature]*  
Staff Director  
FROM: Lawrence M. Noble *[Signature]*  
General Counsel  
N. Bradley Litchfield *[Signature]*  
Associate General Counsel  
Michael G. Marinelli *[Signature]*  
Staff Attorney

SUBJECT: Draft AO 1995-28

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for September 28, 1995.

Attachment

**AGENDA ITEM**  
For Meeting of: SEP 28 1995

1  
2  
3 ADVISORY OPINION 1995-28

4 David Long, Vice President  
5 American Health Care Association  
6 1201 L Street  
7 Washington, D.C. 20005-4014

**DRAFT**

8 Dear Mr. Long:

9 This refers to your August 31 and August 10, 1995  
10 letters concerning the application of the Federal Election  
11 Campaign Act of 1971, as amended ("the Act"), and Commission  
12 regulations to the creation and solicitation of a new class  
13 of members of the American Health Care Association ("AHCA"),  
14 for contributions to the Association's separate segregated  
15 fund, American Health Care Association Political Action  
16 Committee ("AHCA-PAC").

17 AHCA is a nonprofit trade association of licensed  
18 nursing homes and allied long-term care facilities  
19 incorporated under the laws of the State of Ohio.<sup>1/</sup> You state  
20 that for many years AHCA has had a class of membership known  
21 as "associate members." This class of membership was granted  
22 to groups or individuals that were engaged in activities  
23 which relate to AHCA's objectives, but were not associated  
24 with member facilities or State associations.<sup>2/</sup>

25  
26 1/ The AHCA Constitution sets forth a mission of the  
27 Association as "representing its diverse membership on the  
28 national level, by influencing policy development, and by  
29 providing leadership, technical assistances, and education  
30 tools." AHCA Constitution, Article I, section B.

25  
26 2/ AHCA is organized along State or similar jurisdictional  
27 lines with each State affiliate comprised of a single  
28 grouping of health care facilities within a State (district,  
29 territory or possession of the United States) that has a  
30 program of inspection, licensing or approval by one or more  
departments of governments. These State associations are

3 This class of membership paid dues but were ineligible to  
4 hold office or vote in affairs of AHCA. AHCA Bylaws, Chapter  
5 I, Article III.

6 You state that within the nursing home industry there  
7 has been a growing importance of the role of manufacturers,  
8 suppliers and others involved in, or providing goods or  
9 services to, the industry. This group has also grown more  
10 active within AHCA. To recognize this importance, AHCA  
11 proposes to abolish the associate member category entirely  
12 and replace it with a new category which may be called  
13 "supplier group" or "associate business member" (the term  
14 used in AHCA's revised bylaws). This new membership class  
would have certain expanded rights within the Association.

15 You inquire whether associate business members would be  
16 considered members of AHCA for purposes of the Act so that  
17 they may be included in AHCA's solicitation program for  
18 contributions to AHCA-PAC. The Association also proposes to  
19 ask corporate members in this category for contributions to  
20 any administrative fund which AHCA may establish to defray  
21 the administrative and solicitation costs of AHCA-PAC.

22 Your request includes AHCA's governing documents: its  
23 revised and unrevised constitution and bylaws. These  
24 materials identify two bodies, the House of Delegates (the

25 \_\_\_\_\_  
26 (Footnote 2 continued from previous page)  
27 themselves members of AHCA and are called "affiliate  
28 associations." AHCA Revised Bylaws, Chapter I, Article I.  
29 In another class of membership are "member facilities."  
30 These are institutions that are members of the State  
associations. AHCA Revised Bylaws, Chapter I, Article II.

3 "House") and the Board of Directors (the "Board"), that play  
4 a role in governing the Association. The materials also  
5 provide information regarding the membership structure of  
6 AHCA. Resolution of your inquiry requires first an analysis  
7 of AHCA's organizational structure though an examination of  
8 these materials.

9 AHCA GOVERNING BODIES

10 House of Delegates

11 The revised bylaws provide that "The control and  
12 administration of AHCA shall be vested in the House of  
13 Delegates which shall be a continuing body." AHCA Revised  
14 Bylaws, Chapter VIII, Article I. The House is made up of  
15 members of the Board and delegates from all of the  
16 organizational units of AHCA- the State affiliate  
17 associations.<sup>3/</sup> The revised AHCA Bylaws provide that the  
18 House shall also have two associate business member.  
19 delegates.<sup>4/</sup> Id.

20 Among the powers of the House, is the right to determine  
21 the policies which govern the Association and to elect the

22 \_\_\_\_\_  
23 3/ Each State affiliate association is allotted a minimum of  
24 two delegates. More delegates may be assigned for each  
\$15,000 in gross dues paid by the State affiliate  
association.

25 4/ Neither the original, nor revised AHCA Bylaws, specify the  
26 manner in which delegates are to be chosen. However, the  
27 revised bylaws specifically require that an annual meeting of  
28 Associate business members be called by AHCA's chief  
administrative officer for the purpose of electing the associate  
business member Board representative and the associate  
business member delegates. AHCA Revised Bylaws, Chapter III,  
Article IV.

3 major officers of the Association.<sup>5/</sup> The House approves,  
4 modifies or disapproves the budget and the amendments to the  
5 Constitution. It also makes proposals and recommendations to  
6 the Board which the Board is required to refer to a proper  
7 committee. The House also takes final action on such  
8 proposals and recommendations. AHCA Revised Bylaws, Chapter  
9 VIII, Article III.

10 The Board of Directors

11 The Board of Directors consists of the officers of AHCA,  
12 its regional Presidents and Vice Presidents, the AHCA chief  
13 executive officer and the President of the Affiliated State  
14 Health Care Association Executives (the "ASHCAE"), an  
15 organization affiliated with AHCA. With the proposed  
16 revisions, the Board will also have an associate business  
17 member Board representative. AHCA Revised Bylaws, Chapter  
18 VII, Article 1.

19 According to AHCA Revised Bylaws, the Board has "charge  
20 of the property of AHCA and shall have the responsibility to  
21 control and manage affairs and funds of AHCA and have  
22 responsibility for contracting agreements." AHCA Revised  
23 Bylaws, Chapter VII, Article III. It is also responsible for  
24 formulating national program objectives, making policy  
25 decision on financial matters and allocating association  
resources. Id. It may also develop and recommend policies

26  
27 

---

5/ The House elects the AHCA president, five vice presidents,  
28 the secretary and the treasurer. The Board chooses the AHCA  
29 chief administrative officer who has no voting power. The  
30 only other officer is the immediate past president.

3 to the House, as well as proposing amendments to the  
4 constitution. However, while it has the power "to take  
5 action", it may act only "if such action is not contrary to  
6 the Bylaws and does not rescind, change or alter any action  
7 taken by the House of Delegates." Id. It must also submit a  
8 report to the House of all its actions and decisions and may  
9 "perform such other activities as directed by the House of  
10 Delegates." Id.

11 AHCA MEMBERSHIP STRUCTURE

12 Classes of Membership

13 As outlined by AHCA revised Bylaws, the organization's  
14 various classes of membership are: affiliate association,  
15 member facility, honorary member and the new category of  
16 associate business member.<sup>6/</sup>

17 Description of the Proposed Membership Class

18 Associate business member status in AHCA is open to:

19 individuals, corporations, partnerships,  
20 limited liability companies and other  
21 entities that (I) supply products or  
22 services to long term care providers and  
23 (II) will in good faith promote the  
24 objectives of AHCA as set forth in the  
25 Constitution but do not provide products  
26 or services that compete with those  
27 offered by AHCA.

28 AHCA Revised Bylaws, Chapter I, Article  
29 III.

30 Associate business members will be required to pay dues  
though the amount has not yet been set. Id. Associate

---

6/ Since your request only presents the membership status of  
associate business member, this opinion will not discuss the  
status of the other AHCA membership classes.

3 business members will be ineligible to serve as an officer or  
4 to vote in affairs of AHCA directly. However, at a special  
5 meeting of all the members of this class, they will elect two  
6 delegates to serve in the House and one Board member. The  
7 Revised Bylaws do not indicate that the associate business  
8 member delegates and Board member will have any different  
9 voting power from other House delegates and Board members.<sup>7/</sup>

#### 10 ACT AND COMMISSION REGULATIONS

11 The Act prohibits corporations from making any  
12 contribution or expenditure in connection with a Federal  
13 election. 2 U.S.C. §441b(a). The Act states, however, that  
14 the term "contribution or expenditure" does not include "the  
15 establishment, administration, and solicitation of  
16 contributions to a separate segregated fund to be utilized  
17 for political purposes by a corporation, labor organization,  
18 membership organization, cooperative, or corporation without  
19 capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.  
§431(8)(B)(vi) and (9)(B)(v).

20 Under 2 U.S.C. §441b(b)(4)(A)(i), a corporation, or a  
21 separate segregated fund established by a corporation, may  
22 solicit contributions to such a fund only from its  
23 stockholders and their families and its executive and  
24 administrative personnel and their families. An exception  
25 set forth in 2 U.S.C. §441b(b)(4)(C) and 11 CFR 114.7(a)  
26 allows a membership organization (among other corporations

27  
28 <sup>7/</sup> Your August 31, letter confirms this interpretation of the  
29 revised bylaws.  
30

3 without capital stock), or its separate segregated fund, to  
4 solicit contributions to the fund from the members of the  
5 organization and their families. The Commission's  
6 regulations use the term "membership association" to  
7 implement this exception. It is defined, in part, as a  
8 membership organization that (i) expressly provides for  
9 "members" in its articles and bylaws; (ii) expressly solicits  
10 members; and (iii) expressly acknowledges the acceptance of  
11 membership, such as by sending a membership card or inclusion  
12 on a membership newsletter list. 11 CFR 114.1(e)(1)(i),  
13 (ii), and (iii).

14 Commission regulations define the term "members." Under  
15 11 CFR 114.1(e)(2), "members" means all persons who are  
16 currently satisfying the requirements for membership in a  
17 membership association, who affirmatively accept the  
18 membership association's invitation to become a member, and  
19 who meet one of the following requirements:

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

23 (ii) Are required to pay on a regular basis a specific  
24 amount of dues that is predetermined by the association and  
25 are entitled to vote directly either for at least one member  
26 who has full participatory and voting rights on the highest  
27 governing body of the membership association, or for those  
28 who select at least one member of those on the highest  
29 governing body of the membership association; or  
30

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

5 The regulations also provide that the Commission "may  
6 determine, on a case by case basis, that persons seeking to  
7 be considered members of a membership association for  
8 purposes of this section have a significant organizational  
9 and financial attachment to the association under  
10 circumstances that do not precisely meet the requirements of  
11 the general rule." See 11 CFR 114.1(e)(3).<sup>8/</sup>

12 DETERMINING STATUS OF PROPOSED MEMBERSHIP CLASS.

13 AHCA as Membership Association.

14 The facts and background to this request indicate that  
15 AHCA is a membership association for purposes of the Act.  
16 For example, Chapter I, of AHCA Revised Bylaws meets the  
17 requirements of 11 CFR 114.1(e)(1)(i) by expressly providing  
18 for membership. The facts of the request and materials, such  
19 as the portions of AHCA governing materials included in your  
20 request, suggest that AHCA expressly solicits members. See  
21 11 CFR 114.1(e)(1)(ii). Chapter I, Article VI of AHCA  
22 Revised Bylaws states that all members receive membership  
23 certificates. Therefore, the requirement that membership be  
expressly acknowledged is also met. See 11 CFR

24 8/ Your request only concerns solicitation of contributions  
25 and administrative support for AHCA-PAC. Therefore, the  
26 discussion below will concern section 114.1(e). The  
27 Commission notes that section 100.8(b)(4)(iv) relates to an  
28 association's right to make partisan communication to its  
29 members, and the wording of sections 100.8(b)(4)(iv) and  
30 114.1(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.

3 114.1(e)(1)(iii).<sup>9/</sup>4 AHCA highest governing body

5 Both the Board and the House of Delegates have  
6 significant roles regarding the governance of AHCA. However,  
7 it appears that the power of the Board is inferior to or  
8 delegated by the House. It is significant that the House  
9 retains supreme policy-making powers within AHCA and that the  
10 Board may not overrule any prior policy action taken by the  
11 House. There is no similar limitation on the House. The  
12 Board must also report to the House all its decisions with no  
13 similar duty imposed on the House. Further, the House elects  
14 AHCA officers and may amend the bylaws and constitution. In  
15 financial matters, the House retains its superiority since  
16 the budget proposed by the Board must be approved by the  
17 House. After considering these and the other powers enjoyed  
18 by the House over the Board, the Commission concludes that  
19 the AHCA House of Delegates, rather than the AHCA Board of  
20 Directors, is the highest governing body of AHCA for purposes  
of the Commission regulations.<sup>10/</sup>

21 <sup>9/</sup> It also appears that AHCA meets the definition of "trade  
22 association" under 11 CFR 114.8(a). AHCA is "a membership  
23 organization of persons engaging in a similar or related line  
24 of commerce, organized to promote and improve business  
25 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.

26 <sup>10/</sup> This conclusion is consistent with the Commission's  
27 advice in several past advisory opinions which have examined  
28 the relationships between associations and their houses of  
delegates and boards of directors. See Advisory Opinions  
1995-14 and 1994-12.

3 Status and solicitability of Associate Business Members

4 Under the membership regulations, associate business  
5 members would be considered "members" of AHCA for purposes of  
6 the Act. The Commission notes that the proposed membership  
7 class is required to pay dues. Further, it has the right to  
8 elect members to the highest governing body of AHCA, the  
9 House of Delegates. Consequently, this class therefore meets  
10 the membership requirements of section 114.1(e)(2)(ii).

11 Therefore, the Commission concludes that AHCA may  
12 solicit contributions to its PAC from associate business  
13 members who are individuals, partnerships or limited  
14 liability companies.<sup>11/</sup> 11 CFR 114.7(c). The Commission  
15 notes, however, that AHCA is subject to the prior  
16 solicitation approval rules with respect to PAC contribution  
17 solicitations of qualified personnel of its associate  
18 business members who are corporations. 11 CFR 114.8(d); see  
generally 11 CFR 114.8.<sup>12/</sup>

19 The Association may also solicit donations from its  
20 corporate members to an administrative fund established to  
21 defray administrative and solicitation costs of AHCA-PAC.  
22 See 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.5(c). The Commission

23  
24 11/ The Commission has recently reviewed the status of  
25 limited liability companies under the Act. See Advisory  
Opinion 1995-11.

26 12/ As defined in Commission regulations, restricted class  
27 means an individual who is an executive or administrative  
28 employee of an AHCA associate business corporate member, or a  
stockholder of such a member, or within the family of such  
individuals.

3 has interpreted its regulations as permitting corporate  
4 members (i.e. the corporations that qualify as members under  
5 the regulations) of an incorporated trade association to  
6 donate funds, over and above its membership dues, to defray  
7 administrative and solicitation expenses of the trade  
8 association's separate segregated fund. The Commission has  
9 reasoned that when these funds were placed in the trade  
10 association's general treasury, the association could use  
11 them to pay expenses of its SSF. See Advisory Opinions  
12 1995-17, 1992-20 and 1980-59.

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

17 Sincerely,

18 Danny L. McDonald  
19 Chairman

20 Enclosures (AO 1995-17, 1995-14, 1995-11, 1994-12, 1992-20  
21 1991-24, 1980-59)  
22  
23  
24  
25  
26  
27  
28  
29  
30