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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 21 10 51 AM '95

September 21, 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 1995-28

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.^{1/} 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.^{2/}

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.

31
32 2/ AHCA is organized along State or similar jurisdictional
33 lines with each State affiliate comprised of a single
34 grouping of health care facilities within a State (district,
35 territory or possession of the United States) that has a
36 program of inspection, licensing or approval by one or more
37 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
15 would have certain expanded rights within the Association.

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

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

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.^{3/} The revised AHCA Bylaws provide that the
18 House shall also have two associate business member.
19 delegates.^{4/} 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.^{5/} 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.^{6/}

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.^{7/}

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 ^{7/} 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).^{8/}

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
24 expressly acknowledged is also met. See 11 CFR

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

3 114.1(e)(1)(iii).^{9/}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.^{10/}

21 ^{9/} 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 ^{10/} 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.^{11/} 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.^{12/}

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)
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