



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 29, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-28

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

Dear Mr. Long:

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

AHCA is a nonprofit trade association of licensed nursing homes and allied long-term care facilities incorporated under the laws of the State of Ohio.^{1/} You state that for many years AHCA has had a class of membership known as "associate members." This class of membership was granted to groups or individuals that were engaged in activities which relate to AHCA's objectives, but were not associated with member facilities or State associations.^{2/} This class of membership paid dues but were ineligible to hold office or vote in affairs of AHCA. AHCA Bylaws, Chapter I, Article III.

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

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

Your request includes AHCA's governing documents: its revised and unrevised constitution and bylaws. These materials identify two bodies, the House of Delegates (the "House") and the Board of Directors (the "Board"), that play a role in governing the Association. The materials also provide information regarding the membership structure of AHCA. Resolution of your inquiry requires first an analysis of AHCA's organizational structure through the examination of these materials.

AHCA GOVERNING BODIES

House of Delegates

The revised bylaws provide that "The control and administration of AHCA shall be vested in the House of Delegates which shall be a continuing body." AHCA Revised Bylaws, Chapter VIII, Article I. The House is made up of members of the Board and delegates from all of the organizational units of AHCA- the State affiliate associations.^{3/} The revised AHCA Bylaws provide that the House shall also have two associate business member delegates.^{4/} Id.

Among the powers of the House, is the right to determine the policies which govern the Association and to elect the major officers of the Association.⁽⁵⁾ The House approves, modifies or disapproves the budget and the amendments to the Constitution. It also makes proposals and recommendations to the Board which the Board is required to refer to a proper committee. The House also takes final action on such proposals and recommendations. AHCA Revised Bylaws, Chapter VIII, Article III.

The Board of Directors

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

According to AHCA Revised Bylaws, the Board has "charge of the property of AHCA and shall have the responsibility to control and manage affairs and funds of AHCA and have responsibility for contracting agreements." AHCA Revised Bylaws, Chapter VII, Article III. It is also responsible for formulating national program objectives, making policy decisions on financial matters and allocating association resources. Id. It may also develop and recommend policies to the House, as well as proposing amendments to the Constitution. However, while it has the power "to take action", it may act only "if such action is not contrary to the Bylaws and does not rescind, change or alter any action taken by the House of Delegates." Id. It must also

submit a report to the House of all its actions and decisions and may "perform such other activities as directed by the House of Delegates." Id.

AHCA MEMBERSHIP STRUCTURE

Classes of Membership

As outlined by AHCA revised Bylaws, the organization's various classes of membership are: affiliate association, member facility, honorary member and the new category of associate business member.^{6/}

Description of the Proposed Membership Class

Associate business member status in AHCA is open to:

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

AHCA Revised Bylaws, Chapter I, Article III.

Associate business members will be required to pay dues though the amount has not yet been set. Id. Associate business members will be ineligible to serve as an officer or to vote in affairs of AHCA directly. However, at a special meeting of all the members of this class, they will elect two delegates to serve in the House and one Board member. The Revised Bylaws do not indicate that the associate business member delegates and Board member will have any different voting power from other House delegates and Board members.^{7/}

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).^{8/}

DETERMINING STATUS OF PROPOSED MEMBERSHIP CLASS.

AHCA as Membership Association.

The facts and background to this request indicate that AHCA is a membership association for purposes of the Act. For example, Chapter I, of AHCA Revised 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 AHCA governing materials included in your request, suggest that AHCA expressly solicits members. See 11 CFR 114.1(e)(1)(ii). Chapter I, Article VI of AHCA Revised Bylaws states that all members receive membership certificates. Therefore, the requirement that membership be expressly acknowledged is also met. See 11 CFR 114.1(e)(1)(iii).^{9/}

AHCA Highest Governing Body

Both the Board and the House of Delegates have significant roles regarding the governance of AHCA. However, it appears that the power of the Board is inferior to or delegated by the House. It is significant that the House retains supreme policy-making powers within AHCA and that the Board may not overrule any prior policy action taken by the House. There is no similar limitation on the House. The Board must also report to the House all its decisions with

no similar duty imposed on the House. Further, the House elects AHCA officers and may amend the bylaws and constitution. 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 AHCA House of Delegates, rather than the AHCA Board of Directors, is the highest governing body of AHCA for purposes of the Commission regulations.^{10/}

Status and Solicitability of Associate Business Members

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

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

The Association may also solicit donations from its corporate members to an administrative fund established to defray administrative and solicitation costs of AHCA-PAC. See 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.5(c). The Commission has interpreted its regulations as permitting corporate members (i.e. the corporations that qualify as members under the regulations) of an incorporated trade association to donate funds, over and above its membership dues, to defray administrative and solicitation expenses of the trade association's separate segregated fund. The Commission has reasoned that when these funds were placed in the trade association's general treasury, the association could use them to pay expenses of its SSF. See Advisory Opinions 1995-17, 1992-20 and 1980-59.

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 1995-17, 1995-14, 1995-11, 1994-12, 1992-20 1991-24, 1980-59)

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

2 AHCA is organized along State or similar jurisdictional lines with each State affiliate comprised of a single grouping of health care facilities within a State (district, territory or possession of the United States) that has a program of inspection, licensing or approval by one or more departments of governments. These State associations are themselves members of AHCA and are called "affiliate associations." AHCA Revised Bylaws, Chapter I, Article I. In another class of membership are "member facilities." These are institutions that are members of the State associations. AHCA Revised Bylaws, Chapter I, Article II.

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

4 Neither the original, nor revised AHCA Bylaws, specify the manner in which delegates are to be chosen. However, the revised bylaws specifically require that an annual meeting of 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.

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

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.

7 Your August 31, letter confirms this interpretation of the revised bylaws.

8 Your request only concerns solicitation of contributions and administrative support for AHCA-PAC. 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.

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

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

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

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