



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 14, 1999

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-10

Andrew B. Clubok  
Kirkland & Ellis  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005

Dear Mr. Clubok:

This responds to your letters dated February 25 and March 29, 1999, on behalf of Nationwide Political Participation Committee ("the Committee"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of contributions from member policyholders of the connected organization.

The Committee is the separate segregated fund of the Nationwide Mutual Insurance Company and its affiliate, the Nationwide Mutual Fire Insurance Company (collectively "the Nationwide companies" or "the companies").<sup>1</sup> The Committee has been registered with the Commission since March 7, 1977. The Nationwide companies were organized under section 3941.02 of the Ohio Code, which governs the formation and incorporation of mutual insurance companies, and are nonprofit companies under Ohio law. Because they are mutual insurance companies, they have member policyholders rather than shareholders. In accordance with Ohio law, each of the Nationwide companies' policyholders is a member while his policy is in force, and each member has equal voting rights. You state that the Committee would like to solicit voluntary contributions from those policyholders who are independent contractor agents of the Nationwide companies.

---

<sup>1</sup> The companies are corporations within Nationwide Insurance Enterprise, an insurance and financial services company.

### ***Factual Background***

With your request, you have submitted the articles of incorporation and by-laws of each of the companies. The governing documents of the companies are virtually identical. The articles of incorporation provide that the company is formed “for the purpose of transacting a general insurance and reinsurance business except life insurance...,” and that such insurance business shall be on the “mutual plan.” The by-laws explicitly provide that each policy holder whose policy is in force is a member of the company. This is the only class of members provided for in the by-laws. By-laws Article I. The companies each hold an annual meeting of the members and may hold special meetings as well. Article II, sections 2 and 3. Notice of the annual meeting is printed in the member’s policy, and other notice provisions govern special meetings. Article II, sections 4 and 5. Each member has the right to cast one vote in person or by proxy on each proposal brought before a meeting, and with the exception of amending the articles of incorporation (which requires a supermajority), a proposal is passed upon the affirmative vote of the majority of members present in person or by proxy. Article II, sections 7 and 8. The members, voting in person or by proxy, elect all of the 16 persons to serve on the companies’ Board of Directors at the annual meetings or at special meetings called for that purpose. Article IV, sections 2 and 3, Article II, section 7, and Article VII.

The corporate powers and business of each company are conducted and controlled by, or under the direction of, its Board except as otherwise provided by statute, the articles of incorporation, or the by-laws with regard to action to be taken or approved by the members. Article IV, section 1. The Board elects top officers of the company (e.g., the chairman, president, one or more vice presidents, secretary, treasurer, assistant secretaries and treasurers), who must be members of the company. Article VII. The Board may appoint an Executive Committee to exercise the powers of the Board in the interim between Board meetings, but the Executive Committee is subject at all times to any instructions issued by the Board. Article VI.

You have also submitted a page containing language, relevant to your proposal, that appears in each policy issued by the Nationwide companies. This language states that the policyholder is a member of the company while any of his policies are in force, and informs him of his voting rights.

You have described the role of the independent contractor agent, who is hired to sell Nationwide insurance products and service policyholders. The agents act in a fiduciary capacity for the companies and may not represent any companies outside of Nationwide without the prior consent of Nationwide. They have the right to exercise independent judgment as to the time, place, and manner of soliciting insurance, servicing policy holders, and otherwise performing their roles as agents. The agents may accept or reject, at their discretion, offers of training, counsel, and guidance from Nationwide.

### ***Act and Commission Regulations as to Members***

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 the Act, a corporation or a separate segregated fund established by the corporation may solicit contributions to such a fund from its stockholders and their families and the corporate executive and administrative personnel and their families. 2 U.S.C. §441b(b)(4)(A)(i). The Act also provides that an incorporated membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by such an entity, may solicit voluntary contributions to the fund from the entity's members and their families, as well as the executive and administrative personnel and their families. 2 U.S.C. §441b(b)(4)(C); 11 CFR 114.5(a) and 114.7(a). The Commission's regulations use the term "membership association" to describe the entities covered under the latter provision. A membership association is defined, in part, under 11 CFR 114.1(e)(1), as a membership organization, cooperative, or corporation without capital stock 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. See also 11 CFR 100.8(b)(4)(iv)(A).

On the question of what constitutes membership for purposes of the Act, the Supreme Court has suggested that members are to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. See *FEC v. National Right to Work Committee*, 459 U.S. 197, 202 (1982), see also *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C.Cir. 1995), *petition for rehearing denied*, 76 F.3d 1234 (1996);<sup>2</sup> see also Advisory Opinions 1998-19, 1997-22, and 1997-16.

---

<sup>2</sup> In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber*, at 604-605. (There were not four votes at the Commission to seek further judicial review of this decision.) The regulation at 11 CFR 114.1(e)(2), now invalid in the District of Columbia Circuit, had defined members to mean:

all persons who are currently satisfying the requirements for membership in a membership association, affirmatively accept the membership association's invitation to become a member, and either:

- (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

### ***Companies as Membership Associations***

The factual background of this request indicates that the Nationwide companies are membership associations under 11 CFR 114.1(e)(1). The bylaws of the companies provide for members, who are the policyholders. As ongoing businesses, the companies solicit new policyholders, and section 3941.07 of the Ohio Code provides that every policyholder of a domestic mutual company is a member while the policy is still in force. The companies acknowledge the acceptance of membership in the policy issued to the policyholder, which specifically states he is a member.

### ***Policyholders as Members***

The policyholders have both a financial attachment to the companies and participatory rights. The policyholder pays a significant amount in premiums, and a mutual insurance company, by definition, is a type of insurance company in which the policyholders are the owners. See Black's Law Dictionary 1021 (6<sup>th</sup> ed. 1990). In addition, each of the policyholders has the right to cast one vote on matters brought up at the annual and special meetings.<sup>3</sup> In each of the Nationwide companies, this includes the right to vote in the elections for all of the seats on the Board of Directors, which is the highest governing body. Thus, the situation of the policyholders is analogous to that of a stockholder in a capital stock corporation, and the policyholders appear to satisfy even the more restrictive standard struck down in *Chamber*. See footnote 2.<sup>4</sup> Therefore, the Committee may solicit voluntary contributions from the described policyholders of the Nationwide companies, including those who are independent contractor agents of the companies, so long as they are not otherwise prohibited by the Act and regulations from making contributions. See 2 U.S.C. §§441b, 441c, and 441e; 11 CFR 114.2, 115.2, and 110.4(a).<sup>5</sup>

---

membership association; or

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

<sup>3</sup> This requirement is also set out in section 3941.07 of the Ohio Code.

<sup>4</sup> Commission regulations directly address "mutual *life* insurance" companies (emphasis added), stating that such a company may solicit its policyholders "if the policyholders are members within the organizational structure." 11 CFR 114.7(i). This provision is based on a discussion between Senators Cannon and Allen during the debates on the Conference Report for the 1976 amendments to the Act, appearing at 122 *Cong. Rec.* S6478 (daily ed. May 4, 1976). In explaining the amendment permitting the solicitation by an incorporated membership organization of its members, Senator Cannon used the mutual life insurance company as an example, and Senator Allen expressed his specific approval of this example, noting that the policyholders "are the group that make up the corporation." As the owners and voters in the Nationwide companies, the policyholders appear to be in the same position as policyholders in a mutual life insurance company.

<sup>5</sup> In its continuing review of membership issues following the *Chamber* decision, the Commission published a second notice of proposed rulemaking which may lead to regulation changes concerning the definition of membership. See FEC Notice of Proposed Rulemaking, published in the *Federal Register* on December 16, 1998, at pages 69224 through 69229. The conclusion of this opinion regarding membership could be modified or superseded by the adoption of any new regulations on membership criteria, but the opinion may be relied upon until any change is made. If a change is made, it will become effective on a

Because the question has been resolved through a determination that policyholders are members under the Act, there is no need for the Commission to address the issue of whether the agents are solicitable by virtue of their status as agents. See 11 CFR 114.1(c) (defining “executive or administrative personnel”); see also Advisory Opinion 1980-1. (This opinion, which did not address any membership issue, concluded that agents of a mutual insurance company, who were paid on a commission basis and were not employees under 11 CFR 114.1(c)(3), were not solicitable as executive or administrative personnel.)

This response constitutes an advisory opinion concerning application of the Act and Commission regulations to the specific transaction or activity set forth in your request. 2 U.S.C. §437f.

Sincerely,

(signed)

Scott E. Thomas  
Chairman

Enclosures (AOs 1998-19, 1997-22, 1997-16, and 1980-1)