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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

February 24, 2000

## AGENDA ITEM

For Meeting of: 3-02-00

### MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Jonathan M. Levin   
Senior Attorney

Subject: Draft AO 2000-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 2, 2000.

Attachment

1 ADVISORY OPINION 2000-03

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Michael Scott, Director  
Government and Legal Affairs  
American Society of Anesthesiologists  
1101 Vermont Avenue, N.W.  
Suite 606  
Washington, D.C. 20005

**DRAFT**

10 Dear Mr. Scott:

11 This responds to your letter dated January 24, 2000, on behalf of the American  
12 Society of Anesthesiologists ("ASA"), requesting an advisory opinion concerning the  
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and  
14 Commission regulations to payments for receptions involving appearances by Federal  
15 candidates.

16 ***Background***

17 ASA is a national medical society which consists of 34,000 physicians and other  
18 scientists engaged in or especially interested in the medical practice of anesthesiology. It  
19 is a not-for-profit corporation exempt from income tax under 26 U.S.C. §501(c)(6). To  
20 become an ASA member, an individual must be a member of a State component society  
21 chartered by ASA's board of directors. Since 1991, ASA has maintained the American  
22 Society of Anesthesiologists Political Action Committee ("ASAPAC") as a separate  
23 segregated fund ("SSF"). It is registered with the Commission as a multicandidate  
24 committee.

25 In an effort to increase its visibility with the ASA membership, ASAPAC  
26 proposes to host a series of receptions for the members which would be held in  
27 conjunction with meetings and conventions of ASA members. Only members of ASA  
28 would be invited to these receptions. ASAPAC proposes to pay for the reception  
29 invitations, refreshments, and room rental.

30 ASAPAC proposes to invite candidates for the U.S. House or Senate to make  
31 appearances at these receptions. The candidates would be permitted to ask for  
32 contributions to their campaigns. Before and during the reception, ASAPAC will  
33 expressly advocate support for the candidacy of the invited speaker and suggest that ASA

1 members contribute to the candidate's campaign. Any contributions to the candidate's  
2 campaign would be collected by the candidate or her campaign staff, not by  
3 representatives of ASAPAC.

#### 4 ***Questions Presented***

5 In view of a corporation's ability to allow candidates to address its restricted class  
6 and advocate support for the candidate to its restricted class in connection with the  
7 reception, you ask whether the same allowances extend to the SSF of the corporation;  
8 namely, ASAPAC. Assuming ASAPAC may pay for the above expenses, you also ask  
9 whether either ASA or ASAPAC should report the disbursement as an internal  
10 communication pursuant to 11 CFR 104.6(a), or whether ASAPAC alone should report  
11 the disbursements as operating expenditures pursuant to 11 CFR 104.3(b)(3)(i).

#### 12 ***Legal Analysis***

##### 13 ***Act and Commission regulations***

14 The Act prohibits corporations from making any contribution or expenditure in  
15 connection with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(a). Contributions  
16 and expenditures include direct or indirect payments or gifts of money, or any services, or  
17 anything of value to any Federal candidate. 2 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1).  
18 As an exception to the prohibition, the Act and Commission regulations provide that a  
19 corporation or membership organization may make communications on any subject,  
20 including communications expressly advocating the election or defeat of a Federal  
21 candidate, to a restricted class of persons. 2 U.S.C. §441b(b)(2)(A); 11 CFR 114.3(a)(1)  
22 and (2), 100.8(b)(4). For communications by membership organizations, the restricted  
23 class is comprised of the organization's members, its executive and administrative  
24 personnel, and the families of such persons. 11 CFR 114.7(h), 114.1(j).<sup>1</sup>

25 Commission regulations at 11 CFR 114.3(c) describe the circumstances under  
26 which express advocacy communications may be made to a corporation's restricted class.  
27 The requirements at 11 CFR 114.3(c)(2) for an appearance by a candidate apply

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<sup>1</sup> The status of ASA as a "membership organization" and the status of ASA members as "members" eligible to receive communications from ASA on any subject is governed by Commission regulations.

1 specifically to your situation. A corporation may allow a candidate or a candidate's  
2 representative to address its restricted class at a meeting, convention, or other corporate  
3 function, and may bar other candidates from making a similar appearance. 11 CFR  
4 114.3(c)(2)(i). The candidate or her representative may ask for contributions to her  
5 campaign and may accept such contributions before, during, or after the appearance. 11  
6 CFR 114.3(c)(2)(ii). The corporation may suggest that members of the restricted class  
7 contribute to the candidate, but the collection of contributions by any officer, director, or  
8 other representative of the corporation before, during, or after the appearance while at the  
9 meeting would be a prohibited facilitation of contributions under 11 CFR 114.2(f). 11  
10 CFR 114.3(c)(2)(iii).<sup>2</sup> Moreover, in order to avoid corporate facilitation, the corporation  
11 may not provide materials for the purpose of transmitting or delivering contributions such  
12 as stamps, envelopes addressed to a candidate or political committee (other than the SSF),  
13 or other similar items which would assist in transmitting or delivering contributions, but  
14 not including providing the address of the candidate or political committee. 11 CFR  
15 114.2(f)(2)(ii). See Advisory Opinions 1997-22, 1996-21, and 1996-1.

16 A corporation is subject to reporting requirements with respect to express  
17 advocacy communications that it makes to its restricted class. The corporation must  
18 report costs directly attributable to those communications on FEC Form 7 if those costs  
19 exceed \$2,000 for any election. 2 U.S.C. §431(9)(B)(iii); 11 CFR 104.6(a). See also  
20 11 CFR 104.6(b) and (c) for related disclosure requirements.

21 *Application to ASA's proposal*

22 The proposed candidate receptions appear to fit within the exception to the  
23 definition of contribution and expenditure for communications by a membership  
24 organization to its restricted class. See 11 CFR 114.3(c)(2). ASAPAC may engage in the  
25 same activities permitted to ASA under the Commission regulations and may, therefore,

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11 CFR 100.8(b)(4)(iv)(A), (B), and (E); 114.1(e)(1), (2), and (5); and 114.8(g). The Commission assumes that ASA and its members so qualify. (See also Advisory Opinion 1994-19 where the Commission concluded that ASA was a federation of trade associations composed of the State component societies.)

<sup>2</sup> See also 11 CR 114.3(c)(2)(iv) which provides that if the corporation permits more than one candidate (or her representative) for the same office to address its restricted class and permits the news media to cover an appearance by one candidate, it must permit the news media to cover the appearances by the other candidates (or their representatives) under conditions of "equal access." "Equal access" is further defined by the regulation.

1 pay for the costs of the receptions as well as costs for any related communications to  
2 ASA members that are made before the reception. Expenses that can lawfully be paid  
3 with corporate funds (“soft dollars”) may also be paid with funds raised under the limits  
4 and prohibitions of the Act (“hard dollars”).

5 The fact that the SSF, rather than the corporation, is paying the reception expenses  
6 does not remove these payments from the cited exemptions to the definition of  
7 contribution or expenditure and require that they be treated as in-kind contributions by  
8 the SSF, subject to the limit of 2 U.S.C. §441a(a)(2)(A). The Act and Commission  
9 regulations provide that any payment which is exempt from the definitions of  
10 contribution or expenditure, if incurred by a corporation under 2 U.S.C. §441b(b) or 11  
11 CFR Part 114, would not constitute an expenditure by such corporation. 2 U.S.C.  
12 §431(8)(B)(vi) and (9)(B)(v); 11 CFR 100.7(b)(10) and 100.8(b)(11). In addition, 11  
13 CFR 114.1(a)(2)(x) provides that the terms “contribution” and “expenditure” do not  
14 include any activity permitted by 11 CFR Part 114. Commission regulations also state  
15 that a corporation (including an incorporated membership organization) may exercise  
16 control over its SSF. 11 CFR 114.5(d).<sup>3</sup> Therefore, if an SSF of a corporation finances  
17 activity that is permissible for a corporation to finance itself, then in essence the SSF is  
18 making those payments on behalf of the corporation, or as a part of the corporation. This  
19 is tantamount to payments by the corporation and the legal consequences should be the  
20 same; such payments would not be contributions by the SSF subject to the statutory  
21 limits.

22 Because ASAPAC’s disbursements come within the exception to the definition of  
23 “expenditure” pursuant to 2 U.S.C. §441b(b)(2)(A) and 11 CFR 114.3, they should be  
24 reported as “other disbursements.” Since such disbursements will be reported by the  
25 SSF, and not by the corporation, the \$2,000 threshold, at 11 CFR 104.6, for reporting  
26 such costs does not apply. ASAPAC should disclose the name and address of each

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<sup>3</sup> This is consistent with the concept set out in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) that while the funds of an SSF are segregated from other funds of the connected organization, the SSF is a part of the organization. See 407 U.S., at 414, 426; see also Federal Election Commission Regulations, Explanation and Justification, House Document No.95-44, at 108 (1977), citing *Pipefitters* in its discussion of 11 CFR 114.5(d).

1 person who receives payment from the PAC aggregating in excess of \$200 within the  
2 calendar year, and the date, amount, and purpose of the disbursement. 2 U.S.C.  
3 §434(b)(6)(B)(v) and 11 CFR 104.3(b)(3)(ix). In stating the purpose of each such  
4 itemized disbursement, ASAPAC should state the type of expense, such as “printing  
5 invitations” or “room rental for candidate reception.” Payments that do not meet the  
6 \$200 threshold must still be included in ASAPAC’s total of “other disbursements.” 11  
7 CFR 104.3(b)(1)(ix)(B). Because of the somewhat unusual manner in which these costs  
8 will be paid, any ASAPAC report that includes these disbursements should include a  
9 brief reference to this advisory opinion in the pertinent Schedule B entry.

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

13 Sincerely,

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16 Darryl R. Wold  
17 Chairman  
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19 Enclosures (AOs 1997-22, 1996-21, 1996-1, and 1994-19)  
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