

June 2, 2003

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-13 is available for public comments under this procedure. It was requested by Steven Miller, Director on behalf of the American Academy of Ophthalmologists, Inc. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-13 will be on the Commission's agenda for its public meeting of Thursday June 12, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on June 11, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-13 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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June 2, 2003

AGENDA ITEM
For Meeting of: 06-12-03

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Staff Director

FROM: Lawrence H. Norton *[Signature]*
General Counsel

James Kahl *[Signature]*
Deputy General Counsel

Rosemary C. Smith *[Signature]*
Acting Associate General Counsel

John C. Vergelli *[Signature]*
Acting Assistant General Counsel

Cheryl A.F. Hemsley *[Signature]*
Staff Attorney

Subject: Draft AO 2003-13

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 12, 2003.

Attachment

1 ADVISORY OPINION 2003-13

2 Mr. Steven L. Miller, Director
3 OPHTHPAC and Political Affairs
4 OPHTHAC Political Committee
5 Suite 700
6 1101 Vermont Avenue NW
7 Washington, D.C. 20005-3570

DRAFT

8 Dear Mr. Miller:

9 This responds to your letter dated February 19, 2003, as supplemented by Ms. Mara
10 Pearse Burke's letter of April 9, 2003, requesting an advisory opinion on behalf of the American
11 Academy of Ophthalmology ("AAO") concerning the application of the Federal Election
12 Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the member
13 status of AAO's Members-in-Training.

14 *Background*

15 You state that AAO is incorporated under section 501(c)(6) of the Internal Revenue Code
16 and has a membership of 27,000 physicians worldwide specializing in ophthalmology. You state
17 that the majority of AAO members are practicing physicians who are comprehensive eye M.D.s.
18 AAO's purpose is to promote and advance the science and art of medicine related to the eye and
19 related structures, to support and enhance education in ophthalmology in allied fields, to
20 facilitate and improve prevention, diagnosis, and treatment of disorders affecting the eye and
21 related structures. *Articles of Incorporation of the American Academy of Ophthalmology, Inc.*,
22 Article II.

23 You state that AAO has 16 categories of membership, from which AAO's separate
24 segregated fund, OPHTHPAC, solicits 14,988 eligible, domestic, dues paying members.

1 Under AAO's Bylaws, Members-in-Training are physicians holding a degree of Doctor
2 of Medicine, Doctor of Osteopathy (or equivalent medical degree as determined by the Board of
3 Trustees), and either:

- 4 1) Are engaged on a full-time basis in an ophthalmology residency training program
5 conducted either in the United States or in Canada that is acceptable to the Board
6 of Trustees; or
- 7 2) Have successfully completed such training and are engaged in a full-time
8 ophthalmology fellowship training program conducted in the United States or
9 Canada or in a postgraduate educational course of training leading to an advanced
10 degree at an accredited college or university in the United States or in Canada; or
- 11 3) Are foreign medical graduates¹ who are otherwise eligible for International
12 Membership and are engaged on a full time basis in a postgraduate
13 ophthalmology training program in the United States or in Canada.

14 Members-in-Training are not granted voting rights under AAO's bylaws, nor are they
15 required to pay dues. However, Members-in-Training are subject to AAO's Code of Ethics and
16 are subject to sanctions thereunder. You state that eighty percent (80%) of ophthalmology
17 residents within the United States are Members-in-Training of AAO and that ninety-three
18 percent (93%) of all ophthalmologists within the United States are AAO members. You state that
19 candidates for membership must affirmatively accept the invitation to become a member. You

¹ Under 2 U.S.C. 441e, foreign nationals are prohibited from directly or indirectly making (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee or a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communications (within the meaning of 2 U.S.C. 434(f)(3)). It is unlawful for a person to solicit, accept, or receive a contribution or donation described in (A) or (B), above, from a foreign national.

1 further state that references to "member" or "member of the Academy" in AAO's Bylaws refer
2 to members and Members-in-Training unless otherwise specified.

3

4 ***Question Presented***

5 Do the Members-in-Training of AAO qualify as "members" of AAO under Commission
6 regulations and, as such, may they be solicited by AAO to make contributions to AAO's separate
7 segregated fund, OPHTHPAC? For the reasons addressed below, the Commission answers this
8 question in the affirmative.

9

10 ***Legal Analysis and Conclusions***

11 ***Act and Commission Regulations***

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

18 Under 2 U.S.C. 441b(b)(4)(A), a corporation, or a separate segregated fund established
19 by a corporation, may only solicit contributions to such a fund from the corporation's
20 stockholders and their families and the corporation's executive or administrative personnel and
21 their families. An exception set forth in 2 U.S.C. 441b(b)(4)(C) allows a corporation without
22 capital stock, or a separate segregated fund established by such a corporation, to solicit
23 contributions to the fund from the members of the nonstock corporation.

1 *Status of AAO as membership organization*

2 Commission regulations define a "membership organization" as a trade association,
3 cooperative, or corporation without capital stock that:

4 (i) Is composed of members, some or all of whom are vested with the power and
5 authority to operate or administer the organization, pursuant to the organization's articles,
6 bylaws, constitution or other formal organizational documents;

7 (ii) Expressly states the qualifications and requirements for membership in its articles,
8 bylaws, constitution or other formal organizational documents;

9 (iii) Makes its articles, bylaws, constitution, or other formal organizational documents
10 available to its members upon request;

11 (iv) Expressly solicits persons to become members;

12 (v) Expressly acknowledges the acceptance of membership, such as by sending a
13 membership card or including the member's name on a membership newsletter list; and

14 (vi) Is not organized primarily for the purpose of influencing the nomination for election,
15 or election, of any individual to Federal office.

16 11 CFR 114.1(e)(1)(i) through (vi); *see also* 11 CFR 100.134.

17 AAO is a voluntary organization composed of sixteen types of members, of which six
18 have the right to vote on any matter or to attend any annual or special business meeting of AAO.

19 Governance of AAO is vested in the Board of Trustees, which is made up of Active Fellows,
20 Active Osteopathic Fellows, and Life Fellows. *Bylaws of the American Academy of*

21 *Ophthalmology, Inc.*, Article I, Section 1.20. The requirements of each category of membership
22 are clearly set forth in the *Bylaws*, Article I. The *Articles of Incorporation*, *Bylaws*, *Code of*

23 *Ethics*, and *Procedural Rules* are available on AAO's web site, www.AAO.org. You state that

1 AAO invites prospective members to join the organization and that these prospects must
2 affirmatively accept that invitation. You state that upon the affirmative vote of the Board of
3 Trustees and the payment of any dues required for the appropriate membership type, each
4 accepted invitee is recognized with a certificate of membership status. *Bylaws*, Article I, Section
5 1.24. Therefore, the Commission concludes that AAO is a membership organization within the
6 meaning of 11 CFR 100.134 and 114.1(e).

7 *Status of Members-in-Training as "members"*

8 The Act does not define the term "member." However, Commission regulations provide
9 that the term "members" includes all persons who are currently satisfying the requirements for
10 membership in a membership organization, affirmatively accept the membership organization's
11 invitation to become a member, and either:

- 12 (i) Have some significant financial attachment to the membership organization, such as a
13 significant investment or ownership stake; or
14 (ii) Pay membership dues at least annually, of a specific amount predetermined by the
15 organization; or
16 (iii) Have a significant organizational attachment to the membership organization which
17 includes: affirmation of membership on at least an annual basis; and direct participatory
18 rights in the governance of the organization. For example, such rights could include the
19 right to vote directly or indirectly for at least one individual on the membership
20 organization's highest governing board; the right to vote directly for organization
21 officers; the right to vote on policy questions where the highest governing body of the
22 membership organization is obligated to abide by the results; the right to approve the

1 organization's annual budget; or the right to participate directly in similar aspects of the
2 organization's governance.

3 11 CFR 114.1(e)(2)(i) through (iii); *see also* 11 CFR 100.134.

4 You ask whether Members-in-Training qualify as members under the Act and
5 Commission regulations. First, since all prospective members (including Members-in-Training)
6 must apply and be accepted by the Board of Trustees, the Commission accepts as conclusive that
7 AAO evaluates each person and only accepts those who meet AAO's requirements for Members-
8 in-Training set forth in the *Bylaws*, Article I, Section 1.13, and as described in this opinion,
9 below. You state in your February 19, 2003, letter that "[c]andidates for membership within the
10 Academy must affirmatively accept the invitation to become a member." *See also*, *Bylaws*,
11 Article I, Section 1.17. Thus, Members-in-Training meet the first two requirements set forth in
12 11 CFR 114.1(e)(2).

13 In addition to the above two requirements, prospective members must also meet one of
14 the three requirements listed above as 11 CFR 114.1(e)(2)(i), (ii) or (iii). Under the facts you
15 present, Members-in-Training do not meet any of these requirements. Members-in-Training are
16 not required to pay dues and have no other significant financial attachment to the organization,
17 such as an investment or ownership stake. Further, Members-in-Training do not have the right to
18 vote or to participate in the governance of the organization and, therefore, do not meet the
19 organizational attachment requirement in 11 CFR 114.1(e)(2)(iii).

20 Thus, the Members-in-Training do not qualify as "members" of AAO under the general
21 rule in 11 CFR 100.134(f) and 114.1(e)(2). However, under 11 CFR 100.134(g) and 114.1(e)(3),
22 the Commission may, on a case-by-case basis, determine that persons who do not precisely meet
23 the requirements of the general rule, but who do have a "relatively enduring and independently

1 significant financial or organizational attachment to the organization” may be considered
2 members for the purposes of corporate communications and solicitations. *See, e.g.*, AO 1997-5.

3 The Commission regulations regarding what constitutes membership for the purposes of
4 the Act were promulgated in 1999 in response to the Court of Appeals decision in *Chamber of*
5 *Commerce v. FEC*, 69 F.3rd 600 (D.C. Cir. 1995). The *Chamber* case determined that the
6 Commission’s previous membership regulations, which had been adopted in 1993, *see* 58 Fed.
7 Reg. 45770 (Aug. 30, 1993), were too restrictive.

8 The Commission notes that in this instance, while Members-in-Training have no
9 significant financial attachment and you state that they are not required to pay dues to AAO, they
10 are subject to sanctions. In *Chamber*, the issue was whether members of the American Medical
11 Association who paid dues and were subject to professional sanctions by the AMA, but who had
12 no vote in the governance of the organization, could be considered members for the purposes of
13 the Act. The Court noted that “[i]t might be thought, that for a professional, placing oneself in
14 such a position [i.e., subject to sanctions] is the *most* significant organizational attachment.” 69
15 F.3d at 605 (emphasis in original).²

16 You state that eighty percent of all ophthalmology residents are Members-in-Training of
17 AAO. Moreover, upon successful completion of the residency program, a Member-in-Training
18 is invited to become an Active Member/Fellow of the Academy, and ninety-three percent of all
19 ophthalmologists in the U.S. are members of AAO. These statistics indicate that, as a population,
20 Members-in-Training are very likely to have an enduring relationship with the AAO.

21 Therefore, the Commission determines that, given that Members-in-Training are subject
22 to sanctions by AAO, (*see Chamber* 69 F.3d at 605) and, given that the overwhelming majority

² The Commission quoted this statement in the Explanation and Justification of the 1999 membership rules, but did not include sanctions as one of the organizational attachments in the general rules. *See* 64 Fed. Reg. 41266-41273 (July 30, 1999).

1 of Members-in-Training are likely to become Members of AAO, Members-in-Training have a
2 relatively enduring and independently significant organizational attachment to AAO, and qualify
3 as members under the Act. 11 CFR 100.134(g), 114.1(e)(3).

4 This response constitutes an advisory opinion concerning the application of the Act and
5 Commission regulations to the specific transaction or activity set forth in your request. See 2
6 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
7 assumptions presented, and such facts or assumptions are material to a conclusion presented in
8 this opinion, then the requestor may not rely on that conclusion as support for its proposed
9 activity.

10
11 Sincerely,

12
13 Ellen L. Weintraub
14 Chair
15

16
17 Enclosure: (AO 1997-5)
18