



FEDERAL ELECTION COMMISSION
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CERTIFIED MAIL RETURN
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ADVISORY OPINION 2011-08

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Dear Mr. Willard:

We are responding to your advisory opinion request on behalf of the American Society of Anesthesiologists (“ASA”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the status of ASA’s Retired Members and Life Members.¹ The Commission concludes that Life Members and Retired Members are “members” of ASA for the purposes of the Act and Commission regulations. Therefore, ASA may solicit Life Members and Retired Members for contributions to its separate segregated fund (the “SSF”), the American Society of Anesthesiologists Political Action Committee (“ASAPAC”).

Background

The facts presented in this advisory opinion are based on your letter received on April 28, 2011.

ASA is a non-profit medical society incorporated in New York, and described in section 501(c)(6) of the Internal Revenue Code. ASA’s purpose is “to associate and affiliate into one organization all of the reputable physicians in the U.S., its territories and possessions, who are engaged in the practice of or otherwise especially interested in anesthesiology” ASA Bylaws, sec. 1.00. ASA is the connected organization of ASAPAC.

¹ That ASA regards these individuals as members pursuant to their own governing documents does not resolve the question of whether such members qualify as “members” as that term is used in Commission regulations. To avoid confusion, in this advisory opinion the Commission will employ the term “members” in quotation marks to mean “members” as defined by Commission regulations.

ASA's membership consists of approximately 45,000 physicians and other professionals who engage in, or are especially interested in, the medical practice of anesthesiology. ASA has multiple geographically based Component Societies. These Component Societies are chartered by ASA's Board of Directors. ASA Bylaws, sec. 1.31. Generally, to become an ASA member, an individual must be a member of a State Component Society.² ASA Bylaws, sec. 1.34.

ASA's highest governing body is its House of Delegates. The House of Delegates comprises delegates who are elected by the Component Societies, members of the Board of Directors, officers of ASA, past presidents of ASA, section chairs, and other delegates of subspecialty societies and resident societies. ASA Bylaws, sec. 1.12. Delegates are elected by the Component Societies, and must be voting members in the Component Society they represent. ASA Bylaws, sec. 1.61.

ASA's bylaws expressly state the qualifications and requirements of each type of membership. ASA Bylaws, sec. 3. ASA makes its bylaws and administrative procedures available to its members on request and on the "members only" page of its website. ASA expressly solicits persons to become members by advertising on its website, and by direct mail communications to anesthesiologists. ASA acknowledges an individual's acceptance of membership by sending written confirmation in the form of a membership card, as well as listing the new member on the ASA Directory of Members on the "members only" section of ASA's website.

ASA has eight categories of membership, including Life Members and Retired Members. *See* ASA Bylaws, sec. 3.00. Life Members are the past presidents of ASA. Life Members may hold office in ASA and have the right to vote for ASA's delegates and directors. ASA Bylaws, secs. 3.14 and 3.19. Life Members have no dues obligation. ASA Bylaws, sec. 3.22. Each president-elect witnesses the administration of affairs of ASA for a year in anticipation of his or her term of office as president, which begins after the next annual meeting. ASA Bylaws, sec. 1.533. Additionally, each immediate past president must be available for consultation with the current president. ASA Bylaws, sec. 1.537. Finally, Life Members serve as members of the House of Delegates. ASA Bylaws, sec. 1.121.4.

Like Life Members, Retired Members of ASA are not required to pay dues. Unlike Life Members, they do not have a vote in ASA. *See* ASA Bylaws, sec. 3.19. Retired Members may be: 1) individuals who have been Active or Affiliate Members of ASA for 20 years or more and who have retired from practice; 2) individuals who have been Active or Affiliate Members for 20 years or more and have reached the age of 70; or 3) individuals who are Active Members and who are disabled, and therefore are unable to engage in the practice of their profession, for one year or more. These Retired Disabled Members must be reinstated as Active Members should they resume active practice. ASA Bylaws, secs. 3.161, 3.162 and 3.163. All Retired Members continue to have access to ASA resources, and are eligible to serve on advisory committees.

² Certain individuals may be Active Members "at large" or Affiliate Members of ASA without being members of a Component Society. *See* ASA Bylaws, secs. 1.341 and 1.342. The status of these individuals was not raised by ASA and is not addressed in this advisory opinion.

Both Life Members and Retired Members are required to confirm their membership with ASA annually. All members, including Life Members and Retired Members, are subject to the same sanctions and disciplinary procedures. ASA Bylaws, secs. 3.35 and 8.201.

Question Presented

Do ASA's Life Members and Retired Members qualify as "members" under Commission regulations, such that they may be solicited by ASA for contributions to ASAPAC?

Legal Analysis and Conclusions

Yes, because ASA is a membership organization, and its Life Members and Retired Members qualify as "members" under Commission regulations, ASA may solicit them for contributions to ASAPAC.

The Act prohibits corporations from making any contributions in connection with a Federal election. 2 U.S.C. 441b(a). The Act states, however, that "contribution" does not include "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a . . . membership organization." 2 U.S.C. 441b(b)(2)(C); *see also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v).

The Act and Commission regulations delineate the types of persons who may be solicited for contributions to SSFs such as ASAPAC. Such persons comprise the membership organization's "solicitable class." 2 U.S.C. 441b(b)(4); *see also* 11 CFR 114.1(j). The solicitable class of an incorporated "membership organization," which is a type of organization that is membership-based rather than stockholder-based, such as a trade association, cooperative, corporation without capital stock, or a local, national, or international labor organization, includes its "members," as well as its executive and administrative personnel, and their families. 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.7 and 114.8.

1. ASA is a "Membership Organization"

In determining whether an organization's members qualify as "members" under Commission regulations, the Commission must first determine whether the organization itself is a "membership organization" under the Act and Commission regulations.³ *See* 11 CFR 100.134 and 114.1(e)(1).

³ In previous advisory opinions, the Commission did not determine whether ASA is a membership organization. Rather the Commission treated ASA as a membership organization in Advisory Opinion 2000-03 (American Society of Anesthesiologists), and determined ASA to be both a trade association and a federation of trade associations in Advisory Opinion 1994-19 (American Society of Anesthesiologists); *see also* Advisory Opinion 1988-43 (American Society of Anesthesiologists).

A “membership organization” is a trade association, cooperative, or corporation without capital stock that:

- (1) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution or other formal organizational documents;
- (2) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;
- (3) Makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request;
- (4) Expressly solicits persons to become members;
- (5) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and
- (6) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual for Federal office.

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

The facts presented indicate that ASA qualifies as a membership organization under the Commission’s regulations. ASA is a trade association⁴ composed of eight types of members, two of which (Life Members and Active Members) are vested with the power and authority to operate or administer the organization as elected members of the House of Delegates pursuant to ASA’s bylaws. *See* ASA Bylaws, sec. 1.00. The requirements of each category of membership are clearly set forth in the ASA Bylaws, Section 3.00, which are available to members on the “members only” section of ASA’s website. ASA invites prospective members to join the organization, and these prospects must affirmatively accept that invitation. Upon acceptance of membership, ASA sends a confirmation of membership in the form of a membership card and lists the new member in the Member Directory on the “members only” section of ASA’s website. Finally, ASA is not organized primarily for the purpose of influencing the nomination for election or election of any individual to Federal office. ASA’s purpose is to associate and affiliate into one organization physicians who are engaged or interested in the practice of anesthesiology; to encourage specialization in the field; to raise the standards of the specialty; to protect the public against irresponsible and unqualified practitioners in the field; to edit and publish publications in the field; and to further the specialty of anesthesiology. *See* ASA Bylaws, sec. 1.00. Accordingly,

⁴ *See* Advisory Opinion 1994-19 (American Society of Anesthesiologists) (ASA is both a trade association and a federation of trade associations).

the Commission concludes that ASA is a membership organization within the meaning of 11 CFR 100.134 and 114.1(e).

2. ASA's Life Members Are "Members" Under Commission Regulations and May Be Solicited for Contributions to ASAPAC.

Although the Act does not define the term "member," Commission regulations at 11 CFR 100.134(f) and 114.1(e)(2) provide that the term "members" includes all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:

- (1) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
- (2) Pay membership dues at least annually, of a specific amount predetermined by the organization; or
- (3) Have a significant organizational attachment to the membership organization which includes: affirmation of membership on at least an annual basis; and direct participatory rights in the governance of the organization. For example, such rights could include the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote directly for organization officers; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the organization's annual budget; or the right to participate directly in similar aspects of the organization's governance.

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

Life Members are former presidents of ASA, and must annually confirm their acceptance of membership in ASA. Life Members have the right to vote in ASA's elections for delegates to the House of Delegates, ASA's highest governing body. ASA Bylaws, sec. 3.19. Life Members are, themselves, nonvoting members of the House of Delegates. ASA Bylaws, sec. 1.12. Additionally, each immediate past president is a voting member of the Board of Directors, and must be available for consultation to the current president. ASA Bylaws, secs. 1.21 and 1.537.

Accordingly, Life Members qualify as "members" under Commission regulations because they (1) currently satisfy the requirements for membership in a membership organization, (2) affirmatively accept membership in ASA, and (3) have a significant organizational attachment to the membership organization. *See* 11 CFR 114.1(e)(2) and (e)(2)(iii) and 100.134(f) and (f)(3).

3. ASA's Retired Members Are "Members" of ASA Under Commission Regulations and May Be Solicited for Contributions to ASAPAC

Like Life Members, Retired Members currently satisfy ASA's membership requirements, annually accept the invitation to maintain membership in ASA, and have no further dues obligation to ASA. *See* ASA Bylaws, sec. 3.22. Unlike Life Members, however, Retired Members do not have the right to vote in elections to the ASA's House of Delegates. As such, Retired Members do not have the same organizational attachment to ASA as Life Members, nor do they pay dues on a regular basis, or have another significant financial attachment such as an ownership stake in ASA. Accordingly, Retired Members do not satisfy the criteria to be "members" set out at 11 CFR 114.1(e)(2) and 100.134(f).

However, the regulations at 11 CFR 100.134(g) and 114.1(e)(3) permit the Commission to determine on a case-by-case basis that persons who do not precisely meet the requirements of sections 100.134(f) and 114.1(e)(2) nevertheless qualify as "members" because those persons have a relatively enduring and independently significant financial or organizational attachment to the organization. For example, the rules recognize that long-term dues paying members who qualify for lifetime membership status with little or no dues obligation, and retired members, may be considered "members."

The requirements for two of the three types of ASA's Retired memberships are very similar: an individual must have paid dues for at least 20 years and must either 1) be retired from the practice of anesthesiology; or 2) have reached age 70. Because these types of Retired Members are "long term dues paying members," the Commission determines that they qualify as "members" under 11 CFR 100.134(g) and 114.1(e)(3) and that they may be solicited by ASA for contributions to ASAPAC.

The third type of Retired Members are "Active Members who are disabled and therefore unable to engage in the practice of their profession for one year or more" and who, at their request, are placed in Retired membership status. Once they become Retired Members, these individuals no longer have the right to vote in elections to ASA's House of Delegates, nor are they required to continue to pay dues while they are retired. They have, however, the same access to the member benefit resources that they had as Active Members. These resources include: 1) access to the "members only" section of ASA's website; 2) access to a searchable online Member Directory; 3) online access to ASA's peer-reviewed monthly journal; 4) discounted access to ASA's annual meeting; 5) representation and updates on Federal and State legislative and regulatory issues; and 6) library services and literature searches. Further, these individuals are subject to sanction by ASA, even while they are retired. Additionally, these, like all Retired Members, are eligible for appointment to ASA's advisory committees. The decisions of the committees, while subject to approval by the House of Delegates, are often approved as a matter of course. When such members resume active practice, they must notify ASA and be reinstated as Active Members. *See* ASA Bylaws, sec. 3.163.

In Advisory Opinion 2008-21 (CME Group, Inc.), the Commission determined that even when a member of the Chicago Board of Trade (“CBOT”) had temporarily transferred to certain other entities his seat on CBOT, that individual remained a solicitable “member” of CBOT for the purposes of Commission regulations. The Commission reasoned that “while they do not exercise most of the prerogatives of membership . . . they have reversionary interests in the membership and may reacquire those prerogatives.” The Commission concluded that the “ownership interests, the reversionary interests and their ability to exercise certain prerogatives associated with membership even while the transfers remain in effect,” demonstrated a relatively enduring and independently significant financial attachment.

Similarly, in this instance, while the disabled Retired Members have given up their Active Memberships in ASA, they have a reversionary interest in that they must be reinstated as Active Members if they return to practice and wish to maintain membership in ASA. Further, while these members are retired, they continue to be eligible to serve on ASA’s Advisory Committees, have full access to ASA membership benefits described above and remain subject to sanction by ASA. Accordingly, given these facts, the Commission concludes that these disabled Retired Members maintain relatively enduring and independently significant organizational attachments to ASA. *See* Advisory Opinions 2008-21 (CME Group, Inc.) and 2003-13 (OPHTHPAC). Thus, ASA may solicit these members for contributions to ASAPAC.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material respects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions and case law.

The cited advisory opinions are available on the Commission’s website, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Chair