

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2012-13 is now available for comment. It was requested by Edward M. Shack, Esq., on behalf of Physician Hospitals of America, and is scheduled to be considered by the Commission at its public meeting on April 26, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-13, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on April 25, 2012.
- 4) The Commission will generally not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fee.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-13, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

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

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-26

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2012 APR 19 P 4: 53

April 19, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Tony Buckley *TB*
Attorney

Subject: Draft AO 2012-13 (Physician Hospitals of America)

For Meeting of 4/26/12

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 26, 2012.

Attachment

2

3 Edward M. Shack, Esq.
4 814 San Jacinto Boulevard
5 Suite 202
6 Austin, TX 78701

7

8 Dear Mr. Shack:

9 We are responding to your advisory opinion request on behalf of Physician
10 Hospitals of America (“Physician Hospitals”), concerning the application of the Federal
11 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
12 the proposal of Physician Hospitals and persons affiliated with it to make contributions to
13 independent expenditure only political committees. The Commission concludes that
14 Physician Hospitals and persons affiliated with it may make contributions to independent
15 expenditure-only political committees.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 March 5, 2012.

19 Physician Hospitals is an association of physician-owned hospitals operating in
20 Texas. It does not have any contracts with the Federal government or receive any
21 payments from the Federal government under any Federal program, and does not
22 administer any part of its member hospitals’ dealings with the Federal government
23 concerning any Federal program.

24 The member hospitals are owned by various legal entities, including limited
25 partnerships, limited liability corporations, professional associations, trusts, and
26 individuals. The hospitals provide service to patients through the following Federal

1 programs: Medicare, Medicaid, TRICARE and CHAMPUS. The hospitals take
2 assignments of such patients' claims against the Federal government for services
3 rendered and are then directly reimbursed by the Federal government pursuant to the
4 relevant Federal program. The physicians who treat these patients own the hospitals
5 either wholly or in conjunction with non-physician partners.

6 Physician Hospitals asks whether it, its member hospitals, and the physician-
7 owners of its hospitals, may make contributions to independent expenditure-only political
8 committees in light of their involvement with Medicare, Medicaid, TRICARE and
9 CHAMPUS.

10 ***Question Presented***

11 *Are associations of physician-owned hospitals, and/or the physician-owned*
12 *hospitals themselves, and/or the individual physicians who own the hospitals, prohibited*
13 *under 2 U.S.C. 441c(a)(1) from contributing to political action committees that make*
14 *only independent expenditures, if the physician-owned hospitals and/or physicians*
15 *provide services to patients enrolled in government sponsored healthcare programs like*
16 *Medicare, Medicaid, TRICARE, and CHAMPUS and, due to a valid assignment of*
17 *benefits form executed by the respective patients, are reimbursed directly by the federal*
18 *government through the Medicare, Medicaid, TRICARE, and CHAMPUS programs?*

19 ***Legal Analysis and Conclusions***

20 No, associations of physician-owned hospitals, the physician-owned hospitals
21 themselves, and individual physicians who own the hospitals, are not prohibited under
22 2 U.S.C. 441c(a)(1) from making contributions to political committees that make only
23 independent expenditures under the circumstances you describe.

1 Pursuant to 2 U.S.C. 441c(a)(1), it is unlawful for any person who enters into a
2 contract with the United States, or any department or agency of the United States, for the
3 rendition of personal services, if payment is to be made from funds appropriated by the
4 Congress, to make a contribution to any political party, political committee, or candidate.
5 *See also* 11 CFR 115.2(a). This prohibition does not apply when a person contracts with
6 an entity other than the United States or a department or agency of the United States,
7 even if the entity is funded in whole or in part from funds appropriated by the Congress.
8 *See* 11 CFR 115.1(d). The third party beneficiary of a Federal contract is not subject to
9 the prohibition. *Id.*

10 The Explanation and Justification for 11 CFR 115.1(d), which relies in turn on the
11 legislative history of section 441c, makes clear that the regulation excludes from
12 coverage service providers who receive payments from Medicare or Medicaid. *See* H.R.
13 Doc. No. 95-44, COMMUNICATION FROM THE CHAIRMAN, FEDERAL ELECTION
14 COMMISSION, TRANSMITTING THE COMMISSION'S PROPOSED REGULATIONS GOVERNING
15 FEDERAL ELECTIONS, PURSUANT TO SECTION 316(C) OF THE FEDERAL ELECTION
16 CAMPAIGN ACT OF 1971, AS AMENDED, at 120, available at
17 http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=43 (quoting from the
18 1974 Conference Report on the coverage of 18 U.S.C. 611, *S. Conf. Report* 93-1237, 93d
19 Congress, 2d Session, 68-69 (1974)). Congress recognized that, under Medicare, the
20 "basic contractual relationship is between the Federal Government and the individual
21 receiving the medical services[, who] may assign his claim against the Federal
22 Government to the doctor who rendered the services, but in [that] case the doctor merely
23 stands in the shoes of the claimant for payment." *Id.* Under Medicaid, "doctors . . . have

1 specific contractual agreements . . . with State agencies and not with the Federal
2 Government. The House committee did not believe that the [Federal contractor
3 prohibition] has any application to doctors rendering medical services pursuant to a
4 contract with a State agency.” *Id.*

5 Although the Commission has never had occasion to address the specific question
6 presented here, in past advisory opinions it has stated that service providers under
7 Medicare and Medicaid do not qualify as “Federal contractors.” *See* Advisory Opinion
8 1975-31 (Shapp); Advisory Opinion 1975-110 (Treen); Advisory Opinion 1985-12
9 (American Health Care Association PAC). TRICARE and CHAMPUS are
10 programmatically similar to Medicare and Medicaid.¹

11 Accordingly, Physician Hospitals, its member hospitals, and the physician owners
12 of its hospitals, are not prohibited by 2 U.S.C. 441c(a)(1) from making contributions to
13 independent expenditure-only political committees by virtue of their involvement with
14 the Medicare and Medicaid programs and TRICARE and CHAMPUS.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a

¹ “TRICARE is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors and certain former spouses worldwide.” TRICARE Management Activity, What is TRICARE?, <http://tricare.mil/mybenefit/home/overview/WhatIsTRICARE> (last modified March 6, 2012). TRICARE is the successor program to CHAMPUS, the Civilian Health and Medical Program of the Uniformed Services. Authorized TRICARE providers operate similarly to either (1) Medicaid providers by engaging in a contractual relationship with a contractor who manages the program on behalf of the Federal government, or (2) Medicare providers by agreeing to accept payment on behalf of beneficiaries, who assign claims to the providers. *See* TRICARE Management Activity, Types of TRICARE Providers, <http://www.tricare.mil/providers/typesofproviders.aspx> (last accessed April 18, 2012).

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
9 directly from the Commission's Advisory Opinion searchable database at
10 <http://www.fec.gov/searchao>.

11 On behalf of the Commission,

12
13
14 Caroline C. Hunter
15 Chair