



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 24, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-15

John J. Bennett, Esq.
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American Physical Therapy Association
1111 North Fairfax Street
Alexandria, VA 22314-1488

Dear Mr. Bennett:

We are responding to your advisory opinion request on behalf of the American Physical Therapy Association (“APTA”). Your request concerns the application of the Federal Election Campaign Act (the “Act”), and Commission regulations to APTA’s proposed plan to use payroll deduction for members who are employed by corporations owned wholly or partly by APTA members, to make contributions to the APTA Physical Therapy Political Action Committee (“PT-PAC”), APTA’s separate segregated fund. The payroll deductions would be administered by the corporations, and APTA would pay the corporations for their costs.

The Commission concludes that APTA may implement its proposed payroll deduction plan and that the corporations may administer the payroll deduction system provided that APTA makes advance payment for the payroll deduction services the corporations would provide.

Background

The facts presented in this advisory opinion are based on your letter received on February 10, 2012, and on an e-mail received on March 29, 2012.

APTA is a non-profit, Illinois corporation without capital stock. It is registered as a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code. APTA is the national professional organization representing physical therapists, physical therapy assistants, and students who anticipate entering these fields. APTA has no corporate members. APTA actively solicits individuals to join as members, and when new

members join, APTA mails them a membership card. APTA also mails membership cards to existing members when they renew their membership.

According to its Bylaws,¹ which APTA makes available to its members on request and posts on its website, the goal of APTA is “to represent and promote the profession of physical therapy and to meet the needs and interests of its members in order to address the physical therapy needs of members of society and to develop and advance the art and science of physical therapy, including practice, education, and research.” *Bylaws of the American Physical Therapy Association (“APTA Bylaws”), Art. II.* APTA does not itself engage in the practice of physical therapy, but rather fulfills its mission by performing professional support functions, such as: accrediting physical therapy education programs; certifying physical therapist practitioners who have special knowledge, skills, and experience; sponsoring educational meetings and offering continuing education courses; publishing articles in a peer-reviewed journal; and providing members with on-line access to physical therapy literature. APTA also advocates and lobbies on behalf of its members before governmental and non-governmental bodies.

APTA’s Bylaws vest all legislative and elective powers, as well as the authority to determine APTA’s policies, in a House of Delegates. *APTA Bylaws, Art. VIII, Sec. 1.* The House of Delegates may repeal or modify both the Bylaws and the standing rules, and may also adopt the ethical standards of conduct that govern members’ professional practice. *Id.* The House of Delegates elects the Board of Directors. *APTA Bylaws, Art. IX, Sec. 4.A.*

The Board of Directors, in turn, carries out the mandates and policies established by the House of Delegates. *APTA Bylaws, Art. IX, Sec. 5.A.* The duties of the Board include: (1) directing APTA’s financial and business affairs; (2) making personnel policies; (3) creating committees and councils as needed; (4) publishing APTA’s journal; and (5) prescribing and publishing qualifications for each category of membership.² *See APTA Bylaws, Art. IX, Sec. 5.*

Only individuals who have been physical therapist members of APTA for at least two years immediately preceding the beginning of the session in which they serve may vote in the House of Delegates. *APTA Bylaws, Art. VIII, Sec. 3.A.(1).* Likewise, only individuals who have been physical therapist members of APTA for at least five years immediately preceding their election or appointment may serve on the Board of Directors. *APTA Bylaws, Art. IX, Sec. 2.*

Some APTA members practice through corporations that they either wholly or partly own. In addition to the owner-members, some of these corporations also employ

¹ APTA’s Bylaws are included in the advisory opinion request as Attachment 1.

² Qualifications for each category of APTA membership are prescribed by the Board of Directors and are included in the advisory opinion request as Attachment 2. APTA represents that under Illinois law, these prescribed qualifications are considered part of the Bylaws.

physical therapists who are APTA members. APTA would like to solicit members who are employed at these corporations for contributions to PT-PAC, and some of the owner-members have expressed interest in establishing a payroll deduction system that would facilitate the employees' making of contributions to PT-PAC.

APTA proposes to establish four requirements for corporations that elect to participate in the payroll deduction system. First, the participating corporation must be owned wholly or partly by an APTA member. Second, the participating corporation must have requested in writing for APTA's permission to participate. Third, the participating corporation must approve APTA's solicitation of its employees. Fourth, the participating corporation must agree that it will not allow its employees to be solicited by another association or another association's separate segregated fund in the same calendar year.³

Corporations electing to permit payroll deduction would provide APTA the names of all of their employees who are physical therapists or physical therapy assistants. Using this information, APTA would identify those employees who are also its members and would contact them to invite them to participate in the payroll deduction plan. The solicitation would inform the employee of PT-PAC's political purpose and of the employee's right to refuse to contribute without incurring any reprisal in accordance with 11 CFR 114.5(a)(3)-(5).⁴

Employees would have to authorize the deductions in advance in writing, demonstrating their specific and voluntary intent to contribute. The employee would be required to certify that he or she is an American citizen and that he or she is not a Federal contractor. Employees would be able to cancel their authorizations at any time.

Under the proposal, a participating corporation would periodically deduct contributions from the participating employee-member's salary or wages. The corporation will remit a single check to PT-PAC that represents the entire aggregate amount of contributions made by all employees along with a document providing the names of each individual contributor and the amount of each individual's contribution. The corporation will then transmit this check within ten days of making the authorized deductions, as required under 11 CFR 102.8. Corporations will continue to hold contributions in their payroll accounts until they are transmitted to PT-PAC.

APTA would assume the costs of administering the payroll deduction system. It would pay the corporations an amount sufficient to reimburse the corporations for the actual expense they incur in administering the system, and this actual expense would include the value of the lists of employees the corporations provide. APTA would either

³ APTA represents that participating corporations will also be required to provide requesting labor organizations with equal access to the payroll deduction system on the terms specified under 2 USC 441b(b)(6).

⁴ APTA represents that it, and not the participating corporations, will send all the solicitations to its members.

pay this amount in advance based on a reasonable estimate of the future costs or reimburse the corporations for their expenses, including the value of the lists.

Questions Presented

1. *Is the APTA a membership organization under Commission regulations?*
2. *Would the APTA's solicitation of Member-Employees to participate in the payroll deduction system violate 2 U.S.C. 441b(b)(4)(A)(i)?*
3. *Is the APTA's proposed payroll deduction system authorized under 11 CFR 114.7?*
4. *Would participation in the payroll deduction system by a participating corporation or the APTA violate either of the prohibitions in 2 U.S.C. 441b(a) against making or knowingly accepting a contribution?*
5. *Would a participating corporation's participation in the payroll deduction system violate 11 CFR 114.2(f)(1)?*
6. *Would a participating corporation's participation in the payroll deduction system violate 2 U.S.C. 441b(b)(6)?*

Legal Analysis and Conclusions

1. *Is the APTA a membership organization under Commission regulations?*

Yes, the APTA is a membership organization under Commission regulations.

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.

APTA, a corporation without capital stock, satisfies all six criteria for qualifying as a membership organization under Commission regulations. First, APTA is composed of "members," at least some of whom are empowered to operate or administer APTA pursuant to APTA's Bylaws. A House of Delegates establishes APTA's policies, while

day-to-day administrative oversight is provided by a Board of Directors. The House of Delegates is thus APTA's highest policymaking and governing body. *See* Advisory Opinion 1995-28 (American Health Care). The Bylaws provide that voting delegates to the House of Delegates must be APTA physical therapist members who have had that status for at least two years. The delegates who operate and administer APTA appear to qualify as "members" under 11 CFR 114.1(e)(2), because, in addition to satisfying APTA's requirements for membership and having accepted APTA's invitation to become members, they pay annual dues of a predetermined amount.⁵ 11 CFR 114.1(e)(2)(ii). *See also* Advisory Opinion 2011-08 (American Society of Anesthesiologists).

Second, APTA expressly states the qualifications and requirements for membership in its Bylaws and, more specifically, in the Board of Directors' addendum to the Bylaws. *See APTA Bylaws, Art. IV, Sec. 1; Membership Qualifications Prescribed by the Board of Directors, BOD Y10-09-08-18*. Third, APTA makes its Bylaws available to members upon request and on its website. Fourth, APTA expressly solicits persons to become members on its website. Fifth, APTA expressly acknowledges the acceptance of membership by sending membership cards. Sixth, and finally, the Bylaws show that APTA is primarily organized for the purpose of promoting the practice of physical therapy and for supporting those who are engaged in that practice, rather than for the purpose of influencing Federal elections. *APTA Bylaws, Arts. II-III*. Thus, APTA qualifies as a membership organization.

2. *Would the APTA's solicitation of Member-Employees to participate in the payroll deduction system violate 2 U.S.C. 441b(b)(4)(A)(i)?*

3. *Is the APTA's proposed payroll deduction system authorized under 11 CFR 114.7?*

Because the APTA is a membership organization, the APTA's solicitation of Member-Employees would not violate 2 U.S.C. 441b(b)(4)(A)(i), and its solicitation of Member-Employees would be governed by 11 CFR 114.7.

The Act and Commission regulations permit a corporation to pay for "the establishment, administration, and solicitation of contributions⁶ to" its separate segregated fund ("SSF"). 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A corporation or its SSF may solicit contributions to the SSF from a restricted class of persons. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). A corporation's restricted class

⁵ In accordance with the representation made in the advisory opinion request, the Commission assumes for the purpose of this advisory opinion that all members whom APTA would solicit will qualify as "members" under 11 CFR 114.1(e)(2) or (3).

⁶ A "contribution" includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election ." 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 431(8); 11 CFR 100.52(a). "Anything of value" includes all in-kind contributions, including the provision of goods and services without charge or at less than the usual and normal charge. *See* 11 CFR 100.52(d)(1).

generally consists of its executive or administrative personnel, its stockholders, and the families of those persons. 11 CFR 114.5(g)(1), 114.1(j).

While corporations are generally permitted to solicit contributions only from these restricted categories of persons, 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1), membership organizations, cooperatives, and corporations without capital stock are permitted to solicit contributions from their members as well as from their executive or administrative personnel, and the families of each. 2 U.S.C. 441b(b)(4)(C); 11 CFR 114.7(a). And under Commission regulations, “[t]here is no limitation . . . on the method of solicitation or the method of facilitating the making of voluntary contributions which may be used.” 11 CFR 114.7(f). APTA is a membership organization. Thus, APTA may solicit its members who work at the corporations pursuant to 11 CFR 114.7 without violating 2 U.S.C. 441b(b)(4)(A)(i).

4. *Would participation in the payroll deduction system by a participating corporation or the APTA violate either of the prohibitions in 2 U.S.C. 441b(a) against making or knowingly accepting a contribution?*

5. *Would a participating corporation’s participation in the payroll deduction system violate 11 CFR 114.2(f)(1)?*

No, participation in the payroll deduction system would neither cause the participating corporations to violate the prohibition on making a contribution in 2 U.S.C. 441b(a) nor the prohibition on corporate facilitation in 11 CFR 114.2(f)(1) provided that they adhere to certain conditions described below. Further, PT-PAC would not violate the prohibition on knowingly accepting a contribution in 2 U.S.C. 441b(a) provided that it adheres to the conditions described below.

The Act and Commission regulations prohibit corporations from making contributions in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). As noted above, however, the Act and Commission regulations permit a corporation to pay for “the establishment, administration, and solicitation of contributions to” its separate segregated fund (“SSF”). 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii).

In addition to the prohibition on corporate contributions, Commission regulations prohibit corporations from facilitating the making of contributions to candidates or political committees, other than to the SSFs of the corporations themselves. *See* 11 CFR 114.2(f)(1). “Facilitation” means using corporate resources to engage in fundraising activities in connection with any Federal election. *Id.* Fundraising activity includes “[p]roviding materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes addressed to a candidate or political committee other than the corporation’s or labor organization’s [SSF], or other similar items which would assist in transmitting or delivering contributions, but not including providing the address of the

candidate or political committee.”⁷ 11 CFR 114.2(f)(2)(ii). *See also* 11 CFR 114.2(f)(2)(i)(A) (An example of corporate facilitation is “officials or employees of the corporation . . . ordering or directing subordinates or support staff (who therefore are not acting as volunteers) to plan, organize or carry out the fundraising project as a part of their work responsibilities using corporate . . . resources, unless the corporation . . . receives advance payment for the fair market value of such services.”)⁸

Under APTA’s proposal, the participating corporations would use corporate labor, resources, and work time to deduct employees’ contributions from their payrolls and to transmit them to PT-PAC. Because the corporations would be using corporate resources to transmit contributions to SSFs other than their own, they would be facilitating the making of contributions to a political committee under 11 CFR 114.2(f)(1).

As explained above, however, membership organizations like APTA may solicit their members and their members’ families for contributions, 11 CFR 114.7(a),⁹ and “[t]here is no limitation . . . on the method of solicitation or the method of facilitating the making of voluntary contributions which may be used.” 11 CFR 114.7(f).

The Commission concludes that the express and unlimited authorization that 11 CFR 114.7(f) gives to membership organizations to facilitate contributions to their SSFs permits APTA and the corporations to implement APTA’s proposal so long as APTA or PT-PAC pays the corporations in advance for all the costs the corporations

⁷ In explaining the regulation concerning permissible corporate communications, 11 CFR 114.3, the Commission stated in 1977 that while corporations are permitted to communicate with their restricted classes on any subject, they may not facilitate the making of contributions to a particular candidate or political committee, other than their own SSFs, “as by providing envelopes addressed to the candidate or committee or enrolling persons in a payroll deduction plan for contributions to that candidate or committee.” *See* Explanation and Justification of Regulations, H. Doc. No. 95-44, 95th Cong., 1st Sess. at 104-105 (1977). *See also* Advisory Opinion 1987-29 (Life Underwriters), n.2; Advisory Opinion 1986-04 (Armstrong Industries), n.5; and Advisory Opinion 1982-02 (National Radio Broadcasters Association).

⁸ Section 114.2(f)(1) also provides, however, that “[a] corporation does not facilitate the making of a contribution to a candidate or political committee if it provides goods or services in the ordinary course of its business as a commercial vendor in accordance with 11 CFR Part 116 at the usual and normal charge.” Here, the corporations that would administer the payroll deductions do not offer payroll processing services to other persons or entities in their ordinary course of business. Their ordinary course of business is the provision of physical therapy services and thus they are not commercial vendors for the services they will provide to APTA and PT-PAC. *See, e.g.* Advisory Opinion 2011-10 (POET PAC).

⁹ In addition to being a membership organization, APTA is a trade association. *See* 11 CFR 114.8(a). As both, APTA’s solicitations are governed by both 11 CFR 114.7 (membership organizations) and 114.8 (trade associations). A trade association that is a membership organization may solicit its non-corporate members under the provisions of 11 CFR 114.7.

incur in making payroll deduction plans available to their employees.¹⁰

Because APTA will bear the costs of payroll deduction, APTA's or PT-PAC's resources will be used to engage in fundraising activity, not the corporations' resources, if APTA or PT-PAC pays the corporations in advance for all attributable costs. Unlike other corporations, membership organizations like APTA are expressly permitted to engage in any method of facilitating the making of voluntary contributions. 11 CFR 114.7(f).

Given the express and unlimited authorization for facilitation of contributions by membership organizations in section 114.7(f), APTA and the corporations¹¹ may implement APTA's proposal if APTA pays the corporations for the fair market value of the services they will provide to PT-PAC. *See also* Advisory Opinion 2011-10 (POET PAC) (reaching same conclusion with respect to POET Plants facilitating the making of contributions to POET PAC). Because corporations will be providing the services,¹² and APTA or PT-PAC must pay them in advance for those services, APTA or PT-PAC must ensure that the advance payment is not less than the anticipated value of those services, lest the advance result in prohibited corporate contributions. *See* Advisory Opinion 1984-37 (AMA) (separate segregated fund must determine and pay in advance the full value of consulting services to be provided by its corporate connected organization in order to avoid receiving corporate contribution). Because the corporations are not commercial vendors, any amount of the actual value of the services greater than APTA's or PT-PAC's payment would be considered an advance or extension of credit to PT-PAC from the participating corporation, and, therefore, a contribution. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a).¹³ APTA's payments to the corporations therefore must be in advance, not through later reimbursement.

¹⁰ Because PT-PAC is APTA's SSF, and because the payroll deduction plan is a means of obtaining contributions from its restricted class, and therefore may be regarded as an "establishment, administration, and solicitation" cost of PT-PAC, either PT-PAC or APTA may pay the corporations. *See* 11 CFR 114.1(b) ("establishment, administration, and solicitation" costs include cost of fundraising). *See also* Advisory Opinion 2009-30 (Tech Net) (payments by corporations and trade associations to help their SSFs increase their fundraising are "establishment, administration, and solicitation" costs); Advisory Opinion 1994-33 (VITEL); Advisory Opinion 1984-45 (KFC).

¹¹ The Commission notes that the participating corporations are prohibited from using coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activities on behalf of PT-PAC. 11 CFR 114.2(f)(2)(iv).

¹² Corporations are generally prohibited from soliciting employees outside their restricted classes for contributions to their own SSFs. 2 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1).

¹³ The reasoning in Advisory Opinion 2003-22 (American Bankers), relied on by APTA in its request, is not directly relevant here because it involved methods of solicitation by member corporations within a trade association, *i.e.*, solicitations *wholly within* a trade association. The corporations participating in APTA's payroll deduction plan are owned wholly or partly by one or more APTA members, but are not themselves members.

The Commission notes that solicitations by SSFs or by their connected organizations, including non-profit corporations that are membership organizations, must conform to certain requirements under Commission regulations. The solicitation must inform the solicitees of the SSF's political purpose and of their right to refuse to contribute to the SSF without reprisal. 11 CFR 114.5(a)(3)-(5). In addition, if the SSF or connected organization suggests guidelines for contribution amounts, the solicitation must inform the solicitee that the guideline is merely a suggestion, that the solicitee is free to contribute more or less than the guideline suggests, and that the corporation will not favor or disadvantage anyone because of the amount of their contribution or their decision not to contribute. 11 CFR 114.5(a)(2), (5). Further, political committees generally are required to make their "best efforts" to gather information about contributors, and to include in solicitations "a clear request for the contributor's full name, mailing address and name of employer, and . . . an accurate statement of Federal law regarding the collection and reporting of individual contributor identifications." 11 CFR 104.7(b)(1)(i).

Also, every person who receives a contribution for a political committee that is not an authorized committee must forward such a contribution of \$50 or less to the treasurer of that committee no later than 30 days after receiving the contribution; for contributions of \$50 or more, the person must forward the contribution and the required information no later than ten days after receiving the contribution. 2 U.S.C. 432(b)(2)(A), (b)(2)(B); 11 CFR 102.8(b)(1), (b)(2).

6. *Would a participating corporation's participation in the payroll deduction system violate 2 U.S.C. 441b(b)(6)?*

No, a participating corporation's participation in the payroll deduction system would not violate 2 U.S.C. 441b(b)(6), so long as, as APTA has indicated they will do, on receipt of a written request from a labor organization representing any of their employees, participating corporations will make the payroll deduction service provided to APTA available to the labor organization at cost. *See also* Advisory Opinion 1990-25 (Community Psychiatric).

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 requestor 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 aspects 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://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair