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OFFICE OF GENERAL
COUNSEL

March 1, 2012

Mr. Anthony Herman
Acting General Counsel
Federal Election Commission
999 East Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request of Physician Hospitals of America

Dear Mr. Herman:

Pursuant to 2 U.S.C. § 437f, Physicians Hospitals of America (“PHA”) requests an advisory opinion on the following issues:

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

FACTS

PHA is an association of physician-owned hospitals (“the Hospitals”) operating in Texas. PHA provides various informational and advisory services to the Hospitals. PHA does not have any contracts with the federal government, does not receive any payments from the federal government under the Medicare program or any other federal program, and does not administer any part of the Hospitals’ dealings with the federal government concerning the Medicare program or any other federal program.

The Hospitals are owned by various legal entities – limited partnerships, limited liability corporations, professional associations, trusts, and individuals, including individual physicians.

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The Hospitals provide medical services to Medicare, Medicaid, Tricare, and CHAMPUS patients. The Hospitals take assignments of the Medicare, Medicaid, Tricare, and CHAMPUS patients' claims against the federal government for the services rendered, and are then reimbursed directly by the federal government pursuant to the Medicare, Medicaid, Tricare, and CHAMPUS programs.

The individual physicians own the Hospitals either wholly or in conjunction with nonphysician partners and perform medical services for the Medicare, Medicaid, Tricare, and CHAMPUS patients.

LAW

The Federal Election Campaign Act ("the Act") and the Federal Election Commission Regulations ("the Regulations") limit political activity by any person who, under certain conditions, enters into any contract with the United States or any department or agency thereof. See 2 U.S.C. § 441c; 11 C.F.R. part 115. The Act prohibits federal contractors from "directly or indirectly" making "any contribution of money or other things of value, or promising expressly or impliedly to make any contributions to any political party, committee, or candidate for public office or to any person for any political purpose." 2 U.S.C. § 441c(a)(1). § 441c(a)(2). The Regulations define "federal contractor,"¹ and prohibit federal contractors from making contributions to PACS. 11 C.F.R. §§ 115.1- 115.2.

The Regulations also allow for "Employee contributions or expenditures" to PACS, even if the organization in question is a "federal contractor" and is therefore prohibited from contributing to those PACS. 11 C.F.R. § 115.6.²

¹ § 115.1(a) defines "federal contractor" as follows:

- (a) *A Federal contractor* means a person, as defined in 11 C.F.R. 100.10 who—
- (1) Enters into any contract with the United States or any department or agency thereof either for—
 - (i) The rendition of personal services; or
 - (ii) Furnishing any material, supplies, or equipment; or
 - (iii) Selling any land or buildings.

² § 115.6 Employee contributions or expenditures.

Nothing in this part shall prohibit the stockholders, officers, or employees of a corporation, the employees, officers, or members of an unincorporated association, cooperative, membership organization, labor organization, or other group or organization which is a Federal contractor from making contributions or expenditures from their personal assets.

ANALYSIS

As to PHA, an association of physician-owned hospitals does not appear to be a "federal contractor" because such associations do not have any contracts with the federal government and do not receive any funds from the federal government pursuant to the Medicaid or any other federal program. PHA is therefore not prohibited from contributing to PACs under the Act or the Regulations. PHA seeks confirmation of this position in the FEC's advisory opinion.

As to the Hospitals, comparable authority suggests that the Hospitals are not "federal contractors" merely by reason of receiving payments under the Medicare, Tricare, or CHAMPUS programs. *See* Federal Election Campaign Act Amendments of 1974 (Senate Report) (a copy of the Senate Report for the 1974 Amendments is attached to this Opinion Request).

The 1974 Amendments to the Federal Election Campaign Act authorized the establishment and maintenance of segregated campaign funds that would not be subject to the "federal contractors" prohibition. While this Bill was in the House Committee, the House Committee addressed the issue of whether doctors receiving Medicare and Medicaid payments are federal contractors and therefore prohibited from making political contributions. The Senate Report states that these doctors are not federal contractors:

House Amendment

A question was raised in the House committee during the consideration of the amendment to section 611 as to whether doctors receiving payments under the so-called Medicare and Medicaid programs are prohibited from making political contributions as government contractors. The House committee was of the opinion that nothing in the existing section 611, nor in the amendment thereto included in the House amendments, would prohibit a doctor from making a political contribution solely because he was receiving payments for medical services rendered to patients under either the Medicare or Medicaid program. Under the Medicare program the basic contractual relationship is between the Federal Government and the individual receiving the medical services. The individual receiving the medical services may be reimbursed directly by the Federal Government for amounts paid for such services, or he may assign his claim against the Federal Government to the doctor who rendered the services, but in the latter case the doctor merely stands in the shoes of the claimant for payment. This relationship is not altered by the fact that a Federal agency may retain a right to audit the accounts of a medical practitioner to protect the Federal

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Government against fraudulent claims for medical services.

Under so-called Medicaid programs, it is true that doctors may have specific contractual agreements to render medical services, but such agreements are with State agencies and not with the Federal Government. Medicaid programs are administered by State agencies using Federal funds. The House committee did not believe that section 611 prohibiting political contributions by government contractors has any application to doctors rendering medical services pursuant to a contract with a State agency.

Conference substitute

The conference substitute is the same as the House amendment.

The conferees agree with the analysis of the House report (as set forth in the statement relating to the House amendment) regarding political contributions by doctors and professional corporations.

SENATE REPORT NO. 93-885, at p. 5636-5637 (emphasis added).

The above emphasized reasoning should also apply to the issue of whether hospitals are "federal contractors:" "The basic contractual relationship is between the Federal Government and the individual receiving the medical services." Just as the doctor under the 1974 amendments "merely stands in the shoes of the claimant for payment," so to the Hospitals stand in the patients' shoes. The conclusion should therefore be the same: The Hospitals are not "federal contractors." Therefore, the Act and the Regulations do not prohibit the Hospitals from making contributions to PACs.

As to the individual physicians, 11 C.F.R. § 115.6 appears to permit the physicians to make contributions to PACS even if the hospital which the physician partially owns is a "federal contractor." PHA seeks confirmation of this position in the FEC's Advisory Opinion.

Respectfully submitted,



Edward M. Shack

Attachment

ELECTION CAMPAIGN ACT

P.L. 93-443

Committee on Education and Labor. This bill will provide a direct grant of \$4,500,000 to the Eisenhower College and \$500,000 to the Rayburn Library in the fiscal year enactment. The legislation has broad based bipartisan support.

If educational financial grants are needed for higher education assistance, the proper way to obtain them is by legislation reported from the standing Committee having jurisdiction and expertise in this area.

An amendment will, therefore, be offered on the Floor to strike Section 2 of the Committee bill.

CHALMERS P. WYLIE,
JOHN H. ROUSSELOT.

FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974

P.L. 93-443, see page 1436

Senate Report (Rules and Administration Committee)
No. 93-689, Feb. 21, 1974 [To accompany S. 3044]

House Report (House Administration Committee) No. 93-1239,
July 30, 1974 [To accompany H.R. 16090]

House Conference Report No. 93-1438, Oct. 7, 1974
[To accompany S. 3044]

Senate Conference Report No. 93-1237, Oct. 7, 1974
[To accompany S. 3044]

Cong. Record Vol. 120 (1974)

DATES OF CONSIDERATION AND PASSAGE

Senate April 11, October 8, 1974

House August 8, October 10, 1974

The Senate bill was passed in lieu of the House bill. The Senate Report and the Senate Conference Report are set out.

SENATE REPORT NO. 93-689

THE Committee on Rules and Administration, having considered an original bill to amend the Federal Election Campaign Act of 1971 to provide for public financing of primary and general election campaigns for Federal elective office, and to amend certain other provisions of law relating to the financing and conduct of such campaigns, reports favorably thereon, and recommends that the bill do pass.

PURPOSE OF THE BILL

This recommended legislation is a comprehensive and far-reaching measure, designed to bring together various laws already enacted or passed by the Senate, for the purpose of providing complete control over and disclosure of campaign contributions and expenditures in

LEGISLATIVE HISTORY

P.L. 93-443

G. NATIONAL COMMITTEE

Senate bill

Section 301(e) of the Senate bill amended section 591 of title 18, United States Code, by inserting a new paragraph (k), relating to the definition of national committee. Such term was defined to mean the organization which is responsible for the day-to-day operations of a political party at the national level, as determined by the Commission.

House amendment

No provision.

Conference substitute

The conference substitute is the same as the Senate bill.

H. PRINCIPAL CAMPAIGN COMMITTEE

Senate bill

No provision.

House amendment

Section 102(e) of the House amendment amended section 591 of title 18, United States Code, by inserting a new paragraph (i), relating to the definition of principal campaign committee. Such term was defined to mean the principal campaign committee designated by a candidate under section 362(f)(1) of the Act, as added by the House amendment.

Conference substitute

The conference substitute is the same as the House amendment.

POLITICAL FUNDS

Senate bill

Section 303 of the Senate bill amended section 611 of title 18, United States Code, relating to contributions by firms or individuals contracting with the United States, to provide that such section shall not prohibit the establishment or maintenance of a separate segregated campaign fund by a corporation or a labor organization unless such establishment or maintenance is prohibited under section 610 of title 18, relating to contributions or expenditures by national banks, corporations, or labor organizations.

House amendment

Section 103 of the House amendment was the same as section 303 of the Senate bill, except that the amendment to section 611 of title 18, United States Code, relating to contributions by firms or individuals contracting with the United States, made by the House amendment contained a definition of the term "labor organization". Such term was defined by reference to the definition of such term contained in section 610 of title 18, United States Code.

A question was raised in the House committee during the consideration of the amendment to section 611 as to whether doctors receiving payments under the so-called Medicare and Medicaid programs are prohibited from making political contributions as government contractors. The House committee was of the opinion that nothing in the existing section 611, nor in the amendment thereto included in the

ELECTION CAMPAIGN ACT

P.L. 93-443

House amendments, would prohibit a doctor from making a political contribution solely because he was receiving payments for medical services rendered to patients under either the Medicare or Medicaid program. Under the Medicare program the basic contractual relationship is between the Federal Government and the individual receiving the medical services. The individual receiving the medical services may be reimbursed directly by the Federal Government for amounts paid for such services, or he may assign his claim against the Federal Government to the doctor who rendered the services, but in the latter case the doctor merely stands in the shoes of the claimant for payment. This relationship is not altered by the fact that a Federal agency may retain a right to audit the accounts of a medical practitioner to protect the Federal Government against fraudulent claims for medical services.

Under so-called Medicaid programs, it is true that doctors may have specific contractual agreements to render medical services, but such agreements are with State agencies and not with the Federal Government. Medicaid programs are administered by State agencies using Federal funds. The House committee did not believe that section 611 prohibiting political contributions by government contractors has any application to doctors rendering medical services pursuant to a contract with a State agency.

A separate question was raised in the House committee concerning the application of section 610 of title 18, relating to prohibitions against political contributions by corporations, banks, and labor organizations, as to whether a professional corporation composed of doctors, lawyers, architects, engineers, etc., would be prohibited from making political contributions. Whether or not a professional association is a corporation is a matter determined under State law. If, under State law, such an association is a corporation, it would be prohibited from making a political contribution as a corporation. However, nothing in existing law, nor in the amendments contained in the House amendment prohibit an individual member of any corporation from making a political contribution as an individual. Existing law also permits corporations to establish a separate segregated fund to be utilized for political purposes so long as contributions to such fund are voluntary and not secured by force or job discrimination or financial reprisals, or threat thereof, or by money obtained in any commercial transaction.

Conference substitute

The conference substitute is the same as the House amendment.

The conferees agree with the analysis of the House report (as set forth in the statement relating to the House amendment) regarding political contributions by doctors and professional corporations.

EFFECT ON STATE LAW

Senate bill

No provision.

House amendment

Section 104 of the House amendment provided that chapter 29 of title 18, United States Code, relating to elections and political activities, supersedes and preempts provisions of State law.