



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 27, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-13

Edward M. Shack, Esq.
814 San Jacinto Boulevard
Suite 202
Austin, TX 78701

Dear Mr. Shack:

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

Background

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

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

The member hospitals are owned by various legal entities, including limited partnerships, limited liability corporations, professional associations, trusts, and individuals. The hospitals provide service to patients through the following Federal programs: Medicare, Medicaid, TRICARE and CHAMPUS. The hospitals take assignments of such patients’ claims against the Federal government for services rendered and are then directly reimbursed by the Federal government pursuant to the

relevant Federal program. The physicians who treat these patients own the hospitals either wholly or in conjunction with non-physician partners.

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

Question Presented

Are associations of physician-owned hospitals, and/or the physician-owned hospitals themselves, and/or the individual physicians who own the hospitals, prohibited under 2 U.S.C. 441c(a)(1) from contributing to political action committees that make only independent expenditures, 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?

Legal Analysis and Conclusions

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

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

The Explanation and Justification for 11 CFR 115.1(d), which relies in turn on the legislative history of section 441c, makes clear that the regulation excludes from coverage service providers who receive payments from Medicare or Medicaid. *See* H.R. Doc. No. 95-44, COMMUNICATION FROM THE CHAIRMAN, FEDERAL ELECTION COMMISSION, TRANSMITTING THE COMMISSION'S PROPOSED REGULATIONS GOVERNING FEDERAL ELECTIONS, PURSUANT TO SECTION 316(C) OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED, at 120, available at http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=43 (quoting from the 1974 Conference Report on the coverage of 18 U.S.C. 611, *S. Conf. Report* 93-1237, 93d Congress, 2d Session, 68-69 (1974)). Congress recognized that, under Medicare, the

“basic contractual relationship is between the Federal Government and the individual receiving the medical services[, who] may assign his claim against the Federal Government to the doctor who rendered the services, but in [that] case the doctor merely stands in the shoes of the claimant for payment.” *Id.* Under Medicaid, “doctors . . . have specific contractual agreements . . . with State agencies and not with the Federal Government. The House committee did not believe that the [Federal contractor prohibition] has any application to doctors rendering medical services pursuant to a contract with a State agency.” *Id.*

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

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

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.

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).

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