

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

Memorandum

To: Howard Rubin
Legal Counsel, Digestive Health Physicians Association

From: Tom Josefiak

Date: June 29, 2018; revised February 17, 2023

RE: Federal Election Commission Compliance and Political Event Sponsorship

The Digestive Health Physicians Association (“DHPA”) is organized as a non-profit Section 501(c)(6) trade association under the Internal Revenue Code. DHPA Members consist of gastroenterology medical practices which are generally organized as corporations, partnerships, or LLCs (“DHPA Member Practices”).

Among its various activities, DHPA periodically hosts a limited number of political fundraising events (“events”) on behalf of federal candidates who are affiliated with both major political parties. DHPA invites a limited number of individual doctors from the DHPA Member Practices to attend each event. DHPA Member Practices that accept an invitation are not asked to participate in any other event for at least 18 months. To date, voluntary contributions have been made by individual physicians and, in some cases, administrative leaders, of the DHPA Member Practices in connection with these events. In limited instances, certain DHPA Member Practices have made contributions directly in the name of their Member Practice consistent with a prior version of this Memorandum prepared for DHPA dated June 29, 2018. DHPA serves as the host for each event, but the benefiting campaign pays all associated costs; attendees are individual physicians from DHPA’s Member Practices. Contribution checks are sent directly to the candidate’s campaign, and since July 2018, individual physicians have had the option of making their contribution online directly to the candidate’s campaign.

You requested guidance on whether the Federal Election Campaign Act (“FECA”) and Federal Election Commission (“FEC”) rules and regulations would allow DHPA Member Practices to contribute directly to candidate’s campaigns in the name of the Member Practice separate and apart from contributions that are made by the individual physicians of the DHPA Member Practices. This Memorandum updates our prior analysis from June 2018.

I. DHPA’s Restricted Class and Permissible Communications

Under the FECA and FEC regulations, the “restricted class” of an incorporated trade association consists of the trade association’s members, executive and administrative personnel,

and their families.¹ DHPA may communicate with its restricted class on any subject at any time.² This broad right to communicate includes advocating the election of specific candidates and suggesting that members contribute to specific candidates.³

While DHPA may suggest and encourage members to make contributions, as an incorporated entity, it may not *facilitate* the making of such contributions.⁴ FEC regulations specify that “facilitating the making of contributions” includes soliciting contributions earmarked for a candidate that are to be collected and forwarded by the corporation, or providing materials for the purpose of delivering contributions (such as stamps and envelopes).⁵ Accordingly, no DHPA representative may collect and/or transmit (*i.e.*, “bundle”) any contributions made by restricted class members to a federal candidate’s campaign before, during, or after an event. Consistent with current practices, contributions must be sent directly to the campaign or collected by the campaign’s representative.

A non-corporate DHPA Member that itself may permissibly contribute to a federal candidate (see Section II below) may send a contribution directly to a candidate’s campaign, or physically give a contribution to a campaign representative at an event.

You explained that DHPA pursues health policy initiatives that promote the delivery of care in the independent practice setting, including in ambulatory surgery centers (“ASC”) that are not members of DHPA; however, many of the individual gastroenterologists associated with DHPA Member Practices perform procedures at one or more ASC. In some cases, ASCs are owned, in part or in whole, by these same individual gastroenterologists or their practice groups. While a given DHPA Member Practice or ASC may be owned by the same individual gastroenterologist, this overlapping ownership – in and of itself – does not make any ASC a member of DHPA or a part of DHPA’s restricted class. Therefore, ASCs could not be invited to, participate in, or make contributions in connection with DHPA political fundraising events.

There are two options that DHPA may wish to consider in order to communicate with individual gastroenterologists who are associated with ASCs that are not, themselves, members of DHPA, and that do not fall within DHPA’s restricted class. First, if DHPA limits its communications with these non-restricted class doctors to email, it may do so freely because email is generally not subject to FEC regulation.⁶ The FEC has affirmed in past matters that

¹ 11 C.F.R. § 114.1(j); Advisory Opinion 2008-21 (CME Group, Inc.) (“The solicitable class of [an] incorporated ... trade association ... includes its ‘members,’ as well as its executive and administrative personnel, and their families.”). “Executive and administrative personnel” are those individuals employed by the trade association who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities. *Id.* § 100.134(d). This category of employee is generally coterminous with “exempt employees” who are not eligible for overtime pay under the Fair Labor and Standards Act.

² *See* 11 C.F.R §§ 114.3(a)(1) and (2).

³ *Id.* § 114.3(c), (c)(2)(iii).

⁴ *Id.* § 114.2(f).

⁵ *Id.* § 114.3(c)(2)(iii).

⁶ Emails consisting of more than 500 substantially similar communications are required to carry disclaimers if sent by an FEC-registered political committee. 11 C.F.R. § 110.11(a)(1). Emails sent by non-political committees, however, are not required to carry a disclaimer and are not otherwise subject to FEC regulation. *Id.* §§ 100.94 & 100.155.

email communications are not “public communications,” meaning they fall within the so-called “internet exemption” and are not subject to regulation.⁷ Such email may include links to a federal candidate’s donation webpage, or provide an address for mailing a contribution directly to a candidate. If DHPA’s communications are limited to email, those emails may be coordinated with the benefiting candidate. Any such DHPA e-mail communications should make clear that recipients may make contributions in their own right but should not link those contributions to any DHPA political fundraising event. (How a benefitting campaign chooses to tally contributions received is an internal accounting matter rather than a legal issue.)

Second, if DHPA wishes to communicate with these doctors, but does not want to be limited to email, it may communicate beyond its restricted class so long as DHPA is willing to treat and report those (public) communications as independent expenditures. (Paid communications other than email *may not* be coordinated with the benefiting candidate.) Thus, if DHPA paid for solicitation letters to be mailed to the non-restricted class doctors, those letters must be produced independently, may not be coordinated with any candidate or campaign, and the costs must be reported to the FEC if they exceed \$250 with respect to a given election. Such FEC reports require disclosure of donors under certain circumstances. If you wish to pursue this option, please consult with us first to discuss the extent to which DHPA might have to disclose donors.

II. DHPA Member Contributions

A. Individual Physicians

Individual physicians (or other individuals) whose medical practices are members of DHPA may contribute up to \$3,300 per election to a federal candidate.⁸ Individual contributions must be made from the individual’s personal funds and may be not reimbursed by the individual’s employer or any other person.⁹

B. DHPA Member Practices -- Corporations

Corporations are prohibited from making federal contributions to candidates, parties, and political committees (other than Super PACs), including in-kind contributions.¹⁰ Any DHPA Member Practice that is incorporated, or that is organized as a professional corporation under state law, may not make such contributions. The individual doctors who own or are employed by a corporation (or PC) may, of course, contribute from their personal funds.

⁷ See Advisory Opinion 2011-14 (Utah Bankers Association) at 5 (“Because the Project’s communications will appear only on the Project’s own website and by email, the communications will not be either public communications or electioneering communications.”); see also FEC Final Rule on Internet Communications, 71 Fed. Reg. 18,589, 18,597 (April 12, 2006) (“the revised definition of ‘public communication’ does not encompass e-mail communications”).

⁸ Federal contribution limits are adjusted every two years. The current limits are in effect for the 2023-2024 election cycle.

⁹ See 52 U.S.C. § 30122.

¹⁰ *Id.* § 30118; 11 C.F.R. § 114.2(b).

The same rules and considerations apply to any ASC that may wish to make contributions to federal candidates. If an ASC is incorporated, it is prohibited from making federal contributions. Individual doctors who own or are otherwise associated with such ASC may make individual contributions from personal funds.

C. DHPA Member Practices -- Partnerships

DHPA Member Practices that are organized as partnerships may contribute up to \$3,300 per election to a federal candidate. A partnership contribution counts against the limits of both the partnership and the participating partners. Generally, a partnership contribution is allocated equally among all the partners. Under FEC regulations, the default partner allocation shall be in direct proportion to each partner's share of profits.¹¹ The partners, however, are free to specify a different allocation in writing.¹²

For example, if a DHPA Member Practice is organized as a partnership with two physician partners and the Member Practice makes a \$3,300 contribution to a federal candidate, that contribution would be allocated as follows:

- The full \$3,300 contribution is attributed to the partnership; and
- \$1,650 is allocated to each of the two partners and treated as personal contributions, assuming that both share equally in the profits. (The allocated portions generally reflect each partner's share of partnership proceeds.)

Under this scenario, though the partnership has reached its limit on what it may contribute to the candidate, each individual partner may still make an additional contribution of \$1,650 from personal funds (not partnership funds) to that same candidate for the same election. Partnership contribution allocations are made from the partnership's profits, meaning any allocation assumes that each partner will receive profits for that year reduced by the amount of his or her allocated contributions.

This same partnership contribution could also be attributed to only one partner – if designated in writing. If attributed to only one partner, that partner would be precluded from making any additional personal contribution to that candidate for the same election. The partner's year-end profit would also be reduced by the full \$3,300.¹³

If a DHPA Member Practice is organized as a partnership and one of the partners is a corporation, the profits allocated to that corporate partner are not eligible to be used for making federal contributions.¹⁴ We do not believe this scenario exists among the DHPA Member Practices, but a partnership that consists only of corporate partners may not contribute.

¹¹ 11 C.F.R. § 110.1(e)(1).

¹² *Id.* § 110.1(e)(2).

¹³ *See id.* §§ 110.1(e), 114.2(b); FEC Advisory Opinion 1981-56.

¹⁴ 11 C.F.R. § 110.1(e)(2)(ii).

The rules set forth above apply in the same manner to any ASC that is organized as a partnership. An individual doctor that makes attributed contributions via *both* a DHPA Member Practice and an ASC should remain cognizant of the applicable individual contribution limits; the individual doctor is limited to contributing an aggregate total of \$3,300 per candidate per election. This total includes both direct personal contributions and attributed contributions made by LLCs.

D. DHPA Member Practices -- LLCs

1. DHPA Member Practices -- Multi-Member LLCs

A DHPA Member Practice organized as an LLC may contribute under the rules set forth above for partnerships if the LLC has elected to be federally taxed as a partnership. Thus, an LLC that elects partnership taxation may contribute up to \$3,300 per federal candidate per election and the contribution must be allocated among the LLC's individual members in proportion to each member's share of profits, or as specified in writing.

If the LLC elects to be federally taxed as a corporation, it is treated as a corporation for purposes of federal campaign finance law, meaning it is prohibited from making federal contributions (other than to Super PACs).

The rules set forth above apply in the same manner to any ASC that is organized as a multi-member LLC.

2. DHPA Member Practices -- Single-Member LLCs

An LLC with a single natural person member may elect to be treated by the IRS either as a corporation (which is prohibited from contributing) or a disregarded entity, but not as a partnership. A contribution from an LLC with a single natural person member that does not elect to be taxed as a corporation is attributed to the single member in full.¹⁵ Thus, such an LLC may (effectively) contribute as an alter ego of the individual. For FEC reporting purposes, a contribution from a single-member LLC may be reported as made by the LLC and attributed to the LLC's single, individual member.¹⁶

The rules set forth above apply in the same manner to any ASC that is organized as a single-member LLC.

¹⁵ See *id.* § 110.1(g)(4); Advisory Opinion 2009-02 (True Patriot Network, LLC) (“A single-member LLC that does not affirmatively elect treatment as a corporation is treated by default as a disregarded entity. Accordingly, Commission regulations provide that contributions by an LLC with a single natural person member that does not elect to be treated as a corporation for Federal income tax purposes ‘shall be attributable only to that single member.’”).

¹⁶ See FEC Matter Under Review 7454, Statement of Reasons of Chairman Allen Dickerson, Vice Chair Steven T. Walther, Commissioner Shana M. Broussard, and Commissioner Ellen L. Weintraub (April 15, 2022) (A contribution from “[a]n LLC that has a single natural-person member and is not taxed as a corporation must be attributed only to the natural person member.”).

E. DHPA Member Practices -- Other Professional Associations

Whether a DHPA Member Practice that is organized as a Professional Association (“PA”) may contribute to a federal candidate depends on how the PA is organized in its home state. (The same applies to an ASC that is organized as a PA.)

The FEC explained in a 2008 advisory opinion that “in considering how the ... prohibition on corporate contributions applied to a ‘professional corporation composed of doctors, lawyers, architects, engineers, etc.,’ the Committee on House Administration stated that ‘[w]hether or not a professional association is a corporation is a matter determined under State law.’”¹⁷ In this matter, the Commissioners concluded that a law firm “organized and operate[d] as an LLP under the laws of Florida, and not as a corporation, ... is treated as a partnership under the Act and Commission regulations.”¹⁸

Thus, if a PA is organized in, and chartered by, the state as a corporation, the entity is treated as a corporation under federal campaign finance law and would be prohibited from contributing to federal candidates. If the entity is not chartered as a corporation under state law, the determination as to its eligibility to contribute is determined on a case-by-case basis by the FEC, and that determination depends primarily on how the entity is chartered under state law.¹⁹

III. Contribution Limit Chart

<i>Member Practice Type</i> ²⁰	<i>Contribution Limit</i>
Individual / Natural Person	\$3,300 per candidate per election
Corporation	Contributions prohibited
Partnership	\$3,300 per candidate per election; contribution allocated to individual partners
LLC (taxed as corporation)	Contributions prohibited
LLC (taxed as partnership)	\$3,300 per candidate per election; contribution allocated to individual members
LLC (individual, single member, disregarded entity)	\$3,300 per candidate per election; contribution allocated to individual, single member
LLP (if treated as partnership under state law)	\$3,300 per candidate per election; contribution allocated to individual partners
Other professional association (PA) (taxed as corporation)	Contributions prohibited
Other professional association (PA) (not taxed as corporation)	Eligibility determined on a case-by-case basis

¹⁷ See Advisory Opinion 2008-05 (Holland & Knight LLP) (citing H.R. Rep. 93-1239, 93d Cong., 2d Sess., at 21 (1974)); see also 11 C.F.R. § 114.7(d).

¹⁸ See Advisory Opinion 2008-05 (Holland & Knight LLP).

¹⁹ See 11 C.F.R. § 114.2(b).

²⁰ Although this Chart refers to different types of DHPA “Member Practices,” these rules apply equally to contributions that an ASC might choose to make.

IV. Conclusion

This memorandum only addresses the facts as described herein. Any modification of those facts may require additional analysis. Please feel free to contact me if you have any questions or require any additional information.
