A. Respondent American Medical Association publish a copy of this Order in the *Journal of the American Medical Association* and in *American Medical News;* [305]

B. Respondent Connecticut State Medical Society publish a copy of this Order in *Connecticut Medicine;* and

C. Respondent New Haven County Medical Association, Inc. publish a copy of this Order in *Issues and Insights.*

IV.

It is further ordered, That respondents, within ninety (90) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this Order. [306]

APPENDIX A

Constitutions and Bylaws of AMA's constituent and component medical societies providing that AMA's Principles of Medical Ethics shall govern the conduct of their members and that unethical conduct shall be grounds for expulsion:

Medical Society	Constitution and/or Bylaws
Allegheny County Medical Society	CX 2185, pp. 10, 13, 15, 17, 40, 42
Arizona Medical Association, Inc.	1871I, K–L
Bexar County Medical Society	472C, G
California Medical Association	477I, L, Z–6
Camden County Medical Society of the State of New Jersey	747L–M, R
Catawba County Medical Society	2226C, G
Chattanooga and Hamilton County Medical Society, Inc.	1904I, M, V
Chicago Medical Society: The Medical Society of Cook County	2025M, N
Colorado Medical Society	2307Z–9, Z–22, Z–27
Connecticut State Medical Society	991D, L–M (*See* 1404I, J)
Dallas County Medical Society	1905D, F, W–X
Medical Society of the District of Columbia	1976R–S, V [307]
Florida Medical Association	2543C, K

Philadelphia County Medical Society	756A, M, N
Pierce County Medical Society	135A–B, F, H
Prince George's County Medical Society	689K, D
Santa Clara County Medical Society	748N
St. Louis Medical Society	983E
Tarrant County Medical Society	1894A, E [309]
Tennessee Medical Association	14H, L
Texas Medical Association	1899D, U
Travis County Medical Society	1882B, N, Z–9
Medical Society of Virginia	1879Z–8, O–P, Z–5
Volusia County Medical Society	1961K, P, D–E
Washington State Medical Association	475G–H, O, M–N
State Medical Society of Wisconsin	1912B, G [310]

APPENDIX B

State Statutes Regarding Physician Advertising and Solicitation

In 1975, at the commencement of the proceedings in this case, a substantial majority of states had statutes which prohibited or restricted advertising by physicians. Ten states declared any form of physician advertising to be illegal:

(a) Arixona, Ariz. Rev. Stat. §32–1401 (10)(C), §33–1451 (1976) (RX 706);
(b) Arkansas, Ark. Stat. Ann. §72–613(m) (1975) (RX 707);
(c) Florida, Fla. Stat. Ann. §458.1201(1) (f) (1976) (RX 710);
(d) Georgia, Ga. Code Ann. §84–916(a)(6) (1976) (RX 711);
(e) Louisiana, La. Stat. Ann. §37–1285(19) (1976) (RX 717);
(f) Michigan, Mich. Stat. Ann. §14.542(11) (1), (11)(27)(g), (1976) (RX 719);
(g) Missouri, Mo. Ann. Stat. §334.100(12) (1976) (RX 721);
(h) Ohio, Ohio Rev. Code Ann. §4731.22(b)(5) (1975) (RX 727);
(i) Tennessee, Tenn. Code Ann. §63–619 (1976) (RX 734); and,
(j) Utah, Utah Code Ann. §§58–12–36(4), 58–1–25(1) (1973) (RX 736).

Eight states prohibited advertising in an "unethical" manner:

(a) Delaware, Del. Code Tit. 24, §1741(9) (1974) (RX 709);
(b) Idaho, Idaho Code §54–1810(c) (1976) (RX 713); [311]
(c) Maine, Me. Rev. Stat. tit. 32, §3282(A)(B) (1977) (RX 718);
(d) Nebraska, Neb. Rev. Stat. §71–147(11)–(13) (1976) (RX 722);
(e) North Dakota, N.D. Cent. Code §43–17–31(11) (1960) (RX 726);
(f) Rhode Island, R.I. Gen. Laws §§5–37–4, 5–37.1–5 (1976) (RX 731);
(g) South Carolina, S.C. Code Ann. §40–47–200 (7) (1975) (RX 732); and,
(h) Wyoming, Wyo. Stat. §33–340 (1975) (RX 740).

Four states prohibited all advertising except notices of openings or closings of a practice or listing in a directory:

(a) Alaska, Alaska Stat. §§08.64303(b)(1), 08.64.380(3)(D) (1977) (RX 705);
(b) Illinois, Ill. Rev. Stat. ch. 91, §§16a(13), 16a-1 (1976) (RX 714);
(c) New Jersey, N.J. Stat. Ann. §45.9.16 (1976) (RX 723); and,
(d) Oklahoma, Okla. Stat. Ann. tit. 59 §§503, 509(2) (1977) (RX 728).

Sixteen states made it illegal for a physician to engage in misleading or deceptive advertising:

(a) Alabama Ala. Code §§34-24-90 (1975) (RX 704);
(b) Connecticut, Conn. Gen. Stat. §20-44 (1958) (RX 708);
(c) Hawaii, Haw.Rev.Stat. §§453-8, (5) (6) (1975) (RX 712);
(d) Iowa, Iowa Code Ann. §§147.55-(7) (1976) (RX 715);
(e) Kansas, Kan. Stat. §§65-2836(b), 65-2837(g) (1976) (RX 716); **[312]**
(f) Mississippi, Miss. Code §73-25-29(8)(c) (1976) (RX 720);
(g) New Mexico, N.M.Stat.Ann. §§67-5-9(9), (B)(9) (1975) (RX 724);
(h) North Carolina, N.C.Gen. Stat. §§90-14, 9014(8) (1975) (RX 725);
(i) Oregon, O.Rev.Stat. §677.190(10) (1971) (RX 729);
(j) Pennsylvania, Pa.Stat.Ann. tit. 63, §421.15 (a)(92) (1976) (RX 730).;
(k) Rhode Island, R.I.Gen.Laws §§5-37-4, 5-37.1-5 (1976) (RX 731);
(l) South Dakota S.D. Codified laws §§36-4-29, 36-4-30 (5) (1977) (RX 733);
(m) Texas, Tex. Rev. Civ. Stat. Ann. art. 4505(6) (1976) (RX 735);
(n) Vermont, Vt. Stat. Ann. tit. §§ 1353(2), 1361 (1977) (RX 737);
(o) Virginia, Va. Code §§54-316, 54-317(4) (1977) (RX 738); and,
(p) Washington, Wash.Rev.Code §§18.72.030(4), 18.72.250 (1975) (RX 739).

Alabama also provides for suspension or revocation of a medical license for any violation of the Principles of Medical Ethics as set forth in the *Opinions and Reports* of the Judicial Council of the AMA (RX 704B).

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

The complaint in this case was issued on December 19, 1975, charging that the American Medical Association (AMA), the Connecticut State Medical Society (CSMS), and the New Haven County Medical Association, Inc. (NHCMA) violated Section 5 of the Federal Trade Commission Act ("Act")[1] through ethical restrictions on advertising and solicitation, as well as other competitive restrictions. The AMA is the largest medical and professional association in the world. (ID 6) Its membership includes approximately 200,000 physicians, representing 53 percent of all doctors in the nation and 72 percent of office-based practitioners. (RX 658) The AMA is a federation of 55 constituent associations, representing states, commonwealths, territories, and insular possessions. (RX 220, p.27, CX

[1] 15 U.S.C. 45(a)(1)(1976).

990E) Each of these constituent societies has in turn chartered component societies representing smaller geographic areas such as counties. (CX 990E) There are approximately 2,000 component societies in the AMA. (RX 220, p.27) Membership in a component society is a prerequisite to membership in a constituent association and membership in a constituent association is a prerequisite to membership in the AMA. (ID 6) [2]

CSMS is a constituent society of AMA composed of eight component county medical societies, one of which is NHCMA. In 1975, CSMS had approximately 4,400 members, representing approximately 82 percent of the physicians registered in Connecticut. NHCMA had approximately 1,200 members in 1975, representing approximately 71 percent of the physicians registered in New Haven County. (ID 8-9)

The AMA House of Delegates, which is composed of delegates from each constituent or state society, is the official legislative and national policymaking body of AMA with authority to amend the AMA *Constitution and Bylaws,* and the *Principles of Medical Ethics ("Principles").* (ID 7) The AMA operates eight standing committees on specific subjects, known as Councils. *Id.* One of these councils, the Judicial Council, has responsibility for interpreting the AMA *Constitution and Bylaws,* and the *Principles.* (Tr. 3982)

The case against respondents focuses upon their ethical code and interpretations of this code. The AMA adopted a *Code of Ethics* at its first meeting in 1847. (ID 102) With minor revisions, the language and concepts of the original code remained unchanged until 1957. In that year, AMA's House of Delegates adopted a shortened version of the *Code of Ethics,* entitled *The Principles of Medical Ethics,* consisting of ten brief sections. As noted above, the Judicial Council interprets the *Principles* and hears actions based on infractions of the *Principles. Id.* The Judicial Council's interpretations are periodically published under the title *Opinions and Reports of the Judicial Council ("Opinions and Reports").*

The gravamen of the complaint in this case is that respondents, through their ethical canons, agreed to prevent or hinder their members from soliciting business, by advertising or otherwise, from engaging in price competition, and from otherwise engaging in competitive practices. The complaint alleged that these agreements constitute unfair methods of competition and unfair acts or practices in violation of Section 5.

Following an extended trial, the Administrative Law Judge (ALJ) concluded that the Commission possessed jurisdiction over the respondents' practices since each of the respondents is a "corpora-

tion" within the meaning of Section 4 of the Act, and because the challenged acts, practices, and methods of competition are in or affect commerce. With respect to the merits, the law judge found that respondents, their constituent and component medical societies, and their members have agreed to adopt, disseminate and enforce ethical standards that ban physician solicitation of business and severely restrict physician advertising. Additionally, the ALJ held that respondents have unlawfully sought to prevent or hinder certain contractual arrangements between physicians and health care delivery organizations and between physicians and nonphysicians. [3]

To remedy the violations found as well as to protect the public now and in the future, the ALJ issued an order that requires, *inter alia,* respondents to cease and desist from restricting advertising, solicitation, and certain contract practices of their members for a minimum of two years. At the end of this period, the order permits AMA to develop and disseminate ethical guidelines with respect to advertising and solicitation, on condition that respondents first obtain the Commission's approval of these guidelines.

Respondents argue in their appeal to the Commission that they are not "corporations" as defined in Section 4 of the Act. Although AMA concedes that its activities fall within and affect interstate commerce, CSMS and NHCMA urge the Commission to overrule the ALJ's finding of interstate commerce jurisdiction. All respondents object to the finding of a conspiracy, with AMA asserting that it should not be held accountable for the activities of its member societies and the Connecticut respondents attempting to disassociate themselves from proof involving AMA and unnamed state and local societies. With respect to the alleged restraints on advertising, solicitation and contractual arrangements, AMA rests its case primarily upon recent modifications to its ethical positions disseminated after issuance of the complaint and, together with the Connecticut respondents, challenges the sufficiency of the evidence to sustain the law judge's conclusions.

I JURISDICTION

A. Of "Corporations" Under Section 4

At the outset, the Commission must determine whether it has jurisdiction over the respondents. Section 5(a)(2) of the Act[2] extends

[2] 15 U.S.C. 45(a)(2)(1976).

the Commission's jurisdiction to "persons, partnerships, or corporations" and Section 4 defines "corporation" to include:

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.[3]

In analyzing whether this language applied specifically to respondents, the ALJ felt that the Commission could "assert jurisdiction over nonprofit organizations whose activities [4] engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." (ID 238)[4]

Respondents challenge this formulation of the legal standard under Section 4, but their briefs reflect some differences regarding the standard to be applied. AMA argues that the sole inquiry under Section 4 should be to determine whether the respondent is carrying on business in order to accumulate gain for distribution to its shareholders or members. Focusing on the organization's purpose rather than its activities, NHCMA suggests that the proper test is whether the respondent has been organized for the purpose of engaging in business activities to provide gain to its members. Finally, CSMS urges a combination of the criteria suggested by the other respondents. It says that the test should be whether the respondent has been organized *and* operated to profit its members.

We are satisfied that the ALJ has articulated the proper test for examining whether respondent is a "corporation" within the meaning of Section 4. The substantiality test appropriately places the principal focus upon the nature of respondents' activities and is supported by precedent. *National Commission on Egg Nutrition,* 88

[3] 15 U.S.C. 44 (1976).

[4] The following abbreviations will be used in this opinion:

ID	-	Initial Decision page number
Tr.	-	Transcript page number
CX	-	Complaint Counsel's exhibit number
RX	-	Respondent AMA exhibit number
RCX	-	Respondent's CSMS exhibit number
RNHX	-	Respondent's NHCMA exhibit number
RAB	-	Respondent AMA Appeal Brief
RCAB	-	Respondent NHCMA Appeal Brief
CAB	-	Complaint Counsel's Answering Brief
TROA	-	Transcript of Oral Argument before the Commission
App.A	-	Appendix A of this Opinion

F.T.C. 89, 177 (1976) *modified* 570 F.2d 157 (7th Cir. 1977), *cert. denied,* 99 S. Ct. 86 (1978).[5] Clearly, Congress did not intend to bring "any and all nonprofit corporations regardless of their purposes and activities" within the Commission's jurisdiction. *Community Blood Bank of the Kansas City Area, Inc.* v. *F.T.C.,* 405 F.2d 1011, 1018 (8th Cir. 1969). On the other hand, the legislature did not provide a "blanket exclusion" from FTC jurisdiction for all nonprofit corporations, since it recognized that certain "corporations ostensibly organized not-for-profit, such as trade associations, were merely [5] vehicles through which a profit could be realized for themselves or their members." *Id.* at 1017. Thus, the "mere form" of incorporation is not dispositive; it is the "reality" of a respondent being in law and in fact a charitable organization (the determination of which must necessarily be conducted on an ad hoc basis) that places it beyond the Commission's reach. *Id.* at 1018–19.

Respondents contend that for the Commission to assert jurisdiction over them, it must find that they are engaged in some undertaking for the purpose of realizing gain for ultimate distribution to their members. They argue that it is improper for the Commission to focus upon activities which provide only an "economic benefit" for their members. (RAB 17–18) It is clear, however, that an organization may fall within the ambit of Section 4 even though it only "indirectly" pursues profit for its members. *National Commission on Egg Nutrition, supra,* 517 F.2d at 488.[6] Section 4 does not require a transfer or delivery of monetary profits to the members of a nonstock corporation, only that the activities of the corporation provide pecuniary benefits to its members. AMA itself concedes as much when it acknowledges that the Commission has exercised jurisdiction many times in the past over trade associations. (RAB 19)[7] Its effort to distinguish these cases on grounds that the entities involved were devoted primarily to enhancing the pecuniary benefit

[5] In the related preliminary injunction action, the district court held that the respondent was a "corporation" within the meaning of Section 4 by virtue of the fact that many of its members were connected with the egg industry and because its activities "directly promote[d], at least to some extent, the financial health of the egg industry." F.T.C. v. *National Comm'n on Egg Nutrition,* 1975–1 Trade Cas. (CCH) ¶60, 246 at 65,967 (N.D. Ill. 1974), *rev'd on other grounds,* 517 F.2d 485 (1975), *cert. denied* 426 U.S. 919 (1976).

There is some support for the notion that a respondent is subject to FTC jurisdiction if one of its purposes is noncharitable in nature, perhaps only to the extent of its noncharitable activities. *See Community Blood Bank, supra,* 405 F.2d at 1022. ("[W]e hold . . . [t]hat under § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for *only* charitable purposes, and do not derive *any* 'profit' for themselves or their members . . . ."). (Emphasis supplied.) In view of our determination, *infra,* that respondents are subject to the Commission's jurisdiction under the substantiality test, we need not determine whether jurisdiction might exist under some alternative test.

[6] The district court's opinion also supports the proposition that jurisdiction may attach even though there is no actual distribution of profits to the respondent's members. *National Comm'n on Egg Nutrition, supra,* 1975–1 Trade Cas. (CCH) ¶60, 246 at 65,967.

[7] This authority is well established. *E.g., FTC* v. *Cement Inst.,* 333 U.S. 683, 687 (1948); *Fashion Originator's Guild of America* v. *FTC,* 312 U.S. 457, 461 (1941); *FTC* v. *Pacific States Paper Trade Ass'n,* 273 U.S. 52 (1927).

of their members implicitly recognizes that the degree of pecuniary benefit conferred is the fundamental issue, not whether the benefit is physically distributed. [6]

AMA may have abandoned the contention offered below that for an organization to be subject to the Commission's jurisdiction, profit-seeking must play a dominant role in its activities. *Compare* RAB 25 *with* TROA 101. The Connecticut respondents continue to maintain, however, that a respondent is exempt from prosecution if its activities are substantially educational, scientific, and charitable in nature, *i.e.*, even if its commercial activities predominate. RCAB 8; RNAB 4–5. This latter formulation turns the correct standard on its head, in our view, permitting a corporation to escape liability before the Commission for anticompetitive practices, despite the fact that a major portion of its operations provide a pecuniary benefit to its membership. While commercial activity which is only incidental to the eleemosynary functions of a nonstock corporation may not support a claim of jurisdiction, *Egg Nutrition,* 88 F.T.C. at 178–79; *cf. Community Blood Bank,* 405 F.2d at 1017, an organization which exists in substantial part for the pecuniary benefit of its members surely comes within Section 4.

On a slightly different tack, AMA asserts that the legislative history of the Act reveals a congressional intent not to subject professional societies to Commission jurisdiction. In support of this proposition, it cites a decision construing a provision of the Florida antitrust statute,[8] the absence of professional society testimony on the bills that became the Federal Trade Commission Act, and the fact that the 95th Congress failed to enact legislation which would have given the Commission jurisdiction over all nonprofit corporations. We think respondent makes too much of too little. In essence, AMA would have us infer an exemption from the Act for a particular class of organizations, persons and corporations based upon the absence of specific statutory language or legislative history reflecting a congressional desire to have the Act apply to this class. The incredible sweep of such a position and the extraordinary demands it would place upon the legislature perhaps explain why it is unsupported by any precedent of which we are aware.

With respect to the inaction of the 95th Congress, it is well-settled

[8] In *Feminist Women's Health Center, Inc.* v. *Mohammad,* 586 F.2d 530 (5th Cir. 1978), the court held that the medical profession was not "any person" within the meaning of the Florida antitrust law. In considering it unlikely that the 1915 Florida legislature intended its statute to apply to the medical profession, the court applied state law and, in so doing, relied heavily on a recent state appellate court interpretation to that effect. *Mohammad, supra* at 552–53. However, the court reversed a decision granting summary judgment to defendants on a Sherman Act count, following the holding of *Goldfarb* that the learned professions are not exempt from the Sherman Act.

that "the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one."[9] The peril is particularly acute when the subject of congressional inaction is broader in scope than the point [7] for which it is cited. As noted by AMA, the legislation before the 95th Congress would have amended Section 4 to remove the nonprofit exemption altogether, exposing true charitable organizations to the jurisdiction of the Commission. Even assuming that the 95th Congress had some special insight into the intent of a Congress which preceded it by more than sixty years, it is impossible to fathom with any confidence the significance for this case of congressional inaction on the specific amendment recently considered.[10]

We find no reason to differ with the ALJ's conclusion that respondents are engaged substantially in activities which confer a pecuniary benefit upon their members. AMA's own statements belie any suggestion that such activities are only incidental to eleemosynary functions. One of the purposes for which AMA was founded in 1847 was to promote "the usefulness, honor and interest of the medical profession. . . ."[11] The AMA's articles of incorporation, as amended in 1902, stated that one of the objects of the Association was "safeguarding the *material* interests of the medical profession. . . ." (CX 1355–H) (emphasis added). Additionally, the proceedings of AMA's House of Delegates in 1975 indicate that the association continues to exist as "an organization of and for the medical profession." (CX 1042J) [8]

Promotional literature and other material sent by AMA to its members sound the recurring theme that the Association is substantially engaged in protecting the rights and fostering the interests of American doctors. (CX 1532B, 1224, 1528, 1545D, 232D, 2630) For

[9] *United States* v. *Price*, 361 U.S. 304, 313 (1960); *see also United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *United Mine Workers*, 330 U.S. 258, 281–82 (1947).

[10] The then Chairman of the Commission, Calvin J. Collier, testifying on behalf of the Commission, supported the amendment on grounds that it would avoid the often time-consuming proof necessitated by the *Community Blood Bank* analysis. Chairman Collier expressed the view that, where anticompetitive or deceptive behavior is involved, there was little reason for identifying "charitable" corporations, since the harm to the public is the same whether the corporation engages in such behavior for profit or for charity. H.R. Rep. No. 95–339, 95th Cong., 1st Sess. at 54 (1977). The excerpt from the Report of the House Committee on Interstate and Foreign Commerce, quoted by AMA, indicates only that certain minority members of the committee were concerned not that the Commission could properly exercise jurisdiction over an entity found to be "organized to carry on business for its own profit or that of its members," but rather that the proposed amendment would *extend* the Commission's jurisdiction to encompass genuine nonprofit organizations. *Id.* at 120.

[11] Memorandum in Support of Respondent American Medical Association's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction at 12–13 (March 24, 1976) (Quoting from the preamble to AMA's Constitution, adopted in May 1847).

AMA suggests that reliance upon references to the "interests" of physicians overlooks the fact that physicians have policy goals unrelated to profit maximization. While certain of these references are admittedly ambiguous, consideration of the record as a whole leaves little doubt that one of the purposes for which AMA was organized and for which it continues to operate is the economic betterment of its members.

example, a pamphlet sent to AMA's membership in 1974, entitled "What Do You Get For Your Dues?", emphasizes the "remarkable range of tangible benefits and services" provided by AMA membership and describes these benefits and services as "invaluable - personally and professionally." (CX 259C, D) The same pamphlet specifically refers to insurance programs, AMA's retirement plan, physician placement service, publications (such as *Prism,* a socio-economic magazine), authoritative legal information and guidelines, and "professional management information and guides to increase the productivity and profitability of your practice." (CX 259D)[12] The record provides ample substantiation for these promotional statements. (ID 57–59) Practice management programs warrant particular attention because they have been assigned a high priority by AMA and because they present some of the most "tangible benefits" to the association and its members. (CX 1543Z–10) We find it significant that expenditures for this program have more than doubled in the last three years. (ID 57)

According to AMA, the most important of all the tangible benefits and services they offer is the fact that a member has "an effective and influential national spokesman to represent [his/her] views, interests and rights." (CX 259Z–13) The record supports this assertion, describing legislative and lobbying efforts by AMA with respect to price controls on physicians' fees, Medicare, national health insurance, health maintenance organizations (HMOs), the Keogh Act, malpractice insurance legislation, and other issues affecting the financial health of AMA's membership. (See ID 41–49) AMA's intercession on behalf of its members with insurance carriers, such as Blue Shield, government medical care programs, and hospital administrators also provides economic benefits. (ID 50–53) The record of this proceeding documents additional pecuniary benefits in the form of litigation and substantial public relations activity in support of its legislative program. (ID 52–56)

Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged. Respondent's educational, scientific, and public health efforts represent a laudable public service recognized by this agency and the country as a whole. Such activities do not, however, provide immunity from the laws designed to protect the public from anticompetitive practices. [9]

The record also persuades us that the Connecticut respondents

[12] See also CX 245D, reproduced at ID 40. It is noteworthy that AMA's "medicolegal" symposiums have frequently focused on the business practice aspects of the profession. (ID 58)

exist in substantial part for the economic advantage of their members and that the law judge's finding in this regard should be upheld. (*See* ID 73–101, 241–51) Without reiterating all of the various economic activities referenced by the ALJ, we note that both CSMS and NHCMA have promoted the economic interests of their members through lobbying and legislative efforts, through sponsorship of insurance plans such as the Professional Liability Insurance Program, and through relationships with third-party payers. Moreover, both of these respondents have played key roles in the formation of "Foundations for Medical Care," an alternative to HMO's operating on a prepaid basis with fee-for-service physicians.[13]

Record evidence concerning the CSMS *Relative Value Guide ("RVG")* provides added support to the ALJ's finding. The *RVG* provides a precise description and identification in coded form of the services rendered by physicians. (CX 1175D) When utilized with a conversion factor, a relative value guide can be used to generate a fee schedule. *Id.* CSMS first adopted the *RVG* in 1965, republished it in 1971, and distributed it to its membership and to third-party payers up until 1977. (I.D. 85–86) CSMS recommended no specific conversion factors, but did advise its members to check with other physicians in the community to derive an "appropriate" conversion factor. (CX 1171A) Although there is some evidence that third-party payers in Connecticut used their own or different relative value scales and that CSMS advised its members to use the precise coding approved by the specific third-party payer, the record also shows that the *RVG* was utilized by the NHCMA Peer Review Committee to decide complaints regarding members' fees and by the New Haven County Foundation for Medical Care. (CX 1178, 2424C, 2425, 2433) Based on this evidence, we conclude that the *RVG* provided important economic benefits to CSMS and NHCMA members.

The Connecticut respondents object to the law judge's finding that the benefits of AMA membership may be imputed to CSMS and NHCMA and that the benefits of CSMS membership may be imputed to NHCMA. This finding was based on the requirements that a physician must be a member of NHCMA in order to join CSMS and must be a member of both NHCMA and CSMS in order to join AMA. Clearly, little weight should be given to the fact that NHCMA was formed several years prior to CSMS or that both

[13] Respondents argue that the primary purpose of each of these functions is to advance societal welfare through better public health. We have already addressed the contention that to fall within the Commission's jurisdiction, an association must exist primarily for the economic benefit of its members. Likewise, it is unnecessary for the Commission to find that the dominant purpose or effect of any particular activity is profit-making so long as the aggregate total of activities providing any pecuniary gain represents a substantial part of a respondent's overall operation.

organizations predate the creation of the AMA. [10] AMA and CSMS provide valuable benefits to their members and membership in CSMS and/or NHCMA is the *sine qua non* of obtaining these benefits. The fact that approximately half of NHCMA's and CSMS' members chose to join the AMA provides some indication that these benefits were more than negligible. Consequently, we believe it proper to take into account the pecuniary advantages provided by the larger associations.

In light of this evidence regarding the economic activities of all three respondents, the Commission finds it difficult to discern the "striking similarities" alleged to exist between the respondents in this docket and the Kansas City Area Hospital Association ("KCAHA"), a respondent in the *Community Blood Bank* case. By contrast to our findings here, KCAHA funds never "inured to the benefit of any of [its] members" and were utilized "exclusively" for educational and charitable purposes. *Community Blood Bank, supra,* 405 F.2d at 1020. Here, there is abundant record evidence that respondents have engaged in activities providing pecuniary benefits to their members. Respondents' membership serves to distinguish them from the hospital association involved in *Community Blood Bank,* providing further evidence that they exist in substantial part for the profit of their members. Of the 43 member hospitals of KCAHA, 21 were incorporated as not-for-profit charitable or religious associations, 12 were instrumentalities of federal, state, or local governments, and only 2 were organized as proprietary corporations. *Community Blood Bank, supra,* 70 F.T.C. at 767, 405 F.2d at 1020 n. 16.

The KCAHA also differs from respondents in that it is exempt from Federal income tax as a charitable organization pursuant to 26 U.S.C. 501(c)(3)(1976), whereas respondents qualify for an exemption under 26 U.S.C. 501(c)(6)(1976).[14] [11] The latter provision exempts "business leagues, chambers of commerce, real estate boards, boards of trade or professional football leagues. . . ."[15] By contrast, the KCAHA and the American Medical Association Education and

[14] Affidavit of John F. Kelly at 2 (April 5, 1976), attached to Complaint Counsel's Memorandum in Opposition to Respondent's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction (April 8, 1976) ("Kelly Affidavit"); CX 1393.

[15] Section 1.501(c)(6)-1 of the Internal Revenue Regulations defines a "business league" as:

> . . . an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. Treas. Reg. §1.501(c)(6)-1 (1958).

Research Foundation, an AMA subsidiary, come within Section 501(c)(3) of the Code, 26 U.S.C. 501(c)(3)(1976).[16] This provision exempts from Federal income tax:

> Corporations, and any community chest, fund, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to children or animals . . . .

Respondents contend that it makes no difference under what provision an organization is tax-exempt, so long as it is not required to pay any tax. We recognize that a respondent's status as either a §501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals. Nevertheless, the tax-exempt status is certainly one factor to be considered. Rulings of the Internal Revenue Service are not binding upon the Commission, *Ohio Christian College,* 80 F.T.C. 815, 848 (1972), but a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded. Here, respondents' inability to qualify under §501(c)(3) simply means that the IRS does not consider them to be organized and operated "exclusively" for charitable goals, a fact that sets them apart from the KCAHA.[17] [12]

AMA and NHCMA also appeal from the ALJ's determination that their ethical restrictions on advertising, solicitation and contract practice provide a substantial economic benefit to their members. In AMA's view, the law judge's finding amounts to the circular contention that a corporation is subject to Commission jurisdiction whenever it engages in anticompetitive behavior.[18] This argument has potential merit only in a case in which the jurisdictional finding is premised solely upon respondent's illegal acts, and in which the illegal activity does not confer a substantial economic benefit upon the respondent's members.[19] We cannot adopt the view that challenged acts and practices which provide some pecuniary benefit to an organization's membership should not be judged against the substan-

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[16] *Kelly Affidavit* at 2.

[17] Of course, failure to qualify as tax exempt under §501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed *supra,* the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

[18] AMA also references its arguments, considered *infra,* that it has not imposed the alleged restrictions and that there is no evidence that these restrictions have affected its members' financial position. NHCMA simply states that the ALJ's finding is a conclusion on the merits and not a proper finding on the jurisdictional issue.

[19] A respondent could also come within Section 4 based on the alleged illegal activity alone if that activity conferred economic benefits upon its members and represented a substantial portion of its overall operations. *Cf. National Comm'n on Egg Nutrition, supra,* 517 F.2d at 488.

tiality criterion along with other activities simply because such acts and practices coincidentally violate Section 5.

Finally, AMA charges that the law judge improperly rejected the budgetary analysis which it offered to quantify the proportion of its activities devoted to the economic benefit of members. At trial, AMA offered the testimony and report of its expert witness, Dr. Frederick Sturdivant, who classified respondents' activities as follows:

(1) Category A - education, scientific, and association activities;[20]
(2) Category B - indirect economic benefit;
(3) Category C - direct economic benefit;
(4) Category D - miscellaneous (RX 743, p. 5)

Dr. Sturdivant then analyzed each of AMA's 318 project request forms from 1977 and, after consulting with appropriate AMA officials where necessary, assigned each project to a specific category. (Tr. 6428, 6459) Dr. Sturdivant's [13] report indicates that AMA allocated 90.6% of its budget to Category A activities,[21] leading him to conclude that AMA "is a professional association engaged overwhelmingly in scientific and educational activities." (RX 743, p. 28) Dr. Sturdivant's analysis indicates that 5.8% of the budget had a direct or indirect economic benefit to members (Categories B and C), and 3.6% belonged in the miscellaneous group (Category D). *Id.*

Dr. Paul Feldstein, complaint counsel's expert witness, criticized the Sturdivant Report generally on grounds that a budgetary approach is unsuitable for examining the economic relationship of an association of health professionals to its members. (CX 2586-C, -D) Dr. Feldstein also found certain specific deficiencies with the Sturdivant Report. The correction of these deficiencies led him to the conclusion that between 35 and 43 percent of AMA's budget provides economic benefit to its members. (CX 2586-D)

The resource allocation decisions of an organization certainly provide one perspective on the purposes of that organization. However, there are analytical problems with such an approach, since a small budget allocation may have a disproportionate benefit

[20] Category A was further subdivided as follows:
1) lay public education;
2) journals and scientific publications;
3) scientific policy;
4) other scientific;
5) data on physicians and health care;
6) medical quality control and education;
7) government interface; and
8) organizational maintenance and operations. (RX 743, p.7)

[21] The percentages set forth in the text reflect our recalculation of Dr. Sturdivant's percentages to take account of the nine projects omitted from his original computations and noted at RX 743, p. 8. Seven of the nine projects not classified by Dr. Sturdivant have been allocated to Category D.