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FEDERAL ELECTION COMMISSION

Washington, DC 20463

September 26, 1996

AGENDA ITEM

For Meeting of: OCT 3 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1996-38

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 3, 1996.

Attachment

DRAFT

1 ADVISORY OPINION 1996-38

2
3 Michael H. Chanin
4 Powell, Goldstein, Frazer & Murphy
5 1001 Pennsylvania Avenue, N.W.
6 Sixth Floor
7 Washington, D.C. 20004

8
9 Dear Mr. Chanin:

10
11 This responds to your letters dated July 18 and August 19, 1996, requesting an
12 advisory opinion on behalf of the American Seniors Housing Association ("ASHA")
13 concerning the application of the Federal Election Campaign Act of 1971, as amended
14 ("the Act"), and Commission regulations to ASHA's relationship to a political committee
15 formed by its members and the affiliation of that committee with another political
16 committee.

17 *Factual Background*

18 ASHA is an unincorporated association of businesses involved in the
19 development, construction, financing, and management of multifamily housing for senior
20 citizens. ASHA members include sole proprietorships, partnerships, joint ventures, and
21 corporations, as well as individuals employed by such business entities. ASHA's goal "is
22 to improve the financial, legislative and regulatory environment that affects the ability of
23 ASHA members to provide quality housing to the nation's senior citizens." To achieve
24 that end, and in view of the inability of an unincorporated association to form a separate
25 segregated fund ("SSF"), individual members of ASHA's Executive Board plan to form a
26 political committee, tentatively named the Seniors Housing Political Action Committee
27 ("Seniors Housing PAC") to support Federal candidates.

28 You state that ASHA was originally constituted as the Seniors Housing
29 Committee of the National Multi Housing Council ("NMHC"). NMHC is an
30 incorporated trade association representing the interests of the multifamily housing
31 industry, and NMHC members are involved in all aspects of the development and
32 operation of rental housing. The NMHC established an SSF, NMHC PAC, which filed a
33 statement of organization with the Commission on July 7, 1980.

1 For the first several years of its existence, the Seniors Housing Committee
2 "functioned as any other committee of the NMHC, seeking to achieve the broad goals
3 established by the NMHC Board of Directors." Due to the perception that the seniors
4 housing community had specialized needs, the NMHC Board and the Executive Board of
5 the Seniors Housing Committee agreed in June 1992 "to reconstitute ASHA as a separate
6 organization affiliated with the NMHC."¹ You assert that the two organizations are
7 governed by separate boards and pursue separate legislative and regulatory agendas.

8 Although ASHA has no by-laws, you note a number of relevant rules and
9 circumstances. The members of ASHA are required to be members of NMHC. The
10 members pay annual dues to the NMHC, which uses the funds to support the activities of
11 both organizations. There is no requirement that members of the NMHC Board also sit on
12 the ASHA Executive Board, but, from time to time, individuals have served on both

13 Boards simultaneously. Seven of the 110 members of the NMHC Board serve on the 25-
14 member ASHA Board. The Executive Director of ASHA (ASHA's only full-time staff
15 member) is an officer of NMHC.²

16 The members of the ASHA Executive Board who are interested in forming a
17 political committee intend to pay the initial costs of organizing the Seniors Housing PAC
18 from their personal funds. Thereafter, all of the PAC's operational expenses will be paid
19 solely from contributions received by the PAC. You state that neither ASHA nor NMHC
20 will provide any direct or indirect financial support for the establishment, administration,
21 or operation of the Seniors Housing PAC.

22 You assert that the organizational structure of the Seniors Housing PAC will be
23 designed to ensure that the committee is "operationally independent" of both ASHA and
24 NMHC. The Seniors Housing PAC by-laws will provide that the PAC Board of
25 Directors (which will decide which candidates receive PAC assistance) will be elected by
26 the contributors to the PAC, regardless of whether they are members of ASHA or

¹ According to the Minutes of ASHA's June 23, 1992, ASHA's name change was approved by NMHC's Board of Directors. In addition, the minutes state that ASHA's "letterhead will maintain its ongoing relationship as part of the National Multi Housing Council."

² According to *Washington Representatives - 1996*, ASHA's Executive Director, David S. Schless, is also the Vice President of Seniors Housing at NMHC.

1 NMHC. The by-laws will not require that members of the PAC Board be members of
2 either the ASHA or NMHC Boards. For administrative convenience, the PAC organizers
3 intend to appoint ASHA's Executive Director as committee treasurer. Accordingly, the
4 PAC would share office space with NMHC. With a view toward preventing the use of
5 NMHC's facilities from constituting impermissible financial support for a nonconnected
6 political committee, the PAC will reimburse the NMHC for the actual cost of all
7 administrative expenses, including rent, photocopying, and telephone charges.³

8 *Questions Presented*

9 You inquire as to the relationship of the Seniors Housing PAC to ASHA and
10 NMHC and to the NMHC PAC. Specifically, you ask whether either ASHA or NMHC
11 would be considered to be a connected organization of the Seniors Housing PAC. You
12 also posit the assumption that the Seniors Housing PAC and the NMHC PAC are
13 affiliated, and ask whether, as a result of this relationship, solicitations by the Seniors
14 Housing PAC for contributions will be limited by the restrictions of 2 U.S.C.
15 §441b(b)(4).

16 You maintain that the solicitable class for contributions to the Seniors Housing
17 PAC should not be limited. In support of your position, you argue that your situation
18 differs from previous advisory opinions affiliating SSFs with non-connected committees
19 that have restricted the solicitable class for contributions to the non-connected
20 committees. You explain that when the Commission has addressed the affiliation of a
21 corporate SSF with a committee sponsored by members of a partnership, the parent
22 corporation "legally and operationally control[ed] the partnership and the partnership in
23 effect control[ed] the committee." You state that the NMHC does not exercise
24 operational control over ASHA.

25 ASHA's directors set ASHA's policies separate and apart from the
26 NMHC. Although members of ASHA must be members of the NMHC,
27 members of ASHA individually choose to be members. Although the
28 NMHC provides staff support, office space and administration for ASHA,

³ For example, rental costs will be based on an allocation method whereby the amount of time that the space is devoted to Seniors Housing PAC activities will be compared to the total amount of time the space is used for all business and political activities. Telephone charges will be based on the actual cost of the PAC's long distance charges plus a time-based portion of the base monthly charge.

1 these costs are paid from the total budget of the NMHC which includes the
2 dues of ASHA members. However, the provision of this support and
3 overlapping membership do not grant the NMHC control over ASHA or
4 its policies and activities. The assent of NMHC is not required for major
5 decisions of ASHA.

6
7 You also assert that the decisions of the Senior Housing PAC, whose Board will
8 be elected by the PAC contributors, "will be completely independent of the NMHC and
9 ASHA," and that neither organization will pay the PAC's administrative costs.

10 If the Commission determines that the Seniors Housing PAC will be subject to the
11 solicitation rules applicable to NMHC PAC, you ask whether the Seniors Housing PAC
12 will be able to seek solicitation permission from all corporate members of NMHC and
13 ASHA that have not granted permission to NMHC or to any other incorporated trade
14 association. You also ask whether payment by NMHC of the Senior Housing PAC's
15 costs for administration and solicitation would be impermissible contributions.

16 *Legal Analysis*

17 The Act and Commission regulations provide that a corporation, including an
18 incorporated trade association, may make payments for the establishment or
19 administration of, or the solicitation of contributions to, an SSF to be utilized for political
20 purposes by that organization without such payments resulting in a contribution to that
21 fund. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). An organization such as an
22 incorporated trade association, which is not itself a political committee, but which
23 directly or indirectly establishes, administers, or financially supports a political
24 committee is a "connected organization" of that committee. 2 U.S.C. §431(7); 11 CFR
25 100.6(a). The connected organization and its SSF are subject to restrictions as to the
26 category of persons who may be solicited for contributions to the committee. 2 U.S.C.
27 §441b(b)(4)(A) and (D); 11 CFR 114.5(g)(1) and 114.8(c). Specifically, an incorporated
28 trade association may solicit its executive and administrative personnel, the families of
29 such personnel, and its unincorporated members. 11 CFR 114.7(a). In addition, it may
30 solicit the stockholders and executive and administrative personnel, and the families of
31 such stockholders and personnel, of the member corporations that separately and

1 specifically approve the solicitations and that have not approved a solicitation by any
2 other trade association for the same calendar year. 11 CFR 114.8(c).

3 The Act and Commission regulations "do not prescribe qualifications on the
4 individuals who may establish, organize, and direct a non-connected political committee;
5 nor do they necessarily prohibit individuals who have some association with a
6 corporation, labor organization, or trade association from such activity." Advisory
7 Opinion 1984-12. The Commission has permitted the formation of a non-connected
8 political committee that is organized by individuals associated with one entity and that
9 receives and pays for services furnished by that entity, or by the same company that
10 services that entity. Advisory Opinions 1991-37 and 1984-12. See also Advisory
11 Opinion 1982-63. Even if Seniors Housing PAC is considered to be a non-connected
12 committee, however, the legal framework for solicitations by non-connected committees
13 changes when the committee is affiliated with an SSF under 11 CFR 100.5(g)(2) and
14 110.3(a). Normally, non-connected committees are not limited in the categories of
15 persons who may be solicited for contributions, other than those persons described in 2
16 U.S.C. §§ 441b(a), 441c, and 441e. As you indicate, the Commission has determined that
17 a non-connected PAC sponsored by a partnership was affiliated with the SSF of a related
18 corporation. Advisory Opinions 1992-17 and 1979-77. The Commission has also made
19 clear, however, that, even though partnership PACs do not, by themselves, carry the
20 solicitation restrictions applicable to SSFs, the restrictions apply to the PAC of a
21 partnership that is an affiliate of a corporation with an SSF. Advisory Opinions 1992-17
22 and 1989-8. Thus, contributions to the partnership PAC could be solicited only from
23 the shareholders or owners and the executive and administrative personnel of the
24 corporation or the partnership (and their families). 11 CFR 114.5(g)(1).

25 The only ways for the Seniors Housing PAC, as a non-connected committee, to
26 avoid the solicitation restrictions would be if NMHC or ASHA had no sponsoring
27 relationship with the Seniors Housing PAC, or if ASHA were not affiliated with NMHC.

28 With respect to the first way, the Commission notes that the Seniors Housing
29 PAC will be formed by ASHA personnel to achieve ASHA's legislative and regulatory

1 goals. Even if ASHA is not a connected organization, it would be no less a sponsor of
2 the Seniors Housing PAC than is a partnership with a related PAC.

3 The Act and Commission regulations provide for the affiliation of committees
4 established, financed, maintained, or controlled by the same corporation, labor
5 organization, person, or group of persons, including any parent, subsidiary, branch,
6 department, or local unit thereof. 2 U.S.C §441a(a)(5); 11 CFR 100.5(g)(2) and
7 110.3(a)(1)(ii). In making this determination, the Commission may examine the
8 relationship between organizations that sponsor committees, between the committees
9 themselves, or between one sponsoring organization and a committee established by
10 another organization. 11 CFR 100.5(g)(4)(i) and 110.3(a)(3)(i). Your request correctly
11 assumes, based on the relationship between and ASHA and NMHC, that NMHC PAC
12 and the Seniors Housing PAC will be affiliated committees.⁴ If two entities are affiliated
13 under the Act, it makes no difference whether the affiliation results from varying degrees
14 or types of relationship; for example, 60 percent control of one entity by another, or
15 maintenance of one entity by another, does not result in any different or lesser form of
16 affiliation than would 90 percent control. Solicitations for contributions to the Seniors
17 Housing PAC will therefore be limited to the executive and administrative personnel (and
18 their families) of NMHC and ASHA, the unincorporated members of NMHC (all of
19 whom are also members of ASHA), and the executive and administrative personnel and
20 shareholders (and their families) of those incorporated NMHC members that give
21 separate and specific solicitation approval, as set out in 11 CFR 114.8(c).⁵

⁴ Commission regulations provide for an examination of various factors, found at 11 CFR 110.3(a)(3)(ii)(A)-(J), in the context of the overall relationship between committees or sponsoring organizations to determine whether organizations and, hence, their committees are affiliated. 11 CFR 110.3(a)(3)(ii). Pertinent to these factors are that all members of ASHA are required to be members of NMHC; ASHA's activities are funded by NMHC from the annual dues paid to the latter organization; ASHA itself was founded by the NMHC Board and persons associated with NMHC; and there are common significant personnel (as evidenced by the partial Board overlap and the fact that an NMHC officer is Executive Director of ASHA and the prospective treasurer the Seniors Housing PAC). The foregoing facts indicate that ASHA was established by NMHC, and continues to be financed and maintained by NMHC and the persons associated with NMHC. See 11 CFR 110.3(a)(3)(ii)(D), (E), (G), (H), and (I).

⁵ The Commission does not reach any conclusions as to what individuals or organizations qualify as members of NMHC. According to the NMHC bylaws submitted by you, there are two categories of members, Class I and Class II. Class II members are "[a]ssociate non-voting members." They pay dues to NMHC but do not have voting rights with respect to the selection of the Board of Directors. Class I membership consists of those Class II members who are "duly elected" to the Board of Directors. NMHC

1 The affiliation of NMHC PAC with the Seniors Housing PAC is relevant to your
2 question as to whether the Seniors Housing PAC will be able to seek solicitation
3 permission from all corporate members of NMHC and ASHA that have not granted
4 permission to NMHC or to any other incorporated trade association. As a result of the
5 affiliation, any permission granted for solicitations of contributions to either of the PACs
6 applies to the other PAC. Advisory Opinion 1995-12. Therefore, NMHC corporate
7 members, regardless of whether they are also members of ASHA, who have not given
8 any other solicitation permission for this calendar year, may give permission for the
9 solicitation of contributions to the Seniors Housing PAC. However, by doing so, they
10 will also foreclose the grant of permission for solicitation of contributions by any other
11 trade association SSF except NMHC PAC. In addition, if a corporate member of NMHC
12 has given contribution solicitation approval to NMHC, that approval will also allow the
13 solicitation of the qualified personnel of that corporation to Seniors Housing PAC.⁶

14 With respect to question as to NMHC's payment of the administration and
15 solicitation costs of the Seniors Housing PAC, the Commission notes the ability of
16 incorporated entities to pay such costs for the political committees of affiliated entities.
17 See Advisory Opinions 1996-26, 1995-12, and 1983-19. Most relevant to this situation is
18 the Commission's approval of payments of such costs by corporations for the PAC of an

Bylaws, Section 3.01. The Board is self-perpetuating, i.e., it is elected by the Class I members. Section 4.01.

Although the Class I members would clearly satisfy the definition of member as set out at 11 CFR 114.1(e)(2)(ii), it does not appear that Class II members would satisfy that definition, nor is there any other information to indicate that they would satisfy other definitions of "member" under 11 CFR 114.1(e). The Commission notes, however, that the U.S. Court of Appeals for the D.C. Circuit has determined that the regulations defining membership promulgated in 1993 are too restrictive to accord with the membership standard set out by the Supreme Court in *Federal Election Commission v. National Right to Work Committee* ("NRWC"), 459 U.S. 197 (1982). *Chamber of Commerce of the United States v. Federal Election Commission*, 69 F.3d 600 (D.C. Cir. 1995), on denial of petition for rehearing, 76 F.3d 1234 (D.C. Cir. 1996). In pertinent part, the Court in NRWC stated that "some relatively enduring and independently significant financial or organizational attachment is required." *Chamber of Commerce*, 69 F.3d, at 605, citing NRWC, 459 U.S., at 204. The Commission assumes that contributions will be solicited only from those NMHC members, or from the qualified personnel of corporate members of NMHC, that satisfy the NRWC standard. See Advisory Opinion 1996-21.

⁶ See 11 CFR 114.8(d)(5) for limitations by a member corporation on the solicitation approval it grants to an incorporated trade association. See also 11 CFR 114.8(f) prohibiting the solicitation of the qualified personnel of an incorporated member's subsidiary corporation, unless that subsidiary is a member of the trade association.

1 affiliated partnership that is jointly owned by the corporations. Advisory Opinion 1992-
2 17. In view of the affiliated relationship of NMHC and ASHA, the use by NMHC of its
3 corporate funds to pay for the exempt costs would be permitted under 2 U.S.C. §441b.
4 Finally, the Commission notes that, when the Seniors Housing PAC files its
5 statement of organization, it should identify NMHC PAC as an affiliated committee. 2
6 U.S.C. §433(b)(2); 11 CFR 102.2(a)(ii) and (b)(1). In addition, in the event that NMHC
7 pays for the administration and solicitation costs of Seniors Housing PAC (either directly
8 or through ASHA), the PAC must amend its statement of organization to identify NMHC
9 as a connected organization. 2 U.S.C. §433(b)(2); 11 CFR 102.2(a)(ii) and (b)(1) and (2);
10 Advisory Opinion 1992-17.
11 This response constitutes an advisory opinion concerning the application of the
12 Act, or regulations prescribed by the Commission, to the specific transaction or activity
13 set forth in your request. See 2 U.S.C. §437f.

14 Sincerely,

15
16 **Lee Ann Elliott**
17 **Chairman**

18
19 **Enclosures (AOs 1996-26, 1996-21, 1995-12, 1992-17, 1991-37, 1989-8, 1984-12,**
20 **1983-19, 1982-63, and 1979-77)**
21