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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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December 6, 2000

MEMORANDUM

AGENDA ITEM

For Meeting of: 12-14-00

TO: The Commission

THROUGH: James A. Pehrson *JAP*
Staff Director

FROM: Lawrence M. Noble *LMN (acs)*
General Counsel

N. Bradley Litchfield *NBL (acs)*
Associate General Counsel

Michael G. Marinelli *gmm*
Staff Attorney

SUBJECT: Draft AO 2000-28

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 14, 2000.

Attachment

1
2 ADVISORY OPINION 2000-28

3
4 Cheryl M. Cronin
5 Holland & Knight LLP.
6 One Beacon Street
7 Boston, MA 02108

DRAFT

8
9 Dear Ms. Cronin:

10
11 This refers to your letters dated November 6, 2000 (received at the Commission
12 on November 20) and September 20, concerning the application of the Federal Election
13 Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the
14 proposed termination of the former affiliation relationship between American Seniors
15 Housing Association ("ASHA") and the National Multi Housing Council ("NMHC"), and
16 the related ending of affiliated status for their respective separate segregated funds or
17 PACs.

18 **FACTS**

19 In Advisory Opinion 1996-38, the Commission analyzed the application of the
20 Act to ASHA, which at that time was an unincorporated association of businesses
21 involved in the development, construction, financing and management of multifamily
22 housing for senior citizens. In 1996, ASHA had a relationship with NMHC, an
23 incorporated trade association representing the interests of the multifamily housing
24 industry. You state that in the 1996 opinion, the Commission noted that the personnel of
25 ASHA could establish a PAC, to be called the Seniors Housing PAC ("ASHA PAC").¹
26 The Commission found that because of the relationship between ASHA and NMHC,

¹ Reports filed with the Commission indicate that ASHA PAC and NMHC PAC are registered as affiliated multi-candidate committees with NMHC as their connected organization.

1 ASHA PAC would be "affiliated" with NMHC's PAC. Because NMHC would possibly
2 pay for the administrative and solicitation costs of ASHA PAC, NMHC would be
3 connected to the ASHA PAC.

4 You explain that this former situation will change significantly. Over the past
5 several months, NMHC and ASHA engaged in substantial discussions regarding the clear
6 and express separation of these two entities. Those discussions have resulted in formal
7 and legal steps being taken which will result, as of December 31, 2000, in these two
8 organizations functioning as separate entities.

9 On August 7, 2000, ASHA received a Certificate of Incorporation from the —
10 Department of Consumer and Regulatory Affairs of the District of Columbia (included
11 with the request) with the corporate name, American Seniors Housing Association, Inc.
12 The Articles of Incorporation for ASHA provide that it is a 501(c)(6) nonprofit
13 corporation under the Internal Revenue Code. Its purposes are, among others, to serve as
14 a forum for executives in the seniors housing industry, to study issues of concern to that
15 industry and to engage in advocacy those issues before governmental agencies and other
16 organizations. ASHA, Inc., you state, is currently completing an application for tax
17 exempt status under 501(c)(6), which will be filed shortly with the IRS. You affirm that
18 ASHA, Inc. will function as a trade association which will include corporate members.²

19 ASHA, Inc., and NMHC have also entered into a formal "Separation Agreement"
20 (in which ASHA, Inc. is referred to as "New ASHA") that sets forth the terms and
21 conditions related to severing the organizational, operational and formal ties between

² You state that 75% of ASHA's members are corporations.

1 NMHC and New ASHA. You quote the agreement as stating that as of December 31,
2 2000, NMHC and New ASHA "shall be separate and independent legal entities. The
3 parties as of such time, shall not be deemed agents of the other and are not authorized to
4 make any representation, contract, or commitment on behalf of the other." Separation
5 Agreement, section 10.1. To reflect the separation, the Board of Directors of New ASHA
6 is comprised of approximately 50 individuals, the vast majority of whom have no
7 relationship whatsoever with NMHC.³

8 Once this agreement takes effect, you assert that a review of various disaffiliation
9 factors and their application to New ASHA and NMHC justifies the conclusion that the
10 two organizations are no longer affiliated, and therefore that their PAC's are no longer
11 affiliated. You state that NMHC will no longer have the right to participate in the
12 governance of New ASHA. NMHC will play no role in the hiring, appointing or
13 demoting of the officers of New ASHA. You state that subsequent to December 31,
14 2000, no officer or staff member of New ASHA will have continuing ties to NMHC nor
15 will hold any position with NMHC. You concede that while there may be some
16 overlapping membership, you categorize this as minimal.⁴ The Separation Agreement

³ You indicate that of the 50 board members of ASHA it is anticipated that 10 to 12 will represent companies or entities that are also members of NMHC. You explain, however, that it is highly unlikely (due to the different professional perspectives of ASHA and NMHC) that the same individual will serve on both the boards of ASHA and NMHC.

⁴ You anticipate that approximately 14% of ASHA's membership, or 35 companies, may also be members of NMHC. Since NMHC has a membership of approximately 750 companies, that overlap, you explain, represents less than 5% of the NMHC membership.

1 also contains specific terms regarding the separation of the ASHA PAC and NMHC PAC,
2 including the disposition of the funds held by both PACs.⁵

3 You request that the Commission determine that, under the facts set forth above,
4 New ASHA and NMHC are "not connected organizations," that ASHA PAC and NMHC
5 PAC are no longer affiliated, and that ASHA PAC is not connected to NMHC. With this
6 conclusion, you propose that both PACs amend their Statements of Organization,
7 accordingly. While ASHA PAC could not, as the Commission noted in Advisory
8 Opinion 1996-38, be a separate segregated fund of ASHA, since ASHA was an
9 unincorporated association, you propose that it would now be a separate segregated fund
10 of New ASHA. New ASHA would pay the administration and solicitation costs for
11 ASHA PAC. Solicitations for contributions to the ASHA PAC would now be limited to
12 the executive and administrative personnel of New ASHA (and their families). In
13 addition, you understand that permission granted to NMHC PAC for solicitations of
14 contributions from the qualified personnel of corporations that are members of both
15 organizations would not extend to New ASHA.⁶

⁵ Section 10.7 of the Separation Agreement provides :

As of the Effective Time [of the agreement December 31, 2000], the NMHC political action committee ("NMHC PAC"), a political action committee formed by NMHC to support political candidates who further the interests of multi family housing, and the Seniors Housing Political Action Committee [ASHA PAC] a political action committee formed by ASHA to support political candidates who further the interests of seniors housing, shall be deemed as separate and unaffiliated political action committees. As a result of the separation, NEW ASHA shall have ownership and control of and receive all unexpended funds in the [ASHA PAC], and shall expeditiously take all necessary action to, and assume all costs associated with, formally and legally separating the [ASHA PAC] from the NMHC PAC, including obtaining an advisory opinion from the Federal Election Commission to the effect that [ASHA PAC] and NMHC PAC are no longer deemed affiliated. NEW ASHA will provide copies of the advisory opinion and copies of all formal correspondence with the Federal Election Commission relating to the separation of the NMHC PAC and the [ASHA PAC]. In lieu of obtaining an advisory opinion from the Federal Election Commission, NEW ASHA may elect to terminate the [ASHA PAC] after notice to NMHC of such election.

⁶ Besides the Separation Agreement, your request includes copies of ASHA's Articles of Incorporation and the License Agreement, Promissory Note and Security Agreement between ASHA and NMHC.

1 ACT AND COMMISSION REGULATIONS

2
3 The Act and Commission regulations provide that a corporation, including an
4 incorporated trade association, may make payments for the establishment or
5 administration of, or the solicitation of contributions to, an SSF to be utilized for political
6 purposes by that organization without such payments resulting in a contribution to that
7 fund. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). An organization such as an
8 incorporated trade association or membership organization which is not itself a political
9 committee, but which directly or indirectly establishes, administers, or financially
10 supports a political committee, is a "connected organization" of that committee. 2 U.S.C.
11 §431(7); 11 CFR 100.6(a). The connected organization and its SSF are subject to
12 restrictions as to the category of persons who may be solicited for contributions to the
13 committee. 2 U.S.C. §441b(b)(4)(A) and (D); 11 CFR 114.5(g)(1) and 114.8(c).
14 Specifically, an incorporated trade association may solicit its executive and administrative
15 personnel, the families of such personnel, and its unincorporated members. 11 CFR
16 114.7(a). In addition, it may solicit the stockholders and executive and administrative
17 personnel, and the families of such stockholders and personnel, of the member
18 corporations that separately and specifically approve the solicitations and that have not
19 approved a solicitation by any other trade association for the same calendar year. 11 CFR
20 114.8(c).

21 The Act and Commission regulations provide that committees established by the
22 same corporation, person, or group of persons, including any parent, subsidiary, branch,
23 division, department, or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR
24 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by affiliated committees shall

1 be considered to have been made to or by a single committee and thus such committees
2 share contribution limits. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1), and
3 110.3(a)(1)(ii). In addition, a corporation may solicit contributions to its separate
4 segregated fund ("SSF"), from the restricted class (i.e., executive and administrative
5 personnel and stockholders, and the families thereof) of its subsidiaries or other affiliates.
6 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.5(g)(1).

7 In the absence of certain automatically affiliated relationships such as a parent
8 corporation and its subsidiary, Commission regulations provide for an examination of
9 various factors in the context of an overall relationship to determine whether one
10 company is an affiliate of another and, hence, whether their respective SSFs are affiliated
11 with each other. 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), 11 CFR 110.3(a)(3)(i) and (ii)(A)-
12 (J).

13 Included in these factors are (A) whether a sponsoring organization owns a
14 controlling interest in the voting stock or securities of another sponsoring organization;
15 (B) whether a sponsoring organization has the authority or ability to direct or participate
16 in the governance of another sponsoring organization through provisions of constitutions,
17 by-laws, contracts or other rules, or through formal or informal practices or procedures;
18 (C) whether a sponsoring organization has the authority or ability to hire, appoint, demote
19 or otherwise control the officers, or other decision-making employees of another
20 sponsoring organization; (D) whether a sponsoring organization has a common or
21 overlapping membership with another sponsoring organization which indicates a formal
22 or ongoing relationship between the organizations; (E) whether a sponsoring organization
23 has common or overlapping officers or employees with another sponsoring organization

1 which indicates a formal or ongoing relationship between the organizations; (F) whether a
2 sponsoring organization has any members, officers, or employees who were members,
3 officers, or employees of another sponsoring organization which indicates a formal or
4 ongoing relationship or the creation of a successor entity; (G) whether a sponsoring
5 organization provides funds or goods in a significant amount or on an ongoing basis to
6 another sponsoring organization; (H) whether a sponsoring organization causes or
7 arranges for funds in a significant amount or on an ongoing basis to be provided to
8 another sponsoring organization; (I) whether a sponsoring organization had an active or
9 significant role in the formation of another sponsoring organization; and (J) whether the
10 committees have similar patterns of contributions which indicates a formal or ongoing
11 relationship between the committees. 11 CFR 110.3(a)(3)(ii)(A), (B), (C), (D), (E), (F),
12 (G), (H), (I), and (J).

13 The list of ten circumstantial factors set out at 11 CFR 110.3(a)(3)(ii) is not an
14 exclusive list, and other factors may be considered. See Advisory Opinions 1999-39 and
15 1995-36.

16 APPLICATION TO REQUEST

17 *Separation of ASHA and NMHC*

18 The relationship between ASHA and NMHC obviously does not fall within the
19
20 generally understood notion of a corporate parent and subsidiary relationship since neither
21 of them has issued any shares of stock or holds any stock or other ownership interest in
22 the other. However, the altered relationship between the two incorporated trade
23 associations, when reviewed on the basis of affiliation factors in Commission regulations
24

1 at sections 100.5 and 110.3, justifies the conclusion that the two entities will no longer be
2 affiliated with each other after December 31, 2000.

3 In Advisory Opinion 1996-38, the Commission based its conclusion of affiliation
4 between ASHA and NMHC on several specific affiliation factors. The Commission
5 noted:

6 Pertinent to these factors are that all members of ASHA are required to be
7 members of NMHC; ASHA's activities are funded by NMHC from the
8 annual dues paid to the latter organization; ASHA itself was founded by
9 the NMHC Board and persons associated with NMHC; and there are
10 common significant personnel (as evidenced by the partial Board overlap
11 and the fact that an NMHC officer is Executive Director of ASHA and the
12 prospective treasurer of the Seniors Housing PAC). The foregoing facts
13 indicate that ASHA was established by NMHC, and continues to be
14 financed and maintained by NMHC and the persons associated with
15 NMHC. See 11 CFR 110.3(a)(3)(ii)(D), (E), (G), (H), and (I).
16

17 However, these factors have now all been significantly modified by the formal
18 Separation Agreement, as well as the other representations made as part of this request.
19 The Commission notes that members of New ASHA are not required to be members of
20 NMHC. Again, according to your representations, the overlap of membership will be
21 minimal, consisting of 14% of New ASHA's total membership and 5% of NMHC's
22 membership. New ASHA's activities will be funded by annual dues paid directly to it,
23 with no part of such dues under the control of NMHC.⁷ The overlap of personnel and
24 controlling individuals between the two entities has also been altered. The Separation
25 Agreement requires that each employee of New ASHA terminate his or her employment

⁷ According to the terms of the Separation Agreement, beginning in April 2000, an increasing proportion of the membership dues paid to ASHA, while it remained part of NMHC, was reserved for ASHA use alone. After December 31, 2000, the date of the formal separation, all dues from memberships in New ASHA will be paid solely to it. Separation Agreement, section 7.5.

1 with NMHC. Separation Agreement, sections 7.3g, and 9.12.⁸ The composition of the
2 board of directors of New ASHA and NMHC indicates that each will be independent of
3 the other. These changes considered together signify that NMHC will no longer control
4 or finance or maintain New ASHA.

5 The Separation Agreement contains additional provisions that support a
6 conclusion of disaffiliation between New ASHA and NMHC. For example, New ASHA
7 is required to use "best efforts" to find new office space separate from NMHC.
8 Separation Agreement, section 7.4.⁹ New ASHA is not liable, following the effective
9 date of the Separation Agreement, for any liability of NMHC. Separation Agreement,
10 section 2.1. New ASHA will also establish a separate website from NMHC which, in
11 turn, will cease to operate its own ASHA website. Separation Agreement, section 10.10.

12 *Continued relationship between ASHA and NMHC*

13 The ties that will exist between New ASHA and NMHC after December 31, 2000
14 are not inconsistent with a conclusion of disaffiliation. After the date of separation,
15 provision is made for continued contacts and financial transactions between New ASHA
16 and NMHC. As part of the terms of separation, NMHC agrees to license to New ASHA
17 certain of its assets that related to the operation of ASHA prior to their separation, such as
18 the name "American Senior Housing Association" and the data base of ASHA Members.

⁸ New ASHA also assumes all responsibility for providing benefits for its employees following a transfer of assets from NMHC to New ASHA, which appear to represent those assets used to fund the benefits of ASHA employees when they still were employed by NMHC. Separation Agreement, section 10.8.

⁹ However, the agreement provides that, should ASHA be unable to procure new office space prior to the effective time of the Separation Agreement, it may continue to share space with NMHC while paying to NMHC the fair market rental for such space. The Commission notes that shared office expenses between two organizations does not militate against a finding of disaffiliation. The important point is that the space is shared through an arms length agreement showing no subsidization of one party by another. See Advisory Opinions 1999-39 and 1996-50.

1 See License Agreement section 1. Ownership of these assets will transfer to New ASHA
2 following its completion of "royalty payments" to NMHC which are scheduled to end on
3 October 15, 2006. License Agreement section 4. In addition, section 3(c) of the License
4 Agreement, requires New ASHA, at its own expense, to provide NMHC with all changes,
5 updates and additions to the ASHA membership database every year until the termination
6 of the License Agreement, scheduled for October 15, 2006. NMHC also agrees to
7 provide New ASHA a one time secured loan of \$200,000 at 6% interest.¹⁰ These
8 transactions, rather than illustrating the continued affiliation of the two organizations,
9 instead can be seen as part of the process to establish the independence and separation of
10 New ASHA from its organizational parent.¹¹ Past advisory opinions in which the
11 Commission confirmed the disaffiliation between entities and their PACs contained
12 similar arrangements. See Advisory Opinions 1996-42 and 1996-23.¹² The Separation
13 Agreement also includes an understanding that both organizations will cooperate with
14 each other on matters when, at each party's "sole discretion," it is in the "best interests"
15 of both organizations to do so. Since this language does not compel cooperation, it does

¹⁰ The arrangement seems to be an arms length transaction. The loan has a term of up to thirty-six months. Separation Agreement, section 4. The agreement is secured by a Promissory note and Pledge and Security Agreement in which ASHA grants a lien to NMHC of all ASHA assets. These assets include the properties described in the License Agreement between the two parties and the membership dues paid to ASHA. Security Agreement, section A.

¹¹ There is also in the case of New ASHA's obligations to provide updates of its memberships, a restriction that these updates may only be used in connection with the accounting and collection of royalty payments provided in the Licensing Agreement. License Agreement, section 3(e).

¹² In both these opinions the separation agreements between the parent corporation and its former subsidiary included arrangements for the division of the employment benefit plan funding, other assets and liabilities and the licensing of trademarks and other intellectual properties.

1 not compromise the independence of either association.¹³ Further, other more tangible
2 forms of cooperation, such as assistance in research and advocacy, requires that the
3 parties "will in good faith negotiate an appropriate and arms-length fee for such
4 activities." See Separation Agreement. Section 10.4

5 Therefore, considering the above situation, the Commission concludes that,
6 following the execution of the Separation Agreement between the parties, American
7 Seniors Housing Association and National Multi Housing Council will no longer be
8 affiliated with each other. Consequently, their SSFs, ASHA PAC and NMHC PAC, will
9 likewise not be affiliated with each other. —

10 *Impact of Disaffiliation*

11 Disaffiliation between the two organizations and their PACs has consequences on
12 the administration and political activity of AHSA PAC. You correctly note that ASHA
13 PAC must amend its Statement of Organization to replace NMHC with New ASHA as its
14 connected organization. It can no longer list NMHC PAC as an affiliated committee.

15 New ASHA will be permitted to maintain ASHA PAC as its separate segregated
16 fund and may pay the administration and solicitation costs for the ASHA PAC.
17 Solicitations for contributions to the ASHA PAC would now be limited to the executive
18 and administrative personnel of New AHSA (and their families).

19 As a trade association, New ASHA may also solicit its noncorporate members and
20 the restricted classes of its corporate members (i.e., the executive and administrative

¹³ With regard to the SSF's maintained by New ASHA and NMHC, from the circumstances presented, the Commission assumes that the PACs will be administered independently of each other, and any similar patterns in the contributions they make will be the result of independent judgment. See 11 CFR 100.5(g)(4)(J) and 110.3(3)(ii)(J).

1 personnel, stockholders and the families of both groups). *See* 11 CFR 114.8(c).
2 However, New ASHA must obtain the written permission of the corporate member in
3 accordance with the requirements of section 114.8. As you recognize in your request,
4 since New ASHA and NMHC will no longer be affiliated, permission granted to NMHC
5 PAC for solicitations of contributions by corporations who are members of both
6 organizations would not extend to ASHA PAC.

7 Also, the prior affiliation between the two organizations and their PACs will have
8 implications regarding the contributions ASHA PAC (and NMHC PAC) may make in the
9 future. The Commission concludes that, after disaffiliation, the two SSFs may not
10 disregard the other's pre-separation contributions for the purpose of complying with the
11 Act's contribution limitations. *See* Advisory Opinions 1997-25 and 1996-42. As
12 affiliated committees, they shared one set of contribution limits. In determining the
13 amounts that each SSF may contribute to the same candidate after the effective date of the
14 Separation Agreement, the committees must add the amounts given for a particular
15 election by each of them before the disaffiliation and attribute that sum to the
16 contribution limit. For example, if, before December 31, NMHC PAC gave \$2,000 to
17 Senate Candidate X for the 2002 primary election, and ASHA PAC gave \$1,000 to X for
18 the same election, it would follow that, after the disaffiliation, the two SSFs may each
19 contribute an additional \$2,000 to X for the same election, pursuant to 2 U.S.C.
20 §441a(a)(2)(A). The result stems from the required attribution of a \$3,000 contribution to
21 each SSF as a consequence of their affiliated status when both contributions were made.¹⁴

¹⁴ The Commission notes that, unlike candidate committees, SSFs have a calendar year limit as to the contributions they receive, rather than limits tied to a particular election. *See* 2 U.S.C. §441a(a)(1)(A) and (C). Since the effective date of separation takes place at the end of 2000, on January 1, 2001, each PAC

1 However, contributions by each SSF to the same candidate after their disaffiliation would
2 only be attributed to the SSF making the contribution.¹⁵

3 This response constitutes an advisory opinion concerning the application of the
4 Act, or regulations prescribed by the Commission, to the specific transaction or activity
5 set forth in your request. *See* 2 U.S.C. §437f.

6 Sincerely,

7
8 Darryl R. Wold
9 Chairman

10
11 Enclosures (AOs 1999-39, 1997-25, 1996-50, 1996-42, 1996-38, 1996-23,
12 and 1995-36).
13

would have new limits as to the amount of contributions they may receive. Therefore, the need for aggregation of contributions to the PACs does not arise with respect to those made after December 31, 2000. The Commission also notes that, as indicated in prior opinions, ASHA PAC will maintain its multicandidate committee status following its disaffiliation from NMHC PAC. *See* Advisory Opinion 1997-25.

¹⁵ You have not indicated whether NMHC maintained a payroll deduction program for executive employees of ASHA for contributions to ASHA PAC. Several opinions have examined the impact disaffiliation will have on such programs. *See* Advisory Opinions 1997-25 and 1996-42.