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MEMORANDUM

TO: The Commission
FROM: Caroline Goodson
DATE: 06/26/2003
SUBJECT: AO 2003-05

AGENDA ITEM
For Meeting of: 6-26-03
SUBMITTED LATE

Chair Weintraub has requested that the attached document be added to today's agenda.

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7 **ADVISORY OPINION 2003-5**

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9 **E. Mark Braden, Esq.**

10 **William H. Schweitzer, Esq.**

11 **Baker & Hostettler, LLP**

12 **Washington Square, Suite 1100**

13 **1050 Connecticut Avenue, N.W.**

14 **Washington, DC 20036-5304**

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16

17 **Dear Messrs. Braden and Schweitzer:**

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This responds to your letters dated January 17, February 27, and April 23, 2003

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requesting an advisory opinion on behalf of the National Association of Home Builders of

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the United States ("NAHB"), a non-profit incorporated trade association. Your request

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concerns the application of the Federal Election Campaign Act of 1971, as amended

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("FECA"), the Bipartisan Campaign Reform Act of 2002 ("BCRA") (collectively "the

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Act"), and Commission regulations, to activities of NAHB and its separate segregated

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fund, BUILD-PAC, that entail appearances by Federal officeholders or candidates.

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Background

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You state that NAHB is a Washington-based trade association representing more

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than 205,000 members. It is a Nevada non-profit corporation, organized as a trade

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association under the Internal Revenue Code, 26 U.S.C. § 501(c)(6). NAHB is exempt

1 from taxation under section 501(a) of the Internal Revenue Code of 1986. You describe
2 NAHB as a membership organization whose bylaws specifically provide for a number of
3 classes of members. You state that NAHB does not make contributions to, or
4 expenditures for, Federal candidates or political committees.

5 NAHB sponsors a separate segregated fund, BUILD-PAC. NAHB created
6 BUILD-PAC to make contributions to, and expenditures on behalf of, Federal candidates.
7 NAHB uses its general treasury funds for the operating and fundraising costs of
8 BUILD-PAC, pursuant to the Act and Commission regulations. BUILD-PAC makes
9 contributions to federal candidates and political committees, and accepts only
10 contributions that are subject to the limits and prohibitions of the Act.

11 You state that NAHB has for a number of years conducted an issue "Voter
12 Mobilization" program. You explain that this program consists of partisan
13 communications to NAHB individual members and their families, and communications to
14 the general public regarding public policy issues in order to encourage an understanding
15 of issues of significance to the home building industry. The program focuses on the
16 importance of individual participation in the American democratic process through
17 registration, voting, and direct communication with candidates and elected officials. This
18 activity is funded from the general operating accounts of NAHB, which do not limit their
19 receipt of funds to monies that are subject to the amount limits and source prohibitions of
20 the Act.

21 NAHB has engaged in the past, and anticipates engaging in the future, in activities
22 described in 2 U.S.C. 431(20) and 11 CFR 100.24 (which defines "Federal election

1 activity”) and 11 CFR 300.65(a)(1) (which references certain Federal election activities).

2 You state that the Federal election activities described in 11 CFR 300.65(c)¹ are not the
3 principal purpose of NAHB.

4 With respect to events held in conjunction with your annual convention, you have
5 stated that the convention consists of two primary components, a business component and
6 a trade show component. The business component consists of business meetings within
7 the NAHB organization such as government affairs, public affairs, membership and
8 budget. Social events are held in conjunction with the business component of the
9 convention. You state that these meetings and social events are attended by NAHB
10 members and their families, and by speakers and limited special guests. The Commission
11 assumes that NAHB members fall within the definition of “member” in 11 CFR
12 114.1(e)(2). Thus, in the situations you describe in your various questions where the
13 audience is limited to NAHB “members” or its “membership,”² the Commission
14 presumes that covered persons would be addressing only NAHB’s restricted class, which
15 includes its members, executive and administrative personnel, and their families, and that
16 any special guests in attendance would be “other guests of the corporations . . . who are
17 being honored or speaking or participating in the event.” as described in 11 CFR
18 114.3(c)(2)(i).

¹ Such Federal election activities include voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled election is held and ends on the date of that election; or voter identification, get-out-the-vote activity, or generic campaign activity, as defined in the Commission’s regulations. See 11 CFR 300.65(c)(1) and (2)(i)-(iii).

² See 11 CFR 114.1(j). In addressing your questions, the Commission understands that the situations described in your advisory opinion request are distinguishable from those in AO 1996-11, where a membership organization intended to invite Federal candidates to appear at its convention, and where the intended audience for the candidate appearances was to include members of the general public, and was not restricted to its members.

1 You then proffer five different scenarios, and ask questions regarding the
2 application of the Act and the Commission's regulations to each one. The scenarios are
3 described and analyzed below.

4 ***Legal analysis and conclusions***

5 The Act has long restricted fundraising by corporations, including incorporated
6 membership organizations such as NAHB, for their separate segregated funds (SSFs).
7 With the passage of BCRA, new restrictions now exist on the roles that Federal
8 candidates and officeholders³ or their agents⁴ (collectively "covered persons") can play in
9 raising funds. *See* 2 U.S.C. 441i(e).⁵ Both sets of restrictions must be examined to
10 properly respond to your request.

11 ~~At the outset, Commission regulations provide that an advisory opinion request~~
12 ~~shall set forth a specific transaction or activity that the requesting person plans to~~
13 ~~undertake or is presently undertaking and intends to undertake in the future; requests of~~
14 ~~third parties do not qualify as advisory opinion requests. 11 CFR 112.1(b). With respect~~
15 ~~to the questions that relate to potential activity of NAHB, your questions clearly qualify~~
16 ~~as advisory opinion requests. With respect to the questions that address the potential~~
17 ~~activities of any covered person, the Commission does not consider your questions to be~~
18 ~~presented by a third party because of the direct impact on the ability of NAHB to structure~~
19 ~~its events so as to secure the appearances of Federal candidates and elected officials.~~

³ Under 2 U.S.C. 431(3) and 11 CFR 100.4, "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress."

⁴ For the definition of "agent," *see* 11 CFR 300.2(b)(3).

⁶ The Act also restricts the activities of any entity "directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more candidates or individuals or holding office," but such

1 ~~Absent this ability, the Commission understands that it is likely that NAHB will be~~
2 ~~unable, or severely restricted, in engaging in its usual activity of inviting such individuals.~~

3 ~~With respect to events held in conjunction with your annual convention, you have~~
4 ~~stated that the convention consists of two primary components, a business component and~~
5 ~~a trade show component. The business component consists of business meetings within~~
6 ~~the NAHB organization such as government affairs, public affairs, membership and~~
7 ~~budget. Social events are held in conjunction with the business component of the~~
8 ~~convention. You state that these meetings and social events are attended by NAHB~~
9 ~~members and their families, and by speakers and limited special guests. The Commission~~
10 ~~assumes that NAHB members fall within the definition of "member" in 11 CFR~~
11 ~~114.1(e)(2).⁶ Thus, in the situations you describe in your various questions where the~~
12 ~~audience is limited to NAHB "members" or its "membership,"⁷ the Commission~~
13 ~~presumes that covered persons would be addressing only NAHB's restricted class, which~~
14 ~~includes its members, executive and administrative personnel, and their families, and that~~
15 ~~any special guests in attendance would be "other guests of the corporations . . . who are~~
16 ~~being honored or speaking or participating in the event," as described in 11 CFR~~
17 ~~114.3(e)(2)(i).~~

18

~~entities do not fit within the description of those you propose to invite, and the phrase does not appear to apply to NAHB itself.~~

~~⁶You do not ask, and this advisory opinion does not address, any issues with respect to determining membership in the National Association of Home Builders of the United States. See 11 CFR 114.1(e).~~

~~⁷See 11 CFR 114.1(j). In addressing your questions, the Commission understands that the situations described in your advisory opinion request are distinguishable from those in AO 1996-11, where a membership organization intended to invite Federal candidates to appear at its convention, and where the intended audience for the candidate appearances was to include members of the general public, and was not restricted to its members.~~

1 ***Question 1. NAHB sponsors a convention, forum or meeting for all NAHB***
2 ***members to discuss national policy issues of importance to the home-building industry.***
3 ***May a covered person attend? If yes, may a covered person be a speaker at such***
4 ***an event, and be listed as a "featured guest" in pre-event invitation materials? May a***
5 ***covered person solicit contributions to BUILD-PAC at the event?***

6
7 **As clarified in your April 23, 2003 letter and a subsequent telephone discussion**
8 **with Commission staff, this question relates to a covered person's attendance and**
9 **participation at events to be attended by NAHB members where the covered person's**
10 **fundraising activity is limited to solicitations of funds for BUILD-PAC only, and not of**
11 **funds for NAHB or for NAHB's "Voter Mobilization" program. ~~This advisory opinion is~~**
12 **~~based on these factors.~~**

13 **A covered person who is either a Federal candidate or a Federal officeholder may be**
14 **listed as a "featured guest" in pre-event invitation materials produced by NAHB and**
15 **distributed to its restricted class, unless those materials constitute a solicitation or**
16 **direction of non-Federal funds by the covered person. See 11 CFR 114.3(a) and**
17 **(c)(1), (2).**

18 **As explained below, the Commission concludes that covered persons may solicit**
19 **NAHB's members for contributions to BUILD-PAC if the solicitations meet the**
20 **requirements of 11 CFR 114.5(a)(3), (a)(4) and (a)(5). Because such solicitations,**
21 **according to your request, would be for contributions that comply with the source**

1 prohibitions, amount limitations and reporting requirements of the Act, these solicitations
2 are permissible under 2 U.S.C. 441i(e)(1).

3 The Act and Commission regulations permit covered persons to attend these
4 NAHB events ~~without restriction~~. See AO 2003-3 (which addressed, *inter alia*, the
5 appearance of a covered person at an event intended to raise funds for a state candidate,
6 and in which the Commission held that “mere attendance at a fundraiser . . . cannot in and
7 of itself give rise to a violation of section 441i(e)(1) or section 300.62. ~~A covered person~~
8 ~~may participate in any activities at such a fundraising event provided the covered person~~
9 ~~does not solicit funds outside the Act's limitations and prohibitions.”).~~

10 Covered persons may also speak at these NAHB events, within the following
11 parameters. If the covered person’s communication includes express advocacy, the
12 communication is subject to the provisions of 11 CFR 104.6 (governing reporting of
13 internal communications by corporations and member organizations). See also the rules
14 on communications to the restricted class at 11 CFR 114.3 and 114.3.

15 Oral as well as written solicitations by covered persons on behalf of separate
16 segregated funds (SSFs) are subject to 11 CFR parts 114 and 300. With certain
17 exceptions not applicable here, Federal candidates and officeholders cannot solicit
18 monies that do not meet the source prohibitions and amount limitations of the Act. See
19 2 U.S.C. 441i(e) and 11 CFR 300.61.⁸ Further, solicitations made to the members of an
20 incorporated membership organization seeking contributions to its SSF must contain
21 certain information. First, the solicitation must inform the persons being solicited of the

⁸ Because BUILD-PAC is a multicandidate political committee, see 2 U.S.C. 441a(a)(4), the limit on individual contributions that it may accept is \$5,000 per calendar year. 2 U.S.C. 441a(a)(1)(C) and (f).

1 political purposes of the fund. 2 USC 441b(b)(3)(B); 11 CFR 114.5(a)(3). Second, those
2 being solicited must be informed of their right to refuse to contribute without any reprisal.
3 2 USC 441b(b)(3)(C); 11 CFR 114.5(a)(4).⁹ Third, the solicitations for BUILD-PAC
4 must comply with the requirements of 11 CFR 114.3(c) and 114.7. Specifically, any
5 solicitation for BUILD-PAC ~~for contributions not directed to the candidate, and made to~~
6 ~~an audience that includes persons outside of NAHB's restricted class, must inform the~~
7 ~~audience that contributions are being sought only from NAHB's restricted class, and that~~
8 ~~contributions from anyone outside of the restricted class will not be accepted. The~~
9 ~~audience may include only a *de minimis* number of persons outside of NAHB's restricted~~
10 ~~class. See AO 1994-21.~~

11 ~~A covered person who is either a Federal candidate or a Federal officeholder may~~
12 ~~be listed as a "featured guest" in pre-event invitation materials produced by NAHB and~~
13 ~~distributed to its restricted class, unless those materials constitute a solicitation or~~
14 ~~direction of non-Federal funds by the covered person. See 11 CFR 114.3(a) and~~
15 ~~(e)(1), (2).~~

16 ~~_____ The Commission concludes that covered persons may solicit NAHB's members~~
17 ~~for contributions to BUILD-PAC if the solicitations meet the requirements of 11 CFR~~
18 ~~114.5(a)(3) and (a)(4). Because such solicitations, according to your request, would be~~
19 ~~for contributions that comply with the source prohibitions, amount limitations and~~

⁹ Commission regulations also require a trade association to obtain permission from its member organizations before that trade association may solicit the personnel of the member organizations for contributions to the trade association's separate segregated fund. See 11 CFR 114.8(e). Your response to the Commission's questions, specifically Article I of NAHB's bylaws, indicates that NAHB's membership is made up of individuals, not organizations. Accordingly, assuming this is correct, the requirements of section 114.8(e) do not apply to NAHB.

1 ~~reporting requirements of the Act, these solicitations are permissible under 2 U.S.C.~~
2 ~~441i(e)(1).~~

3
4 *Question 2. NAHB sponsors a forum or meeting to discuss national policy issues*
5 *of importance to the industry, and invites only representatives of firms or individuals who*
6 *have made donations to the NAHB "Voter Mobilization" effort. May a covered person*
7 *attend the event? If yes, may a covered person speak at the event, and be listed as a*
8 *featured guest in pre-event invitation materials?*

9 ~~You state that prior donations would not necessarily have to be made as a~~
10 ~~condition of receiving an invitation to the event, but you do not rule out this possibility.~~
11 ~~You further state that no Voter Mobilization financial solicitations would occur at such an~~
12 ~~event. You describe the purpose of this forum or meeting as being to discuss policy~~
13 ~~issues of importance to the homebuilding industry. Therefore, the Commission assumes~~
14 ~~that the covered person's participation is not a candidate appearance subject to 11 CFR~~
15 ~~114.4(b)(1) and 114.3(e)(2). See Explanation and Justification for Regulations on~~
16 ~~Corporate and Labor Organization Activity, Express Advocacy and Coordination with~~
17 ~~Candidates, 60 FR 64260, 64266 (December 14, 1995) (where the Commission noted, in~~
18 ~~its explanation and justification for revised 11 CFR 114.3(e)(2), that "these amendments~~
19 ~~do not adversely affect the ability of corporations . . . to invite their restricted class, other~~
20 ~~employees or the general public to attend a speech given by an officeholder or other~~
21 ~~prominent individual who is also a [F]ederal candidate, if the speech is not campaign-~~
22 ~~related and the individual is not appearing in his or her capacity as a candidate for Federal~~

1 | ~~office.”). Thus, the question of whether the invitees/audience for such an event would be~~
2 | ~~limited to NAHB’s restricted class is not at issue here.~~

3 | A covered person may attend an NAHB-sponsored forum or meeting to discuss
4 | national policy issues of importance to the industry, where invitees comprise only persons
5 | who are representatives of firms or individuals that have made donations to the NAHB
6 | “Voter Mobilization” effort.¹⁰ For the reasons stated in response to Question 1, a covered
7 | person may speak at the event. Mere attendance, or speaking, does not constitute
8 | solicitation, and you have stated that solicitations will not occur at the event.

9 | A covered person may also be listed as a “featured guest” in pre-event invitation
10 | materials, provided that the materials do not constitute a solicitation or direction of
11 | ~~Federal or non-Federal funds by the covered person.~~

12 |
13 | *Question 3. NAHB invites the Secretary of Housing and Urban Development to a*
14 | *NAHB membership meeting or reception in the Secretary’s honor for efforts on behalf of*
15 | *housing. May the Secretary attend the event if invitations are provided only to those who*
16 | *have made prior donations to NAHB at a certain level? If so, may the Secretary speak at*
17 | *the reception? If the reception is a ticketed fundraising event for any general account of*
18 | *NAHB or BUILD-PAC, could the Secretary attend and/or speak? Could a Secretary*
19 | *attend and/or speak at a reception if the event was specifically designated as a*
20 | *fundraising event for NAHB’s “Voter Mobilization” program?*

¹⁰ The Commission assumes that the covered person’s participation is not a candidate appearance subject to 11 CFR 114.4(b)(1) and 114.3(c)(2).

1 Under 11 CFR 100.3 and 100.4, the Secretary of Housing and Urban
2 Development is neither a Federal candidate nor a Federal officeholder. Therefore,
3 FECA's and BCRA's provisions regarding participation at events and solicitations only
4 apply if the Secretary is a representative of a Federal candidate for purposes of 11 CFR
5 114.3(c)(2), or an agent of a Federal candidate or officeholder. Nothing in your request
6 suggests that you would be inviting the Secretary of Housing and Urban Development to
7 appear as a representative of a Federal candidate.¹¹ Accordingly, the Secretary would be
8 able to participate in any and all of the events in the manner you describe.

9 The Commission expresses no opinion regarding applicability of the Ethics in
10 Government Act or any departmental ethics regulations to the participation of the

11

¹¹ You also do not suggest that the Secretary of Housing and Urban Development would be an agent of any political party committee or non-Federal candidate, and this advisory opinion does not reach such situations. See 11 CFR 300.2(b).

1 Secretary in these events, because these questions are outside the Commission's
2 jurisdiction.

3

4 *Question 4. NAHB organizes a sporting event for its membership, such as a golf*
5 *event. Does BCRA limit the ability of a covered person to participate in such a sporting*
6 *event? Can a covered person be listed as a featured player? Does the analysis change if*
7 *a sporting event is a fundraiser rather than a social event?*

8 For the reasons stated in response to Question 1, a covered person may participate
9 in a NAHB-sponsored sporting event for its members that is a social event and not a
10 fundraiser. NAHB may produce and distribute materials to its members listing a covered
11 person as a featured player.

12 Pursuant to your June 4, 2003 telephone conversation with Commission staff, the
13 Commission understands that NAHB wishes to use such sporting events to raise funds
14 from its members for either BUILD-PAC or NAHB's Voter Mobilization program, but
15 for no other purpose. Thus, the response below is limited to these two fundraising
16 scenarios.

17 If the fundraiser is for BUILD-PAC, see the response to Question 1. If the
18 fundraiser is for NAHB's Voter Mobilization program, covered persons may also attend.

19 NAHB is organized under section 501(c) of the Internal Revenue Code of 1986,
20 specifically 26 U.S.C. 501(c)(6), and is exempt from taxation under section 501(a) of the
21 Internal Revenue Code of 1986. While NAHB does engage in Federal election activity,
22 such activity is not its principal purpose. A covered person may solicit funds on behalf of

1 any organization that is described in section 501(c) of the Internal Revenue Code of 1986,
2 and that is exempt from taxation under section 501(a) of the Internal Revenue Code of
3 1986, in the following manner.

4 ~~If the organization conducts activities in connection with an election, but the~~
5 ~~organization's principal purpose is other than to conduct election activities, including~~
6 ~~certain voter registration, get out the vote (GOTV) or generic campaign activity (see~~
7 ~~footnote 1) and the solicitation is not to obtain funds for use in connection with an~~
8 ~~election or any such activities, the covered person may make a "general solicitation" of~~
9 ~~funds without regard to source prohibitions or amount limitations. 11 CFR~~
10 ~~300.65(a)(2)(i) and (ii).~~

11 A covered person may also make a "specific solicitation" to obtain funds for the
12 an organization's voter registration, GOTV or generic campaign activity ~~described~~
13 ~~above~~ (see footnote 1), or for an organization whose principal purpose is to conduct such
14 activity, if the solicitation is made only to individuals, and the amount solicited from any
15 individual does not exceed \$20,000 during any calendar year. 11 CFR 300.65(b)(1)
16 and (2).

17 The Commission concludes that solicitations for the Voter Mobilization program
18 would constitute solicitations for voter registration and other activities, some of which
19 will constitute Federal election activity under 2 USC 431(20)(A)(i) and (ii). Accordingly,
20 solicitations for the Voter Mobilization program will constitute "specific solicitations" as
21 covered by 2 USC 441i(e)(4)(B). Thus, a covered person may make these "specific

1 solicitations” to individuals for no more than \$20,000 per individual. 2 U.S.C.
2 441i(e)(4)(B); 11 CFR 300.65.

3

4 *Question 5. Would the Commission’s analysis and opinion change in any of the*
5 *circumstances set forth above if NAHB specifically and expressly requests or directs any*
6 *covered person not to solicit, receive or direct any funds or financial support for its*
7 *“Voter Mobilization” activities in any remarks at any event?*

8 No, the Commission’s analysis would not change. If the event involves
9 solicitations of funds for the Voter Mobilization activities, the restrictions found at
10 11 CFR 300.65(b) must be followed by the participating covered persons.

11 The Commission expresses no opinion as to possible Federal tax ramifications of
12 the activities described in your request because those issues are outside the Commission’s
13 jurisdiction.

14 This response constitutes an advisory opinion concerning the application of FECA
15 and Commission regulations to the specific transaction or activity set forth in your
16 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requester may not rely on that
19 conclusion as support for its proposed activity.

20 The Commission notes that this advisory opinion analyzes FECA, as amended by
21 BCRA, and Commission regulations, including those promulgated to implement the
22 BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-

1 judge panel of the United States District Court for the District of Columbia ruled that a
2 number of BCRA provisions are unconstitutional and issued an order enjoining the
3 enforcement, execution, or other application of those provisions. *McConnell v. FEC*, 251
4 F.Supp.2d 176 (D.D.C. May 2, 2003); *stay granted by* 2003 WL 21146609 (D.D.C. May
5 19, 2003); *probable jurisdiction noted*, No. 02-1674, *et al.* (U.S. June 5, 2003).
6 Subsequently, the District Court stayed its order and injunction. *Id.* The District Court
7 ruling has been appealed to the United States Supreme Court. *Id.* The Commission
8 cautions that the legal analysis in this advisory opinion may be affected by the eventual
9 decision of the Supreme Court.

10

11

Sincerely,

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Ellen L. Weintraub
Chair

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16 Enclosures (AOs 1994-21, 1996-11 and 2003-03)