



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 15, 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1986-23

Mr. Gary D. Lipkin
Assistant General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Suite 1500 - North Lobby
Washington, D.C. 20004

Dear Mr. Lipkin:

This responds to your letter of June 19, 1986, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed marketing plan for a computerized "game" that simulates the term of office and re-election campaign of a freshman member of Congress. After a demonstration of this "game" for Commission staff you supplemented your request, by letter dated July 17, 1986, with documents describing numerous "game" situations, decisions, and consequences. These documents along with your original letter constitute the advisory opinion request.

You state that the National Association of Manufacturers ("NAM") is a nonprofit incorporated trade association whose membership consists of over 13,500 manufacturing corporations. You state that NAM does not have a political action committee and does not endorse, support, or oppose candidates for public office at any level of government in any fashion. A number of NAM member companies do have PACs, however.

You explain that several years ago NAM began to develop a computerized "game" that simulates the term of office of a freshman congressman. The "game" was developed jointly with Claremont College's Rose Institute of State and Local Government. According to your request, those who play the "game" (as many as 64 participants can play) are confronted with activities and decisions much like those encountered by a freshman congressman. These decisions include choosing a staff, selecting committee assignments, and voting in committee and on the floor of the House. The computer responds to each decision with the Washington and home district

reaction. The computer also simulates news media coverage and provides simulated reaction and input from party officials, lobbyists, committee chairmen, and Federal officials. The computer makes time a significant factor in the decision-making process. You state that the "game" ends with the freshman congressman's re-election campaign, the outcome of which is determined by the cumulative effect of the decisions made.

The supplemental materials and the demonstration of the "game" for Commission staff indicate that a variety of election related and campaign financing information is an integral part of the "game" scenarios from the outset. This information includes fictional political party registration figures and election results as well as amounts of campaign expenditures and contributions, including categories of PAC contributions. At the midpoint of the game (turn 6 of a total of 11), the fictional freshman member of Congress is assumed to be a candidate for re-election and is thus given an opportunity to decide whether to conduct campaign fundraising activities in the Congressional district. In subsequent turns until the conclusion of the "game" the member of Congress has to make numerous decisions with respect to using his time for campaign activity or legislative activity or constituent service activity. The decisions made with respect to these activities, as well as the member's votes on pending legislation, have consequences on the success of the re-election campaign from the standpoint of press coverage, possible campaign opposition, and promises of campaign support from different special interest groups. They also have effects on the prospects for campaign assistance from political party leaders and high ranking Congressional and White House personnel. See the documents in the July 17 supplement relating to "game" turns 6 through 11. Questions and scenarios for turns 8 through 11 occur in the election year; as election day nears they increasingly reflect the favorable and adverse campaign consequences of the decisions made.¹

You describe the "game" as nonpartisan and nonideological in that decisions that result in actions favorable to the positions of NAM do not necessarily result in favorable constituent reaction, or in a "win" in the re-election campaign. You note, in this respect, that the program that runs the "game" is not updated to reflect current legislation or the changing goals and priorities of NAM. Rather, the outcome is dependent on a variety of factors, including the composition of the hypothetical congressional district, constituent service, and other variables having no relation to NAM and its policy positions. You add that the "game" is an honest attempt to inform and educate the players regarding the pressures and difficulties faced by any member of Congress, and that NAM has made every effort to make the "game" a nonpartisan, educational experience.

You state that NAM proposes to market the floppy disk software that runs this "game" both to NAM member companies and to non-member companies, and that you anticipate giving NAM members a 15 percent discount from the non-NAM member price. You state that while prices have not been firmly set, the following pricing schedule is an accurate representation of your current planning:

¹ Turns 8 and 9 precede the primary election, and seven of the ten decision scenarios presented in those turns present choices in the explicit context of the election campaign. Similarly, turns 10 and 11 are taken between the primary and general election, and four of the six decision scenarios presented require choices with respect to the election campaign.

First copy-	\$2,600 for non-members \$2,210 for members
Second copy-	\$1,300 for non-members \$1,105 for members
Third and subsequent copies-	\$900 for non-members \$765 for members

You also propose a special rate for educational, charitable, and civic organizations, as well as for congressional offices. You state that with respect to these organizations you have two price structures under consideration. Under one alternative, all of these organizations, including congressional offices, would be charged the third copy NAM member price of \$765. Under the other alternative pricing scheme, educational, charitable, and civic organizations would be charged the third copy member price of \$765, while congressional offices would pay an unspecified amount which would be less than \$765. You note that all of these prices will allow NAM to make a profit on the sale of the "game," and that none are as low as, or below, NAM's costs.

You explain that it is conceivable, though unlikely, that the "game," if purchased by or for a congressional office, could help an incumbent run a better campaign in real life. You express concern about whether the proposed pricing structure would be viewed as making a contribution to a congressional purchaser because of the discount given to congressional offices as compared to, for example, NAM member companies that buy just one copy of the software that runs the "game."

Accordingly, you ask (1) whether the contemplated marketing of this "game" beyond NAM's membership is permissible under the Act, and, if so (2) whether the proposed pricing structure is permissible.

Because of the corporate status of NAM, and the candidate status of "game" purchasers who are members of Congress (or their agents), your questions raise issues concerning application of the Act's prohibition on corporate contributions to candidates for Federal office. The Act prohibits a corporation from making a contribution or expenditure in connection with any Federal election. 2 U.S.C. 441b(a). The term "contribution" is defined to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate [or] campaign committee . . . in connection with any [Federal] election . . ." 2 U.S.C. 441b(b)(2) and 11 C.F.R. 114.1(a)(1). The regulations at 11 C.F.R. 100.7(a)(1)(iii)(A) describing the term "anything of value" state that if goods or services are provided at less than the usual and normal charge, the difference between the usual and normal charge and the sale price would be a contribution from the seller. See Advisory Opinion 1985-28. The term "usual and normal charge" means the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 C.F.R. 100.7(a)(1)(iii)(B).

In light of the facts you have presented, however, the Commission concludes that because the "game's" purpose is to educate and inform players and because the content of the "game"

suggests no attempt to influence Federal elections, the proposed marketing of the "game" to congressional offices at a discount would not be viewed as a prohibited corporate contribution. In arriving at this conclusion, the commission notes that if the content of the "game" were changed in such a way that it conveyed a partisan or electioneering message, a different result might be reached. Similarly, if the "game" were to be provided to some candidates at a lower price than to other candidates, or if NAM refused to sell the "game" to a certain class of candidates (e.g., challengers), a different conclusion might be reached. Assuming the content of the game remains essentially unchanged, and assuming the game is made available to Federal candidates on a non-discriminatory basis, no prohibited corporate contribution would result.

The Commission expresses no opinion as to application of House rules or tax ramifications with respect to your proposed activity since those issues are not within its jurisdiction.

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

Sincerely yours,

(signed)

Joan D. Aikens
Chairman for the
Federal Election Commission

Enclosure (AO 1985-28)