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Washington, DC 20463

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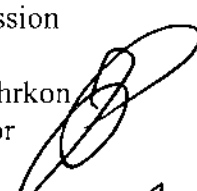
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June 12, 2003


**AGENDA ITEM**  
For Meeting of: 06-19-03


**MEMORANDUM**

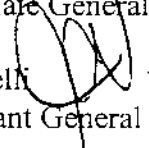
TO: The Commission


THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James A. Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Richard Ewell   
Staff Attorney

Subject: Draft AO 2003-14

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 19, 2003.

Attachment

1 ADVISORY OPINION 2003-14

2  
3 Brett G. Kappel, Esquire  
4 Powell, Goldstein, Frazer & Murphy LLP  
5 1001 Pennsylvania Avenue, NW  
6 Sixth Floor  
7 Washington, D.C. 20004

**DRAFT**

8  
9 Dear Mr. Kappel:

10 This responds to your letter dated April 21, 2003, as supplemented by your electronic  
11 mail message dated May 6, 2003, requesting an advisory opinion on behalf of The Home Depot,  
12 Inc., concerning the application of the Federal Election Campaign Act of 1971, as amended  
13 ("FECA" or "the Act"), and Commission regulations to the distribution of pins to be worn on the  
14 shop aprons of certain members of the restricted class bearing the abbreviated name of Home  
15 Depot's separate segregated fund.

16  
17 ***Background***

18 You state that Home Depot has a "long tradition" of distributing shop aprons and "apron  
19 pins" to its employees and that this distribution of apron pins is a significant part of Home  
20 Depot's corporate culture. You provide examples of apron pins that have been distributed in the  
21 past for a number of different reasons, such as to reflect company values or to commemorate  
22 events in conjunction with company sponsorships.<sup>1</sup> You observe that it is not unusual for any  
23 given employee to display five, ten, fifteen, twenty or even more apron pins on his or her shop  
24 apron.

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<sup>1</sup> Specifically, you cite the distribution of a number of different pins that "reflect the company's values," symbolize various corporate sponsorships, acknowledge employee's years of service and specialized training or expertise in a particular area, or recognize voluntary employee participation in civic and charitable activities.

1           You state that Home Depot's separate segregated fund, The Home Depot Better  
2   Government Committee ("Home Depot PAC" or "the PAC"), wishes to distribute an apron pin to  
3   members of its restricted class as a token of appreciation for making a contribution to the PAC.  
4   The pin would be approximately one and one-half inches long and would depict the dome of the  
5   United States Capitol atop the orange square Home Depot logo. The word "PAC" would appear  
6   below the orange square. You note that Home Depot apron pins normally vary between one and  
7   two inches in height or length. You indicate that the Home Depot PAC pin would thus be an  
8   average size and would not stand out in relation to other Home Depot apron pins.

9           You state that the Home Depot PAC pin would be sent to members of the restricted class  
10   attached to a backing card mailed to each contributing member's home address. The card would  
11   thank the members of the restricted class for their contributions to the PAC and include the  
12   statement, "Please accept the attached pin as a token of thanks for your support of the Home  
13   Depot PAC." There would be no further communication from either Home Depot or the Home  
14   Depot PAC to the members of the restricted class regarding the PAC pin. Other than the initial  
15   act of distributing the pins, neither Home Depot nor the Home Depot PAC will take any action to  
16   encourage or discourage members of the restricted class from wearing the PAC apron pins. You  
17   also state that the PAC apron pins will not be distributed to persons other than contributors to the  
18   PAC and that no such contributor will receive more than one pin. The approximate value of each  
19   pin will be less than fifty cents per pin.

20           You note that while every Home Depot employee is issued an orange shop apron, only  
21   store employees are required to wear them on a daily basis. Home Depot PAC estimates that less  
22   than 6% of the PAC apron pins will be distributed to store employees. You state that Home  
23   Depot's corporate managers, who make up the "overwhelming majority" of the Home Depot

PAC's restricted class, are not required to wear their shop aprons on a daily basis but many do wear them four times a year for ceremonial purposes at quarterly corporate meetings. Therefore, although the subset of the restricted class who will actually wear the PAC apron pin on their shop aprons is unknown, Home Depot PAC estimates that more than 94% of the PAC apron pins will be worn for no more than the four annual ceremonial occasions. Furthermore, given Home Depot's long tradition of issuing apron pins and their customary display, you state that it is "extremely unlikely" that the pins will be worn in any manner other than on the shop apron. You assert that, given the limited distribution of the pins to members of the restricted class, and the fact that most members of the restricted class only wear their shop aprons at four corporate events per year, it is unlikely that the Home Depot PAC pin will be seen by a significant number of individuals who are outside the Home Depot PAC's restricted class.

### ***Questions Presented***

1. May Home Depot PAC distribute its pin in the manner described above?
2. Does the distribution and display of the Home Depot PAC pin as described in this advisory opinion constitute a solicitation within the meaning of 2 U.S.C. 441b?

### ***Analysis and Conclusions***

For the reasons set forth below, the Commission concludes that, in the circumstances you describe in your request, the distribution of the PAC pins by Home Depot PAC and their display on shop aprons is permissible under the Act and does not constitute a solicitation within the meaning of 2 U.S.C. 441b.

1 Under the Act and Commission regulations, a corporation or separate segregated fund  
2 (“SSF”) established by a corporation may solicit contributions to the SSF from the corporation’s  
3 “restricted class,” which consists of the corporation’s executive and administrative personnel, its  
4 stockholders, and their families. 2 U.S.C. 441b(b)(4); 11 CFR 114.1(c) and 114.5(g).  
5 Solicitations beyond the restricted class are generally prohibited.<sup>2</sup> 2 U.S.C. 441b(b)(4)(A). All  
6 contributions to the SSF must be strictly voluntary and without coercion. *See* 2 U.S.C.  
7 441b(b)(3) and 11 CFR 114.5(a).

8 The Commission has previously concluded that a communication regarding SSF activity  
9 is not a solicitation under section 441b where the information provided would neither encourage  
10 readers to support the SSF activities nor facilitate contributions to the SSF. Advisory Opinions  
11 2000-7, 1991-3, 1988-2, 1983-38, 1982-65, 1980-65, and 1979-66. In Advisory Opinion 1999-6,  
12 the Commission determined that a solicitation would occur where a magazine article described  
13 the process for an employee to establish automatic monthly deductions to an SSF, provided a  
14 telephone number to call for additional information, and included several positive references to  
15 the convenience and advantages of using the automatic deduction system. Likewise, the  
16 Commission concluded that a solicitation would occur where a corporate newsletter described  
17 the fundraising activities of the SSF and contained a quotation from the fund’s chairman  
18 commending the enthusiasm of employees who had participated in the fund’s activities during  
19 the past year. Advisory Opinion 1979-13.

20 In contrast, the Commission has determined that other newspaper articles and internal  
21 intranet postings would not be considered solicitations under 2 U.S.C. 441b when they consisted

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<sup>2</sup> A corporation or its SSF may, however, make two written solicitations per year to non-executive employees, subject to certain restrictions. 2 U.S.C. 441b(b)(4)(B), 11 CFR 114.6.

1 only of limited informational statements without additional encouragement. *See* Advisory  
2 Opinions 2000-7 and 1983-38. These latter communications, the Commission concluded, merely  
3 convey information that might engender inquiry, rather than encouraging or facilitating a  
4 contribution. *Id.* In addition, where a trade association posting the PAC reports and receipts of  
5 its members “without comment or embellishment” on an access-restricted bulletin board was  
6 viewed by the Commission as a “passive conduit of information,” the Commission determined  
7 that the reports would not constitute a solicitation as the posted information did not encourage  
8 support of its PAC or facilitate contributions to the PAC. Advisory Opinion 1988-2.

9       The Home Depot PAC pins would consist solely of the word “PAC” accompanied by the  
10 Home Depot logo, which contains the words “The Home Depot.” As noted above, the pins are  
11 of only nominal value, the wearing of pins on shop aprons is customary for Home Depot  
12 employees, the PAC pins are small and relatively the same size as the other Home Depot apron  
13 pins, the pin is likely to be displayed along with a number of other pins so that the PAC pin will  
14 not be overly conspicuous, and the pins will have only limited exposure to persons within and  
15 outside the restricted class. As such, the apron pin does no more than convey information that  
16 might engender an inquiry. The Commission concludes that the pin does not, by itself,  
17 encourage or facilitate the making of a contribution. Thus, in the circumstances you describe in  
18 your request, and so long as Home Depot and its SSF do not monitor the display of the PAC pins  
19 or otherwise act in contravention of 2 U.S.C. 441b(b)(3) or 11 CFR 114.5(a), the Commission  
20 concludes that the distribution of Home Depot PAC pins for display on the shop apron of  
21 members of the restricted class is permissible and would not constitute a solicitation for  
22 contributions to the Home Depot PAC under 2 U.S.C. 441b.

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The Commission further notes that the letter accompanying the PAC pin is permissible because the letter would only be sent to members of the restricted class who had already made a contribution. Under 2 U.S.C. 441b(b)(2)(A), corporations and SSFs are generally permitted to solicit and otherwise communicate with members of the restricted class, and the proposed letter of thanks does not appear to implicate any prohibitions or restrictions of the Act or Commission regulations.

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

Sincerely,

Ellen L. Weintraub  
Chair

Enclosures (AOs 2000-7, 1999-31, 1999-6, 1991-3, 1988-2, 1983-38, 1982-65, 1980-65, 1979-66, and 1979-13.)