AGENDA DOCUMENT NO. 06-81

FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 6, 2006

MEMORANDUM

TO: The Commission

FROM: James A. Kahl JAK
Deputy General Counsel

Rosemary C. Smith ALR for RCS
Associate General Counsel

Amy L. Rothstein ALR
Acting Assistant General Counsel

Ron B. Katwan RBK
Attorney

Subject: Draft AO 2006-33

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 14, 2006.

Attachment

ADVISORY OPINION 2006-33

DRAFT

Jan Witold Baran, Esq.
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

Dear Mr. Baran:

We are responding to your advisory opinion request on behalf of the National Association of Realtors ("NAR") and its separate segregated fund ("SSF"), Realtors Political Action Committee ("RPAC"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to NAR's proposed payment of corporate treasury funds to its State affiliates to encourage the State affiliates to increase their fundraising for RPAC. The Commission concludes that NAR's proposed payment of corporate treasury funds to its State affiliates would constitute a prohibited exchange of corporate treasury funds for voluntary contributions.

Background

The facts presented in this advisory opinion are based on your letter received on October 20, 2006.

NAR is an Illinois not-for-profit corporation exempt from Federal income tax under section 501(c)(6) of the Internal Revenue Code. NAR engages in a variety of activities intended to improve business conditions in the real estate industry, and to serve its members, as permitted by section 501(c)(6). RPAC is the SSF of NAR and is registered with the Commission as a multi-candidate political committee.

In each State, there is a State association of Realtors affiliated with NAR ("State Associations"). Approximately 1,500 local associations of Realtors are also affiliated

with NAR and with the State Associations. The Commission has determined that NAR and its affiliates are a "federation of trade associations" under 11 CFR 114.8(g). *See* Advisory Opinion 1995-17 (National Association of Realtors).

Each State Association operates its own non-Federal political action committee ("State PAC"). NAR, the State Associations, and the local associations solicit voluntary contributions from NAR members and their families to RPAC and to the State PACs, with the State Associations and local associations serving as collecting agents. A written agreement (the "Agreement") between NAR and all but one of the State Associations governs these solicitation activities. With certain exceptions not relevant to this request, the Agreement currently provides that a State PAC retains 70% of the funds raised, and RPAC receives the remaining 30%. Contributors are advised of how the funds they give will be allocated between RPAC and the State PACs at the time they are solicited for contributions and donations. One State Association has not entered into a written agreement with NAR. This State Association operates an affiliated SSF, which makes discretionary transfers to RPAC in amounts determined by that State Association.

NAR plans to encourage the State Associations to enter into new agreements under which RPAC would receive more than 30% of the funds raised. Similarly, NAR will encourage the State Association that is not a party to the Agreement to increase the amount of funds that its SSF transfers to RPAC.

As an incentive for the State Associations to increase the percentage of funds to be solicited for RPAC and for the State Association that is not a party to the Agreement to increase the amount of Federal funds that it transfers to RPAC, NAR proposes to pay

to the State Associations monies from NAR corporate treasury funds.[1] The State Associations would be permitted to use these "incentive payments" for any lawful purpose, including use in connection with State or local elections or other related political activities as permitted by State law. Individual contributors will not receive, directly or indirectly, any portion of the incentive payments from NAR, nor will they receive any other benefit as a result of the incentive payments.

The amount NAR pays to a State Association would approximately equal the amount of contributions provided to RPAC in excess of the 30% currently provided. In the case of the State Association that is not a party to the Agreement, the amount of corporate treasury funds NAR would pay would approximately equal the increase in the funds that the State Association's SSF transfers to RPAC.

Individuals who make voluntary contributions to RPAC in response to the joint solicitation efforts by NAR and its State Associations would be advised at the time of the solicitation of the new percentage of funds to be sent to RPAC. You state that these solicitations will include all legally required notices pursuant to 11 CFR 114.5(a).

Questions Presented

1. *Would NAR's payment of corporate treasury funds to the State Associations in amounts approximately equal to the amount of increased contributions the State Associations provide to RPAC be permissible as an "establishment, administration, and solicitation cost" under 11 CFR 114.1(b)?*

[1] Alternatively, where desired by a State Association and permitted by State law, NAR may pay the corporate treasury funds to the State Association's State PAC.

2. *Would NAR's payment of corporate treasury funds to the State Associations in exchange for an increase in the amount of Federal funds the State Associations provide to RPAC be subject to the one-third rule in 11 CFR 114.5(b)(2)?*

Legal Analysis and Conclusions

Question 1: Would NAR's payment of corporate treasury funds to the State Associations in amounts approximately equal to the amount of increased contributions the State Associations provide to RPAC be permissible as an "establishment, administration, and solicitation cost" under 11 CFR 114.1(b)?

No, NAR's payment of corporate treasury funds to the State Associations in amounts approximately equal to the amount of increased contributions the State Associations provide to RPAC would constitute a prohibited exchange of treasury funds for voluntary contributions.

The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. *See* 2 U.S.C. 441b. The Act states, however, that the term "contribution or expenditure" does not include "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. 441b(b)(2)(C); *see also* 11 CFR 114.1(a)(2)(iii) and 114.5(b). Commission regulations, in turn, define the term "establishment, administration and solicitation costs" to include "the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, fund-raising and other expenses incurred in setting up and running a separate segregated fund established by a corporation." 11 CFR 114.1(b).

Although a corporation such as NAR may use corporate treasury funds to pay its SSF's "establishment, administration and solicitation costs," corporations "may not use the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions." 11 CFR 114.5(b). Here, NAR proposes to pay to the State Associations approximately one dollar in corporate treasury funds for each additional dollar that the State Associations give to RPAC. The State Associations would not be required to use the corporate treasury funds that they would receive from NAR to pay for costs incurred in fundraising for RPAC, or any other "establishment, administration and solicitation costs," as defined in 11 CFR 114.1(b). Instead, the State Associations would be entirely free to use the funds for any lawful purpose.

The situation presented here differs materially from that in Advisory Opinion 1999-31 (Oshkosh Truck Corporation), on which you rely in your request. In Advisory Opinion 1999-31, the Commission permitted a corporation to use its treasury funds to pay for "premium gifts" (*i.e.*, gift certificates and football tickets) to be awarded to employees who signed up other eligible employees to contribute to the corporation's SSF. The Commission concluded that the "premium gifts" were fundraising devices involving a prize, and thus expressly authorized by 11 CFR 114.5(b)(2), which allows corporations to use fundraising devices involving a prize, as well as dances, parties, and other types of entertainment, to raise funds for the corporation's SSF, so long as State law permits and the prize or entertainment is not disproportionately valuable. By contrast, NAR's proposed payment of corporate treasury funds to the State Associations would not be for a raffle or other fundraising device which involves a prize or for a dance, party, or other type of entertainment and, therefore, would not be covered by 11 CFR 114.5(b)(2).

Moreover, unlike the "premium gifts" in Advisory Opinion 1999-31, whose value was far less than the value of the contributions received, NAR proposes to pay to each State Association an amount equal to the increase in Federal funds that would result from the change in the contribution allocation between RPAC and the State PACs. Even though the individual contributors themselves would not receive something of value from NAR, the State Associations would receive corporate treasury funds compensating them for each dollar their State PACs give up under the new agreement in excess of what they would have given up under the current Agreement. RPAC, in turn, would receive additional Federal contributions that it would not have received under the current Agreement for each dollar of treasury funds NAR transfers to the State Associations. Thus, NAR's proposed incentive payments would be a one-for-one trade of treasury funds for voluntary contributions. *See, e.g.*, Regulations, Explanation and Justification, House Document No. 95-44, at 107 (1977) (noting that, when using corporate treasury funds to pay for raffles to raise funds for a corporation's SSF, "[t]he prizes may not be so numerous or disproportionately valuable in relation to the cost of the raffle ticket that the raffle is, in effect, a 'trading' money situation").

For these reasons, the Commission concludes that the proposed incentive payments would be an impermissible use of the solicitation process as a means of exchanging corporate treasury funds for voluntary contributions.

Question 2: Would NAR's payment of corporate treasury funds to the State Associations in exchange for an increase in the amount of Federal funds the State Associations provide to RPAC be subject to the one-third rule in 11 CFR 114.5(b)(2)?

No, NAR's proposed incentive payments to the State Associations would not be covered by the one-third rule, because they would not be for "a raffle or other fundraising device which involves a prize," or for entertainment used as a fundraising device.

A corporation's use of corporate treasury funds to pay for "a raffle or other fundraising device which involves a prize" and for "dances, parties, and other types of entertainment" to raise funds for the corporation's SSF is not a prohibited trade of corporate treasury funds for voluntary contributions to the SSF, if the payments by the corporation do not exceed one third of the money contributed to the SSF. 11 CFR 114.5(b)(2). This so-called "one-third rule" does not appear in any other part of the Commission regulations. Nor has the Commission ever applied the rule outside of the context of a raffle or other fundraising device which involves a prize and dances, parties, and other types of entertainment that are used as fundraising devices. Accordingly, because NAR does not propose to spend its corporate treasury funds on a raffle or other fundraising device which involves a prize or on dances, parties, and other types of entertainment, its incentive payments to the State Associations would not be covered by the one-third rule.

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 advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Michael E. Toner
Chairman

Enclosures (Advisory Opinions 1999-31 and 1995-17)