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**AGENDA ITEM**  
For Meeting of: 12-14-06

**MEMORANDUM**

**SUBMITTED LATE**

To: The Commission  
General Counsel  
Staff Director  
Office of the Commission Secretary

From: Commissioner Hans A. von Spakovsky 

Date: December 12, 2006

Re: Draft AO 2006-33 (The National Association of Realtors and Realtors  
Political Action Committee)

Attached please find Commissioner von Spakovsky's alternative draft that he plans to offer at the Commission's Open Session on Thursday, December 14, 2006.

Thank you.

1 ADVISORY OPINION 2006-33

2

3 Jan Witold Baran, Esq.  
4 Wiley Rein & Fielding LLP  
5 1776 K Street, NW  
6 Washington, DC 20006

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**WHITE DRAFT**

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8 Dear Mr. Baran:

9 We are responding to your advisory opinion request on behalf of the National  
10 Association of Realtors (“NAR”) and its separate segregated fund (“SSF”), Realtors  
11 Political Action Committee (“RPAC”), concerning the application of the Federal Election  
12 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to NAR’s  
13 proposed payment of corporate treasury funds to its State affiliates to encourage the State  
14 affiliates to increase their fundraising for RPAC. The Commission concludes that NAR’s  
15 proposed payment of corporate treasury funds to its State affiliates is not a violation of  
16 the Federal Election Campaign Act (“FECA”).

17 ***Background***

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

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

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

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

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

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

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

1 to the State Associations monies from NAR corporate treasury funds.<sup>1</sup> The State  
2 Associations would be permitted to use these “incentive payments” for any lawful  
3 purpose, including use in connection with State or local elections or other related political  
4 activities as permitted by State law. Individual contributors will not receive, directly or  
5 indirectly, any portion of the incentive payments from NAR, nor will they receive any  
6 other benefit as a result of the incentive payments.

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

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

16 ***Questions Presented***

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

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<sup>1</sup> 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.

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

4 ***Legal Analysis and Conclusions***

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

9 The payment by NAR of corporate treasury funds to the State Associations would  
10 be permissible under the Act. The "establishment, administration, and solicitation cost"  
11 exemption set forth at 11 CFR 114.1(b), however, is inapplicable to the facts described.

12 The Act prohibits corporations from making any contribution or expenditure in  
13 connection with a Federal election. *See* 2 U.S.C. 441b. The Act states, however, that the  
14 term "contribution or expenditure" does not include "the establishment, administration,  
15 and solicitation of contributions to a separate segregated fund to be utilized for political  
16 purposes by a corporation, labor organization, membership organization, cooperative, or  
17 corporation without capital stock." 2 U.S.C. 441b(b)(2)(C); *see also* 11 CFR  
18 114.1(a)(2)(iii) and 114.5(b). Commission regulations define the term "establishment,  
19 administration and solicitation costs" to include "the cost of office space, phones,  
20 salaries, utilities, supplies, legal and accounting fees, fund-raising and other expenses  
21 incurred in setting up and running a separate segregated fund established by a  
22 corporation." 11 CFR 114.1(b). Both the regulation at 11 CFR § 114(b) and the Federal  
23 Election Campaign Act at 2 U.S.C. 441b(b)(2)(C) refer to these "establishment,

1 administration, and solicitation” funds as costs incurred in setting up and running “a  
2 separate segregated fund” established by a “corporation, labor organization, membership  
3 organization, cooperative, or corporation without capital stock.”

4 Transaction A

5 In this case, no transfer of funds is proposed from any of the aforementioned  
6 entities to a separate segregated fund (“SSF”). Rather, NAR will transfer funds from its  
7 corporate treasury to its affiliated State Associations - no corporate treasury funds will be  
8 transferred to RPAC or any state-sponsored federal political committee, or any SSF. In  
9 and of itself, this transfer of funds does not even implicate the federal campaign finance  
10 laws.

11 Transaction B

12 As described, NAR intends to increase the percentage of funds received by RPAC  
13 through its joint fundraising efforts with the various State Associations. With respect to  
14 any funds received by RPAC pursuant to joint fundraising agreements entered into  
15 between NAR and the State Associations, the formula for dividing contributions may  
16 provide for any division of contributions that a federation of trade associations and its  
17 member associations desire. *See* 11 CFR 102.17. No provision of the Act or  
18 Commission regulations prevents the aforementioned parties from negotiating a modified  
19 percentage division in their joint fundraising agreements.

20 Transaction A + B

21 The proposed transactions, taken together, also do not violate the Act or  
22 Commission regulations. Specifically, the combination of these two proposed  
23 transactions does not trigger the restrictions set forth at 11 CFR 114.5(b), which prohibits

1 the use of the establishment, administration, and solicitation process as a means of  
2 exchanging treasury monies for voluntary contributions. First, NAR's proposed transfer  
3 of funds to the State Associations is not the payment of money for the "establishment,  
4 administration and solicitation" costs *of an SSF*, meaning 11 CFR 114.5(b) is  
5 inapplicable on its face. Second, the proposal does not involve the exchange of treasury  
6 monies for "voluntary contributions." NAR does not propose to provide treasury funds to  
7 any individual donor in exchange for a voluntary contribution. Rather, the proposed  
8 exchange of funds involves NAR's treasury funds and funds from the State PACs. While  
9 the funds of the State PACs are comprised of individuals' voluntary contributions, once  
10 those individuals contributed to the State PACs, those funds became the property of the  
11 State PACs. A subsequent transaction by one of these State PACs does not involve  
12 "voluntary contributions." Thus, the transfer of funds from a State PAC to RPAC via a  
13 joint fundraising agreement in no way implicates any "voluntary contributions," meaning  
14 the restriction of 11 CFR 114.5(b) is not violated. .

15 Under these facts, the proposed transfers of funds would not violate the Act or  
16 Commission regulations. The State Associations will be entirely free to use funds  
17 received from NAR for any lawful purpose, including use in connection with a State or  
18 local election or other related political activities, as permitted by the relevant State law.

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

4 No, NAR's proposed incentive payments to the State Associations would not be  
5 covered by the one-third rule, because they would not be for "a raffle or other fundraising  
6 device which involves a prize," or for entertainment used as a fundraising device and in  
7 any event, are not being paid directly or indirectly to the individual contributors.

8 A corporation's use of corporate treasury funds to pay for "a raffle or other  
9 fundraising device which involves a prize" and for "dances, parties, and other types of  
10 entertainment" to raise funds for the corporation's SSF is not a prohibited trade of  
11 corporate treasury funds for voluntary contributions to the SSF, if the payments by the  
12 corporation do not exceed one third of the money contributed to the SSF. 11 CFR  
13 114.5(b)(2). This so-called "one-third rule" does not appear in any other part of the  
14 Commission regulations. Nor has the Commission ever applied the rule outside of the  
15 context of a raffle or other fundraising device which involves a prize and dances, parties,  
16 and other types of entertainment that are used as fundraising devices. Accordingly,  
17 because NAR does not propose to spend its corporate treasury funds on a raffle or other  
18 fundraising device which involves a prize or on dances, parties, and other types of  
19 entertainment, and in fact, will not make any payments of any kind directly or indirectly  
20 to the individual contributors, its incentive payments to the State Associations would not  
21 be covered by the one-third rule.

22 This response constitutes an advisory opinion concerning the application of the  
23 Act and Commission regulations to the specific transaction or activity set forth in your



1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity.

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Sincerely,

Michael E. Toner  
Chairman