MEMORANDUM

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.
ADVISORY OPINION 2006-33

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 is not a violation of the Federal Election Campaign Act ("FECA").

**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 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.\footnote{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.} 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)?
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)?

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

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 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). Both the regulation at 11 CFR § 114(b) and the Federal Election Campaign Act at 2 U.S.C. 441b(b)(2)(C) refer to these “establishment,
administration, and solicitation” funds as costs incurred in setting up and running “a

separate segregated fund” established by a “corporation, labor organization, membership

organization, cooperative, or corporation without capital stock.”

Transaction A

In this case, no transfer of funds is proposed from any of the aforementioned

entities to a separate segregated fund (“SSF”). Rather, NAR will transfer funds from its

corporate treasury to its affiliated State Associations - no corporate treasury funds will be

transferred to RPAC or any state-sponsored federal political committee, or any SSF. In

and of itself, this transfer of funds does not even implicate the federal campaign finance

laws.

Transaction B

As described, NAR intends to increase the percentage of funds received by RPAC

through its joint fundraising efforts with the various State Associations. With respect to

any funds received by RPAC pursuant to joint fundraising agreements entered into

between NAR and the State Associations, the formula for dividing contributions may

provide for any division of contributions that a federation of trade associations and its

member associations desire. See 11 CFR 102.17. No provision of the Act or

Commission regulations prevents the aforementioned parties from negotiating a modified

percentage division in their joint fundraising agreements.

Transaction A + B

The proposed transactions, taken together, also do not violate the Act or

Commission regulations. Specifically, the combination of these two proposed

transactions does not trigger the restrictions set forth at 11 CFR 114.5(b), which prohibits
the use of the establishment, administration, and solicitation process as a means of
exchanging treasury monies for voluntary contributions. First, NAR’s proposed transfer
of funds to the State Associations is not the payment of money for the “establishment,
administration and solicitation” costs of an SSF, meaning 11 CFR 114.5(b) is
inapplicable on its face. Second, the proposal does not involve the exchange of treasury
monies for “voluntary contributions.” NAR does not propose to provide treasury funds to
any individual donor in exchange for a voluntary contribution. Rather, the proposed
exchange of funds involves NAR’s treasury funds and funds from the State PACs. While
the funds of the State PACs are comprised of individuals’ voluntary contributions, once
those individuals contributed to the State PACs, those funds became the property of the
State PACs. A subsequent transaction by one of these State PACs does not involve
“voluntary contributions.” Thus, the transfer of funds from a State PAC to RPAC via a
joint fundraising agreement in no way implicates any “voluntary contributions,” meaning
the restriction of 11 CFR 114.5(b) is not violated.

Under these facts, the proposed transfers of funds would not violate the Act or
Commission regulations. The State Associations will be entirely free to use funds
received from NAR for any lawful purpose, including use in connection with a State or
local election or other related political activities, as permitted by the relevant State law.
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 and in any event, are not being paid directly or indirectly to the individual contributors.

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, and in fact, will not make any payments of any kind directly or indirectly to the individual contributors, 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