FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 21, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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 would be permissible under the Act and Commission regulations.

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).

[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.

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 Commission concludes that 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 be permissible under the Act and Commission regulations.

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. Individual Commissioners have explained their reasons for voting to approve this opinion in separate concurring statements that accompany this opinion or that will be sent under separate cover.

Sincerely,

(signed)
Robert D. Lenhard
Vice-Chairman

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

CONCURRING OPINION IN ADVISORY OPINION 2006-33

OF

CHAIRMAN MICHAEL E. TONER AND
VICE CHAIRMAN ROBERT D. LENHARD

We voted for Advisory Opinion 2006-33 because the payments proposed by the National Association of Realtors ("NAR") are permissible under 2 U.S.C. § 441b(b)(2)(C) as "establishment, administration, and solicitation" costs.

The Act prohibits corporations from making contributions or expenditures in connection with a Federal election. 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). Our regulations define "establishment, administration, and solicitation costs" to include, *inter alia*, fundraising expenses. 11 CFR § 114.1(b).

Here, the proposed payments are for the purpose of encouraging NAR's affiliates to solicit contributions to NAR's separate segregated fund, RPAC. The payments are for the purpose of raising funds, and are similar to the commission that a committee might pay in return for the services of a commercial fundraiser. The payments are certainly "incurred in the pursuit of voluntary contributions, the maintenance of those contributions, or the utilization of those contributions for 'political purposes.'" *See* AO 1977-19 (concluding that taxes levied on interest earned by a separate segregated fund (SSF) do not qualify as "administration" expenses because the expense was not "incurred in the pursuit of voluntary contributions, the maintenance of those contributions, or the utilization of those contributions for 'political purposes'"). Thus the proposed payments qualify as fundraising expenses and are excluded from contribution treatment under 2 U.S.C. § 441b(b)(2)(C) and 11 CFR § 114.1(b). NAR may therefore make the proposed payments to its affiliates, and RPAC may receive the attendant fundraising benefits, without a prohibited in-kind contribution from NAR to RPAC resulting.

The proposed payments do not run afoul of our prohibition on use of "the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions." 11 CFR § 114.5(b). This restriction is inapplicable here because the "exchange" proposed is not of treasury money for voluntary contributions, but of treasury money for fundraising services. The individuals who ultimately make voluntary contributions to RPAC will receive nothing from NAR, either directly or indirectly, and hence are not party to this exchange. This treatment is consistent with Advisory Opinion 2003-4, in which we concluded that a corporation's plan to "match" contributions to its SSF with corporate contributions to a charity of the

donor's choosing did not constitute an impermissible exchange of treasury money for voluntary contributions because "no individual contributor to the SSF would receive a financial, tax, or other tangible benefit from either the corporation or the recipient charities." *See also* AOs 2003-33, 1990-6, 1989-9, 1986-44.

For all of these reasons, we have concluded that the Act does not prohibit NAR from making the proposed fundraising payments.

December 19, 2006

_____/s/_____
Michael E. Toner, Chairman

_____/s/_____
Robert D. Lenhard, Vice Chairman

FEDERAL ELECTION COMMISSION
Washington, DC 20463

CONCURRING OPINION OF

COMMISSIONER DAVID M. MASON AND COMMISSIONER HANS A. von SPAKOVSKY

IN ADVISORY OPINION 2006-33

On December 14, 2006, the Commission voted 4-2 to approve the Advisory Opinion Request of the National Association of Realtors, and its separate segregated fund, Realtors Political Action Committee. Commissioners differed with respect to the legal analysis supporting the response to Question 1. We write separately to provide our analysis of that issue.

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 phrase "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 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 and is beyond the jurisdiction of the Commission.

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 generally* 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 the "establishment, administration, and solicitation process" is not at issue, and thus 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 raised by RPAC and the State PACs. The transfer of a larger percentage of federal funds to RPAC per 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.

December 19, 2006

_____s/_____ _____s/_____
David M. Mason, Commissioner Hans. A. von Spakovsky, Commissioner