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BY ELECTRONIC MAIL

Merita Johnson, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2006-33

Dear Ms. Johnson:

This office represents the National Association of Realtors® ("NAR") and its separate segregated fund Realtors® Political Action Committee ("RPAC") (collectively "Requestors") in the above-captioned matter. We respectfully submit these comments to the December 6, 2006, Draft prepared by the Office of General Counsel and urge the Commission to reject its answer to Question 1.

I. The Draft Response to Question 1 Conflicts with FEC Regulations and Previous Advisory Opinions

The statute specifically exempts "establishment, administration, and solicitation" for a PAC from the definitions of "contribution or expenditure." 2 U.S.C. § 441b(b)(2)(C). Similarly, the FEC regulations state: "the terms *contribution* and *expenditure* shall *not* include" establishment, administration, and solicitation expenses for a PAC. 11 C.F.R. § 114.1(a)(2)(iii) (emphasis in original). In neither the statute nor § 114.1 of the regulation is there a restriction on the amount of the expenses that "shall *not*" be contributions and expenditures. The only limitation on such expenses is contained in § 114.5(b) which addresses "exchanging treasury monies for voluntary contributions." The scope and intent of this limitation is reflected in subpart (1) which prohibits payments to contributors and subpart (2) which establishes the so-called "one-third rule" which again pertains to giving something of value to a contributor paid for by treasury funds.

Accordingly, FEC regulations, in relevant part, permit spending for "fund-raising and other expenses incurred in setting up and running a" PAC. 11 C.F.R. § 114.1(b). There is no question that the proposed incentive payments by NAR are associated with "fund-raising" and intended to increase revenues to RPAC. The Draft asserts that § 114.5(b) bars the incentive payments because they constitute "a means of exchanging treasury monies for voluntary contributions." But no

reasonable construction of § 114.5(b) of the word "exchange" can involve a circumstance where, as here, payments are made to a party other than the contributors by whom voluntary contributions are made and where, as the Draft acknowledges, "[I]ndividual 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." Draft at 3. If adopted, the Draft would represent the first time the FEC applied a limit on expenditures for fund-raising, even though the statute contains no such restriction and the regulations curtail only payments *to contributors* in exchange for contributions. Such a conclusion is unjustified. Moreover, it conflicts with prior opinions cited in the Request and not addressed in the Draft.

Specifically, for decades, the FEC has allowed corporations (and unions) to match contributions to a PAC with corporate payments in equal amounts to charities. *See* Advisory Opinion 1994-6. This sanctioned practice enables a corporation to spend corporate funds (in the form of charitable donations) for 100% of the PAC funds that the PAC receives. This has been repeatedly approved and never ruled an "exchange of treasury monies for voluntary contributions." In AOR 2006-33, Requestors are proposing incentive payments to affiliated entities of the incremental amount over the portion of individual contributions provided to RPAC under the existing fund-raising agreements with affiliated state associations. The Draft, however, considers "each additional dollar" of PAC funds to trigger an improper "exchange of treasury monies" while it fails to acknowledge that payments of treasury monies to third party charities equal to 100% of the amounts contributed by individuals is proper. Both types of programs are permissible fund-raising expenses payable by sponsoring organizations and neither violates § 114.5(b).

In short, the Draft improperly intertwines authority provided in the statute to spend unrestricted amounts for PAC administrative and fund-raising expenses with the proscription on "trading money." Draft at 6. The two are separate legal concepts and in fact are addressed in separate FEC regulations. A corporation (or union) under § 114.1(b) may absorb an unspecified amount of administrative and fund-raising expenses. However, it may not do so by making payments *to contributors*, i.e. "exchanging funds." Indeed, the sponsoring organization is subject to the "one-third" rule if any of its payments are to the contributor. For that reason, the FEC has never curtailed charitable matching programs because the contributor does not and may not receive the payment or a benefit. A corporation may make charitable donations constituting 100% of the PAC funds received without the payments

resulting in an "exchange of treasury monies." In the same way, as the Draft expressly recognizes, no contributor to RPAC will receive or otherwise benefit in any way from any incentive payment. Such payments will go to affiliated state associations or PACs. This is not an "exchange of treasury funds" as contemplated in § 114.5(b).

II. The Draft Response to Question 2 is Correct

As explained above, there is no restriction on the amount a corporation may spend on PAC administrative or fund-raising expenses except for prizes, gifts, or exchanges of funds with contributors. Since the proposed incentive payments are not to contributors, they are not subject to the "one-third" rule. (Note that the Draft's conclusion in Question 1 that the incentive payments constitute an "exchange" conflicts with this conclusion in Question 2, since if the payments were indeed an "exchange" under § 114.5(b) they would, by definition, be subject to the one-third rule of § 114.5(b)(2).) We note, however, that contrary to the assertion on Draft p. 7, the rule has been applied outside of raffles and fund-raising involving a prize, and dances, parties, and other types of entertainment. In Advisory Opinion 1999-31, the Commission applied the one-third rule to a $1000 gift certificate given to an employee who successfully persuaded other employees to enroll in payroll deductions. This further underscores the FEC's traditional concern that treasury money not be exchanged with contributors' PAC donations except under the one-third rule.

Sincerely,

Jan Witold Baran

cc: Commission Secretary
Amy Rothstein, Esq.
Ron Katwan, Esq.