

December 13, 2006

VIA FACSIMILE AND E-MAIL

Ms. Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: **Comments on Draft Advisory Opinion 2006-33**

Dear Secretary Dove:

These comments on Draft Advisory Opinion 2006-33 are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations and the American Federation of State, County and Municipal Employees.

Draft Advisory Opinion 2006-33 responds to a request from the National Association of Realtors ("NAR") for guidance as to: (1) whether certain "incentive payments" NAR proposes to make to its affiliated State associations may be treated as administrative costs of its separate segregated fund, Realtors Political Action Committee ("RPAC"); and, (2) whether those incentive payments are subject to the "one-third rule" of 11 C.F.R. § 114.5(b). We respectfully disagree with the Draft's conclusion that the proposed incentive payments would constitute an impermissible exchange of corporate treasury funds for voluntary contributions, and thus, are not RPAC administrative costs.

FACTS

As explained in NAR's Advisory Opinion Request, NAR is an incorporated federation of trade associations as defined at 11 C.F.R. § 114.8(g). NAR and its State and local associations solicit voluntary contributions from NAR's restricted class to RPAC and the non-Federal PACs of the various State associations. NAR's affiliated State and local associations serve as collecting agents for these voluntary contributions, and transfer either an agreed-upon percentage of the contributions received to RPAC, or make discretionary transfers of voluntary contributions to RPAC.

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In order to increase the amount of voluntary contributions received by RPAC, NAR proposes to make "incentive payments" to the State affiliates who agree to a new fundraising allocation that increases the share of voluntary contributions that RPAC receives from solicitations of the restricted class, who have deferred decisions as to the allocation of the contributions to the respective designated committees. Likewise, NAR would make incentive payments to the single State affiliate whose transfers to RPAC are made on a discretionary basis in the absence of a written agreement. These incentive payments would approximate the amount of new voluntary contributions transferred to RPAC above the current percentage or amount of transfers, and would be made from NAR's treasury funds. Contributors would continue to be notified at the time of solicitation of the percentage of their contribution to be sent to RPAC.

COMMENTS

L. NAR's Incentive Payments are Permissible Administrative Costs of RPAC.

The Draft Advisory Opinion incorrectly concludes that NAR's contemplated incentive payments to its State affiliates are a prohibited exchange of treasury funds, and may not be treated as administrative costs of RPAC.

a. The Incentive Payments are Not a Prohibited Exchange of Treasury Funds for Voluntary Contributions.

While corporations and labor organizations are permitted to use treasury funds to pay the establishment, administration or solicitation costs of their SSFs, they "may not use the establishment, administration or solicitation process as a means of exchanging treasury monies for voluntary contributions." 11 C.F.R. § 114.5(b). The Commission's regulations illustrate and expound upon the prohibited treasury-monies-for-voluntary-contributions exchange by explaining that contributors may not be paid for their PAC contributions "through a bonus, expense account, or other form of direct or indirect compensation." 11 C.F.R. § 114.5(b)(1). In addition, a contributor may receive a prize as part of a PAC fundraising effort, so long as the prize is not "disproportionately valuable." 11 C.F.R. § 114.5(b)(2).

These regulations are clearly directed at preventing corporations and labor organizations from advancing funds to, or reimbursing, members of the restricted class for their PAC contributions under the guise of "administrative" costs. Such an arrangement would improperly result in an artificial increase in contributions received by the PAC because individuals within the restricted class are in fact used as conduits for the connected organization to feed its treasury funds into its PAC. See, e.g., *Advisory Opinion 1980-27*. NAR's proposed incentive payments do not constitute such an

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arrangement. The incentive payments would not be used to compensate any contributor in exchange for making a contribution to RPAC. Nor would the incentive payments facilitate RPAC's receipt of corporate treasury funds. Under NAR's proposed incentive payment plan, all funds received by RPAC would comply with the contribution limits and source restrictions of the Federal Election Campaign Act of 1971, as amended ("the Act").

NAR's incentive payments would be made in exchange for the State associations' agreement to renegotiate a new joint fundraising allocation formula. Under the new allocation formula, RPAC would receive a greater share of future voluntary contributions received from RPAC's restricted class. However, neither joint fundraising agreements nor transfers of joint fundraising proceeds to a participating SSP pursuant to such an agreement are treated as contributions from one committee to the other. See 11 C.F.R. 102.6(c)(7). Consequently, the proposed incentive payments do not constitute a prohibited exchange of treasury funds for voluntary contributions.

Instead, the proposed incentive payments are similar to the charitable matching programs long permitted by the Commission. See, e.g., *Advisory Opinions* 2003-4, 2003-33, 1986-44, 1987-18. Pursuant to these fundraising programs, the connected organization is permitted to match - dollar for dollar - voluntary PAC contributions with treasury fund contributions to the charity of the PAC contributor's choice. Like these charitable matching programs, NAR's planned incentive payments to the State associations do not confer, either directly or indirectly, any financial, tax, or other tangible benefit upon the individual contributors, who will continue to contribute from their own funds without reimbursement from any source. As is the case with the charitable matching payments, NAR's incentive payments would not involve any exchange of treasury funds for voluntary contributions.

b. The Incentive Payments are RPAC Administrative Costs.

Corporations and labor organizations are not prohibited from using treasury funds to pay for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes..." 2 U.S.C. § 441b(b)(2)(c); see also 11 C.F.R. § 114.1(a)(2)(iii) and 114.5(b). "Establishment, administration and solicitation costs" include "office space, phones, salaries, utilities, supplies, legal and accounting fees, fundraising and other expenses incurred in setting up and running a separate segregated fund..." 11 C.F.R. § 114.1(b). The Commission has also treated as establishment, administration and solicitation costs expenses such as those associated with indemnification insurance provided to PAC officers (*Advisory Opinion 1980-135*), travel costs incurred by corporate employees attending an event where the purpose of the corporate PAC was to be discussed (*Advisory Opinion 1980-50*), a "thank

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you" reception for past PAC contributors (*Advisory Opinion 1983-24*), matching charitable contributions made by the corporation to encourage PAC contributions from the restricted class (e.g., *Advisory Opinion 2003-4*), gifts for corporate employees who successfully solicit other employees to make PAC contributions via payroll deduction (*Advisory Opinion 1999-31*), and even travel and lodging expenses of corporate representatives attending an event sponsored by a political party committee (*Advisory Opinion 1991-36*).

In those instances where the Commission has found that an expense did not qualify as an establishment, administration or solicitation cost, it was because the Commission determined that the expense was not "incurred in pursuit of voluntary contributions, the maintenance of those contributions, or the utilization of those contributions for political purposes." See *Advisory Opinion 1991-36*, quoting *Advisory Opinion 1977-19*. Here, NAR's incentive payments are directly tied to an increase in the amount of joint fundraising receipts allocated to RPAC. As the Draft Advisory Opinion states, the purpose of the incentive payments is to "encourage the State affiliates to increase their fundraising for RPAC." *Draft Advisory Opinion 2006-33 at 1*. So, the proposed incentive payments are "incurred in pursuit of voluntary contributions," and should be treated as RPAC establishment, administration and solicitation costs.

II. NAR's Incentive Payments are Not Subject to the One-Third Rule.

We agree with the Draft Advisory Opinion's conclusion that the contemplated incentive payments are not subject to the one-third rule. The Commission's regulations clearly state that the one-third rule is applicable only to "a raffle or other fundraising device which involves a prize," or to "dances, parties or other types of entertainment." 11 C.F.R. § 114.5(b)(2). Because the incentive payments proposed by NAR are neither a fundraising device involving a prize nor entertainment, the payments are not subject to the one-third rule.

CONCLUSION

For the reasons set forth above, we respectfully urge the Commission to reject the Draft Advisory Opinion's conclusion that NAR's proposed incentive payments "constitute a prohibited exchange of treasury funds for voluntary contributions" and may not be treated as establishment, administration and solicitation costs of RPAC.

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In addition, we respectfully request that the Commission approve the Draft Advisory Opinion's conclusion that the incentive payments are not subject to the one-third rule.

Respectfully submitted,

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