FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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

Michael E. Toner, Chairman

Robert D. Lenhard, Vice Chairman