FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
High Point Regional Association of Realtors	)	**MUR 5681**
National Association of Realtors Political Action	)	
Committee and Bruce Wolf, in his official	)	
capacity as treasurer	)	

STATEMENT OF REASONS OF COMMISSIONER HANS A. von SPAKOVSKY

(Solicitation by Trade Association PAC in Monthly Newsletter)

I dissented in this matter due to concerns that the activities engaged in by the High Point Regional Association of Realtors ("HPRAR") were not "solicitations," as that term is used in 11 C.F.R. 114.5(a). However, to the extent that such activities may have constituted "solicitations" that were required to be accompanied by certain notifications, the Office of General Counsel did not adequately demonstrate that the actual, individual solicitations sent by HPRAR to its membership lacked the notifications required by 11 CFR 114.5(a)(3) – (4). Additionally, I have serious concerns about requiring *voluntary* trade associations to continuously repeat these notifications.

I. Background

HPRAR is a voluntary trade association that is associated with the National Association of Realtors ("NAR"). HPRAR solicits its members for contribution to NAR's separate segregated fund, the National Association of Realtors Political Action Committee ("NARPAC"). The complaint in this matter alleged that HPRAR repeatedly publicized the names of individual members who had not yet contributed to NARPAC, in an effort to increase contributions.[1] The *Factual and Legal Analysis* identifies two solicitations:

[1] The Commission declined to make a finding that such actions constituted unlawful "coercion" under 2 U.S.C. § 441b(b)(3)(A) and 11 CFR 114.5(a)(1) In my view, the reporting of factual information, such as the names of non-contributing members – which could have been discerned by anyone willing to compare an Association membership roster with NARPAC's FEC reports – does not rise to the level of "physical force, job discrimination, financial reprisals, or the threat" thereof. It may amount to pressure, or even be intended to embarrass, but it is not "coercive."

(1) One page of HPRAR's monthly newsletter included a list of members who had not yet made a contribution to NARPAC. Below this list was printed, "Have you made your contribution?"

(2) The newsletter also contained a report summarizing new state (not federal) legislation "that makes significant improvements to the State's real estate licensing law." The report stated that this was an example of "your [NA]RPAC dollars at work," asked if readers had given their NARPAC "fair share," and gave a "special [NA]RPAC thanks" to an individual realtor member for her support of NARPAC.

In addition, it appears that at at least one HPRAR meeting, the names of non-contributing members were displayed on an overhead slide.

II. Analysis

A. Solicitation

It is not clear to me – and it is certainly a matter of ambiguity and uncertainty – that the activities of HPRAR constituted "solicitations" under our regulations.

Commission regulations do not define the term "solicitation" as it is used in 2 U.S.C. § 441b. Rather, its meaning took shape in the early days of modern federal campaign finance law, and has not been systematically reconsidered since to take into account the vast changes that have occurred in how campaigns are conducted and funded. Roughly 30 years ago, the Commission held (in my opinion erroneously) that merely "encouraging" support for a separate segregated fund can be a "solicitation."

In Advisory Opinion 1979-13 (RAYPAC), the Commission considered a proposed newsletter article that "states the amount of money raised and spent by RAYPAC and the methods used by RAYPAC in determining to whom it should contribute. The article further points out the number of corporate employees who 'participated in' RAYPAC's activities in 1978 and includes a quotation from [the] RAYPAC chairman: 'I was glad to see that Raymond has so many employees who realize that the welfare of us all is tied very closely to government policies and attitudes toward business. RAYPAC is one way we can make the voice of business people and our industry heard in this county. I hope we continued [sic] to have such an enthusiastic group.'"

The Commission determined that "[t]he legislative history of the Act indicates that informing persons of a fundraising activity is considered a solicitation. See Advisory Opinions 1976-27, 1976-96, and 1978-17 . . . . See particularly AO 1976-27 which includes quotes from Senators Allen, Cannon, and Packwood during Senate floor debates on the 1976 Amendments to the Act. Also, Representative Hays of Ohio, in explaining the corporate and union solicitation provisions of the 1976 Amendments (2 U.S.C. [§§]

441b), stated: [We] determined that any action [that] could fairly be considered a request for a contribution should be treated as a solicitation. 122 Cong. Rec. 43779 (daily ed. May 3, 1976))." Advisory Opinion 1979-13.[2]

These 30-year old precedents are in dire need of reevaluation and revision. Describing the activities of a separate segregated fund, generally encouraging its support, or commending those who do support it, is simply not a "solicitation" as that term is commonly understood. Such activity should never have been considered to satisfy Representative Hays' standard noted in the legislative history, that a "solicitation" is "any action [that] could fairly be considered a request for a contribution." In Advisory Opinion 1979-13, the facts as outlined can in no way "fairly be considered a request for a contribution."

As a result of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Commission enacted detailed regulations defining the term "to solicit" for purposes of 2 U.S.C. § 441i. *See* 11 CFR 300.2(m) (2006); *Final Rules: Definitions of "Solicit" and "Direct,"* 71 Fed. Reg. 13,926 (March 20, 2006). BCRA did not amend the definition of "solicitation" for corporate and labor union separate segregated fund purposes, so we now have two separate standards for "solicitation" in the campaign finance laws, and those two standards are not believed by anyone to be coterminous.

The *Factual and Legal Analysis* in this matter will further confuse the regulated community since it leaves unclear whether publicizing the names of non-contributing members is itself a "solicitation," or if this activity must be coupled with a separate exhortation in order for it to be considered a "solicitation." To the extent that any of my colleagues are of the former view, I disagree. As noted above, the names of non-contributing members is factual information discernible by anyone willing to take the time to compare an Association member list to NARPAC's FEC reports. Furthermore, the Commission previously determined in Advisory Opinion 1988-2 (Chicago Board Options Exchange, Inc.) that a corporation does not make a solicitation when it posts its FEC reports without comment or embellishment. I would not treat the publication of factual information that is *not* included in an FEC report any differently.

Assuming that the publication of purely factual information is not itself a "solicitation," the first alleged "solicitation" was a newsletter listing of members who had not contributed to NARPAC *along with* the rhetorical question, "Have you made <u>your</u> contribution?" I have difficulty treating this combination of a factual listing plus a general exhortation as a "solicitation." Admittedly, it bears similarities to the tenth example contained in the current definition of "to solicit" ("A candidate hands a potential donor a list of people who have contributed to a group and the amounts of their contributions. The candidate says, 'I see you are not on the list.'"). This example,

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[2] *See also* Jan Witold Baran, *Political Contributions and Expenditures by Corporations*, Practicing Law Institute at 161 (2004) ("Several FEC Advisory Opinions suggest that solicitations are more than express appeals for voluntary contributions For example, informing a person of PAC fundraising activity may constitute a solicitation. FEC Advisory Opinion 1976-27.")

however, is not a general exhortation, but rather, a direct statement that calls for a response delivered by a candidate to a potential donor.

The second alleged "solicitation" included a summary of *state* legislation that served as an example of "your [NA]RPAC dollars at work," and asked if the reader had given his NARPAC "fair share." The argument that this is a "solicitation" is even less compelling than the previous example. It is a general exhortation, and an ambiguous one at that, and the context suggests only a non-Federal purpose.

B. Notice Requirements

Even if we assume that "solicitations" were made in the newsletter, it is worth considering whether the notice requirements set forth at 11 CFR 114.5(a)(3) – (5) (which are derived from the requirements at 2 U.S.C. § 441b(b)(3)(A) – (C)) serve a useful purpose in a situation like this. As noted above, HPRAR is a ***voluntary*** trade association made up of individual realtors who decide on their own whether to join the Association, or work for real estate firms that are members. These members are all well aware that they are not obligated to contribute to the PAC of a voluntary trade association. In fact, the individual who brought the complaint in the matter admitted that he was fully aware that he was not required to make a contribution to NARPAC in the Complainant he filed with the Commission: "Members of the association are not required to make contributions to RPAC. All contributions are supposedly strictly voluntary." *See* Complaint in MUR 5681. In other words, the various notices prescribed in the regulations would not have informed the Complainant of anything he did not already know.[3]

The notice requirements set forth in the Act are contained in 2 U.S.C. § 441b, which addresses contributions and expenditures by national banks, corporations, and labor organizations. These requirements are intended to ensure that those who make contributions do so with full knowledge of their legal rights. This makes sense with respect to the employees of a corporation (or national bank), or the members of a labor union. In these instances, either the corporation or labor union has actual power over the individual's livelihood, and that power could be exercised coercively. But a voluntary trade association has no coercive power over its members – an unhappy member is free to leave. The Commission's regulations treat "membership organizations" as if they were no different than national banks, corporations, and labor unions.[4] The underlying

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[3] There is absolutely no doubt that the Complainant was within his rights to file this complaint, and I have no quarrel that he did so. I raise the issue only because the complaint makes clear that the Complainant was aware of his legal rights as a member of the Association, and therefore, was complaining only of the trade association's "pressure" tactics (which even my colleagues found did *not* violate the law, *see supra* footnote 1).

[4] The inclusion of trade associations and other member organizations, along with corporations and labor unions, in the separate segregated funds regulation dates to the very first Commission regulations on the subject. In 1977, the Commission explained that "[s]ubsections (3), (4), and (5) [of 11 CFR 114.5(a)(2)] incorporate the requirements of 2 U.S.C. § 441b(b)(3)(B) and (C). Because the Act requires the disclosures

assumption here is faulty, and I question the necessity of extending to voluntary trade association members every protection afforded corporate employees and labor union members with respect to separate segregated fund solicitations.

1. Notice of Political Purpose

One could also question whether adults really need to be told that something called the "National Association of Realtors *Political Action* Committee" has a "political purpose." However, in this matter, the newsletter article stated, "[t]hese bills are representative of your [NA]RPAC dollars at work to improve our industry standards and working environment as well as to further protect our customers and clients, the real estate consumer." The Office of General Counsel observed that this language could be construed as a statement of NARPAC's political purpose. Commission regulations do not prescribe any magic words for satisfying the political purpose notice requirement, and therefore, I have no difficulty concluding that the newsletter language satisfies 11 CFR 114.5(a)(3). Furthermore, I would not require that this notice appear more than once in the single newsletter at issue, regardless of the number of discrete solicitations it contained.

2. Notice of Right to Refuse Without Reprisal

What "reprisal" might a member of a voluntary trade association face in the event that he does not contribute to the association's PAC? The trade association cannot fire the member, demote him, or reduce his pay, assuming the member is an individual or sole proprietor. If the member is a corporation, the trade association has no power over that corporation's individual employees. The "right to refuse to so contribute without any reprisal," *see* 2 U.S.C. § 441b(b)(3)(C), makes little sense beyond the specific corporate/labor context in which it appears in the statute.

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to be made by anyone soliciting employees, § (5) requires all written solicitations to contain the required disclosures. The Act requires the disclosures to be made by anyone soliciting employees. Accordingly, the disclosure requirements apply to solicitation by a membership organization, such as a trade association, of the executive or administrative personnel of its member corporations. Language in the Conference Report indicates that the disclosures are to be made by a labor organization when soliciting members who are also employees of a corporation or labor organization. The regulation, accordingly, adds the word 'member' to the statutory language. These disclosure requirements also apply to the solicitation of members of a membership organization, cooperative, or corporation without capital stock. The fact that the political purpose of the fund must be disclosed is in accord with § 102.6 of the regulations. These solicitations must also inform the member of his or her right to refuse without reprisal. This was done to make clear that the membership organization, cooperative, or corporation without capital stock may not cancel membership, policies, or take other similar actions against members who do not contribute." *The Commission's Proposal Regulations Referred to the Committee on House Administration*, Jan. 12, 1977 at 107, *available at* http://www fec gov/law/cfr/ej_compilation/1977/95-44 pdf#page=30. Thus, these particular regulations have always reflected an expansive reading of the statute

3. Redundancy Requirement

Commission regulations include a requirement that "[a]ny written solicitation for a contribution to a separate segregated fund which is addressed to an employee or member must contain statements which comply with the [notice of political purpose and notice of right to refuse without reprisal] requirements of . . . this section." 11 CFR 114.5(a)(5). Providing a general report on the activities of a PAC in a newsletter, even if it includes a list of members who have not contributed, is not the type of solicitation for funds that requires the specific notices required in our regulations – in fact, it is not a solicitation at all. I have little doubt that HPRAR sends individual letters to each of its members soliciting contributions to the PAC. And I strongly suspect that these letters contain all the required warning language – something that the Commission did not investigate. If a PAC distributes individualized solicitations to its members with all of the warnings required by our regulations, there is no reason that it should still be found in violation of the law because these same warnings were not *again* included in a monthly newsletter report on the PAC's political activities. The inclusion of a general exhortation such as "have you given your fair share?" does not alter this conclusion.

III. Conclusion

The result of this MUR is a perpetuation of the lack of clarity surrounding separate segregated fund solicitations, and a continuation of the inevitable consequence: any time an association mentions the activities of its PAC, even in passing, it must include the regulatory notifications and warnings, regardless of the circumstances. As this case makes clear, the association that does not acts at its own peril and risks an enforcement action with the Commission because of the overly broad meaning that has been given to the term "solicitation."

March 26, 2007

Hans A. von Spakovsky
Commissioner