



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/
David M. Mason, Commissioner

s/
Hans. A. von Spakovsky, Commissioner