



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 28, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-17

Ralph W. Holmen, Senior Counsel
National Association of Realtors
430 North Michigan Avenue
Chicago, IL 60611-4087

Dear Mr. Holmen:

This responds to your letters dated April 17 and May 17, 1995, requesting an advisory opinion on behalf of the National Association of Realtors ("NAR") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the relationship of NAR to its Member Boards.

You state that NAR is an incorporated trade association comprised of real estate professionals involved in all aspects of the real estate industry. It is the connected organization of Realtors Political Action Committee ("RPAC"), a multicandidate committee registered with the Commission.

NAR consists of a number of categories of members. Among these categories are Member Boards and Board Members. For purposes of this opinion, the principal category is its "Member Boards" which are state and local associations of REALTORS organized on a state-wide basis in each state or on a local jurisdictional level such as a county or city. You indicate that the vast majority of NAR's members are individuals who qualify as "Board Members" under the NAR Constitution. This category includes REALTOR members at the state and local Member Board level who, you assert, have a regular dues obligation and "sufficient NAR voting rights to qualify" as NAR members under Commission regulations.

Your request then poses several questions that are premised on NAR's possible status as a federation of trade associations with components (the state and local boards) whose "members" may qualify as members under Commission regulations. The consequences of federation status

and membership qualification relate to fundraising activities conducted by NAR and the Member Boards. At issue are the classes of individuals who may be solicited for contributions to RPAC; who may make donations of funds to Member Boards for solicitation expenses and donations of items to be sold, raffled, or auctioned to raise funds for RPAC; and the cost reimbursement rules applicable to such raffles or auctions.

The questions you have posed are restated:

1. Are the committees established by NAR and its constituent member state associations and local boards "affiliated committees" according to Commission regulations?
2. Is NAR a federation of trade associations within the meaning of 11 CFR 114.8(g)?
3. Assuming affirmative responses to questions 1 and 2, may RPAC contribution solicitations be directed to individuals who meet the definition of members of Member Boards because they have a regular dues obligation to the Member Board and the right to vote for one or more members of the highest governing body of the Member Board or another person who votes for one or more members of the highest governing body of the Member Board, but who do not meet the same standards for membership in NAR.
4. Assuming an affirmative response to question 3, may individual members of Member Boards (as described in question 3) also be solicited to provide, or make unsolicited donations for, funding to be used by the Member Board to underwrite the costs of soliciting members for contributions to RPAC?
5. In connection with RPAC fundraising events such as raffles or auctions, which are conducted by Member Boards and where prizes are distributed and the application of the "one-third rule" of 11 CFR 114.5(b)(2) may be invoked:
 - (a) Should any reimbursements required by 114.5(b)(2) be paid to the fundraising event sponsor (the Member Board) to whom fundraising items are donated, or to the donors who provided such items?
 - (b) In calculating the reimbursement required by 114.5(b)(2), must the value of each item be considered individually in relation to the fundraising proceeds from that item, or may the value of all items and the total of all fundraising proceeds be aggregated and the "one-third rule" applied to such aggregate amount?
 - (c) If aggregation is permitted (as suggested in (b)) but reimbursement of the item donors is required, must the reimbursement of donors be done on a pro rata basis?

To facilitate the legal analysis required to address these specific questions, the initial issues addressed are the status of NAR and its Member Boards, and the consequences of that status on the classes of individuals associated with the Member Boards of NAR who may be solicited for contributions to RPAC. These issues are presented by your questions 1 through 3. The opinion will thereafter address the fundraising issues presented by your questions 4 and 5.

The factual basis for the Commission's analysis is found in the governing documents you have provided, i.e., the NAR's Constitution and Bylaws, and model bylaws for state and local Member Boards. At NAR's request, state and local Member Boards have adopted the model bylaws. The NAR requires that many of the articles in these bylaws are to be adopted verbatim.^{1/}

I. Status of the NAR and the Member Boards

A. NAR and the Member Boards as Trade/Membership Associations with Qualified Members

The initial question is the status of NAR and its Member Boards as trade associations composed of persons or entities who qualify as members under the Act. As stated in the Commission regulations, a trade association is

generally a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.

11 CFR 114.8(a).

The NAR and the Member Boards are composed of individuals engaged in the real estate profession, and their purpose is to ensure high standards for the profession. There is no indication from the governing documents submitted with the request that NAR and the Member Boards are organized to operate for a profit or that a part of the net earnings inures to the benefit of any member. They therefore appear to qualify as trade associations.

The issue of whether NAR and the Member Boards may solicit their "members" for contributions to RPAC also depends upon whether they qualify as "membership associations" under the Commission regulations. See 11 CFR 114.1(e) and 100.8(b)(4)(iv).

A membership association is a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list. 11 CFR 114.1(e)(1)(i), (ii), and (iii).

Commission regulations provide guidance as to the definition of the term "members" in a membership association. Under 11 CFR 114.1(e)(2), "members" means all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who meet one of the following requirements:

- (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);

- (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- (iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

11 CFR 114.1(e)(2)(i), (ii), and (iii).

The regulations also provide that the Commission "may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have a significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule." See 11 CFR 114.1(e)(3).

Subject to the conditions and for the reasons discussed below, the Commission concludes that the NAR and the Member Boards are membership associations composed in part of entities and persons who qualify as members under the Act.

Your request appears to be limited to those whom you describe as having regular dues obligations and voting rights with respect to the selection of the highest governing body of a Member Board, i.e., REALTOR and REALTOR-ASSOCIATE members. NAR documents indicate that REALTOR members are members who are the principals of real estate firms, or are in the position of management or control on behalf of principals who are not physically present or engaged in the firm's business; or who are employed by REALTOR members or affiliated as independent contractors with REALTOR members and deemed qualified by a state or local Member Board. REALTOR-ASSOCIATE members are independent contractors and salesmen affiliated with or employed by a REALTOR member, or by a real estate firm in which the REALTOR member is a partner or officer, and who are deemed qualified by a Member Board. NAR Constitution, Article III.

You have submitted model bylaws for local boards which are either "All REALTOR" or which have both REALTOR and REALTOR-ASSOCIATE members. The relevant portions of each set of bylaws are similar in all respects material to the situation you have presented.

The highest governing body of the local board is its Board of Directors which consists of the elected officers, i.e., the President, Vice President, Secretary, and Treasurer, and a specified number of REALTOR members. The officers and the Board of Directors are elected at the local board's annual meeting. Local Bylaws, Article XI. Both sets of model bylaws explicitly grant the right to vote and hold office to just the REALTOR members. The bylaws for a board with both REALTOR and REALTOR-ASSOCIATE members provide that the board has the option of granting voting and officeholding rights to REALTOR-ASSOCIATE members.^{2/} Local Bylaws, Article VI. In addition, REALTOR and REALTOR-ASSOCIATE members pay annual dues. Local Bylaws, Article X.

The state bylaws provide for a number of categories of membership, including local Member Boards within the state, Board Members, and REALTOR and REALTOR-ASSOCIATE members. Board Members are the REALTOR and REALTOR-ASSOCIATE members of the local boards. In addition, there are other classes that are labeled as REALTOR and REALTOR-ASSOCIATE members of the state association. These are REALTOR and REALTOR-ASSOCIATE members whose place of business is outside the area of the jurisdiction of a local Member Board. State Bylaws, Article II.

The state association's highest governing body, the Board of Directors, includes the President of each Member Board, additional directors from each Member Board depending on its number of Board Members, state association Past Presidents, and elected officers (who are ex-officios on the Board). State Bylaws, Articles IV and V. The Board of Directors and officers are elected at the annual membership meeting. Voting is by the local Member Boards. The local board is represented by its president or another authorized REALTOR member, who has voting power equal to the number of REALTOR and REALTOR-ASSOCIATE members in that board. REALTOR members not attached to Member Boards may vote in person. State Bylaws, Articles VIII and XI.

Local Member Boards pay annual dues to the state association based, in part, on the number of REALTOR and REALTOR-ASSOCIATE members holding membership in the board. REALTOR and REALTOR-ASSOCIATE members who are not Board Members pay dues directly to the state association. State Bylaws, Article III.

The government of NAR is "vested" in its Board of Directors. Included in the Board of Directors are the presidents of the state and District of Columbia associations. In addition, each state (and the District of Columbia) is entitled to at least two Directors at Large. NAR Constitution, Article IV. There are also elective officers, i.e., the President, President-Elect, First Vice President, Regional Vice Presidents, Treasurer, and Corporate Secretary. All but the Corporate Secretary serve on the Board. NAR Constitution, Articles IV and VII.

The directors and officers are elected by the delegates at the National Convention. The delegates are the presidents of the Member Boards or their authorized agents; they have voting power equal to the number of REALTOR and REALTOR-ASSOCIATE members of the board. NAR Constitution, Articles IX and X.

NAR bylaws provide for the payment of annual dues by each local Member Board based, in part, on the numbers of REALTOR and REALTOR-ASSOCIATE members of that board. Each state Member Board pays annual dues based, in part, on the number of members of the state board who fall into those membership classes and who are not eligible for membership in a local board. NAR Bylaws, Article II.

With respect to the application of the Commission regulations, the state and local Member Boards and the NAR provide for members in their governing documents, actively seek members, and expressly acknowledge the acceptance of membership. See 11 CFR 114.1(e)(1)(i), (ii), and (iii).

The local, state, and national organizations each have members qualifying under 11 CFR 114.1(e)(2)(ii). With respect to local Member Boards, REALTOR members and, in the discretion of the Member Board, REALTOR-ASSOCIATE members may vote for directors. They also pay dues directly to the local board. With respect to state Member Boards, local boards pay annual dues and may vote to select members of the state Board of Directors, i.e., their presidents and other directors, and are thus members under 11 CFR 114.1(e)(2)(ii). REALTOR members that are not attached to local boards also have the voting rights and dues obligations to qualify as members of the state Member Boards under the Act. Member Boards pay dues directly to NAR. In addition, they each select a person, i.e., its president or another delegate, who has the right to vote for members of NAR's Board of Directors. See Advisory Opinions 1995-13, 1994-12, and 1993-24.

B. Federated and Affiliated Nature of NAR, State and Local Boards, and Members

1. NAR as a Federation of Trade Associations

Commission regulations define a federation of trade associations as "an organization representing trade associations involved in the same or allied line of commerce." 11 CFR 114.8(g)(1). Commission regulations explain the federation's role for purposes of the Act as follows:

- (1) Such a federation may, subject to the following limitations, solicit the members of the federation's regional, State or local affiliates or members, provided that all of the political committees established, financed, maintained or controlled by the federation and its regional, State, or local affiliates or members are considered one political committee for the purposes of the [contribution] limitations. The factors set forth at 100.5(g)(4) shall be used to determine whether an entity is a regional, State or local affiliate of a federation of trade associations.
 - (i) The federation and its member associations may engage in a joint solicitation; or
 - (ii) The member association may delegate its solicitation rights to the federation.
- (2) A federation is subject to the provisions of this section when soliciting the stockholders and executive or administrative personnel of the corporate members of its member associations.

11 CFR 114.8(g)(1) and (2).^{3/}

The documents submitted by you show that the state and local Member Boards are not just members of NAR but also component parts. See Advisory Opinions 1994-19, 1991-24, 1983-28, and 1977-44. These component associations have their own governance mechanisms while still participating as units of the national body bound by the rules of the national body.

In particular, as indicated above, the NAR prescribes model bylaws that are used to govern the state and local associations in a manner consistent with the NAR's rules, structure, and purposes. The governance framework of the NAR and its state and local boards is structured

so that the state boards collectively are extensively represented on the NAR Board of Directors and the local boards collectively are similarly represented on the state association's Board of Directors. In addition, the dues structure of NAR and the state associations each provide for payment from the lesser component structures, i.e., NAR from the state and local boards and the state association from the local boards.

The NAR Constitution and the bylaws of the state and local Member Boards contain provisions unifying the levels and memberships of the three levels of organization. The NAR's Constitution provides that, by membership agreement between the NAR and a state association, all of the Member Boards in that state must be members of the state association in order to continue as NAR members. Pursuant to such an agreement, local Member Boards shall be the constituent members of the state association, except that individuals may be members where there is no local board. The state association must provide for the same minimum membership requirements for election to a local board as are provided by the NAR. NAR Constitution, Article XV. The model state bylaws define a Member Board as any Board within the state in which all of the REALTOR and REALTOR-ASSOCIATE members hold membership in the NAR and the state association. State Bylaws, Article II. The local bylaws provide that the Member Board is a member of the NAR and the state association and that, by virtue of such membership, each REALTOR and REALTOR-ASSOCIATE is entitled to NAR and state association membership without further payment of dues to those entities. Local Bylaws, Article IX.^{4/}

The Commission concludes that, given the above-described relationships involving an organizational structure of three interactive tiers, the NAR is a federation of trade associations under 11 CFR 114.8(g).

2. NAR, State Boards, and Local Boards as Affiliated Entities

Your request poses the specific question whether any and all committees established by NAR and its component entities (the State Associations and local Boards of REALTORS) are affiliated committees under Commission regulations. The Commission answers this question in the affirmative.

For reasons very similar to those discussed above regarding the federation status of NAR, and also in view of the affiliation factors in Commission regulations, the component REALTOR entities at the State and local levels have an affiliated relationship with the NAR and among themselves. This relationship is demonstrated in several specific respects. (1) The state and local entities have the power to participate in the governance of NAR through selection of members of the NAR Board of Directors and the membership of their elected officials on the NAR Board. (2) NAR controls key aspects of the governance of the state and local entities because it has promulgated model bylaws for those entities to approve, including NAR's requirement that some key provisions be approved verbatim by the state and local bodies. (3) The pyramid or ascending membership structure of the NAR and its state/local bodies indicates virtually complete membership overlap as regards the REALTOR and REALTOR-ASSOCIATE members at the three levels; this overlap is also evident because state association presidents are NAR directors and local board presidents are state association directors. (4) Local member boards pay dues to

the relevant state association on a regular basis, and those local and state entities have similar, ongoing dues obligations to NAR. The relevant Commission regulations that apply here are 11 CFR 100.5(g)(4)(i) and (g)(4)(ii); 11 CFR 110.3(a)(3)(i) and (a)(3)(ii). See Advisory Opinion 1994-19.^{5/}

C. Who May Be Solicited for Contributions to RPAC

Under 11 CFR 114.8(g), solicitations for contributions to RPAC may be directed to all those who, under 11 CFR 114.1(e), qualify as members of the affiliated trade associations, i.e., the state and local Member Boards. These solicitations may be done by the NAR or by any of the Member Boards. See Advisory Opinions 1995-12 and 1977-44. The REALTOR members, at any level, and REALTOR-ASSOCIATE members with voting rights in the local Member Board may therefore be solicited for contributions to RPAC.

II. Solicitation of Funding and Fundraising Items to Support Efforts to Solicit Contributions to RPAC

A. Individual Member Donations of Funds to Member Boards

Under the Act and Commission regulations, a corporation, including an incorporated trade association, may use general treasury funds, including dues monies or membership fees, for the establishment, administration, and solicitation of contributions to its separate segregated fund. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.5(b). The Commission has interpreted this provision to permit corporate members (i.e., members under the Act) of an incorporated trade association to donate funds, over and above its membership dues, to defray administrative and solicitation expenses of the trade association's SSF. The Commission reasoned that once these funds were placed in the association's general treasury, the association could use them to pay expenses of its SSF. See Advisory Opinions 1984-33 and 1980-59. See also Advisory Opinions 1992-20, 1990-4, and 1982-61. The Commission has also held that corporate members of a trade association may donate merchandise to serve as raffle prizes to raise contributions to the PAC, thereby defraying solicitation expenses. Advisory Opinion 1989-18, 1986-13, and 1982-36.

The solicitations for such donations and the acceptable sources for the donations are subject to the limitations and prohibitions of 2 U.S.C. 441b and 11 CFR Part 114. See Advisory Opinions 1991-23, 1989-18, and 1983-24. In Advisory Opinion 1989-18, the Commission held that unsolicited donations of raffle prizes for SSF fundraising received from individual non-corporate donors who did not belong to the connected trade association were permissible as long as such donations fell within the contribution limitations and were not otherwise prohibited by the Act. See 11 CFR 114.5(j). The Commission treated these donations as contributions to the SSF, and not as the payment of PAC solicitation expenses since the individuals could not be said to be providing support to their own trade association of which they were a member. Donations to defray solicitation costs, or for the purchase of fundraising items, from corporations not in a qualified membership class of the association are prohibited under 2 U.S.C. 441b and, hence, may be neither solicited nor accepted. See Advisory Opinions 1991-23 and 1983-24.

To underwrite the costs that NAR and the Member Boards incur in soliciting contributions, those entities may solicit donations from individuals who are solicitable members. Since these are individual members donating funds to their own trade association, such donations, whether solicited or unsolicited, are not subject to the Act's limits.

B. Reimbursement for Donations of Items

You state that Member Boards will conduct fundraising social events for RPAC entailing the sale, raffle, or auction of items solicited from and donated by individual members. Items may include tangible goods such as televisions, radios, or other household items, services such as the weekend use of a vacation home, or the donations of real estate services normally performed by members for compensation. After the items are sold, raffled or auctioned, the gross sale proceeds are aggregated, and the fair market value of the items is compared to the proceeds under the one-third rule of 11 CFR 114.5(b)(2).

Commission regulations at 11 CFR 114.5(b)(2) specifically permit a connected organization, such as a membership organization, to utilize a raffle or other fundraising device which involves a prize so long as State law permits and the prize is not disproportionately valuable. Dances, parties, and other forms of entertainment may also be used to raise funds. When using raffles or entertainment to raise funds a reasonable practice to follow is for the SSF to reimburse the membership organization for costs which exceed one-third of the money contributed. 11 CFR 114.5(b)(2). In support of the one-third rule, the Commission has explained that "the prizes cannot be so numerous or valuable in relation to the cost that the fundraising procedure becomes, in effect, a 'trading money' situation." Advisory Opinions 1989-18 and 1982-36.^{6/}

As indicated above, a connected organization can receive the donation of items from its members for the purposes of raising funds. It is the connected organization's right and ability to use its funds to pay establishment, administration, and solicitation costs that enable the connected organization to receive such donations. See 2 U.S.C. 441b(b)(2)(C). In addition, Commission regulations specifically provide for reimbursement to the connected organization. 11 CFR 114.5(b)(2). The Commission concludes that any reimbursements made by the PAC under the one-third rule should be made to the Member Board. The Member Board may then make its own decisions as to how to distribute the reimbursed amounts among the donors. See Advisory Opinion 1982-36. Compare Advisory Opinion 1989-18.

In view of the conclusion that reimbursement may be made to the connected organization, and does not have to be made from the PAC to individual donors, the value of the items may be aggregated for determining how the reimbursement should be made. Since these raffles, auctions, and sales are being made at a social event, e.g., a dinner-dance, the costs of any professional entertainment should also be added to the value of fundraising items when determining the one-third figure. Since solicitation costs are exempt costs with regard to any lawful solicitation of funds under 2 U.S.C. 441b(b)(2)(C) and 441b(b)(4), the Member Board may subtract from the cost of the event the costs of the actual solicitation for the event. Such solicitation costs include the expenses for food, drink, and the facilities where the event is held. See Advisory Opinions 1980-50 and 1979-72.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Danny L. McDonald
Chairman

Enclosures (AOs 1995-13, 1995-12, 1994-19, 1994-12, 1993-24, 1992-20, 1991-24, 1991-23, 1990-4, 1989-18, 1986-13, 1984-33, 1983-28, 1983-24, 1982-61, 1982-36, 1980-59, 1980-50, 1979-72, and 1977-44)

1 You state that specific bylaws adopted by associations differ in a variety of respects to address matters of particular concern to each association, but that "all are quite similar." You state that these similarities include the provisions that are relevant to this request. The Commission assumes that these similarities exist with respect to significant articles that are not required to be adopted verbatim, such as "Membership" and other articles pertaining to voting rights.

2 The Commission does not address the membership status of REALTOR-ASSOCIATE members of local boards that have not given them voting rights.

3 The separate segregated funds of affiliated entities within a federation are treated as one committee for purposes of the Act's limitations on contribution amounts. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1). Contributions by an individual member to all the SSFs must be aggregated, as must contributions by those SSFs to a particular candidate or committee. See Advisory Opinion 1995-12.

4 Given the conclusions set out below, the Commission does not need to reach the issue of whether the individual members of the Member Boards at either the state or local level are members of the higher levels of the organization.

5 Commission regulations describe as affiliated committees those that are established, financed, maintained or controlled by a membership organization, including a trade association and/or related state and local entities of that organization. 11 CFR 100.5(g)(3)(iv) and 110.3(a)(2)(iv). Committees listed or described in this regulation are among those viewed as per se affiliated. Explanation and Justification, Federal Election Commission Regulations, 54 Fed. Reg. 34099 (August 17, 1989). Since the Member Boards are clearly state and local units of NAR, NAR and the Member Boards are affiliated on that basis as well. See Advisory Opinion 1994-19.

6 In general, the one-third concept works as follows: If the fair market value of the prizes raffled off is \$6,000, but only \$15,000 is raised for the PAC, then the PAC will make a reimbursement

of \$1,000, i.e., the difference between one-third of the amount raised and the value of the prizes. However, if \$18,000 is raised for the PAC, no reimbursement will be needed.