



FEDERAL ELECTION COMMISSION
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November 9, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1995-37

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for November 16, 1995.

Attachment

AGENDA ITEM
For Meeting of: **NOV 16 1995**

DRAFT

ADVISORY OPINION 1995-37

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

Dear Mr. Holmen:

This refers to your letter dated October 5, 1995, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of a class of members of the National Association of Realtors ("NAR"), for contributions to the Association's separate segregated fund.

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.

In Advisory Opinion 1995-17, the Commission examined the status of NAR as a federation of trade associations and the membership status of certain groups within NAR. Your request specifically concerns the solicitation of a group of members not addressed in Advisory Opinion 1995-17, those in the realtor-associate membership class who did not have voting rights in a member board. NAR wishes include this group in its solicitation for contributions to RPAC. You state NAR's belief that the financial and organization attachments of realtor-associate members to the local and State associations, and to NAR itself, should qualify this class as

members of their local and State associations, and of NAR, for purposes of the Act and Commission regulations.

Your request includes NAR governing documents: its constitution and bylaws, model bylaws for local member boards and its Code of Ethics and Arbitration Manual. From your previous advisory opinion request, the model bylaws for State associations were also available.^{1/}

NAR MEMBERSHIP STRUCTURE

Structure of NAR as Federation of Trade Associations

In Advisory Opinion 1995-17, the Commission concluded that NAR is a federation of trade associations made up of three distinct tiers: local associations that assert jurisdiction over municipalities, State associations that assert jurisdiction over an entire State, and the national governing structure itself. Each tier has its own governing board of directors.

Various links, relevant to the membership status of realtor-associates, join the component parts of the NAR federation of trade associations together. To be considered part of NAR, a local or State organization must incorporate verbatim into its bylaws certain provisions of the model bylaws. See, for example, NAR Bylaws, Article IV;

^{1/} The materials included with your request are identical to those presented in the prior advisory opinion. In that previous request, you noted that, due to the particular concerns of each local or state association, the specific bylaws adopted by local board and State association members may differ in some respects, but that all were quite similar. Certain sections of the model bylaws are required to be adopted verbatim as a condition of membership in NAR. See below.

3 Local Model Bylaws, Introduction, Articles VII and IX; and
4 State Model Bylaws, Introduction. Individual members pay
5 dues to their local boards. Local boards pay dues to the
6 State and national organizations. The State associations pay
7 dues to the national organization as well. NAR Bylaws,
8 Article II; State Model Bylaws, Article III; and Local Model
9 Bylaws, Article X.^{2/} A final important link is through the
10 election of NAR's Board of Directors. The Board of Directors
11 and the officers of NAR are elected by the presidents of the
12 different local and State boards in their capacities as
13 delegates to the national convention. NAR Constitution,
14 Article X. Officers and Boards of Directors of State
15 Associations are also elected by the presidents of the
16 different local boards. State Model Bylaws, Article IX.^{3/}

17 Classes of Membership

18 NAR consists of a number of categories of members.
19 Among these categories are member boards and board members.
20 "Member boards," as noted above, are State and local
21 associations of realtors organized on a State-wide basis in
22 each State or on a local jurisdictional level, such as a

23 ^{2/} The amount of dues owed to NAR by the local and State
24 Organizations is determined in part by the number of realtor
25 and realtor-associate members of each association. While the
26 members of the local boards do not pay dues directly to NAR,
NAR imposes certain guidelines and restrictions on the dues
an association may require of members. See Model Bylaws,
Article X.

27 ^{3/} According to the local model bylaws, each local president,
28 as well as the local board, is chosen by the voting
29 membership of the local organization. See Local Model
30 Bylaws, Article XI.

county or city. You indicate that the vast majority of NAR's members are individuals who qualify as "board members" under the NAR Constitution. Board members are the members of the State and local associations. This category, in turn, includes two subgroups of members: realtor members and realtor-associate members, both groups deriving NAR membership from their own membership in member board local and State associations. The local boards have the option of having both realtor and realtor-associate classes. See Local Model Bylaws, Article IV.^{4/}

Description of Realtor-Associate Class

Under the NAR Constitution, realtor-associate membership is is open to:

independent contractors and salesmen who are affiliated with or employed by a REALTOR Member or a firm, partnership, or corporation of which any REALTOR Member is a sole proprietor, partner or officer, who are actively engaged in the real estate business and who are deemed qualified for REALTOR-ASSOCIATE membership by the local board, or if there is no local board having jurisdiction, by the State association having an effective membership agreement with the National Association as provided in Article XV, section 2.

NAR Constitution, Article III, Section 1(C).

The definitions under the local and State model bylaws

^{4/} According to your request, the number of persons holding realtor-associate membership as of July, 1995 is 83,167 out of a total NAR membership of 711,989. Again, NAR does not require all local boards to have a realtor-associate category of membership and, therefore, not all local boards have this membership option available.

4 for realtor-associate membership are nearly identical and are
5 consistent with the definition under the national
6 organization. Realtor-associate members are:

7 individuals who are engaged in the real
8 estate profession other than as
9 principals, partners, or corporate
10 officers and do not qualify for or seek
11 REALTOR Membership as described in
12 Article V, section 2(b). Salesmen and
other associates of a real estate office
shall be eligible for REALTOR-ASSOCIATE
membership if they are employed by, or
affiliated as an independent contractor
with, a REALTOR member as provided in
this Article.

13 Local Model Bylaws, Article IV,
14 Section b. See also State Bylaws,
Article II.

15 Obligations and Benefits of Realtor-Associates

16 Benefits

17 With regard to voting rights, the local boards have
18 the option to grant these rights to realtor-associates, but
19 not all boards do so. Local Model Bylaws, Article VI.^{5/} Local
20 boards also have the option to decide that realtor-associates
21 are eligible to serve as officers or directors of the local
22 board. In addition, realtor-associates may be appointed to
23 various committees of the local board, including its finance
24 and grievance committees. Local Model Bylaws, Article XIII.
25 However, they cannot serve on the election or nominating
26 committees. Local Model Bylaws, Article XI.

27 Realtor-associates may also be appointed to various

28 ^{5/} You state that NAR does not maintain records indicating
29 which local boards do and do not grant voting rights to
30 realtor-associates.

committees, institutes, and councils of NAR and the State associations. NAR Constitution, Article VIII; and State Model Bylaws, Article VII.

Another benefit granted to realtor-associates is the license by NAR to use the Federally-registered collective membership mark "Realtor-Associate" to identify themselves as NAR members. NAR Bylaws, Articles V.

Obligations

Realtor-associate members are obligated to pay dues to their local board. Local Model Bylaws, Article X. They do not pay dues directly to the State and national Associations.^{6/} Realtor-associates are also subject to NAR's Code of Ethics and Arbitration Manual. This requires realtor-associates not only to follow a canon of ethical behavior, but also requires that realtor-associates arbitrate certain types of contractual and business disputes that may arise.^{7/} Realtor-associates members (as well as realtor

^{6/} However, NAR and the State associations base the dues assessed against local boards on the number of realtor and realtor-associate members that belong to each local board. NAR Bylaws, Article II and State Model Bylaws, Article III.

^{7/} The NAR bylaws also require member boards to adopt the NAR Code of Ethics and Manual "as a part of the board's governing regulations for violation of which disciplinary action may be taken." A member board that refuses to enforce the Code and Manual with respect to the business activities of its members may be expelled from NAR membership. NAR Bylaws, Article IV. Enforcement of the Code and Manual is primarily an obligation of the local board. State associations may exert authority in certain limited situations where there are no local boards with jurisdiction or the local board is incapacitated. State Bylaws, Article XII.

3 members) may be fined, suspended, expelled or otherwise
4 disciplined by the local board of directors for violations of
5 the Code, Manual or the local bylaws. Local Model Bylaws,
6 Articles V and VII. Your request states that one option
7 available to a local board is to refer the matter to the
8 proper State real estate commission for further action where
9 State real estate laws have also been violated: NAR Code and
10 Manual Part 2, section 23.

11 ACT AND COMMISSION REGULATIONS

12 The Act prohibits corporations from making any
13 contribution or expenditure in connection with a Federal
14 election. 2 U.S.C. §441b(a). The Act states, however, that
15 the term "contribution or expenditure" does not include "the
16 establishment, administration, and solicitation of
17 contributions to a separate segregated fund to be utilized
18 for political purposes by a corporation, labor organization,
19 membership organization, cooperative, or corporation without
20 capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.
§431(8)(B)(vi) and (9)(B)(v).

21 Under 2 U.S.C. §441b(b)(4)(A)(i), a corporation, or a
22 separate segregated fund established by a corporation, may
23 solicit contributions to such a fund only from its
24 stockholders and their families and its executive and
25 administrative personnel and their families. An exception
26 set forth in 2 U.S.C. §441b(b)(4)(C) and 11 CFR 114.7(a)
27 allows a membership organization (among other corporations
28 without capital stock), or its separate segregated fund, to
29
30

solicit contributions to the fund from the members of the organization and their families. The Commission's regulations use the term "membership association" to implement this exception. It is defined, in part, as 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 define the term "members." 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

4 the highest governing body of the membership association.

5 The regulations also provide that the Commission "may
6 determine, on a case by case basis, that persons seeking to
7 be considered members of a membership association for
8 purposes of this section have a significant organizational
9 and financial attachment to the association under
10 circumstances that do not precisely meet the requirements of
11 the general rule." See 11 CFR 114.1(e)(3).^{8/}

12 DETERMINING STATUS OF REALTOR-ASSOCIATE MEMBERSHIP CLASS

13 NAR and Its Component Parts as Membership Organizations

14 The Commission, in Advisory Opinion 1995-17, determined
15 that NAR, the State associations and local boards met the
16 requirements of 11 CFR 114.1(e)(1)(i), (ii), and (iii). It
17 concluded that NAR and its component parts are membership
18 organizations as defined by the Act. See Advisory Opinion
19 1995-17.

20 Membership status within local boards

21 Your request concerns only those realtor-associates who
22 do not have voting rights. By definition, such members would
23 not meet the requirements of sections 114.1(e)(2)(ii) or

24 ^{8/} Your request only concerns solicitation of contributions
25 for RPAC. Therefore, the discussion below will concern
26 section 114.1(e). The Commission notes that section
27 100.8(b)(4)(iv) relates to an association's right to make
28 partisan communication to its members, and the wording of
29 sections 100.8(b)(4)(iv) and 114.1(e) dealing with membership
30 are identical. Therefore, the analysis of section 114.1(e)
will, to that extent, be applicable to section
100.8(b)(4)(iv) as well.

4 (iii).^{9/}

5 The Commission concludes, however, that
6 realtor-associates also do not meet the requirements of
7 section 114.1(e)(2)(i). In explaining what is meant by a
8 "significant financial attachment" or a "significant
9 investment or ownership stake" in the membership organization
10 beyond the payment of dues, the Commission cited, as an
11 example, the tens of thousands of dollars necessary to
12 acquire nonvoting membership seats in stock and commodity
13 exchanges. See 58 Fed. Reg. 45771 (August 30, 1993). In
14 Advisory Opinion 1994-34, the Commission concluded that a
15 significant financial attachment existed where a member
16 derived his income from the seat (costing about \$125,000)
17 occupied in a commodity exchange. See also Advisory Opinion
18 1995-2. While realtor-associate members receive certain
19 benefits from their membership in the local board, these
20 benefits taken together do not equal a "significant financial
21 attachment" or a "significant investment or ownership stake"

22
23 ^{9/} It is clear that the nonvoting realtor-associates of the
24 Local boards have certain possible opportunities for
25 participation in policy matters, though participation in
26 other committees, but this, in and of itself, is not
27 sufficient to meet the requirements of section
28 114.1(e)(2)(ii) and (iii). The Explanation and Justification
29 for these provisions of the regulations notes: "The
30 Commission stresses that so-called 'governance' voting is
required, as opposed to voting for the association's policies
or positions." 58 Fed. Reg. 45771 (August 30, 1993). See
Advisory Opinion 1993-24.

3 in local board, as stated in the above standard.^{10/}

4 Lastly, the Commission addresses the application of the
5 revised regulation's definition of "members" under the case
6 by case approach of section 114.1(e)(3). Of importance here
7 is whether the nonvoting realtor-associates of the local NAR
8 boards have a "significant organizational and financial
9 attachment to the association under circumstances that do not
10 precisely meet the requirements of the general rule." Id.
11 The Explanation and Justification for the regulations
12 indicates that while the application of section 114.1(e)(3)
13 provides certain leeway, its application should take into
14 account the same factors and elements stressed in the prior
15 paragraphs. The importance of voting rights is reaffirmed
16 under section 114.1(e)(3) when considering what constitutes a
17 "significant organizational attachment." For example,
18 section 114.1(e)(3) elaborates on possible "case by case"

19 ^{10/} You stress the right of a realtor-associate, granted by
20 NAR through the local board to use the licensed term
21 "realtor-associate" in business transactions. However, as
22 your request makes clear, a realtor-associate derives the
23 legal permission to practice a profession from the license
24 granted by the State.

25 The Commission also acknowledges the arbitration
26 obligations, disciplinary regime and the sanctions that may
27 be imposed against a realtor-associate for violations of the
28 Code and Manual. Other than the payment of a maximum \$2,500
29 fine (which presumably could be avoided by resigning
30 membership in local board), your request fails to indicate
the extent of any theoretical loss of income an
realtor-associate might suffer through these penalties. It
is significant that the sanctions described in your request,
including expulsion from the local board, would not directly
affect the realtor-associate's license. Your request affirms
that the most that can occur is that the local board would
refer the case to the State regulatory authority, if there is
also a violation of a State law.

3 situations. It states "student members who pay a lower
4 amount of dues while in school or long term dues paying
5 members who qualify for lifetime membership status with
6 little or no dues obligations may be considered members if
7 they retain voting rights in the association." See Advisory
8 Opinion 1993-24.^{11/} Since nonvoting realtor-associates have
9 no voting rights at all, the Commission concludes that they
10 do not meet the definitional requirement for "members" under
11 section 114.1(e)(3).

12 Membership status within the State and National
13 Associations.

14 For reasons similar to those outlined above, the
15 Commission concludes that nonvoting realtor-associates are
16 not members of the State or national components of NAR.
17 Your request notes that the total numbers of nonvoting
18 realtor-associates is taken into account when determining the
19 level of voting participation of local boards on the State or
20 local levels. You also emphasize the right of all
21 realtor-associates to apply for appointment on various State
22 or national committees. The Commission again concludes that
23 this is insufficient to meet the voting rights requirements
24 of 114.1(e)(2)(ii) or (iii) or to provide the "significant
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26 ^{11/} The Explanation and Justification for the revised
27 regulations discusses these examples further and notes that
28 individuals in these categories could be considered members
29 under section 114.1(e)(3) only if they have "some voting
30 rights in the association." See 58 Fed. Reg. 45773. (August
30, 1993).

organizational attachment" described in section 114.1(e)(3).^{12/}
The financial benefits provided by membership in the State and national organization also do not meet the significant financial attachment required by section 114.1(e)(2)(i).

The Commission, therefore, concludes that NAR, its component State associations and the local board may not solicit contributions for RPAC from realtor-associates who have no voting rights in the local association since these members do not qualify as members of NAR, the State associations or the local boards for purposes of the Act.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the

^{12/} Section 114(e)(2)(ii) for membership organizations would require the payment of dues by individuals on a regular basis to the national and State associations. This particular element is not required in your circumstances since NAR, the state associations and the local boards form a federation of trade associations. Therefore, the payment of dues by a member to the local board would fulfill the dues requirement for membership under the Act in the relevant state association or in NAR.

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3 Commission, to the specific transaction or activity set forth
4 in your request. See 2 U.S.C. §437f.
5
6

7 Sincerely,
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10
11 Danny L McDonald
12 Chairman
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14 Enclosures (AOs 1995-17, 1995-2, 1994-34, 1993-24 and
15 1982-55)
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