Center for Competitive Politics

December 12, 2006

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Alternative Draft AO 2006-33 (National Association of Realtors)

Dear Ms. Dove and Mr. Norton:

These comments are filed on behalf of the Center for Competitive Politics in regard to Alternative Draft Advisory Opinion 2006-33 (National Association of Realtors), released on December 12, 2006. The Center urges the Commission to adopt this alternative draft, which is more consistent with the language and purpose of Commission regulations than the original draft.

In its Advisory Opinion Request, the National Association of Realtors ("NAR") proposes two transactions. The first is the division of jointly raised funds according to a new formula, acceptable to the fundraising parties and agreed to by donors. The second is the transfer of treasury funds from NAR to its affiliated state associations. As the alternative draft correctly observes, neither of these individual transactions violates federal campaign finance law. Alternative Draft AO 2006-33 at 5. Indeed, NAR's transfer of treasury funds to its affiliated state associations "does not even implicate the federal campaign finance laws." *Id.* The question before the Commission is whether these two activities, unquestionably permissible when performed separately, remain permissible when performed together.

The original draft concluded that these activities, when performed together, violate 11 CFR 114.5(b). This conclusion is incorrect. The alternative draft appropriately recognizes that 11 CFR 114.5(b) is inapplicable to these combined activities. This conclusion is faithful not only to the text of the regulation[1], but also its purpose, which is to prevent circumvention of the corporate source prohibition in federal elections.

[1] *See* Alternative Draft AO 2006-33 at 6 (explaining that 11 CFR 114.5(b) is "inapplicable on its face").

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In *Austin v. Michigan Chamber of Commerce*, the Court justified corporate contribution and expenditure limits as a means of combating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. 652, 660 (1990). These concerns are not present here. As a federation of trade associations, NAR's separate segregated fund ("RPAC") and the state associations' non-federal political action committees ("State PACs") are treated as a single political committee, 11 CFR 114.8(g), and it is individuals, not corporations, who are filling the federal account of that political committee. Regardless of the division of contributions between RPAC and the State PACs, all of the funds available to RPAC will have been raised from individuals within the contribution limits and source prohibitions that apply to federal political committees.

Equally important is that individual donors, while the source of these contributions, are not the recipients of NAR's treasury funds. Those funds are distributed only to the state associations, which are prohibited from making contributions or expenditures in relation to a federal campaign, 2 U.S.C. 441b, and may only make donations or disbursements in relation to *state* campaigns to the extent permitted by state law. The original draft neglected to note this absence of direct or indirect payment to individual contributors among its reasons for finding the so-called "one-third rule"[2] inapplicable, an omission that is corrected in the alternative draft. *Compare* Original Draft AO 2006-33 at 7, *with* Alternative Draft AO 2006-33 at 7.

The Center for Competitive Politics does not doubt that, in joint fundraising, the method of allocating contributions between organizations may affect an individual donor's propensity to give. This is true of any number of factors. But unless corporate funds are being used to reimburse individual donors, or to facilitate donations in the name of another, *Austin's* concerns and the concerns of 11 CFR 114.5(b) are simply absent. In the absence of these concerns, the alternative draft reaches the correct conclusion, finding both the "establishment, administration, and solicitation cost" exemption and the "one-third rule" inapplicable, and finding NAR's proposed incentive program permissible. Accordingly, we urge the Commission to adopt the alternative draft.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Paul M. Sherman

Paul M. Sherman
Associate Director
Center for Competitive Politics

[2] 11 CFR 114.5(b)(2).

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