

RPAC Solicitation of Affiliate Members and Association Staff

Association Staff. From time to time AEs and other association staff raise questions about RPAC solicitation. One of those questions is whether Association staff members may be solicited to contribute to RPAC. Most members and AEs involved in RPAC are aware that federal law permits solicitation of RPAC contributions only from members of the so-called “solicitable class”, and most are also aware that the solicitable class includes members of NAR and their immediate family members. But often overlooked is that executive and administrative personnel of NAR and its state and local associations may also be solicited to make RPAC contributions, in the same way and to the same extent as REALTORS® are solicited for RPAC.

For this purpose the “executive and administrative personnel” of associations who may be solicited includes individuals paid on a salary rather than an hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities. The requirements of the Fair Labor Standards Act may also be applied in distinguishing between “executive and administrative” personnel who may be solicited in this way, and other employees. That means that those employees who are “exempt” (that is, not entitled to receive overtime pay) are included in the solicitable class, and those who must be paid for overtime are not (but subject to the opportunity for limited solicitation of such others, described below.)

As noted, executive and administrative Association employees may be solicited for RPAC in the same manner as REALTORS®. That is, they may be solicited an unlimited number of times using any form of communication or solicitation. Just as in the case of solicitation of REALTORS®, however, all RPAC contributions must be voluntary. In particular, association staff may not be required to contribute to RPAC as a condition of employment or entitlement to employment privileges or benefits. And all the usual requirements of soliciting contributions to RPAC apply equally to soliciting association executive and administrative staff. For example, the usual “disclaimer” notice must be included on all written solicitation materials provided to association executive and administrative personnel. In addition, because a portion of each RPAC contribution is provided to the State PAC of the state where the contribution is made, all solicitations must also comply with the requirements of state law regarding soliciting State PAC contributions. Thus, even though solicitation of executive and administrative association personnel is permitted under federal law, AEs should be sure to confirm that state law also permits such individuals to be solicited, or to determine and comply with any unique requirements and duties that may apply to solicitation of such association staff.

Association employees other than executive and administrative employees may also be solicited to make RPAC contributions, but federal law narrowly limits solicitation of such employees. For those employees there is enhanced concern for explicit or indirect management pressure or coercion to contribute, and these restrictions are intended to reinforce the ability of such employees to contribute in a truly voluntary fashion. There are three specific requirements imposed:

1. Non-executive and administrative association employees may be solicited for RPAC not more than two times per year;
2. They may only be solicited in writing, by mail addressed to their home addresses; and
3. The association soliciting such employees must establish a “custodial arrangement” operated by a third party that allows such employees to make anonymous contributions. The association must also inform employees being solicited in this fashion of the custodial arrangement and of their opportunity to make anonymous contributions via that custodial arrangement, and further inform them that their employer may not be advised of those who do not make contributions.

A custodian appointed to fulfill this function will typically be a bank or other financial institution. The custodian operating the custodial arrangement must keep records of contributions made and deposit those

contributions in a separate account. The custodian must provide to RPAC or the state PAC as RPAC's agent information about contributors, including the identity of contributors of a single contribution in excess of \$50 or annual aggregate contributions in excess of \$200, and transfer the funds received to the same. Conversely, the custodian may not provide to the employer (the association) information about the identity of contributors of amounts of \$50 or less or aggregate contributions of \$200 in a single year. Note that if an association chooses not to establish and operate such a custodial arrangement, however, RPAC solicitation of non-executive and administrative personnel is prohibited.

Finally, another question raised is whether association employees who are *not* executive or administrative personnel and therefore may be solicited only twice per year in writing directed to their home addresses may nevertheless participate in conducting association RPAC fundraising programs and activities. It could be argued that by assisting the association to conduct RPAC fundraising programs such employees are implicitly solicited in violation of the rules described above. While no FEC regulation or Advisory Opinion speaks directly to the issue, by analogy to certain rules and opinions on related issues it appears reasonable to conclude that such involvement in RPAC fundraising programs by non-executive and administrative association employees is permitted, provided two conditions exist. First, the involvement in and/or attendance at such fundraising programs and activities by non-executive and administrative personnel must be part of their usual and normal job responsibilities. Second, the fundraising activities and materials used in connection with those activities and efforts must be directed at soliciting contributions only from members and their families and executive and administrative personnel and their families, and *not* directed at the non-executive and administrative employees who may be solicited only in the much more limited manner described above. As a safeguard, it would also be advisable for the association to decline to accept any contributions offered by such employees in connection with fundraising efforts in which the employees participate as a part of their job responsibilities.

Affiliates. Another RPAC solicitation question is whether affiliate members may be solicited for contributions to RPAC. Many local associations include in their bylaws one or more categories of "affiliate membership" for individuals or firms involved in business activities related to but not directly engaged in real estate. These may include, for example, mortgage brokerage or title or property insurance firms. Even if the association bylaws provide that such firms qualify for membership, because they are in most cases incorporated those firms are precluded by the prohibition against corporate PAC contributions to contribute to RPAC. But if the association bylaws provide for individuals employed by or associated with such firms to hold *individual* affiliate membership in their own names, they may be solicited for and make contributions to RPAC as long as the bylaws establish a *bona fide* category of membership by which such individuals are eligible for membership. More specifically, Federal Election Commission regulations provide that such individuals are deemed "members" for purposes of RPAC solicitation if they are obligated to pay dues (of a meaningful, and not purely nominal, amount), or if they have some other "significant organizational attachment to the organization." Examples of such a "significant organizational attachment" include the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote directly for organization officers; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; the right to approve the organization's annual budget; or the right to participate directly in similar aspects of the organization's governance. Individuals that hold membership that satisfies these criteria may be solicited as often and as aggressively as desired, in the same manner that REALTOR® members are solicited.

Conversely, as noted above affiliate members who are corporations, or affiliates not permitted to be solicited for RPAC because their status as "members" does not satisfy these criteria, may never be solicited to nor make a contribution to RPAC. But corporate affiliate members, or other affiliate members whose membership relation with the association does not satisfy the criteria described above, may contribute to or make financial resources available to the association for use in connection with RPAC

administration or fundraising, such as assisting with the costs of a fundraising event or providing a “prize” to be used at an RPAC auction or raffle (where otherwise permitted by law.) Affiliate members who are corporations may, however, also freely contribute to the NAR “Political Advocacy Fund,” a fund of NAR used for certain political purposes that may accept corporate funds.

Finally, another related issue raised in connection with solicitations of contributions to RPAC is what constitutes a “solicitation.” The Federal Election Commission takes a fairly broad view of what constitutes a solicitation. Communications that do not explicitly request a contribution may nevertheless be deemed a solicitation (and therefore subject to the requirements and restrictions described above) if they encourage support of RPAC or facilitate the making of contributions. Facilitating contributions would include providing information on how individuals may contribute to the RPAC, such as by including in the communication an address to which a contribution could be sent.

Conversely, however, general information about RPAC is not a solicitation. This kind of information would include how much had been contributed to the RPAC in a given period, how many contributors had contributed to the RPAC, the federal candidates supported by RPAC, that RPAC funds are used to support candidates for federal office, or that only certain individuals may be solicited for contributions to RPAC.