

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6520

DATE COMPLAINT FILED: December 13, 2011

DATE OF NOTIFICATION: December 28, 2011

LAST RESPONSE RECEIVED: January 23, 2012

DATE ACTIVATED: February 14, 2012

EXPIRATION OF SOL: May 31, 2017

ELECTION CYCLE: 2012

COMPLAINANT:

Marguerite De Santis

RESPONDENTS:

National Association of Realtors
Massachusetts Association of Realtors
Berkshire County Board of Realtors

**RELEVANT STATUTES AND
REGULATIONS:**

2 U.S.C. § 441b
2 U.S.C. § 441b(b)(3)(A)
11 C.F.R. § 114.2(f)
11 C.F.R. § 114.5(a)-(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant Marguerite De Santis, a real estate broker in Berkshire County, Massachusetts, alleges that the National Association of Realtors ("NAR") and its state and local affiliates plan to increase membership dues to fund NAR's lobbying and political activities, including "the direct support of candidates." She contends that she cannot conduct her business activities as a broker without access to the local Multiple Listing Service ("MLS") system in Berkshire County where she operates. The Berkshire County Board of Realtors (the "Board") limits access to that system, however, only to those who are members of the Board, the

1 Massachusetts Association of Realtors ("MAR"), and NAR and who pay the challenged dues.
2 She therefore asserts that she either must pay the challenged dues or suffer a significant financial
3 injury, making the disputed portion of the payment a coercive contribution in violation of the
4 Federal Election Campaign Act of 1971 as amended (the "Act") and Commission regulations.

5 Respondents acknowledge that beginning in 2012 NAR's membership dues increased by
6 \$40 and that NAR will use a portion of that increase for political activity, including independent
7 expenditures.¹ Disclosure reports filed with the Commission show that since 2010 NAR has
8 been using its general treasury funds to make contributions to the National Association of
9 Realtors Congressional Fund (the "Congressional Fund"), an FEC-registered independent
10 expenditure-only committee ("IEOPC").

11 The central question presented in this matter is whether a membership corporation that
12 finances independent expenditures — either directly from its treasury or by making a
13 contribution to an IEOPC — may be prohibited under the existing "anti-coercion" provisions of
14 the Act and Commission regulations from using membership dues for that purpose.² For the
15 reasons discussed below, we conclude that those provisions do not bar the conduct at issue here.
16 Accordingly, we recommend that the Commission find no reason to believe that the Respondents
17 violated 2 U.S.C. § 441b(a), (b)(3) and 11 C.F.R. §§ 114.2(f), 114.5 and close the file in this
18 matter.

19 **II. FACTUAL BACKGROUND**
20

21 NAR is a trade association and an Illinois incorporated voluntary membership
22 organization, exempt from federal income tax under Section 501(c)(6) of the Internal Revenue

¹ NAR also has stated that a portion of membership dues it receives in 2013 and 2014 will also be used for lobbying activity. See <http://www.realtor.org/narfininfo.nsf/pages/DuesTransmittalInfo>.

² See 2 U.S.C. § 441b(b)(3)(A); 11 C.F.R. §§ 114.5, 114.2(f).

1 Code.³ NAR engages in a variety of activities intended to influence and shape the real estate
2 industry and to otherwise serve the interests of its members.⁴ Its members include residential and
3 commercial realtors, such as brokers, salespersons, and other persons engaged in the real estate
4 industry.⁵ In 2011, NAR had just over 1 million members.⁶

5 As a membership organization NAR files reports with the Commission disclosing its
6 communication costs.⁷ NAR also has a separate segregated fund ("SSF"), the National
7 Association of Realtors Political Action Committee ("NARPAC"), and in September 2010 NAR
8 established an IEOPC, the Congressional Fund. Both committees are registered with the
9 Commission. According to its disclosure reports, the Congressional Fund receives all of its
10 contributions from NAR's general treasury, has the same treasurer as NARPAC, and lists
11 NARPAC and the SSFs of several state associations of realtors as affiliated committees.⁸ The
12 Congressional Fund disclosed receiving \$4.28 million in contributions from NAR from 2010
13 through 2013.⁹

³ *NAR at a Glance*, <http://www.realtor.org/about-nar/nar-at-a-glance>; NAR Resp. at 1 (Jan. 23, 2012).

⁴ *NAR's Mission and Vision*, <http://www.realtor.org/realtororg.nsf/pages/narmission>.

⁵ *NAR at a Glance*, <http://www.realtor.org/about-nar/nar-at-a-glance>.

⁶ Matt Carter, *NAR to Hike Dues by \$40*, INMAN NEWS (May 16, 2011), <http://www.inman.com/news/2011/05/16/nar-hike-dues-40>.

⁷ 2 U.S.C. § 431(9)(B)(iii) (requiring membership organizations (including labor organizations) and corporations to disclose costs for express advocacy communications).

⁸ See Congressional Fund, Statement of Organization at 3-8 (Nov. 12, 2010).

⁹ See 2010 Year-End Report at 4 (Jan. 6, 2011) (\$1,105,625.16 in contributions); 2011 Year-End Report at 3 (Jan. 25, 2011) (\$607.60 in contributions); 2012 Year-End Report at 3 (Jan. 22, 2013) (\$3,176,353.60 in contributions); 2013 Year-End Report at 3 (Jan. 16, 2013) (\$617.28 in contributions).

1 NAR is affiliated with state-level associations of realtors in every state, as well as local
2 associations that are affiliated with both NAR and the relevant state association.¹⁰ Respondent
3 MAR is a state association affiliated with NAR and the Board is a local association affiliated
4 with NAR and MAR.¹¹ Both MAR and the Board are Massachusetts incorporated membership
5 organizations exempt from federal income tax under Section 501(c)(6) of the Internal Revenue
6 Code.¹²

7 The MLS is a collective database of real estate listings owned and controlled by local
8 chapters of NAR.¹³ Most, but not all, local chapters require membership — and thus, payment of
9 NAR membership dues — to access the corresponding local MLS system.¹⁴

10 De Santis is a buyer-broker in Berkshire County, Massachusetts and a member of the
11 Board, MAR, and NAR.¹⁵ De Santis alleges that she must use the local MLS to conduct her
12 business and that the Board requires the payment of NAR membership dues to access MLS.¹⁶

13 According to the Complaint, in “late spring” 2011, the Board informed its members that
14 NAR planned to transform itself from a trade association into a “political lobbying and campaign

¹⁰ See <http://www.realtor.org/realtororg.nsf/pages/whoisarealtor> (Apr. 5, 2011).

¹¹ MAR Resp. at 1 (Jan. 18, 2012); Board Resp. at 1 (Jan. 18, 2012).

¹² *Id.*

¹³ See Bylaws of the Berkshire County Board of Realtors, Art. XVIII (Amended Oct. 2012), available at http://www.berkshirerealtors.org/downloads/BGBR_Bylaws.pdf:

¹⁴ NAR's restricted access to the MLS has been challenged on antitrust grounds in state and federal courts. In 1991, the Eleventh Circuit held that restricting MLS access constituted an illegal group boycott and tying arrangement if the MLS had “market power” in a relevant geographic market. See *Thompson v. Metropolitan Multilist-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991). NAR subsequently changed its policy to permit the regional MLS services to decide whether to provide access to non-members. See <http://www.realtown.com/community/MLSInformation/view/JMFORIA>; see also NAR, HANDBOOK ON MULTIPLE LISTING POLICY at 13 (2014), available at <http://www.realtor.org/sites/default/files/publications/2014/Policy/2014-MLS-Handbook.docx>.

¹⁵ Compl. at 1 (Dec. 13, 2011).

¹⁶ *Id.* at 1; see *MLS Membership*, <http://www.berkshirerealtors.org/page.taf?ID=70> (requiring membership in the local and state association as well as payment of national dues to access the MLS Service for Berkshire County).

1 contributing group.”¹⁷ Submitted with the Complaint are documents NAR created in 2011
2 regarding its “Realtors Political Survival Initiative.” According to those materials, NAR
3 intended to become “America’s most powerful advocacy organization” by, among other
4 measures, making independent expenditures to promote federal candidates.¹⁸ NAR would
5 finance this initiative with a \$40 dues increase, and it planned to spend a total of \$3.59 million in
6 independent expenditures.¹⁹ A part of each NAR member’s dues — averaging \$3.42 a year —
7 would be used to fund the independent expenditures.²⁰ The NAR board of directors approved the
8 increase in May 2011, and it took effect beginning in 2012.²¹

9 De Santis contends that she and many other members opposed NAR’s initiative.²² She
10 claims she has no choice but to pay the dues so that she can access the MLS, although she does
11 not want any part of her dues payment to be used for political purposes: “I do not want to be in
12 this political group but, I will not be allowed to access the MLS unless I join and pay my full
13 amount . . . a large chunk [*sic*] going into politics. I feel that this is a form of extortion and I will
14 be restrained from carry [*sic*] on my business unless I join the Board of Realtors and pay this
15 extra money.”²³ She further asserts that she should be afforded the opportunity to opt-in or -out

¹⁷ Compl. at 1.

¹⁸ See *id.*, Attach. A.

¹⁹ *Id.*, Attach. B.

²⁰ See Compl., Attach. B (Political Survival Initiative Chart).

²¹ See *NAR Dues Increase Approved: \$40 Increase in 2012*, CHICAGO AGENT (May 16, 2011),
<http://chicagoagentmagazine.com/nar-dues-increase-approved-40-increase-in-2012/>; see also NAR Resp. at 1
(acknowledging that the \$40 increase took effect beginning in 2012).

²² Compl. at 2.

²³ *Id.*

1 of the program: "Shouldn't there be some sort of check-off card for me to APPROVE of this use
2 of my dues for political purposes? . . . Political purposes that I have had no say in formulating."²⁴

3 Respondents NAR, MAR, and the Board each filed separate but essentially identical
4 responses. Respondents acknowledge that dues for NAR membership were increased \$40
5 beginning in 2012, and that NAR intends to use some or all of the dues increase for lobbying and
6 political activity.²⁵ Respondents assert, however, that after the Supreme Court's decision in
7 *Citizens United v. FEC*, 588 U.S. 310 (2010), none of these activities violates the Act.

8 Respondents provide an affidavit of Timothy A. Ryan, Managing Director and Chief of Staff to
9 NAR's Senior Vice President for Community and Political Affairs. Ryan asserts that NAR will
10 use treasury funds (and thus membership dues) specifically to support, among other things,
11 "'independent expenditures' as defined in the Act."²⁶ Respondents further aver that none of the
12 funds will be used to make direct or indirect contributions to federal candidates or committees.²⁷

²⁴ *Id.*

²⁵ NAR Resp. at 1; MAR Resp. at 1; and the Board Resp. at 1-2.

²⁶ Ryan Aff. ¶ 4.f.

²⁷ Respondents also contend that the Complaint fails to allege a violation because it refers only to NAR's prospective intent to collect money to fund independent expenditures. Under the Commission's regulation, however, any person may file a complaint relating to a violation that has occurred or is about to occur, 11 C.F.R. § 111.4(a), and the dues increase at issue was implemented shortly after the Complaint was filed. MAR and the Board also claim that the Complaint fails to allege a violation as to them, because it alleges that NAR — not MAR or the Board — will use the dues improperly. The applicable Commission regulations, however, apply not only to NAR but to officers, directors, or other representatives acting as its agents. *See* 11 C.F.R. § 114.2(f). Although the dues are paid to NAR, De Santis alleges that the Board collects them. Compl. at 2. The Board also appears to control access to the local MLS, and De Santis alleges that she cannot access the MLS without paying dues. Further, De Santis allegedly must be a member of all three associations to access the MLS. Thus, if NAR's course of action violated the Act, the allegations at least give rise to the possibility that MAR or the Board may have been liable as well. Accordingly, MAR and the Board were provided notice and an opportunity to respond to the allegations if they so chose.

1 **III. ANALYSIS**

2
3 In *Citizens United v. FEC*,²⁸ the Supreme Court held that corporations may make
4 unlimited independent expenditures using corporate treasury funds. Although the Act prohibits
5 corporations from making contributions in connection with any federal election,²⁹ the decision in
6 *Citizens United* also opened the way for corporations to make contributions to IEOPCs.³⁰ NAR,
7 an incorporated membership group, therefore may permissibly use its general treasury funds to
8 finance — directly or through an IEOPC like the Congressional Fund — independent
9 expenditures intended to influence a federal election.

10 The Complaint alleges that the Respondents nonetheless are “forcing” her to provide
11 funds to NAR for independent expenditures that she does not support,³¹ and hence her
12 contribution to NAR in the form of dues is involuntary.³² She argues that, because she must have
13 access to the MLS to conduct her business, she has no choice but to pay the increase in dues that
14 will be used by NAR to finance independent expenditures.³³ The Respondents do not dispute
15 that De Santis is required to finance independent expenditures or that access to the MLS is
16 essential for De Santis to engage in her employment as a real-estate broker. Rather, they contend

²⁸ 588 U.S. 310 (2010).

²⁹ See 2 U.S.C. § 441b(a).

³⁰ See *SpeechNow.org v. FEC*, 599 F.3d 686, 692-96 (D.C. Cir. 2010) (en banc); see also Advisory Op. 2010-11 (Commonsense Ten) (permitting IEOPC to solicit and accept unlimited contributions from corporations).

³¹ Compl. at 2.

³² See 2 U.S.C. § 431(8)(A) (defining contribution to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office”).

³³ Compl. at 2.

1 that *Citizens United* now permits them to use the “dues/treasury monies” to “support candidates
2 for federal office.”³⁴

3 Based on the available information, Respondents do not appear to have afforded
4 members the right not to contribute to the independent expenditure effort; rather, NAR informed
5 De Santis that a portion of the dues increase that De Santis must pay in 2012 to belong to the
6 organization would be used to fund independent expenditures.³⁵ The record also reflects, and
7 Respondents do not dispute, that if De Santis refused to contribute to the political activity by
8 paying dues in full, she would lose her membership in NAR, MAR, and the Board and, with
9 them, access to the MLS system, a consequence that she claims would inhibit her ability to
10 conduct her business.³⁶

11 The Act and Commission regulations seek to prevent the coercion of two types of
12 contributions: (1) those to a corporation’s separate segregated fund, or SSF, and (2) those
13 involving corporate “facilitation” of contributions to a political committee. Neither of those
14 prohibitions appears to prohibit the conduct alleged here.

15 First, the Act and Commission regulations prohibit an SSF from making contributions or
16 expenditures “by utilizing money or anything of value secured by physical force, job
17 discrimination, financial reprisals, or the threat of force, job discrimination, or financial
18 reprisals . . . or by dues, fees, or other moneys required as a condition of membership in a labor
19 organization or as a condition of employment”³⁷ The Act, thus, requires that all

³⁴ See, e.g., NAR Resp. at 2-3.

³⁵ See Compl., Attach. B.

³⁶ Compl. at 2.

³⁷ 2 U.S.C. § 441b(b)(3)(A); 11 C.F.R. § 114.5(a)(1).

1 contributions to an SSF are made voluntarily and without coercion. To ensure that contributions
2 solicited for an SSF are voluntary, a solicitation for contributions must inform the solicited
3 employee or member at the time of the solicitation about the political purposes of the SSF and
4 the right to refuse to contribute without reprisal.³⁸ The term "reprisal" was included in the
5 regulation "to make clear that the membership organization . . . may not cancel membership,
6 policies, or take other similar actions against members who do not contribute."³⁹ A solicitation
7 may be coercive if proper notice is not given.⁴⁰

8 The Respondents allegedly intend to fund independent expenditures either directly from
9 NAR's treasury or through the Congressional Fund. Although established by NAR, the
10 Congressional Fund is not an SSF. Consequently, the SSF-related anti-coercion provisions do
11 not apply to the conduct alleged in the Complaint.⁴¹

³⁸ See 2 U.S.C. § 441b(b)(3)(B)-(C); 11 C.F.R. § 114.5(a)(3)-(5).

³⁹ Explanation and Justification, H.R. Doc. No. 95-44, at 107 (Jan. 11, 1977).

⁴⁰ See Conciliation Agreement ¶ IV.7, MUR 5337 (First Consumers Nat'l Bank) (written solicitations to bank managers did not contain adequate notice).

⁴¹ See Advisory Op. 2012-18 at 2 (Nat'l Right to Life Comm.) (concluding that a corporation's payments for the establishment, administration, and solicitation of an IEOPC were not exempt from the definition of a contribution or expenditure because "an [IEOPC] is not an SSF"); Advisory Op. 2010-09 at 5 (Club for Growth) (same).

The Commission has examined the application of the SSF-related anti-coercion provisions in other contexts previously. First, in MUR 6344 (United Public Workers), the Commission found reason to believe that the respondent labor union violated the Act by failing to report political activity the union obligated its employees to perform as independent expenditures. This Office also recommended finding reason to believe that the union's apparent coercion of its employees to engage in political activity itself violated Section 441b(a) of the Act. The Commission split evenly on that question, however, where the relevant in-kind contributions were not directed to any of the recipients identified in the Act or the Commission's regulations — namely, federal candidates, campaign committees, political party organizations, or political committees such as an SSF. Rather, the coerced in-kind contributions were directed to the union itself, as a labor organization that was permitted to make independent expenditures under *Citizens United*. The Commissioners issued two Statements of Reason describing their respective positions. See Statement of Reasons, Comm'rs Weintraub, Bauerly & Walther, MUR 6344 (United Public Workers); Statement of Reasons, Comm'rs Hunter, McGahn & Petersen, MUR 6344 (United Public Workers). Second, in Advisory Op. 2012-01 (Stop this Insanity), an SSF sought to establish a separate "non-contribution" account to solicit and receive unlimited contributions from its employees and the general public to finance independent expenditures. The Commission did not issue an opinion, however, and the Commission is

1 Second, the anti-coercion provisions relating to corporate “facilitation” of contributions
2 to a political committee also do not appear to prohibit NAR’s alleged activity. The Act prohibits
3 corporate contributions under 2 U.S.C. § 441b(a), which includes the corporate facilitation of
4 contributions to political committees.⁴² Among other things, “facilitation” includes coercing
5 contributions through “threat of a detrimental job action [or] the threat of any other financial
6 reprisal.”⁴³ De Santis essentially argues that the threat of losing access to the MLS database if
7 she refuses to pay her membership dues to NAR constitutes a threat of financial reprisal.

8 As presented here, a finding that NAR coerced contributions through the threat of
9 financial reprisal would result in NAR making a corporate contribution to the Congressional
10 Fund, previously prohibited under Section 441b.⁴⁴ The *Citizen’s United* and *SpeechNow.org*
11 decisions, however, specifically permit corporate contributions to IEOPCs like the Congressional
12 Fund. Accordingly, even the potential loss of access to the MLS system constitutes a financial
13 reprisal that renders De Santis’s mandatory dues payments to NAR a corporate contribution
14 under a facilitation theory, a corporate contribution to the Congressional Fund is itself legally
15 permissible.

16 Nor do we believe that the broader implication in the Act that a contribution must be
17 made voluntarily — made explicit with regard to contributions to SSFs at Section 441b(b)(3)(A)

currently a party in civil litigation relating to that matter. See *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23 (D.D.C. Nov. 5, 2012).

⁴² 11 C.F.R. § 114.2(f)(1) (defining corporate facilitation as using corporate resources or facilities to engage in fundraising activities in connection with any federal election).

⁴³ *Id.* § 114.2(f)(2)(iv).

⁴⁴ See, e.g., MUR 5268 (*Kentucky State District Council of Carpenters, et al.*) (union employees coerced into making contributions to and working on federal campaigns under threat of job loss); MUR 5337 (*First Consumers Nat’l Bank*) (coercive email solicitations sent to bank managers); MUR 5379 (*CarePlus Health Plans, Inc., et al.*) (coercive email solicitations sent to staff).

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1 — provides a sufficiently clear basis on the facts presented here to identify a violation of a
2 specific provision of the Act, given the decision in *Citizens United* that corporations may not be
3 precluded under Section 441b from making independent expenditures even in the face of
4 shareholder disagreement with the proposed political activity.⁴⁵

5 Accordingly, we recommend that the Commission find no reason to believe that
6 Respondents violated 2 U.S.C. § 441b(a), (b)(3) and 11 C.F.R. §§ 114.2(f), 114.5.

7 **V. RECOMMENDATIONS**

- 8
9 1. Find no reason to believe that the National Association of Realtors, Massachusetts
10 Association of Realtors, and the Berkshire County Board of Realtors violated
11 2 U.S.C. §§ 441b(a), (b)(3) and 11 C.F.R. §§ 114.2(f), 114.5;
12
13 2. Approve the attached Factual and Legal Analyses;
14
3. Approve the appropriate letters; and

⁴⁵ Although the Court in *Citizens United* did not specifically address compelled membership dues, it did address the related issue of compelled shareholder speech in its consideration of the corporate contribution ban under Section 441b. The Court concluded that corporate independent expenditures could not be limited to protect dissenting shareholders from being compelled to fund political speech, reasoning that such disagreements could be addressed adequately "through the procedures of corporate democracy." *Citizens United*, 558 U.S. at 361 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)). The Court in *Bellotti* further explained that shareholders, like "individual[s] voluntarily join[ing] an association, and later find[ing] [themselves] in disagreement with its stance on a political issue," are not compelled to contribute anything since they invest in a corporation of their own volition and are free to withdraw their investments at any time and for any reason. *Bellotti*, 434 U.S. at 795 n.34. The Court indicated that in such instances an association would not need to "refund a portion of the dissenter's dues or, more drastically, refrain from expressing the majority's view." *Id.*

