



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 26, 1982

CETIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1982-2

Thomas Schattenfield, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006

Dear Mr. Schattenfield:

This responds to your letter of January 21, 1982, supplemented by your letter of February 10, 1982, requesting an advisory opinion on behalf of the National Radio Broadcasters Association ("NRBA") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act") to the sending of letters by NRBA to its members recommending that they contribute to and vote for certain candidates for Federal office.

In your request, you state that NRBA is a trade association, incorporated in the District of Columbia as a non-profit, non-stock corporation with members. NRBA was organized, among other things, to promote and improve business conditions in radio broadcasting. Its membership consists of individuals, corporations and other entities which are the licensees of approximately 1700 AM and FM radio stations located throughout the United States. Among its other activities, the NRBA represents the interests of radio broadcasters before the Federal Communications Commission and before Congress; distributes weekly information to its members on trends in radio broadcasting, including sales trends, management concepts, programming philosophies, and engineering developments; and distributes the "Washington Memo," a monthly publication which discusses federal regulations and other matters pertaining to broadcasting. NRBA's Articles of Incorporation, a copy of which is attached to your request, state that the corporation is in the nature of a business league organized for the mutual benefit of its members and that no part of its net earnings shall inure to benefit of any private shareholder or individual.¹ You state

¹ See Certificate of Incorporation filed November 30, 1959, Fourth article.

that NRBA does not administer or sponsor a political committee and does not intend to institute such a committee.

NRBA's By-Laws and Statement of Election to Accept the Provisions of the District of Columbia Nonprofit Corporation Act, copies of which are attached to your request, provide for two classes of members: active and associate. Both classes must pay dues, assessments and other fees as set by the Board of Directors.² In order to be eligible for active membership in NRBA, the individual, partnership, firm, corporation, etc. must be licensed by the Federal Communications Commission to operate, or must hold a permit for the construction of, a commercial AM and/or FM radio broadcast station.³ However, each such station for which a license or construction permit is held is limited to one active membership, with the proviso that AM and FM radio broadcast stations or construction permits for such stations in the same market are treated as one station.⁴ Active members who are not in default of payment of all required dues and fees are accorded the following rights:⁵

- the right to one vote on all appropriate occasions;
- the right to attend all conventions and membership meetings and to comment from the floor at those meetings;
- the right to have a representative nominated and, if elected, to serve as a member of the Board of Directors;
- access to NRBA's publications.

Associate members of NRBA, on the other hand, are comprised of entities licensed to operate or holding a permit for the construction of, a noncommercial AM and/or FM radio broadcast station, as well as those individuals, firms, corporations, etc. engaged in a business or profession involved in anyway with commercial or noncommercial AM and/or FM radio broadcast stations but which are not eligible for active membership.⁶ Associate members not in default in payment of all required dues and fees have the following rights:⁷

- the right to attend and to exhibit at conventions;

² See By-Laws, Article III, Sections 3 and 4, and Article IV; Statement of Election, p. 4.

³ See By-Laws, Article III, Section 1(a); Statement of Election, p. 3.

⁴ Id.

⁵ See By-Laws, Article III, Sections 2 and 3; Statement of Election, p. 4.

⁶ See By-Laws, Article III, Section 1(b); Statement of Election, p. 3.

⁷ See By-Laws, Article III, Section 4; Statement of Election, pp. 4-5.

- the right to have a representative nominated as a candidate for election as a Director-at-Large and, if elected, to serve and vote as a member of NRBA's Board of Directors;
- the privilege of having a representative serve on committees when appointed and of voting at the meetings thereof;
- access to NRBA's publications.

The NRBA proposes to send letters to both its active and associate members recommending that they support certain specified candidates for Federal office and encouraging them to vote for those candidates. In your request, you state that these letters will satisfy the following conditions:

- The recipients will include the NRBA's individual members and the representatives of its corporate members with whom the NRBA normally conducts the association's activities.
- The letters will be printed and distributed at the sole expenses of the NRBA.
- The letters will consist of an expression of the views of the NRBA, not solely a reproduction in whole or part of the campaign materials of a candidate, his campaign committees or his authorized agents.
- The letters will urge the recipients to vote for and/or contribute to specified candidates for federal office.
- The NRBA will not provide a means for the recipients of the letters to make contributions to the specified candidate or his campaign committee or authorized agents and will not otherwise serve as a conduit for those contributions.

The specific questions posed in your request are whether payment by NRBA of the costs of sending these letters would constitute a contribution or expenditure under the Act, and whether NRBA may lawfully defray these costs without either instituting a political committee or itself becoming a political committee. The Commission concludes that NRBA may do so because the proposed activity falls within the permissive provisions of Part 114 of the Commission's regulations and because the NRBA is an organization which may properly avail itself of those provisions.

As you note in your request, 2 U.S.C. 441b prohibits corporations from making any contribution or expenditure in connection with Federal elections. However, Commission regulations expressly permit trade associations to make partisan communications (other than solicitations) to their individual members and to the representatives of its corporate members with whom it normally conducts the association's activities. See 11 CFR 114.1(a)(2)(x), 114.8(h). Such communications must, nevertheless, be in accordance with 11 CFR 114.3, which specifically allows the distribution of printed material of a partisan nature, provided that the material is produced at the expense of the trade association and constitutes a communication of the association's views

rather than a republication or reproduction, in whole or part, of campaign materials prepared by the candidate, his or her campaign committees or their authorized agents. See 11 CFR 114.3(c)(1). Commission regulations further make clear that any such communication may expressly advocate the election or defeat of a clearly identified candidate. See 11 CFR 114.3(b)⁸. Moreover, partisan communications under section 114.3 may include the suggestion that a contribution be made to a particular candidate so long as the trade association does not actually facilitate the making of the contribution. As the Commission explained in transmitting the proposed section 114.3 to Congress:

The corporation or labor organization may suggest in a communication sent to stockholders, executive or administrative personnel or members that they contribute to a particular candidate or political committee and provide the candidate's address. The corporation or labor organization may not, however, facilitate the making of contributions to a particular candidate or political committee other than its separate segregated fund, as by providing envelopes addressed to the candidate or committee or enrolling persons in a payroll deduction plan for contributions to that candidate or committee.

See Explanation and Justification of Regulations, H. Doc. No. 95-44, 95th Cong., 1st Sess. at 104-105, reprinted in 1 Fed. Elec. Camp. Fin. Guide (CCH) 923 at 1606.⁹ Since the proposed mailings as described in your request satisfy the foregoing requirements, they fall within the partisan communications exception set forth in 11 CFR 114.8(h) and would not, therefore, constitute a contribution or expenditure under the Act. See 11 CFR 114.1(a)(2)(x).

However, because section 114.8(h) applies only to communications by trade associations to their members, the questions remain whether NRBA is a trade association and, if so, whether it may send the proposed mailings to both its active and associate members. As discussed above, NRBA's Articles of Incorporation and By-Laws provide that it is a non-profit membership organization comprised of individuals and businesses involved in the broadcast industry. It exists for the mutual benefit of its members, with no part of its earnings inuring to the benefit of any private person. As such, the NRBA meets the requirements of a trade association under 11 CFR 114.8(a). See also Advisory Opinions 1981-23, 1979-62, and 1977-44, copies enclosed. Moreover, both the active and associate members of NRBA constitute "members" for purposes

⁸ Such expenditures may, however, be reportable if they exceed \$2,000 per election. See 2 U.S.C. 431(9)(B)(iii); 11 CFR 100.8(b)(4).

⁹ Section 114.8(h), which made the provisions of section 114.3 applicable to partisan communications by trade associations, applies by its terms to communications "other than solicitations." The "solicitations" referred to in 114.8(h) are those made by the trade association to its own separate segregated fund, in which case the prior approval rules set forth in 114.8 would apply. See 11 CFR 114.8(c)-(e). The language "other than solicitations" was not intended to apply to an otherwise lawful suggestion by a trade association that contributions be made to a candidate or political committee other than its own separate segregated fund. See Explanation and Justification of Regulations, H. Doc. No. 95-44, 95th Cong., 1st Sess. at 114-115, reprinted in 1 Fed. Elec. Camp. Fin. Guide (CCH) 923 at 1616.

of section 114.8(h). The term "member" is defined to include all persons currently satisfying the requirements for membership in a trade association. See 11 CFR 114.1(e). In Advisory Opinion 1977-67, the Commission addressed the requisite relationships and attributes of membership by individuals in incorporated membership organizations, as well as the issue of how the definition of "member" is to be applied when used in the Act and Commission regulations. The Commission observed that sufficient indicia of a membership relationship must exist between an organization and a group of persons in order for those persons to be considered "members" under the Act. See also Advisory Opinions 1980-75, 1980-48, 1979-69, 1977-17, and 1976-79. Pursuant to NRBA's By-Laws, both its active and associate members have interests and rights in NRBA, assume some right to participate in the organization's direction, and have an obligation to help sustain the organization through regular financial contributions. Accordingly, under the circumstances presented in your request, the Commission concludes that NRBA may send the proposed letters to both its active and associate members without either instituting or becoming a political committee.¹⁰

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)

Frank P. Reiche
Chairman for the
Federal Election Commission

Enclosures (AOs 1981-23, 1980-75, 1980-48, 1979-69, 1979-62, 1977-44, 1977-17, and 1976-79)

¹⁰ The Commission notes that the facts presented in your request are distinguishable from those at issue in Advisory opinion 1979-69. In that opinion, the Commission found that certain associate members of the Alaska Loggers Association were not "members" under the Act where the Association's Articles of Incorporation and By-Laws expressly precluded associate members from having "any voice in the affairs of the Association or control over its officers."