



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

January 25, 1982

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-52

Mr. Paul D. Kamenar, Esq.  
1015 Fifteenth Street, N.W.  
Suite 1100  
Washington, D.C. 20005

Dear Mr. Kamenar:

This responds to your letter of November 16, 1981, requesting an advisory opinion on behalf of the National Association of Real Estate Investment Trusts, Inc. ("NAREIT"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the solicitation of unincorporated members of NAREIT.

Your letter states that NAREIT is a not-for-profit organization incorporated under the laws of Massachusetts and is also qualified under section 501(c)(6) of the Internal Revenue Code as a tax exempt organization. NAREIT is the national trade association of the real estate investment trust (REIT) industry and has established a separate segregated fund ("NAREIT-PAC") pursuant to 2 U.S.C. 441b. Members of NAREIT include not only those REITs that have been incorporated, but also those which are unincorporated. According to your letter, those unincorporated REITs are doing business in the trust form as provided by the laws of several states that permit such organization structure, such as Massachusetts and California. Accordingly, under state law, these trusts are not considered corporations. You indicate that a typical clause in a declaration of trust for an unincorporated REIT states that the trust "is not intended to be deemed to be partnership, joint venture, corporation, or joint stock company." With respect to those member REITs which are unincorporated, NAREIT proposes to solicit the REIT itself<sup>1</sup> and not any of its employees or other individuals. You ask whether such a solicitation of a REIT is permissible under the Act.

The Commission regulations provide that a trade association whose membership is made up, in whole or in part, of corporations is subject to the provisions of 11 CFR 114.8 when

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<sup>1</sup> For purposes of this opinion the Commission assumes that the unincorporated REITs are members of NAREIT pursuant to NAREIT's articles of incorporation or bylaws. See 11 CFR 114.1(e).

soliciting any stockholders or executive or administrative personnel of members that are corporations. Such a trade association may, however, solicit its noncorporate members under the provisions of 114.7. See 11 CFR 114.7(c) and 2 U.S.C. 441b(b)(4)(C). The Commission has previously held that noncorporate members of an incorporated trade association, such as partnerships and sole proprietors, may be solicited for contributions to the association's political fund. See the Commission's response to Advisory Opinion Request 1976-63. An unincorporated REIT that operates as a business trust or association under relevant state law is materially indistinguishable, as regards its membership in a trade association, from other types of trade association members such as corporations and partnerships.<sup>2</sup> Therefore, NAREIT may solicit its unincorporated REIT members for contributions to NAREIT-PAC provided they are not considered as corporations in the states where they were formed or have their principal place of business. This conclusion is also consistent with Commission regulations that defer to state law in determining the corporate status of professional organizations. 11 CFR 114.7(d).

A further issue raised by your request is the attribution of contributions to NAREIT-PAC that may be made by unincorporated REIT members of NAREIT. Specifically, the question is whether such contributions are attributed only to the unincorporated REIT, or whether they must also be attributed to those persons who have beneficial ownership interests in such REIT. The Commission has previously considered contributions by a testamentary trust and concluded that such a contribution was not barred under the Act although the trust could not be considered as a "person" making a contribution in its own right. See Advisory Opinion 1978-7, copy enclosed. Specifically, the Commission concluded that contributions from a testamentary trust must be treated as contributions from the living beneficiaries of that trust according to their interest in the trust estate under the relevant testamentary and trust instruments. The Commission cautioned, however, that such a contribution may be so attributed only if (i) the beneficiaries have capacity under relevant state law to make a knowing and voluntary decision to contribute and (ii) such a contribution so attributed would be otherwise lawful under the Act.

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<sup>2</sup> Commission regulations defining the term "members" refer to "all persons" satisfying membership requirements of the organization. 11 CFR 114.1(e). The Act defines "person" to include, *inter alia*, an association, corporation, or any other organization of persons; the definition excludes only the Federal Government (and any authority thereof). 2 U.S.C. 431(11), 11 CFR 100.10. For Federal income tax purposes, a "real estate investment trust" may exist in the form of a corporation, trust, or association. 26 U.S.C. 856(a). Also, for purposes of satisfying the Federal tax requirement that a qualified REIT have a beneficial ownership of "100 or more persons," 26 U.S.C. 856(a) (5), the Internal Revenue Service has apparently ruled that each separate, tax qualified, pension and profit-sharing trust would be a "person". Rev. Rul. 65-3, cited at 26 USCS 856, n. 2. Given the Act's definition of "person" which includes two of the three terms also used in 856(a) of the Internal Revenue Code, the Commission concludes that the term "person" would include an unincorporated REIT. But see the discussion below on attribution of contributions by such a REIT.

Although a REIT and a testamentary trust are different in several respects,<sup>3</sup> the Commission does not believe that those differences justify a different conclusion than that stated in Advisory Opinion 1978-7. Accordingly, for purposes of the Act (including the limits of 441a and disclosure under 434), a contribution from an unincorporated REIT to NAREIT-PAC shall be attributed both to the REIT and to each person who has any beneficial ownership in such REIT, as evidenced by transferable shares or by transferable certificates of beneficial interest. See 26 U.S.C. 856(a).

The allocated share of the contribution to be attributed to each REIT investor shall equal the investor's interest in the REIT. However, an alternative agreement may be made among the investors to attribute the contribution in some other fashion. Such an agreement would have to provide for appropriate reductions to REIT earnings or increases in REIT losses as regards each REIT investor to whom the contribution is attributed. See by analogy, the regulations on partnership contributions at 11 CFR 110.1(e). Furthermore, as indicated above, no attribution of any share of a contribution may be made to any investor who is prohibited from making a direct contribution to NAREIT-PAC, such as a corporation, labor organization, national bank, government contractor, or foreign national. See 2 U.S.C. 441b, 441c, 441e, also see Advisory Opinion 1980-132, copy enclosed.

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 yours,

(signed)

Frank P. Reiche  
Chairman for the  
Federal Election Commission

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<sup>3</sup> In a number of cases the courts have discussed or commented upon the features which distinguish the Massachusetts or business trust (like a REIT) from the ordinary or private (testamentary) trust. See, e.g., Morrissey v. Commissioner, 296 U.S. 344 (1935). One such distinction is functional; the business trust is a device to conduct business for profit, whereas the traditional trust is designed to conserve and protect property. Another distinction lies in the manner in which the trust relationship is created; investors in a business trust enter into a voluntary, consensual, and contractual relationship, whereas the beneficiaries of a traditional private trust take their interests by gift from the donor or settlor. For a review of the representative cases dealing with business trusts (including a REIT), see 88 ALR 3d 704.