

Elliot Johnson

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 28 2 34 PM '95

September 28, 1995

AGENDA ITEM

For Meeting of: 10-5-95

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *Chrysis*
Staff Director

FROM: Lawrence M. Noble *L*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Michael G. Marinelli *m-g m.*
Staff Attorney

SUBJECT: Draft AO 1995-27

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for October 5, 1995.

Attachment

DRAFT

ADVISORY OPINION 1995-27

Tony M. Edwards, General Counsel
National Association of Real Estate
Investment Trusts
1129 20th street, N.W.
Washington, D.C. 20036-3482

Dear Mr. Edwards:

This refers to your letters of August 22, July 27, and July 13, 1995, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a planned solicitation of certain members of the National Association of Real Estate Investment Trusts, Inc. ("NAREIT") for contributions to NAREIT's separate segregated fund, NAREIT PAC ("the Committee").

NAREIT is the national trade association of the real estate investment trust ("REIT") industry.^{1/} You state that the Association is a not-for-profit organization incorporated under the laws of Massachusetts and, you state, it is also qualified under Section 501(c)(6) of the Internal Revenue Code as a tax-exempt organization. You explain that members of NAREIT include 256 REITs, more than 200 of which trade on the New York Stock Exchange, the American Stock Exchange or the NASDAQ National Market System. You further affirm that, out of NAREIT's 256 members, approximately 80 are organized

^{1/} The NAREIT Bylaws set forth, among the purposes of the Association, the goal of serving "as a vehicle for the development and dissemination of policies and positions on behalf of real estate investment trusts and the membership of NAREIT, concerning such matters as rules, regulations and statement of policies adopted by public and private regulatory authorities and ethical standards of conduct among REITs..." NAREIT Bylaws Article I, section 2.

as business trusts ("REIT trusts") and the remainder are organized as corporations ("REIT corporations").^{2/}

Your request concerns the solicitation of the REIT trust members of NAREIT. NAREIT wishes to solicit these members in the same manner as the REIT corporations are solicited, by reaching the executive and administrative classes of each REIT trust, and their families, rather than the REIT trust itself.

You note that in a previous advisory opinion, the Commission concluded that the Association could solicit the REIT trust members of the Association. However, the Commission concluded that the contributions would have to be attributed among all the beneficial owners of the trust and that beneficial owners who would be barred from making a direct contribution to a Federal candidate could not participate in the contribution. See Advisory Opinion 1981-52. Noting the similarities between corporations and business trusts in the common attributes they share, your current request seeks the overruling of the 1981 opinion. Your request further cites the administrative burdens of

^{2/} A REIT is a variant of the business trust which has been defined "as an unincorporated business organization created by an instrument by which property is to held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interest in the trust estate." 13 Am. Jur. 2nd Business Trusts §1 (1964). Business trusts are not necessarily corporations but "are treated as corporations for some purposes by the courts of different states." 16A Fletcher Cyclopedia Corporations §8229 (1988). They have been described as "a hybrid form of organization, partaking in some respects the nature of a corporation and in other respects that of a partnership." Id.

attribution.

4 Your proposal raises the issue of the personnel
5 associated with the REIT trust members that may be solicited
6 for contributions to NAREIT PAC. The resolution of this
7 question first requires the determination of the membership
8 status of REIT trusts and a related analysis dealing with
9 NAREIT's organizational structure. These determinations will
10 be made before the specifics of your solicitation proposal
11 are addressed.

12 NAREIT GOVERNING BODY

13 Your request includes the NAREIT governing documents:
14 its Bylaws and Articles of Incorporation. These materials
15 identify the Board of Governors (the "Board") as the
16 governing body of the Association.^{3/} The Board is comprised
17 of between five and thirty-five members of which at least
18 two-thirds must be voting delegates of REIT members. Also,
19 immediate past committee chairs are made members of the Board
20 with full voting rights for three years. At the end of that

21 3/ The NAREIT bylaws provide that:

22 The Board of Governors is the governing
23 body of the Association, vested with the
24 powers necessary for the management and
25 administration of the Association, and
26 has supervision, control and direction of
27 all affairs of the Association including
28 but not limited to: determinations of
policies of the Association and changes
therein; development of and active
prosecution of the objectives of the
Association; supervision of the
disbursements of its funds; and the
assumption of debt by the Association.

NAREIT Bylaws, Article IV, section 1.

30

3 time, past committee chairs become, at their option,
4 nonvoting Ex-Officio members. NAREIT Bylaws, Article IV,
5 section 2.^{4/}

6 NAREIT MEMBERS

7 As outlined by NAREIT Bylaws, the organization's various
8 classes of membership are: REIT members, associate members
9 and honorary members.^{5/} REIT members are required to pay
10 dues. NAREIT Bylaws, Article III, section 1. Each real
11 estate investment trust that is a REIT member is entitled to
12 one vote on all matters submitted to the members of the
13 Association, including a vote for each open position for
14 election to the Board of Governors. The voting rights are
15 exercised through a voting delegate who is an employee of the
REIT. Id.

16
17 ^{4/} NAREIT Bylaws delineate two institutions which play
18 roles in the governance of the Association-- the Board of
19 Governors and the Executive Committee. For purposes of the
20 analysis below, the Commission concludes that the Board,
rather than the Executive Committee, is the highest governing
21 body of NAREIT. In the past, the Commission has based such
22 determinations on which governing component of a membership
23 organization holds pre-eminent power. See Advisory Opinions
24 1993-24 and 1994-12.

25 The Commission notes that under NAREIT Bylaws, the
26 Executive Committee, while responsible for the day-to-day
27 running of the organization, has important limitations to its
28 power. For example, under Article V, section 1, the
29 Executive Committee may act on behalf of the Board but may
30 not exercise any of the powers exclusively reserved to the
Board. These powers include approval of the budget,
elections of officers and approval of application for
membership in the Association. The Executive Committee is
also required to report its actions to the Board no later
than the next Board meeting.

^{5/} Since your request only presents the solicitation of REIT
members, this opinion will not discuss the status of the
other NAREIT membership classes.

ACT AND COMMISSION REGULATIONS

4 The Act prohibits corporations from making any
5 contribution or expenditure in connection with a Federal
6 election. 2 U.S.C. §441b(a). The Act states, however, that
7 the term "contribution or expenditure" does not include "the
8 establishment, administration, and solicitation of
9 contributions to a separate segregated fund to be utilized
10 for political purposes by a corporation, labor organization,
11 membership organization, cooperative, or corporation without
12 capital stock." 2 U.S.C. §441b(b)(2)(C). See also 2 U.S.C.
13 §431(8)(B)(vi) and (9)(B)(v).

14 Under 2 U.S.C. §441b(b)(4)(A)(i), a corporation, or a
15 separate segregated fund established by a corporation, may
16 solicit contributions to such a fund only from its
17 stockholders and their families and its executive and
18 administrative personnel and their families. ^{In addition} An exception ^{to trade account}
~~set forth~~ ^(reference) in 2 U.S.C. §441b(b)(4)(C) and 11 CFR 114.7(a)
19 allows a membership organization (among other corporations
20 without capital stock), or its separate segregated fund, to
21 solicit contributions to the fund from the members of the
22 organization and their families. The Commission's
23 regulations use the term "membership association" to
24 implement this ^{allowance} ~~exception~~. It is defined, in part, as a
25 membership organization that (i) expressly provides for
26 "members" in its articles and bylaws; (ii) expressly solicits
27 members; and (iii) expressly acknowledges the acceptance of
28 membership, such as by sending a membership card or inclusion

3 on a membership newsletter list. 11 CFR 114.1(e)(1)(i),
4 (ii), and (iii).

5 Commission regulations define the term "members." Under
6 11 CFR 114.1(e)(2), "members" means all persons who are
7 currently satisfying the requirements for membership in a
8 membership association, who affirmatively accept the
9 membership association's invitation to become a member, and
10 who meet one of the following requirements:

11 (i) Have some significant financial attachment to the
12 membership association, such as a significant investment or
13 ownership stake (but not merely the payment of dues);

14 (ii) Are required to pay on a regular basis a specific
15 amount of dues that is predetermined by the association and
16 are entitled to vote directly either for at least one member
17 who has full participatory and voting rights on the highest
18 governing body of the membership association, or for those
19 who select at least one member of those on the highest
20 governing body of the membership association; or

21 (iii) Are entitled to vote directly for all of those on
22 the highest governing body of the membership association.

23 The regulations also provide that the Commission "may
24 determine, on a case by case basis, that persons seeking to
25 be considered members of a membership association for
26 purposes of this section have a significant organizational
27 and financial attachment to the association under
28 circumstances that do not precisely meet the requirements of
29
30

the general rule." See 11 CFR 114.1(e)(3).^{6/}

4
5
DETERMINING STATUS OF REIT MEMBERSHIP CLASS

6
7
8
9
10
11
12
13
14
15
NAREIT as Membership Association

The facts and background to this request indicate that NAREIT is a membership association for purposes of the Act. For example, Article II, of NAREIT Bylaws meets the requirements of 11 CFR 114.1(e)(1)(i) by expressly providing for membership. The facts of the request and materials, such as the portions of NAREIT governing materials included in your request, suggest that NAREIT expressly solicits members. See 11 CFR 114.1(e)(1)(ii). Article I, Section 2 of NAREIT Bylaws implies that members receive publications from the Association. Therefore, the requirement that membership be expressly acknowledged is also met. See 11 CFR 114.1(e)(1)(iii).^{7/}

17
18
19
20
21
22
23
24
25
26
27
28
Status and solicitability of NAREIT members

6/ Your request only concerns solicitation of contributions for NAREIT PAC. Therefore, the discussion below will concern section 114.1(e). The Commission notes that section 100.8(b)(4)(iv) relates to an association's right to make partisan communication to its members, and the wording of sections 100.8(b)(4)(iv) and 114.1(e) dealing with membership are identical. Therefore, the analysis of section 114.1(e) will, to that extent, be applicable to section 100.8(b)(4)(iv) as well.

7/ It also appears that NAREIT meets the definition of "trade association" under 11 CFR 114.8(a). NAREIT is "a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member." 11 CFR 114.8(a), see also Advisory Opinion 1991-24.

3 Under the membership regulations, REIT members would be
4 considered "members" of NAREIT for purposes of the Act. The
5 Commission notes that the REIT membership class is required
6 to pay dues. Further, it has the right to elect members to
7 the highest governing body of NAREIT, the Board of Governors.
8 Consequently, this class meets the membership requirements of
9 section 114.1(e)(2)(ii). Therefore, the Commission concludes
10 that NAREIT may solicit contributions to its PAC from
11 non-corporate NAREIT members and from qualified personnel
12 groups of its corporate members.

13 SOLICITATION OF NAREIT TRUST MEMBERS

14 Solicitation of REIT trust personnel

15 NAREIT proposes to solicit PAC contributions from
16 executive personnel of its trust members in the same manner
17 it may solicit similar personnel who are employed by its
18 corporate members. Commission regulations at 11 CFR 114.7
19 provide that the question of whether a professional
20 organization is a corporation is determined by the law of the
21 state in which the professional organization exists. The
22 Commission has likewise used state law to generally determine
23 the corporate status of an entity. See Advisory Opinions
24 1995-11 and 1981-52. Your request specifically cites
25 Maryland and Delaware statutes and describes the corporate
26 attributes accorded to business trusts in those states.
27 However, these States nonetheless regard business trusts as a
28 separate form of business organization that is distinct from
29
30

corporations.^{8/} Therefore, following past precedent, the REIT trusts in those States (and in other States with similar statutes) must be treated as if NAREIT were soliciting non-corporate rather than corporate members.

*limited liability
personal liability
treated as a partnership
the are partners in
trade association
as a whole*

*✓ changes to
position*

why?

Accordingly, NAREIT may not solicit the beneficial owners and stockholders of the individual trusts or their families, unless these individuals or business entities are themselves members of NAREIT. See Advisory Opinion 1988-3.^{9/} Further, NAREIT may not solicit the executive and administrative classes of the member REIT trusts or their families. See the Commission response to Advisory Opinion Request 1976-63.^{10/}

The Commission has not in the past identified the personnel of an unincorporated member to which a solicitation by an incorporated trade association may be directed.

^{8/}See, for example, DEL. CODE ANN. §3801 and MD CODE ANN. §8-101.

^{9/} In Advisory Opinion 1988-3, the Commission concluded that the individual marine pilot members of a unincorporated regional association, which belonged to a incorporated national association, could not be solicited by the national association for contributions to its PAC. The individual pilots were not members of the national association. However, the national association could solicit directly the unincorporated member regional association.

^{10/} Advisory Opinion Request 1976-63, concerned PAC solicitations by a federated trade association, the American Hotel and Motel Association, of the unincorporated member partnerships and proprietorships (the individual motel and hotel firms) making up the state associations. The Commission concluded that the unincorporated members could be solicited for contributions to the trade association's separate segregated fund, but that this did not permit the solicitation of the executive and administrative classes of these unincorporated business firms. See Re: AOR 1976-63.

*Add in
Trade Assoc note*

3 However, a useful analogy can be found in 11 CFR 114.8(d)(3)
4 which identifies the personnel of a corporate member to which
5 an incorporated trade association may direct its request for
6 prior approval for solicitation of the corporate member's
7 executive and administrative personnel class. Section
8 114.8(d)(3) states that the request may be sent to the
9 representatives of the corporation with whom the trade
10 association normally conducts the association's activities.
11 In this situation, NAREIT's solicitation should be directed
12 to the representatives of the member REIT trusts with whom it
usually conducts its activities.^{11/}

13 Attribution of Contributions by REIT Trust Members

14 The Commission concluded in Advisory Opinion 1981-52,
15 that a REIT was a "person" under 2 U.S.C. §431(11) and that
16 the contributions made by REIT trusts should be attributed to
17 all the beneficial owners of the trust. The 1981 opinion
18 explains that the Commission had previously required
19 attribution of contributions made by testamentary trusts and
20 determined to treat all trusts, business and testamentary, in
21 the same manner regarding attribution. The Commission
22 nonetheless noted that REITs, as business trusts, were
23 distinguishable in many respects from testamentary trusts,
24 the greatest difference being the for-profit purpose of the

25
26 ^{11/} NAREIT Bylaws, for example, identify one individual who
27 may perform this role in the Association. Each member REIT
28 exercises its voting rights through one delegate, an employee
of the REIT, chosen to represent the member REIT. See NAREIT
Bylaws, Article II, section 1.

3 business trust.^{12/} Your request further details the additional
4 legal developments that have increased the substantive
5 differences between business trusts and other trusts since
6 Advisory Opinion 1981-52 was decided.

7 Reconsidering these distinctions, the Commission now
8 determines that the circumstances of the business trust are
9 closer to that of the limited liability company, an entity
10 which as a form of business organization, like the business
11 trust, shares many corporate and partnership attributes. In
12 Advisory Opinion 1995-11, when considering the status of the
13 limited liability company where no member of the company was
14 itself a corporation, the Commission concluded that
15 attribution of the contribution among the members or
16 principals of the company was not required. Likewise, the
17 Commission herein partially overrules Advisory Opinion
18 1981-52 and concludes that where there are no corporate

19 12/ In Advisory Opinion 1981-52, the Commission noted the
20 distinctions between the business trust and the testamentary
trust. The Commission observed:

21 One such distinction is functional; the
22 business trust is a device to conduct
23 business for profit, whereas the
24 traditional trust is designed to conserve
25 and protect property. Another
26 distinction lies in the manner in which
27 the trust relation is created; investors
28 in a business trust enter into a
29 voluntary, consensual and contractual
30 relationship, whereas the beneficiaries
of a traditional private trust take their
interests by gift from the donor or
settlor.

31 Id., see also footnote 2.

3 beneficial owners of the REIT trust, the contributions made
4 by the REIT trust do not have to be attributed among its
5 beneficial owners.

6 However, the Commission noted in Advisory Opinion
7 1995-11 that the participation of corporations as members in
8 a limited liability company would raise the issue of
9 indirect contributions or expenditures which are prohibited
10 by 2 U.S.C. §441b. This concern, likewise addressed in
11 Advisory Opinion 1981-52, is still valid regarding REIT
12 trusts where, as the facts of your request indicate, many if
13 not most of these trusts have corporations as beneficial
14 owners. The Commission, consistent with Advisory Opinions
15 1995-11 and 1981-52, reaffirms that the participation of the
16 corporate beneficial owners of a REIT trust in political
17 contributions made by that trust is prohibited by section
18 441b.^{13/} A REIT trust must screen or segregate out corporate
19 participation in the PAC contribution by taking the necessary
20 steps to ensure that the earnings or losses of corporate
21 beneficial owners are unaffected by the PAC contribution.

22 Your request mentions the administrative difficulty
23 in determining whether or not a REIT trust has any corporate
24 beneficial owners. The Commission notes that if such a

25
26 13/ The same would be true if any other person or entity, such
27 as a Federal contractor or foreign national, prohibited by
28 the Act from making political contributions, participated as
29 a beneficial owner of the REIT trust in a political
30 contribution made by the REIT. See 2 U.S.C. §§441c and 441e.

5 determination were impossible, then that REIT trust would be
6 barred from making political contributions. However, your
7 request suggests the possibility that an agreement among the
8 beneficial owners might be possible, although it could
9 interfere with the fungibility of stock under the securities
10 laws and the Internal Revenue Code. The Commission does not
11 necessarily agree that fungibility precludes making any
12 distinction among corporate and unincorporated beneficial
13 owners. However, the concept of fungibility, even if
14 implicated, does not nullify or override the Act's provisions
15 which bar the direct or indirect making of a political
16 contribution by a corporation or other individual or entity
17 likewise prohibited from making political contributions. See
18 footnote 13.

19 The Commission expresses no opinion regarding any tax
20 ramifications of the proposed transaction, because these
21 issues are not within its jurisdiction.

22 This response constitutes an advisory opinion concerning
23 application of the Act, or regulations prescribed by the
24 Commission, to the specific transaction or activity set forth
25 in your request. See 2 U.S.C. §437f.

26 Sincerely,

27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

Enclosures (AO 1995-11, 1994-12, 1993-24, 1991-24, 1988-3
1981-52, 1976-63)