



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 6, 1995

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

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.<sup>1/</sup> 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 as business trusts ("REIT trusts") and the remainder are organized as corporations ("REIT corporations").<sup>2/</sup>

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 attribution.

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

### NAREIT GOVERNING BODY

Your request includes the NAREIT governing documents: its Bylaws and Articles of Incorporation. These materials identify the Board of Governors (the "Board") as the governing body of the Association.<sup>3/</sup> The Board is comprised of between five and thirty-five members of which at least two-thirds must be voting delegates of REIT members. Also, immediate past committee chairs are made members of the Board with full voting rights for three years. At the end of that time, past committee chairs become, at their option, nonvoting Ex-Officio members. NAREIT Bylaws, Article IV, section 2.<sup>4/</sup>

### NAREIT MEMBERS

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

### ACT AND COMMISSION REGULATIONS

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

Under 2 U.S.C. 441b(b)(4)(A)(i), a corporation, or a separate segregated fund established by a corporation, may solicit contributions to such a fund only from its stockholders and their families and its executive and administrative personnel and their families. A trade association may solicit the stockholders and executive or administrative personnel of corporations that are members, and their families, if prior approval is obtained. 2 U.S.C. 441b(b)(4)(D); II CFR

114.8(c). In addition, 2 U.S.C. 441b(b)(4)(C) and 11 CFR 114.7(a) allow a membership organization (among other corporations without capital stock), or its separate segregated fund, to solicit contributions to the fund from the members of the organization and their families. The Commission's regulations use the term "membership association" to implement this allowance. It is defined, in part, as a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list. 11 CFR 114.1(e)(1)(i), (ii), and (iii).

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

- (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);
- (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- (iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

The regulations also provide that the Commission "may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have a significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule." See 11 CFR 114.1(e)(3).<sup>6/</sup>

## DETERMINING STATUS OF REIT MEMBERSHIP CLASS

### 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).<sup>7/</sup>

### Status and Solicitability of NAREIT Members

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

## SOLICITATION OF NAREIT TRUST MEMBERS

### Solicitation of REIT Trust Personnel

NAREIT proposes to solicit PAC contributions from executive personnel of its trust members in the same manner it may solicit similar personnel who are employed by its corporate members. Commission regulations at 11 CFR 114.7 provide that the question of whether a professional organization is a corporation is determined by the law of the state in which the professional organization exists. The Commission has likewise used state law to generally determine the corporate status of an entity. See Advisory Opinions 1995-11 and 1981-52. Your request specifically cites Maryland and Delaware statutes and describes the corporate attributes accorded to business trusts in those states. However, these States nonetheless regard business trusts as a separate form of business organization that is distinct from corporations.<sup>8/</sup> 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. If, however, a REIT member of NAREIT would qualify as a corporation under the relevant State statute, the qualified personnel of that corporation could be solicited for contributions to the Committee under the rules cited herein.

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.<sup>10/</sup>

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

### Attribution of Contributions by REIT Trust Members

The Commission concluded in Advisory Opinion 1981-52, that a REIT was a "person" under 2 U.S.C. 431(11) and that the contributions made by REIT trusts should be attributed to all the beneficial owners of the trust. The 1981 opinion explains that the Commission had previously required attribution of contributions made by testamentary trusts and determined to treat all trusts, business and testamentary, in the same manner regarding attribution. The Commission nonetheless noted that REITs, as business trusts, were distinguishable in many respects from testamentary trusts, the greatest difference being the for-profit purpose of the business trust.<sup>12/</sup> Your request further details the additional legal developments that have increased the substantive differences between business trusts and other trusts since Advisory Opinion 1981-52 was decided.

Reconsidering these distinctions, the Commission now determines that the circumstances of the business trust are closer to that of the limited liability company, an entity which as a form of business organization, like the business trust, shares many corporate and partnership attributes. In Advisory Opinion 1995-11, when considering the status of the limited liability company where no member of the company was itself a corporation, the Commission concluded that attribution of the contribution among the members or principals of the company was not required. Likewise, the Commission herein partially overrules Advisory Opinion 1981-52 and concludes that where there are no corporate beneficial owners of the REIT trust, the contributions made by the REIT trust do not have to be attributed among its beneficial owners.

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

Your request mentions the administrative difficulty in determining whether or not a REIT trust has any corporate beneficial owners. The Commission notes that if such a determination were impossible, then that REIT trust would be barred from making political contributions. However, your request suggests the possibility that an agreement among the beneficial owners might be possible, although it could interfere with the fungibility of stock under the securities laws and the Internal Revenue Code. The Commission does not necessarily agree that fungibility precludes making any distinction among corporate and unincorporated beneficial owners. However, the concept of fungibility, even if implicated, does not nullify or override the Act's provisions which bar the direct or indirect making of a political contribution by a corporation or other individual or entity likewise prohibited from making political contributions. See footnote 13.

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

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)

Danny L. McDonald  
Chairman

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

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.

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.

3 The NAREIT bylaws provide that:

The Board of Governors is the governing body of the Association, vested with the powers necessary for the management and administration of the Association, and has supervision, control and direction of all affairs of the Association including 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.

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

The Commission notes that under NAREIT Bylaws, the Executive Committee, while responsible for the day-to-day running of the organization, has important limitations to its power. For example, under Article V, section 1, the Executive Committee may act on behalf of the Board but may 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.

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.

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.

11 NAREIT Bylaws, for example, identify one individual who may perform this role in the Association. Each member REIT 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.

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

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 relation 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.

Id., see also footnote 2.

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