FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
FEC Press Office
FEC Public Records

FROM: Marjorie W. Emmons/Delores Hardy DH
Secretary of the Commission

DATE: October 4, 1995

SUBJECT: COMMENTS: PROPOSED AO 1995-27

Transmitted herewith is a timely submitted comment from Mr. Tony M. Edwards, Vice President and General Counsel.

Proposed Advisory Opinion 1995-27 (National Association of Real Estate Investment Trusts, Inc.) is on the agenda for Thursday, October 4, 1995.

Attachment:

5 pages

Celebrating the Commission's 20th Anniversary

YESTERDAY, TODAY AND TOMORROW
DEDICATED TO KEEPING THE PUBLIC INFORMED

NAREIT

National Association of Real Estate Investment Trusts®

1129 Twentieth Street, N.W.
Suite 305
Washington, D.C. 20036-3482

202-785-8717
Fax 202-785-8723

October 3, 1995

BY FAX

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Draft Advisory Opinion 1995-27

Dear Commissioners:

This letter constitutes the comments of the National Association of Real Estate Investment Trusts® ("NAREIT") to FEC Draft Advisory Opinion 1995-27 (the "Draft Opinion"), which is scheduled for consideration by the Commission on Thursday, October 5, 1995.

The Draft Opinion concludes that NAREIT PAC, NAREIT's separate segregated fund, may not solicit the executive and administrative personnel and shareholders of its member REITs that are organized as business trusts rather than corporations. Although the Draft Opinion acknowledges that business trusts are "treated as corporations for some purposes," see fn. 2 of the Draft Opinion, it takes the position that the executive and administrative personnel and shareholders of a member REIT trust cannot be solicited for contributions by NAREIT PAC in the same manner as the personnel and shareholders of member REIT corporations. Instead, NAREIT PAC only could solicit contributions from the REIT trust itself.

The General Counsel's recommendation does not effectively or reasonably apply the requirements of the Act to the particular issues presented by the structure and management of REITs, nor is it consistent with the underlying purposes of the Federal Election Campaign Act of 1971. The Act seeks to regulate campaign financing while preserving, to the maximum extent possible, individuals associated in a political or commercial endeavor right to express political views, including making voluntary political contributions. Generally, the Act discourages involuntary contributions and contributions that are made without the explicit consent of the donor.

By prohibiting NAREIT PAC from soliciting contributions from executive and administrative personnel of its member REITs, the draft Opinion would prevent individuals responsible for the management of REITs from making voluntary contributions. At the same time, REITs would be able to make contributions from trust funds without the informed consent, and possibly against the wishes, of trust personnel and beneficial owners. Even if this problem of shareholder consent could be solved or overlooked, the Opinion requires a "screening" of corporate shareholders which is impossible to achieve and is also inconsistent with the requirements of federal law.

Therefore, the General Counsel's recommendation imposes the most burdensome structure possible while denying the most logical and fairest solution. We request that the Commission modify the Draft Opinion to permit NAREIT PAC to solicit executive and administrative personnel of its member REITs in the same manner as personnel of its corporate REIT members.

NAREIT Should Be Permitted to Solicit Voluntary Individual Contributions, Not Funds From REIT Earnings.

Shareholders of a REIT trust are likely to be unaware that they own shares of a business trust and not a corporation. As explained in our letter dated July 27, 1995, the market makes no distinction between REIT trusts and corporations. Just as shareholders would not expect their corporate investees to make political contributions from corporate earnings, they do not expect that REITs in which they invest make such expenditures. The Act does not permit involuntary or non-consensual use of funds to make political contributions. Nor should it be construed to permit it here. Accordingly, it is more appropriate that NAREIT PAC solicit voluntary, individual contributions from the executive and administrative personnel and shareholders of our member REIT trusts, rather than seeking contributions from the earnings of the trusts themselves.

The Commission Should Accommodate Tax Law Restrictions in its Interpretation

The Draft Opinion acknowledges that its conclusion is in direct conflict with securities and tax law requirements governing REITs but does not in any way attempt to reconcile its conclusion with these other legal policies. When an agency enforcing its statute is faced with such a "true conflict," it must, insofar as possible, enforce its statute "in a manner that minimizes the impact of its actions on the policies of the other statute." New York Shipping Assoc. v. Federal Maritime Commission, 854 F.2d 1338, 1367 (D.C. Cir. 1988). The Federal Election Commission has not been directed to effectuate the policies of its statutes "so single-mindedly that it may wholly ignore other and equally important Congressional objectives." Id. at 1365, quoting Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942).

As explained in our July 27 letter, it will be impossible for a publicly traded REIT trust to attribute a contribution to NAREIT PAC to its individual shareholders due to the difficulties of determining beneficial ownership of its shares. Moreover, attributing the contribution only to certain investors pursuant to an alternative agreement (and reducing their dividends accordingly) might be deemed to create a preferential dividend under Section 562(c) of the Internal Revenue Code. If the special allocation was found to be a preferential dividend, the REIT would lose its right to a dividends paid deduction pursuant to Internal Revenue Code Section 857(b)(2)(B), which possibly could lead to its loss of REIT status for five years. A loss of REIT status would result in a severe devaluation of a shareholder's investment.

In light of the basic conflicts between the Draft Opinion and the tax code requirements a business trust must meet to qualify as a REIT, the Commission should consider alternative interpretations to accommodate these tax concerns. Id. At 1365.

The Draft Opinion states that it partially overrules Advisory Opinion 1981-52 to the extent that when there are no corporate beneficial owners of a REIT trust, the contributions made by the REIT trust do not have to be attributed among its beneficial owners. This, in practical terms, offers no relief. As stated in our letter dated August 22, 1995, our REIT trust members have uniformly both corporate and individual shareholders. We would be very surprised to learn and it would be highly unusual that any REIT, especially a publicly traded REIT (or any publicly traded corporation for that matter), has no corporate shareholders.

Trust REIT Management is Properly Treated As Comparable to Corporate REIT Management.

The OGC's Draft produces these results out of a reluctance to treat trust REITs like corporations for solicitation purposes. There is no basis for this reluctance in law or logic. We note that the authorities cited in footnote 2 of the Draft Opinion, which support the position that business trusts have corporate attributes, are relatively old -- a 1964 American Jurisprudence volume and a 1988 volume of Fletcher Cyclopedia Corporations. However, as detailed in our August 22, 1995 letter, in recent years state laws have been changed to increase the corporate attributes of REIT trusts.

NAREIT has only one class of "corporate" membership and that class is its REIT Members. All other membership classes provide individual membership only. NAREIT's Bylaws make no distinctions between REIT Members organized as corporations and those organized as business trusts. Further, and more importantly, the officers and other executives of our member REIT trusts enjoy the same benefits and serve in the same NAREIT leadership positions as officers and executives of our member REIT corporations. The Board of Directors, the Executive Committee, and the various NAREIT committees include executives of member REIT trusts. All employees of corporate REITs and trust REITs enjoy lower registration fees to conferences and lower publication fees as compared to individual Associate Members and nonmembers. Further, NAREIT's Directors and Officers Insurance Program covers employees of both corporate and trust REITs. Both corporate and trust REITs make presentations at NAREIT's institutional investor seminars. In addition, we expect that executives of our member REIT trusts will serve on NAREIT PAC's Leadership Council, which will determine the candidates that the PAC should support.

Because the executives and administrative personnel of our member REIT trusts have precisely the same relationship to NAREIT as the personnel of our member corporate REITs, and because executives of our member REIT trusts will have the same interests and rights to participate in NAREIT PAC's Leadership Council, logic suggests that NAREIT PAC should be able to solicit these individuals to the same extent it can seek contributions from the executive and administrative personnel of our corporate REIT members. Of course, corporate and trust REITs have the same tax and other legislative interests that will be the central focus of NAREIT PAC.

Advisory Opinions Cited in Draft Opinion Are Obviously Distinguishable.

The Draft Opinion cites Advisory Opinions 1976-63 and 1988-3 to support the propositions that executive and administrative personnel and shareholders of member REIT trusts may not be solicited for contributions. See fns. 9 and 10. These Advisory Opinions easily are distinguishable from the situation at hand. Advisory Opinion 1976-63 determined that executive and administrative personnel of a trade association's member partnerships and proprietorships could not be solicited for contributions to the trade association's separate segregated fund. This opinion did not involve executive and administrative personnel of entities in any way similar to publicly traded REITs structured as business trusts. Similarly, Advisory Opinion 1988-3, which concluded that individual members of an unincorporated association belonging to a national association could not be solicited by the national association's PAC, did not involve shareholders of an entity similar to trust REITs. Members of the unincorporated association were assessed for the expenses of the association.

In contrast, as explained in our July 27 letter, shareholders of a business trust REIT are not responsible for the REIT's liabilities. Indeed, Advisory Opinion 1988-3 explicitly distinguishes the unincorporated association at issue from a business trust and cites Advisory 1981-52, which was given to NAREIT with respect to its prior separate segregated fund. Inasmuch as the Draft Opinion acknowledges the corporate attributes of REIT trusts, the Commission should not be bound by prior opinions relating to partnerships, proprietorships and unincorporated associations.

* * *

Please call Margaret Campell at (202) 973-1341 or me if you would like to discuss this issue in greater detail.

Very truly yours,

Tony M. Edwards /MK

Tony M. Edwards
Vice President and General Counsel

cc: Office of the General Counsel
Margaret A. Campell

P:\FEDREG.95RPAC.COMMENT.DOC
OCT. 3, 1995 (MAC)