July 27, 1995

National Association of Real Estate Investment Trusts®

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Danny L. McDonald
Chairman
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

AOR 1995-27

Re: Advisory Opinion Request

Dear Chairman McDonald:

Pursuant to 2 U.S.C. § 437f and 11 C.F.R. § 112.1, the National Association of Real Estate Investment Trusts ® ("NAREIT") hereby requests an advisory opinion from the Federal Election Commission ("FEC"). On June 2, 1995, NAREIT filed with the Commission FEC Form 1 establishing a separate segregated fund (National Association of Real Estate Investment Trusts, Inc. Political Action Committee, or "NAREIT PAC") pursuant to 2 U.S.C. § 441b. We are seeking an advisory opinion allowing NAREIT PAC to solicit the executive and administrative personnel and shareholders of business trust members of NAREIT, and families of both groups, for contributions to NAREIT PAC.

NAREIT is a not-for-profit organization incorporated under the laws of Massachusetts and also is 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. Members of NAREIT include over 250 REITs, more than 200 of which trade on the New York Stock Exchange, the American Stock Exchange or the NASDAQ National Market System. Out of NAREIT's 256 Member REITs, over 80 are organized as business trusts (referred to herein as "REIT trusts") and the remainder are organized as corporations (or "REIT corporations").

The Bylaws of NAREIT provide that a REIT may become a "REIT Member" of NAREIT. A REIT Member is entitled to one vote on all matters submitted to the members of NAREIT, including a vote for each open position of the Board of Governors, the highest governing body of NAREIT. Each REIT Member exercises its voting rights through a Voting Delegate who is employed by the REIT Member. The Bylaws do not draw any distinctions between a REIT trust and a REIT corporation. The

Bylaws define a "REIT" eligible to be a "REIT Member" as "any entity that meets the requirements set forth in Section 856(a) of the United States Internal Revenue Code," which section sets out the criteria for an organization to be treated as a REIT for federal income tax purposes. Such section allows either corporations or trusts (but not partnerships) to qualify for REIT status.

We would like to treat all of our REIT Members, whether a REIT trust or a REIT corporation, in the same manner for purposes of soliciting contributions for NAREIT PAC in accordance with the Federal Election Act of 1971, as amended, (the "Act") and the regulations thereunder. Specifically, we wish to request consent from our REIT Members, both corporations and business trusts, to solicit (and upon receiving such consent to thereafter solicit) their executive and administrative personnel, shareholders and families of both groups. We would not solicit any REIT Member itself.

In Advisory Opinion, 1981-52, the FEC concluded that a REIT organized as a business trust could be treated like a testamentary trust under the Act. More specifically, the FEC allowed NAREIT to solicit its REIT trust members themselves for contributions to NAREIT's separate segregated fund[1] so long as the REIT trusts were not considered to be corporations under applicable state law.[2]

In that Advisory Opinion the FEC recognized that a REIT trust and a testamentary trust varied in several critical respects. See AO 1981-52 at n.3. As the REIT industry has matured, these differences have grown to the point that REIT trusts are, under most state laws, indistinguishable from REIT corporations.

The ownership, operation and management of the modern day REIT trust make it more appropriate to treat a REIT trust and a REIT corporation similarly for solicitation purposes. Both types of entities are owned, operated and managed in a similar manner. A REIT trust is governed by a Board of Trustees, which functions in the same manner as

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[1] That separate segregated fund, also known as NAREIT PAC, was established on October 28, 1981 and subsequently terminated on or about December 18, 1984.

[2] The Advisory Opinion further provided that a contribution from a REIT trust had to be attributed to each investor in the REIT trust, in accordance with each investor's interest in the REIT. Alternatively, an agreement could be made among a REIT trust's investors to attribute the contribution in some other way. In any case, no attribution of any share of a contribution could be made to any investor who was prohibited from making a direct contribution to the separate segregated fund (e.g., a corporation, labor organization or foreign national). A copy of Advisory Opinion 1981-52 is enclosed for your convenience.

a corporation's Board of Directors. Treasury Regulation § 1.856-1(d)(1) requires that a REIT trust's trustee's have "such rights and powers as will meet the requirement of 'centralization of management'", meaning that the trustees must have "continuing exclusive authority over the management of the trust, the conduct of its affairs and [with certain exceptions] the management and disposition of the trust property." The owners of the equity interests of a REIT trust are known as shareholders and their ownership interests are known as shares of beneficial interests. The owners of the equity interests of a REIT corporation are called stockholders and own shares of stock. The stockholders or shareholders, as the case may be, elect the directors or trustees of the REIT. The directors or trustees, as the case may be, elect or appoint the officers of the REIT.

For example, many REIT trusts are organized under Maryland law. Maryland adopted a special REIT trust statute in 1963, Md. Corps. & Ass'ns. Ann. § 8, which has been updated regularly to extend corporate traits to REIT trusts. Maryland's REIT statute provides that the beneficial owners of a business trust or REIT are entitled to the same limitation of personal liability enjoyed by stockholders of corporations, unless the trust's charter provides otherwise.[3] Limited liability, of course, is the hallmark of a corporation, in addition to perpetual existence. Maryland law provides that a REIT trust will have perpetual existence, unless otherwise provided in the trust's charter.[4] A Maryland REIT trust also can indemnify its trustees and officers in the same manner as a corporation. Other states have adopted statutes recognizing REIT trusts and providing for limited liability of their shareholders and trustees. See e.g. 3 Cal. Corp. Code § 23001 (shareholders only); Tex. Corps. & Assns. Code Ann. §§ 6138A-9.1 and 6.138A-9.1 (trustees and shareholders); and Ill. Rev. Stat. Ch. 745, para. 60.2 (shareholders only). Thus, under modern REIT law, REIT trusts and corporations are indistinguishable in most fundamental respects.

Furthermore, the marketplace makes no distinction between REIT trusts and corporations. Both types of REITs are listed on the exchanges, and the securities analysts who follow the industry classify REITs by product type or market capitalization rather than by state organizational choice. The stockholders and shareholders receive the same type of disclosure documents required by the Securities and Exchange

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[3] Md. Corps. & Assns. Ann. § 8-601. See also Del. Code Ann. Tit. 12 (Treatment of Delaware Business Trusts) § 3803.
[4] Md. Corps & Assns. Ann. § 8-301. See also Del. Code Ann. Tit. 12 § 3808.

Commission, and the trading rules of the stock exchanges apply equally to REIT trusts and corporations.

One reason that a number of REITs are organized as business trusts rather than as corporations is historical. When Congress enacted the original REIT sections of the Internal Revenue Code in 1960, REIT status was conferred only on entities operating as trusts. In 1976, the law was changed to provide that a trust or corporation meeting the requirements of Sections 856 through 860 of the Internal Revenue Code would be treated as a REIT. Whether organized as a trust or a corporation, a REIT must meet the same qualifications under the Internal Revenue Code and receives the same tax treatment. As a result of this law change, some of the REITs originally structured as business trusts reorganized into corporations.

Moreover, we believe that it is neither appropriate nor feasible for REIT trust members of NAREIT to attribute contributions to NAREIT PAC as required by Advisory Opinion 1981-52. Of the 80-plus REIT trusts that are NAREIT members, approximately 68 are publicly traded companies. The ultimate ownership of shares of a public company cannot be determined with any degree of certainty since usually most shares are held by brokers in "street name" for the true beneficial owners. Also, thousands of REIT shares change hands daily on the securities exchanges. Accordingly, a public REIT trust could not know if a contribution to NAREIT PAC was being attributed to a corporation or some other entity or individual prohibited from making such a contribution.

A REIT trust's attribution of a contribution to NAREIT PAC only to certain investors under an alternative agreement (and reducing their dividends accordingly) also would not work because it would result in shares of the same class receiving different amounts of dividends per share. This could violate requirements of the securities laws and the exchange rules requiring that shares of the same class be fungible. This special allocation also might be deemed to create a "preferential dividend" under Section 562(c) of the Internal Revenue Code. If the allocation was found to be a preferential distribution, the trust 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.

NAREIT PAC would like to solicit not the REIT trust itself, but rather the REIT trust's executive and administrative personnel, its shareholders, and families of both groups. Utilizing this approach, NAREIT could solicit all of its REIT Members in the same way. Each REIT Member would be sent a request for consent to solicit that REIT's executive and administrative personnel and shareholders, in accordance with 11 C.F.R. § 114.8. Only upon receipt of a consent would any such solicitable persons be sent a request for contributions.

Thank you for your consideration of this request for an advisory opinion. If you have any questions or require any additional information, please call me or Margaret Campell, Associate Counsel of NAREIT, at (202) 785-8717.

Respectfully submitted,

Tony M. Edwards
NAREIT Vice President and General Counsel
Treasurer, NAREIT PAC

Enclosure

cc: Margaret Campell
NAREIT Associate Counsel

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 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[1/] and

1/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).

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 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.2/. 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).

2/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.

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.

Although a REIT and a testamentary trust are different in several respects,3/ 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

3/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.

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,

Frank P. Reiche

Frank P. Reiche
Chairman for the
Federal Election Commission

Enclosure (Re: AOR 1976-63, AO 1978-7 and AO 1980-132)