

NAREIT Financial Standards Alert



National Association of Real Estate Investment Trusts®
REITs: Building Dividends and Diversification®

SEC REGISTRATION IMPLICATIONS OF AN UPREIT OPERATING PARTNERSHIP OFFERING REIT STOCK IN AN ELECTIVE STOCK DIVIDEND

As you know, in December 2008 the Internal Revenue Service issued Revenue Procedure 2008-68¹, which allows a listed REIT to receive a dividends paid deduction in 2009 by issuing its stock to shareholders, so long as it offers its shareholders the ability to elect to receive at least 10% of the total distribution in cash. The SEC recently advised NAREIT regarding the implications under the Securities Act of 1933 (the "Securities Act") concerning the implications of this election in the context of a REIT with an operating partnership (OP) (or UPREIT structure) providing an option to its unitholders to elect to receive in a distribution a combination of cash, additional OP Units or REIT stock.

The SEC has a long-standing view that a dividend offered in either cash or company securities is not a sale of securities under the Securities Act. See [Securities Act Sections Compliance and Disclosure Interpretations, Question 103.01](#) on the SEC website. The SEC staff advised NAREIT that they do not extend this position when one entity (the OP) offers securities of another entity (the REIT). Thus, the SEC staff concluded that any REIT stock that is offered by the OP to unitholders must either be registered or another exemption must be available under the Securities Act.

In addition, the SEC also advised NAREIT that it viewed the transaction as a primary offering

by the REIT of its shares through the OP. Accordingly, the SEC staff advised us that another alternative is for the REIT to use its shelf registration statement to register the stock that an OP offers to holders of its units. The SEC staff said that the SEC views the OP as acting as an underwriter in this circumstance.

¹ Revenue Procedure 2008-68 was superseded in January 2009 by Revenue Procedure 2009-15, which extended the earlier guidance to mutual funds as well as REITs.

NAREIT

Steven A. Wechsler
President and CEO

(202) 739-9400 swechsler@nareit.com

Policy and Politics

Tony M. Edwards

Executive Vice President and General Counsel

(202) 739-9408 tedwards@nareit.com

Financial Standards Staff

George L. Yungmann

Sr. Vice President,
Financial Standards

(202) 739-9432 gyungmann@nareit.com

Sally Glenn

Director, Financial Standards

(202) 739-9442 sglenn@nareit.com

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