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COMMENTS

REAL ESTATE SYNDICATION

Real property is and always has been an important aspect of our industrial society. It is an important source of investment and is itself a sound investment. In the case of the average investor, however, realty can be purchased only on a small scale. Moreover, to the inexperienced, real estate may bring more burdens than rewards. Thus, problems of management, maintenance, taxation, and possible liability often induce an individual to turn to securities investment. In addition, real estate transactions usually require large sums of money and financing, leaving the good opportunities primarily to the "giants." But even the "giants" had difficulty raising the required cash and financing and concentrating it into one piece of property. Thus "it became clear that investment in important structures could not be a lone hand venture. . . . [In addition,] the big fellow was worrying about how to prevent the tax problem from reducing him to a little fellow . . . [and the little fellow] was aching to get into a real estate venture . . . [so] he 'could make enough money to worry about the tax problem in the first place'."

From these dynamic tensions the real estate syndicate was formed, designed to make the "little fellow" a "big fellow" and to keep the latter from becoming the former.

I. NATURE OF THE SYNDICATE

A. Generally

A syndicate has been described as "the pooling of the resources of a group of individual investors to acquire or develop an agreed-upon real asset." This definition obscures the true nature of the syndicate. Ordinarily, rather than individuals pooling together and buying, a contract is first made by one or more promoters who in turn make a public offering of participating shares in much the same manner as a securities issue is sold to the public. These shares may be offered on one particular building, or in a lot consisting of more than one, or it may be in a lease rather than a building; in fact

3. E.g., Navarre-500 Bldg. Associates Prospectus (May 2, 1958). A contract was made for the purchase of the building by the associates, which at the time consisted of only two partners, and then offered to the public in participating shares. Id. at 3. A syndicate can be more realistically described as "a large group, who share the ownership of a position in real estate, and set up a procedure which enables them to hold this investment, planned as a permanent investment." Wien, How the Syndicate Functions, 14 Record of N.Y.C.B.A. 51, 52 (1959).
4. E.g., Center-City Properties Prospectus (Jan. 19, 1962). This was a syndication of three separate properties, to be owned in fee by one syndicate.
5. E.g., Empire State Bldg. Associates Prospectus (Oct. 31, 1961). The syndicate upon completion of transactions was to own a net lease, with renewal privileges, which would run for approximately 114 years. Id. at 3.

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they may be offered in any form in which real estate may exist. At the same time the syndicate itself may exist as a trust, corporation, partnership, limited partnership, or as a tenancy in common.

B. Creation of the Syndicate

1. Role of the Promoter

Syndication begins with a syndicate manager or promoter who creates the investment. It is his job to select property suitable for investment; in this task he is usually assisted by expert consultants. He then determines income and financing details. At the same time a lessee must be found, or, if it is a lease that will be purchased, a sublessee. If neither can be found one must be created, for the lessee will ultimately undertake the actual operation of the property. Pre-contract provision is also made, whereby the prospective lessee is bound to acquire an actual equity in the real estate. Soon thereafter a contract is made to purchase the property and a cash deposit is given which is usually forfeited in the event title does not close. A syndicate is then formed which will purchase the property or purchase the promoter's right to buy the property. Finally a public offering of the participating shares is made.

6. E.g., 120 Broadway Associates Prospectus (April 12, 1956) (office building); Center-City Properties Prospectus (Jan. 19, 1962) (apartment building); Plaza Hotel Associates Prospectus (March 13, 1959) (hotel); Glickman Corp., Real Estate Syndication Circular, p. 6 (industrial center).


8. E.g., La Guardia East Prospectus (June 21, 1961).


10. E.g., 63 Wall St. Associates Prospectus (Sept. 6, 1961).


13. Id. at 53. The lessee will operate the property; he is of prime importance to avoid having the syndicate labeled as an association. That is why, if a lessee cannot be found, he must be created.

14. Id. at 53-54.

15. Id. at 54.

16. The actual formation of the syndicate does not have to occur at this point, but it is usually formed after the property is selected, because the syndicate is formed for the sole purpose of acquiring a specific piece of property. E.g., in one syndicate organized as a limited partnership it was stated that the purpose was to acquire "complete fee ownership of the 35-story office building known as 63 Wall Street..." 63 Wall St. Associates Prospectus, p. 3 (Sept. 6, 1961).


2. Remuneration of the Promoter

The promoter may realize remuneration in various forms. As initiator of the transaction he may deduct a profit "off the top." If he chooses, he may assign his interest in the contract to the syndicate or, if he is the owner, sell his interest in the property to the syndicate. At the same time he can also be the lessee or sublessee and thereby receive an income from operating the property. Underwriting may be done by a corporation owned by the promoter and a fee may thus be earned. Further, if circumstances permit, his company may receive a broker's commission for selling the property or may be retained to perform supervisory management services. If the organizer is a lawyer, he or his firm may receive a fee for performing the legal services involved in the transaction, and additional provision may be made whereby he is hired by the syndicate on an annual retainer. Whichever vehicle is chosen, the promoter will almost certainly expend considerable amounts of his own money for expenses, surveys, consultation, prospectuses, and down payments, all of which he stands to forfeit if title does not close. Thus, the promoter takes the original risks of syndication; once formed, however, the risks rest mainly on the participants.

3. Pros and Cons of Participation

Individual investors, indispensable as they are, have no choice as to what form the syndicate will assume. Their sole decision is: should they invest? The syndicate usually offers a high return, but unlike securities there is...

22. E.g., Garment Capitol Associates, where the property was simultaneously leased to another partnership, in which the general partners in the syndicate were also partners. Garment Capitol Associates Prospectus, p. 3 (Feb. 13, 1957).
28. After the participating shares are marketed the organizer is usually reimbursed for his expenses, and thus no longer has a risk. See The Beaver & William St. Co. Prospectus, p. 5 (Oct. 27, 1961). But where the participant is a member of a joint venture he will have unlimited liability. E.g., Empire State Building Associates, where each general partner executed a joint venture agreement, to the extent of his interest, with the participants. Thus any member can be liable, under the laws of New York, for the full amount of any obligation of the associates. See Empire State Bldg. Associates Prospectus, p. 12 (Oct. 31, 1961).
29. The anticipated distributions are usually around 10% per annum. See, e.g., The Beaver & William St. Co. Prospectus (Oct. 27, 1961); Center-City Properties Prospectus (Jan. 19, 1962).
relatively small participation at relatively high prices. For the most part the investor will enjoy limited liability. He will not share in management and except for major decisions will have no say at all. On the other hand, the investor will usually have a tax shelter resulting from depreciation deductions, thereby increasing his effective rate of return while his annual income and his interest in the syndicate will remain constant. His investment attracts, at best, a slim market and usually is not freely transferable; but relative safety is afforded by federal, state, and private association regulations designed to protect the investor and increase public confidence in syndicates.

30. The following schedule will illustrate the number of units and price:

<table>
<thead>
<tr>
<th>No. of Units Available</th>
<th>Price Per Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Garment Capitol Associates</td>
<td>1047</td>
</tr>
<tr>
<td>2. Beaver &amp; William St. Co.</td>
<td>220</td>
</tr>
<tr>
<td>3. Plaza Hotel Associates</td>
<td>635</td>
</tr>
<tr>
<td>4. 120 Broadway Associates</td>
<td>1045</td>
</tr>
<tr>
<td>5. Empire State Bldg. Associates</td>
<td>3900</td>
</tr>
</tbody>
</table>

* May be sold in 1/2 unit participations.

There is, however, one group especially designed for small investors, The Sire Plan (Small Investors Real Estate Plan, Inc.), which was formed in New York, markets to the small investor. Cost per unit usually ranges from $100 to $1,000. See La Guardia East Prospectus, p. 2 (June 21, 1961). See also Sire Plan Performance Record (Aug. 1, 1961).


32. Because the lessee is in charge of the operation of the property, it is his responsibility to manage it. In addition, participating agreements usually delegate power to the general partners to make other decisions not being made by the lessee. But the partner will usually not have the power to sell, mortgage, or renew leases without the consent of the participants. Id. at 12.

33. Depreciation will reduce the taxable income. In the case of a partnership, the partner's basis will be reduced by the amount of money distributed to such partner. Int. Rev. Code of 1954, § 733(1). In the case of a stockholder, a distribution in excess of earnings and profits is deemed a return of capital. Int. Rev. Code of 1954, §§ 301(c)(2)-(c)(3).

34. Each year as he reduces his basis by the amount of tax free income, his investment will grow smaller, thus his rate of return will increase.

35. There is usually a restriction on free transferability of participating interests. This would hamper any marketing operations. See, e.g., 63 Wall St. Associates Prospectus, p. 3 (Sept. 6, 1961).

36. Ibid.


39. In New York, the Association of Real Estate Syndicators, Inc., polices the actions of its members.

II. Mechanics of the Syndicate

A. Form and Purpose

Tax considerations generally suggest the operational form which the syndicate will assume.\textsuperscript{41} At the present time partnerships and limited partnerships are most popular.\textsuperscript{42} Formation usually is for the sole purpose of acquiring title to a specific property or lease. In one such syndicate it was stated that the group was formed for the "sole purpose of acquiring the Master Lease on the Empire State Building, to receive the rent under the Sublease. . . . It does not propose to engage in any other activities. . . ."\textsuperscript{43} This particular syndicate was formed with three general partners, each owning a one-third interest. Provision was made for each partner to enter into participation agreements with investors respecting that particular partner's interest in the syndicate. Each agreement, therefore, created a joint venture, and in this case three ventures were formed. It was further provided that the partner would be the agent for the participants in his partnership interest, with the power to bind his participants.\textsuperscript{44}

Syndicates using the limited partnership form generally use a method different from the general partnership in marketing participation.\textsuperscript{45} It should be noted that under New York law, participants in this form of syndication occupy the status of limited partners.\textsuperscript{46}

B. Choice of Property

Many factors play in the selection of property for a syndicate basis. To be suitable for syndication, the property should show a return of twelve per cent or more on equity. In most cases, however, this value has to be created.\textsuperscript{47} Competition, too, is a key factor in the selection of property and an analysis of this is usually accomplished by experts in the field.\textsuperscript{48}


\textsuperscript{41} See generally Spandorf, Real Estate Syndicates: How to Organize, Operate and Sell Them for Tax Advantage, 6 J. Taxation 44 (1957).

\textsuperscript{42} This is true because these firms can avoid the corporate tax and thus offer a greater return on investment. But the Real Estate Investment Trust Act, Int. Rev. Code of 1954, §§ 856-58, may help to popularize the trust form.


\textsuperscript{44} Id. at 12-13.

\textsuperscript{45} E.g., 63 Wall St. Associates Prospectus (Sept. 6, 1961) (units sold as limited partnership interests).

\textsuperscript{46} N.Y. Partnership Law §§ 90-119.

\textsuperscript{47} E.g., the property might only show an 8% return and through refinancing have a yield of 12%. See Helmsley, Business Aspects, 14 Record of N.Y.C.B.A. 48, 50 (1959).

C. Acquisition of the Property

1. Methods

Purchase of the property, more often than not, involves a series of complicated and simultaneous transactions. The property may be purchased directly from the owner with a simultaneous leaseback. In one acquisition the property was purchased from the original owner by the syndicate, then sold to a third party who leased it back to the syndicate which in turn simultaneously subleased it to another. The sublessee was in the form of a joint venture in which one of the members was also a general partner in the syndicate. In another case, the property was purchased from the original owner by a corporation, which then sold it to a syndicate and the latter simultaneously leased it back to the corporation. The principal officer of the corporation was a general partner in the syndicate. Involved in the transaction was a third corporation which was retained in a supervisory capacity at an annual fee. Here too the principal officer was a general partner in the syndicate. In yet another acquisition a lease was purchased from a partnership and immediately subleased to another partnership. One of the principal partners in the syndicate was at the same time a partner in each of the other groups involved.

2. Reasons for Complexity

The immediate leaseback, or sublease as the case may be, is of prime importance to divorce management of the property from the syndicate. In some situations it may be leased back to the seller, in which case the latter might enjoy an immediate capital gain and still retain possession. In addition, conversion frees cash for further investment. The leaseback arrangement also carries several advantages for the syndicate—operation of the property by a third party, annual payments upon which to base distributions, and several possible tax benefits.

49. E.g., 120 Broadway Associates Prospectus, p. 3 (April 12, 1956); Plaza Hotel Associate Prospectus, p. 3 (Sept. 6, 1961).
51. 63 Wall St. Associates Prospectus, p. 6 (Sept. 6, 1961).
53. It is important to separate ownership and management to prevent the organization from being taxed as an association. See generally White, How to Prevent Real Estate Venture Being Taxed as a Corporation, 12 J. Taxation 48 (1960).
54. E.g., the property may have been fully depreciated and have a zero basis, so it might be advantageous to convert it into cash. See generally Mandell, Tax Aspects of Sales and Leasebacks as Practical Devices for Transfer and Operation of Real Property, N.Y.U. 16th Inst. on Fed. Tax 17 (1960).
55. Id. at 18.
56. Most leases provide for an annual payment to the syndicate on which the syndicate bases its anticipated distributions. In most cases the lessee will guarantee payment but this guarantee usually will not extend beyond the rent collected by the lessee. E.g., in one acquisition a corporation capitalized at $2,500 was to pay a minimum rent of $275,000 annually. So, in effect, the payment of rent depends on the lessee’s profits from operation under the lease. La Guardia East Prospectus, pp. 16-17 (June 21, 1961).
D. Status, Liability, and Rights of Participant

As the syndicate may assume a corporate, limited partnership, or general partnership form, so the participant will be a stockholder, \(^5\) limited partner, \(^0\) or joint venturer. \(^6\) His liability will also vary according to the form of the syndicate: in the corporate, limited partnership, and trust forms he will enjoy limited liability. \(^61\) As a joint venturer his liability is unlimited. \(^62\) Rights and duties are defined by agreement \(^63\) and generally both are restricted. \(^64\) His income, too, will vary according to the form of the syndicate. Generally, the partnership forms offer a higher return because they avoid the double taxation feature of the corporate form. \(^65\)

III. Tax Considerations

A. Generally

The prime factor that led to the formation and form of the syndicate was taxation. \(^66\) From a tax point of view the corporate form is least desirable. \(^67\) The selection, however, of the more popular partnership forms does not of itself resolve the tax problems, for, despite nomenclature, there is always the danger of corporate tax treatment. This danger results from the broad definition assigned to a corporation under the Internal Revenue Code of 1954, \(^68\) which specifically includes associations. \(^60\) Thus, careful draftsmanship must be employed in forming the syndicate so as to avoid its classification as an association and taxation as a corporation.

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58. See, e.g., La Guardia East Prospectus (June 21, 1961).
59. See, e.g., 63 Wall St. Associates Prospectus (Sept. 6, 1961).
61. N.Y. Partnership Law § 96.
63. In order to purchase participating shares, the participant will enter into a written agreement which will enumerate his rights under the syndicate. See, e.g., Empire State Bldg. Associates Prospectus, pp. 12-13 (Oct. 31, 1961).
65. Under the corporate form, the corporation pays a tax as an entity; then the participants pay another tax as they receive the income. Int. Rev. Code of 1954, § 11. Under a partnership form, the partnership itself does not pay any tax, all income being taxed to the partners. Int. Rev. Code of 1954, § 701.
67. It has, however, been used. See, e.g., La Guardia East Prospectus (June 21, 1961).
69. Ibid.
B. Treasury Regulations

In 1960 the Treasury issued regulations defining its position regarding classification of organizations for corporate tax treatment. It states that an "organization will be treated as an association if the corporate characteristics are such that the organization more nearly resembles a corporation than a partnership or trust." The characteristics listed to aid this determination are: (1) associates; (2) an objective to carry on a business and divide the gains therefrom; (3) continuity of life; (4) centralization of management; (5) liability for corporate debts limited to the corporate property; and, (6) free transferability of interest. As to which of these tests will govern, the regulations go on to say that when "the organization has more corporate characteristics than noncorporate characteristics" it will be classified as an association. In applying this test, however, those characteristics common to both will not be considered. Thus, if a limited partnership has centralized management and free transferability but lacks continuity of life and limited liability, it will not be classified as an association even though it has associates and an objective to carry on a business, the latter characteristics being common to both forms of enterprise.

C. Specific Characteristics To Be Avoided

1. Continuity of Life

"An organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation or expulsion of any member will not cause a dissolution of the organization." Dissolution does not mean the organization must terminate, but only that there is an alteration in its identity. Thus, an agreement may provide for the continued existence of an organization without


72. Ibid.

73. Ibid. These characteristics of a corporation given by the Treasury are based on the rules set out in Morrissey v. Commissioner, 296 U.S. 344 (1935). It was stated by the Court: "'Association' implies associates. It implies the entering into a joint enterprise... an enterprise for the transaction of business." Id. at 356. The Court went on to say that "the inclusion of associations with corporations implies resemblance." Id. at 357. The features of a corporation could be listed as: (1) title in the entity; (2) centralization of management; (3) continuity of life; (4) limitation of liability; (5) free transferability of interest. Id. at 359. The first criterion, i.e., title in the entity, has been disregarded as a factor by the Treasury, since under the Uniform Partnership Act § 8(3), a partnership can hold real estate in the partnership name.

74. This is the example given by the regulations. Treas. Reg. § 301.7701-2(a)(3) (1960).


76. Ibid.
creating a continuity of life. In effect, if an organization has continuity of identity, it has retained an association characteristic, but continuity of business is not of itself such a characteristic. Moreover, if an organization is subject to a statute corresponding to the Uniform Partnership Act or the Uniform Limited Partnership Act it will lack continuity of life, notwithstanding that the partnership agreement provides that no member has the power to dissolve the organization for a stated period. Thus, it appears that local law and not the agreement governs in this situation. Accordingly, if a syndicate is organized under New York partnership laws it would lack continuity of life.  

2. Centralized Management

"An organization has centralized management if any person . . . or group . . . has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed." This definition contemplates the concentration of power in the hands of a small group of persons who may or may not be members of the organization. An organization subject to a statute corresponding to the Uniform Partnership Act is not within the definition. This is so because such an organization cannot achieve centralization of management; one partner can bind the organization notwithstanding an agreement to the contrary among the partners. Likewise, a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act, will not have centralized management unless substantially all interest is owned by the limited partners.

A syndicate would appear to have centralization of management in this respect: that a small group will make decisions necessary to the conduct of the business for which the organization is formed, namely, to purchase property or a lease and to collect the rents. Although the regulations exclude certain local laws and their effect on dissolution, the regulations do not exclude a limited partnership from centralized management. The regulations cite Glensder Textile Co., 46 B.T.A. 176 (1942). This case dealt with a limited partnership organized under the laws of New York. By law, the partnership would dissolve upon the retirement, death, or insanity of a general partner, unless the business is continued by the remaining general partners, (a) under a right to do so stated in the certificate, or (b) with the consent of all members. N.Y. Partnership Law § 109. The partners in this case provided that in the event of death, retirement or insanity of a general partner "the remaining partner or partners shall have the right to continue the business." 46 B.T.A. at 184. The court spoke of this as being a "contingent continuity" and thus it would not be analogous to the chartered life of a corporation which continues regardless of the death or resignation of its directors or stockholders. Id. at 185.

77. Ibid. The regulations cite Glensder Textile Co., 46 B.T.A. 176 (1942). This case dealt with a limited partnership organized under the laws of New York. By law, the partnership would dissolve upon the retirement, death, or insanity of a general partner, unless the business is continued by the remaining general partners, (a) under a right to do so stated in the certificate, or (b) with the consent of all members. N.Y. Partnership Law § 109. The partners in this case provided that in the event of death, retirement or insanity of a general partner "the remaining partner or partners shall have the right to continue the business." 46 B.T.A. at 184. The court spoke of this as being a "contingent continuity" and thus it would not be analogous to the chartered life of a corporation which continues regardless of the death or resignation of its directors or stockholders. Id. at 185.


79. The N.Y. Partnership Law is an adoption of the Uniform Limited Partnership Act and the Uniform Partnership Act. See N.Y. Partnership Law § 1 and note following that section.


81. Ibid.


83. Ibid.

84. See, e.g., 63 Wall St. Associates Prospectus, p. 3 (Sept. 6, 1961).


86. Ibid. The duties of the general partners, however, would probably be considered
partnerships, the methods employed by a syndicate do not seem to come within the exclusion since some syndicates form joint ventures for each interest owned by a general partner. The partners then, act as agents for the participants and have the power to make decisions for the group. Those syndicates operating under the form of the limited partnership are not within the exclusion because substantially all of the interests are owned by the limited partners. It must be noted however, that the regulations require that the management group make decisions necessary to the "conduct of the business." It might be argued that the lessee and not the syndicate is conducting the business and the only function of management is to perform ministerial acts.

The syndicate employs the method of simultaneous acquisition and leasing to divorce management of the property from ownership. Thus, the syndicate as owner will achieve some measure of control, yet avoid the characterization of centralized management since the lessee, managing the property at a profit, will merely pay a net rent to the lessor. While the regulations indicate that the management group may or may not be a member of the organization, it would seem they contemplate professional management retained by and representing the organization. The lessee, however, is not acting for the organization, but rather in his own behalf. This view seems to be in conformity with Morrissey v. Commissioner.

87. E.g., those organized under statutes corresponding to the Uniform Partnership Act. Treas. Reg. § 301.7701-2(c) (4) (1960).
89. E.g., The Beaver and Williams Street Company was capitalized at $1,100,000 of which $900,000 was to be contributed by limited partners. See Beaver & Williams St. Co. Prospectus, p. 4 (Oct. 27, 1961). See also Center-City Properties Prospectus, pp. 4-5 (Jan. 19, 1962) (capitalized at $400,000 of which $390,000 was to be contributed by limited partners).
92. "[T]here is not centralized management when the centralized authority is merely to perform ministerial acts as an agent at the direction of a principal." Treas. Reg. § 301.7701-2-(c)(3) (1960).
94. Ibid.
96. 296 U.S. 344 (1935). In the Morrissey decision it was stated that "corporate organization furnishes the opportunity for a centralized management through representatives of the members of the corporation." Id. at 359. This concept of centralized management through representatives was again emphasized in Helvering v. Coleman-Gilbert Associates, 296 U.S. 369, 373 (1935). Then in Glensde Textile Co., 46 B.T.A. 176 (1942), which involved a limited partnership, it was stated: "There was centralized control by the general partners ... [but] they were acting in their own interest ... and not merely in a representative capacity...." Id. at 185. See also Smith, Associations Classified as Corporations Under the Internal Revenue Code, 34 Calif. L. Rev. 461, 513-14 (1946). In applying
Indirectly, the syndicate does achieve the benefits of centralized management. It can do this because the lessee or sublessee may be a corporation wholly owned by one of the general partners, or it may be a partnership whose general partner is also a general partner in the syndicate. In many cases the lessee is a creation of the syndicate solely for this purpose. It is highly undesirable that the lessee be a total stranger since it might exploit the investment, and damage the interest of the participants. In such a situation, the reputation of the promoter and his ability to raise funds in the future would also be impaired.

3. Limited Liability

"An organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization." Syndicates organized under state statutes corresponding to the Uniform Partnership Act would not have limited liability because the general partners are held to be personally liable. This, however, does not automatically insure that a limited partnership subject to such a statute would possess the characteristic of non-limited liability. The courts will search beyond the structure itself to question whether a general partner has substantial assets which can be reached. It must appear that the general partner is not a mere "dummy" acting as agent for the limited partners if such agency exists there is in effect limited liability. The usual method of avoiding this difficulty is to place an individual with substantial assets as a partner in the organization. Although complying with the regulations, limited liability may in fact be achieved by the use of an exoneration clause, whereby the mortgagee agrees not to look beyond the property for payment. Where a lease is purchased, a similar result is obtained when the lessor agrees not to impose any liability on the lessee beyond the actual occupancy of the property.
4. Free Transferability of Interest

"An organization has the corporate characteristic of free transferability of interests if each of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization."\textsuperscript{107} The sale and purchase of corporate stock is a typical example of free transferability of interest. Such transferability would not be present in the typical syndicate because a contract provision generally restricts alienation of participating interests.\textsuperscript{103} Another classification called a "modified form" of transferability exists when a member must first offer his interest to other members at its fair market value.\textsuperscript{109} Most syndicates, however, avoid this modification and require consent of the general partners as a condition to any transfer.\textsuperscript{110} As a standard for determining the existence of this corporate characteristic the presence of transferability in a "modified form" will be accorded less significance than unrestricted transferability.\textsuperscript{111}

5. Summary of Characteristics

The ratio of corporate to noncorporate characteristics will determine the taxable status of the syndicate.\textsuperscript{112} The regulations indicate what are considered corporate characteristics and since no further explanation is offered,\textsuperscript{113} it would seem that noncorporate characteristics arise in the absence of corporate ones.

Of the six characteristics listed, two—the presence of associates and an intention to carry on business for profit—are common and necessary to both corporate and partnership forms of enterprise.\textsuperscript{114} Thus, the absence of either of these two elements will preclude a syndicate from being an association.\textsuperscript{115} On this premise it may be argued that a syndicate holding a lease or sublease is not doing business because it exists merely to collect rents.\textsuperscript{116} Accordingly, where a syndicate uses the trust form to hold a lease it has been held that the trust should not be classed as an association.\textsuperscript{117} Of course, the presence of these

\textsuperscript{107} Treas. Reg. § 301.7701-2(e)(1) (1960).
\textsuperscript{109} Treas. Reg. § 301.7701-2(e)(2) (1960).
\textsuperscript{111} Treas. Reg. § 301.7701-2(e)(2) (1960).
\textsuperscript{112} Treas. Reg. § 301.7701-2(a)(1) (1960).
\textsuperscript{113} Ibid.
\textsuperscript{114} Treas. Reg. § 301.7701-2(a)(3) (1960).
\textsuperscript{115} Treas. Reg. § 301.7701-2(a)(2) (1960).
\textsuperscript{116} See, e.g., 63 Wall St. Associates Prospectus, p. 3 (Sept. 6, 1961); Empire State Bldg. Associates Prospectus, p. 11 (Oct. 31, 1961).
\textsuperscript{117} Lansdowne Realty Trust v. Commissioner, 50 F.2d 56 (1st Cir. 1931); Sears v.
two elements will not be weighed against the syndicate in determining its tax status.

Assuming an organization possesses two of the remaining four characteristics, the examples given in the regulations indicate that a syndicate runs little risk of being classified as an association.\textsuperscript{118} It is of significance to note that an organization will lack both continuity of life and limited liability when organized under statutes corresponding to the Uniform Partnership Act.\textsuperscript{119} A limited partnership will also lack these characteristics when its general partners have substantial assets and it is subject to the provisions of the Uniform Limited Partnership Act.\textsuperscript{120}

**D. Tax Aspects to Participant**

In choosing a syndicate in which to invest, the individual will generally be most interested in obtaining the highest return on his investment. From prior considerations it may appear that investment in an unincorporated syndicate will accomplish this goal. Although this is generally the case,\textsuperscript{121} situations

Hassett, 45 F. Supp. 772 (D. Mass. 1942). It was stated that the trustees "were not carrying on business after the form and manner of a corporation. . . . The trustees were not called upon to seek tenants or do anything with reference to the property of any consequence except to collect the rents." 50 F.2d at 58. The syndicates employ similar methods so as to have the lessee and not the syndicate operate the property. See, e.g., Empire State Bldg. Associates Prospectus, p. 11 (Oct. 31, 1961).

\textsuperscript{118} (1) A group of 25 persons form an organization for the purpose of engaging in real estate investment activities. The organization has the characteristics of centralized management, modified form of free transferability of interests, associates, and an object to carry on the business and divide the gains therefrom. But the organization, lacking continuity of life and limited liability, will be characterized as a partnership for all purposes under the Internal Revenue Code. Treas. Reg. § 301.7701-2(g)(4) (1960).

(2) Same facts as above and the organization has associates and an objective to carry on business and divide the gains therefrom. While the organization does not have limited liability, it does have continuity of life, centralized management, and a modified form of free transferability of interest. It will be classified as an association. Treas. Reg. § 301.7701-2(g)(5) (1960).

(3) Same facts as above and the organization has associates and an objective to carry on business and divide the gains therefrom. It does not have continuity of life but does have limited liability, centralized management, and a modified form of free transferability of interest. The organization will be classified as an association. Treas. Reg. § 301.7701-2(g)(6) (1960).


\textsuperscript{120} Treas. Reg. § 301-7701-2(d)(2) (1960).

\textsuperscript{121} The following is a schedule of a comparison of the returns offered by syndicates.

<table>
<thead>
<tr>
<th>Syndicate</th>
<th>Form</th>
<th>Rate of return</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Sire Plan, Hotel La Guardia*</td>
<td>corporate</td>
<td>8%</td>
</tr>
<tr>
<td>2. Sire Plan, 115 Chambers Street*</td>
<td>corporate</td>
<td>8%</td>
</tr>
</tbody>
</table>

* Taken from Sire Plan Performance Record (Aug. 1, 1961).

(Continued at bottom of next page)
do arise where an incorporated syndicate, despite double taxation, will offer an equally generous return as the partnership. Thus, the investor must look to substantial factors rather than form in determining the object of his investment.

1. Effect of Depreciation on Tax Free Income

For each taxable year, the syndicate is allowed a depreciation allowance for wear and tear on all the property except the land. Taxable income is thereby reduced but since the deduction does not represent any actual expenditure there is no reduction in cash available for distribution. Thus any amount distributed in excess of the taxable income will result in a tax free distribution to the participant. This tax free distribution is deemed a return of capital, and it must be deducted from the participant's basis for the purpose of determining the amount of taxable gain in the event that the participation is sold. Thus, if the participant had been reducing his basis yearly, and sold his interest at the same price he paid for it, he would realize a taxable gain on the sale.

121. (Continued)

<table>
<thead>
<tr>
<th>Syndicate</th>
<th>Form</th>
<th>Rate of Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Sire Plan,</td>
<td>corporate</td>
<td>8%</td>
</tr>
<tr>
<td>Parthenon, Bowling Alley</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Empire State Bldg.</td>
<td>partnership</td>
<td>9%</td>
</tr>
<tr>
<td>Associates†</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. 63 Wall St. Associest</td>
<td>limited partnership</td>
<td>10%</td>
</tr>
<tr>
<td>Associates†</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Beaver and Williams</td>
<td>limited partnership</td>
<td>10%</td>
</tr>
<tr>
<td>Street Company†</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

† Anticipated distributions taken from prospectus.

123. See, e.g., La Guardia East Prospectus (June 21, 1961) (offering 10%).
125. E.g., assume that the income for the year is $100,000 and the allowance for depreciation is $40,000. It will be illustrated as follows:

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Cash Available for Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Rent Received $100,000</td>
<td>Net Rent Received $100,000</td>
</tr>
<tr>
<td>Less: Depreciation Allowance $40,000</td>
<td>Cash Distributed $100,000</td>
</tr>
<tr>
<td>Taxable Income $60,000</td>
<td></td>
</tr>
</tbody>
</table>

126. In the case of a partnership his basis is reduced by the amount received. Int. Rev. Code of 1954, § 733(1). In case of a stockholder, the adjusted basis of the stock is reduced by the amount in excess of a dividend. Int. Rev. Code of 1954, § 301(c)(2).
127. Assume that the participant's basis is $1,000; that over the course of five years he
Several methods of depreciation are available but regardless of method the total amount to be depreciated will remain the same. The annual amount deducted, on the other hand, will vary according to the method of depreciation employed. If a syndicate chooses the straight line method, the annual deduction will remain constant throughout the period of depreciation and thus if there is no mortgage, the tax free income will also be constant each year. But, if an accelerated method is used, deductions will decelerate over the period of depreciation.

2. Effect of a Mortgage on Tax Free Income

Rarely does a syndicate purchase real property without the acquisition being financed by a mortgage. The interest element of each payment has received a tax free income of $400; and, that he sells his interest for $1,000, the original basis.

<table>
<thead>
<tr>
<th>Original Basis</th>
<th>$1,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less: Tax Free Income</td>
<td>400</td>
</tr>
<tr>
<td>Adjusted Basis</td>
<td>$600</td>
</tr>
</tbody>
</table>

The taxpayer, here, would realize a taxable gain of $400 on the resale.

130. E.g., the declining balance rate may be twice the rate of the straight line method. See Int. Rev. Code of 1954, § 167(b)(2). See note 133 infra.
131. Assuming that the building has a value of $100,000 and has an estimated life of twenty years, the following schedule will illustrate the deductions and the basis.

<table>
<thead>
<tr>
<th>Basis</th>
<th>Depreciation Allowance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Yr.</td>
<td>$100,000</td>
</tr>
<tr>
<td>2d Yr.</td>
<td>95,000</td>
</tr>
<tr>
<td>3d Yr.</td>
<td>90,000</td>
</tr>
<tr>
<td>4th Yr.</td>
<td>85,000</td>
</tr>
<tr>
<td>5th Yr.</td>
<td>80,000</td>
</tr>
</tbody>
</table>

Assume that the organization makes an annual distribution of $100,000; $5,000 will be tax free and $95,000 will be taxable.

132. Assume the same facts as in note 131 supra except that we use the declining balance method, at twice the rate above, e.g., 10%.

<table>
<thead>
<tr>
<th>Basis</th>
<th>Declining Balance Rate</th>
<th>Depreciation Allowance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Yr.</td>
<td>$100,000</td>
<td>10%</td>
</tr>
<tr>
<td>2d Yr.</td>
<td>90,000</td>
<td>10%</td>
</tr>
<tr>
<td>3d Yr.</td>
<td>81,000</td>
<td>10%</td>
</tr>
<tr>
<td>4th Yr.</td>
<td>72,900</td>
<td>10%</td>
</tr>
<tr>
<td>5th Yr.</td>
<td>65,610</td>
<td>10%</td>
</tr>
</tbody>
</table>

Thus there was an annual distribution of $100,000. In the first year there would be a
on this liability is a deductible item from income. Unlike the deduction for depreciation, however, the amount paid out will also reduce the amount of cash available for distribution. Since the amount paid out representing principal is not deductible, there is a drain on cash to the extent of the principal amortized each year. Ordinarily the amount payable each year will be constant, while the principal and interest allocations of that amount will vary. Thus, in the early years the greater part of each payment will represent interest while in the latter years of amortization the principal element of each installment will increase. Consequently the amount of taxable income of $90,000. In the second year it would be $91,000 and the taxable income will vary yearly as the depreciation allowance declines.


134. Assume the organization has to pay interest of $5,000 and has an income of $100,000. The following illustration will show the effect on the taxable income and distribution:

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Cash Available for Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Rent Received $100,000</td>
<td>Net Rent Received $100,000</td>
</tr>
<tr>
<td>Less:</td>
<td>Less:</td>
</tr>
<tr>
<td>Interest Expense $5,000</td>
<td>Interest Expense $5,000</td>
</tr>
<tr>
<td>Depreciation $5,000</td>
<td>Cash Distributed $95,000</td>
</tr>
<tr>
<td>Taxable Income $90,000</td>
<td></td>
</tr>
</tbody>
</table>

The $5,000 interest expense reduced the taxable income, and because it was paid out to the mortgagee, it also reduced the cash available for distribution.

135. E.g., assume the organization had $100,000 available for distribution and had to pay $10,000 representing principal of mortgage:

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Cash Available for Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Rent Received $100,000</td>
<td>Net Rent Received $100,000</td>
</tr>
<tr>
<td>Less:</td>
<td>Less:</td>
</tr>
<tr>
<td>Deduction $0</td>
<td>Amortization $10,000</td>
</tr>
<tr>
<td>Taxable Income $100,000</td>
<td>Cash Distributed $90,000</td>
</tr>
</tbody>
</table>

The organization would then distribute $90,000 and have taxable income of $10,000.

136. The following is an illustration of a typical amortization schedule. Assume the terms of the mortgage to be:

Amount $91,500
Rate 5.45%
Time 25 years
Monthly Payment $549

<table>
<thead>
<tr>
<th>Payment number</th>
<th>Payment to Interest</th>
<th>Payment to Principal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$400.30</td>
<td>$148.70</td>
</tr>
<tr>
<td>2</td>
<td>399.70</td>
<td>149.30</td>
</tr>
<tr>
<td>3</td>
<td>399.00</td>
<td>150.00</td>
</tr>
</tbody>
</table>

(Continued at bottom of next page)
tax-free income will vary from year to year. In order to extend amortization of principal over a greater period, syndicates often finance an acquisition with a "balloon mortgage," i.e., a mortgage, upon whose expiration there remains a portion of principal unpaid.

3. Relation of Depreciation to Amortization

While depreciation and amortization oppose each other respecting money available for distribution, interest may be termed a "neutral element," because, although it reduces cash available for distribution, it correspondingly reduces taxable income. Thus, the difference between depreciation and amortization determines tax-free income (if any). Practically, therefore, where depreciation exceeds amortization the difference will result in tax-free income, and the basis of the investment will correspondingly be re-

136. (Continued)

<table>
<thead>
<tr>
<th>Payment Number</th>
<th>Payment to Interest</th>
<th>Payment to Principal</th>
</tr>
</thead>
<tbody>
<tr>
<td>***</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>141</td>
<td>$275.00</td>
<td>$274.00</td>
</tr>
<tr>
<td>142</td>
<td>273.80</td>
<td>275.20</td>
</tr>
<tr>
<td>143</td>
<td>272.60</td>
<td>276.40</td>
</tr>
<tr>
<td>***</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>297</td>
<td>7.70</td>
<td>541.30</td>
</tr>
<tr>
<td>298</td>
<td>5.30</td>
<td>543.70</td>
</tr>
<tr>
<td>299</td>
<td>2.90</td>
<td>546.10</td>
</tr>
</tbody>
</table>

137. The amount of tax free income to the participant will be affected by the amount of amortization of the mortgage. Thus, in the early years of the mortgage where the amount of amortization is small, the effect will be slight, but in the later years when amortization is high, it will have a greater effect. See notes 143 and 145 infra.

138. See, e.g., Center-City Properties Prospectus (Jan. 19, 1962). In this syndication a first mortgage in the amount of $270,000 was obtained. It matured in 10 years with approximately $198,666 remaining after maturity. Id. at 12. By having a balloon, amortization is kept low. At the expiration of the term of the mortgage the balloon will be refinanced, thus amortizing the principal over a greater period.

139. See note 125 supra.
140. See note 135 supra.
141. See note 134 supra.
142. E.g., assume the income of the organization is $100,000 and there is an allowance for depreciation of $10,000 while amortization is $5,000 and interest is $2,000.

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Cash Available for Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Rent Received $100,000</td>
<td>Net Rent Received $100,000</td>
</tr>
<tr>
<td>Less:</td>
<td></td>
</tr>
<tr>
<td>Depreciation</td>
<td></td>
</tr>
<tr>
<td>Allowance $10,000</td>
<td></td>
</tr>
<tr>
<td>Interest 2,000</td>
<td></td>
</tr>
<tr>
<td>Amortization</td>
<td></td>
</tr>
<tr>
<td>Cash Distributed 12,000</td>
<td></td>
</tr>
<tr>
<td>Taxable Income 7,000</td>
<td></td>
</tr>
<tr>
<td>Interest 5,000</td>
<td></td>
</tr>
<tr>
<td>Cash Distributed $93,000</td>
<td></td>
</tr>
</tbody>
</table>

Thus, there would be a distribution of $93,000 and a taxable income of $88,000 resulting in a tax free income of $5,000 (depreciation minus amortization).
duced.\textsuperscript{143} If, on the other hand, amortization exceeds depreciation, the difference will result in a situation whereby a tax is paid on income never actually received.\textsuperscript{144}

Since the basic purpose of syndication is to achieve tax benefits, the organization will ordinarily arrange to receive a tax-free income, which decreases yearly\textsuperscript{145} to a point where the factors of depreciation and amortization are equal. At this point the syndicate must contemplate either refinancing the mortgage\textsuperscript{146} or an outright sale of the property.\textsuperscript{147} Thus, it is apparent that despite the permanent nature of the investment,\textsuperscript{148} unfavorable tax consequences might dictate a premature disposition.\textsuperscript{149}

\textsuperscript{143} See note 127 supra.

\textsuperscript{144} E.g., assume the income for the organization is $100,000 and interest expense is $2,000; depreciation is $5,000 and amortization is $10,000.

\begin{tabular}{|l|l|l|l|}
\hline
Gross Income & $100,000 & Gross Income & $100,000 \\
\hline
Less: & & Less: & \\
Depreciation & $5,000 & Interest Expense & $2,000 \\
Allowance & & \\
Interest Expense & 2,000 & Amortization & 10,000 \\
Taxable Income & $93,000 & Distributed & $88,000 \\
\hline
\end{tabular}

The participants would receive $88,000 and be taxed on $93,000, thus paying tax on $5,000 which was never received.

\textsuperscript{145}

\begin{tabular}{|l|l|l|l|}
\hline
Anticipated Annual Distribution & Portion Reportable as Ordinary Income & Tax Free Income & Percentage of Tax Free Income \\
\hline
1st Yr. & $500 & $167.28 & $332.72 & 66% \\
2d Yr. & 300 & 212.60 & 288.60 & 57% \\
3d Yr. & 500 & 255.65 & 244.35 & 49% \\
4th Yr. & 500 & 298.36 & 201.64 & 40% \\
5th Yr. & 500 & 340.34 & 159.66 & 32% \\
\hline
\end{tabular}

This is the anticipated distributions of Center-City Properties for each $5,000 unit. See Center-City Properties Prospectus, p. 14 (Jan. 19, 1962).

\textsuperscript{146} Id. at 13.

\textsuperscript{147} Ibid.


\textsuperscript{149} The syndicate will sometimes anticipate refinancing at a future date, but this will be contingent upon economic conditions which cannot be predicted. See Center-City Properties Prospectus, p. 13 (Jan. 19, 1962).
IV. REGULATION OF THE SYNDICATE

A. Federal Regulation

1. Generally

Section 5 of the Securities Act of 1933 makes it unlawful to use interstate transportation or communication facilities or the mails to sell securities through the use of any prospectus unless the latter is registered. The section also prohibits the use of any means of interstate commerce to carry or transmit any prospectus unless it meets the requirements of section 10 of the act. The Government by this act is not attempting to approve or disapprove of an offering or security but is merely requiring registration under the terms of the act. In effect, anyone offering securities on an interstate basis comes under the act and is thus required to register. It is clear, from the definition of a security, that a real estate syndicate is subject to the act. If the syndicate employed the corporate form, participation would be in the form of stocks and bonds and would be covered expressly by the act. Likewise trust certificates are deemed securities and the statutory definition is broad enough to include partnership interests.

2. Operation of the Statute

The theory of the act is full disclosure and anti-fraud. It provides for a twenty day waiting period before registration becomes effective. During

152. Ibid.
153. Ibid.
156. "The term ‘security’ means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a ‘security,’ or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 48 Stat. 74 (1933), as amended, 15 U.S.C. § 77b(1) (1958).
159. Ibid.
160. Ibid; see Berger, Real Estate Syndication: Property, Promotion, and the Need for Protection, 69 Yale L.J. 725, 760-62 (1960); Kroll, Syndication and Regulation, 14 Record of N.Y.C.B.A. 71, 73 (1959). In SEC v. W. J. Howey Co., 328 U.S. 293 (1946), an investment contract was defined as a “transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ." Id. at 298-99.
this period the Commission studies and determines the adequacy of the information contained in the prospectus. Offers may be extended during this time provided they comply with section 10. Legal, equitable, and criminal sanctions attach to violations of the act. Thus, where false statements are contained in a prospectus or where registration requirements are not met, the syndicate incurs civil liability to the investors. In addition, the Commission is empowered to petition for an injunction against further violations and at the same time transmit evidence to the Attorney General for criminal prosecution.

3. Exemptions

The fact that a syndicate comes under the provisions of the act does not automatically require registration. Express exemptions from this requirement are provided for. It does not follow, however, that a syndicate is thereby relieved from the civil and criminal provisions of the act.

Section 3(a)(11) exempts any securities issue offered and sold only to persons within a single state, where the issuer is resident and doing business. This, of course, contemplates a transaction originated and consummated within the boundaries of one state by residents of that state. Thus, if offered or sold to one nonresident, the entire issue will be excluded from this exemption.

Involved in determining the exemption is the meaning of the term "issue." The regulations require the Commission, in determining the time of issuance, to look to the ultimate purchaser, and to ignore the fact that the immediate

162. Ibid.
174. A basic condition of the exemption is that the entire issue be offered and sold exclusively to the residents of one state. Whether an offering is an integrated part of an offering previously made or about to be made is a question of fact. Any one or more of the following factors may be determinative of the question of integration: (1) are the offerings part of a single plan of financing; (2) do the offerings involve issuance of the same class of security; (3) are the offerings made on or about the same time; (4) is the same type of consideration to be received; and, (5) are the offerings made for the same general purpose. SEC Securities Act Release No. 4434, Dec. 6, 1961.
sale might have been to a dealer for the purpose of resale.\textsuperscript{175} Moreover, to preserve the exemption it is incumbent upon the dealer to obtain assurances from his immediate buyer that the participation is not being purchased with a view toward resale to a nonresident.\textsuperscript{176} This, of course, does not preclude the purchaser from reselling in due course\textsuperscript{177} to a nonresident. It should be noted that use of the mails does not, of itself, defeat the exemption.\textsuperscript{178}

The act provides for an additional exemption from its provisions where the offering is private.\textsuperscript{179} Such an exemption will not, however, relieve the issuer from civil liability for false statements.\textsuperscript{180} In determining the nature of an offering several factors are taken into account.\textsuperscript{181} Among these are: (1) the number of offerees and their relation to the issuer and to each other; (2) the number of units offered; (3) the size of the offering; (4) the manner of the offering.\textsuperscript{182}

A final though qualified exemption applicable to syndicates is provided for in the case of an issue involving less than $300,000. Here, however, the Commission’s consent is necessary.\textsuperscript{183}

B. New York State Regulation

In addition to federal statutes, syndicates organized in New York must consider New York laws regarding offerings of securities.\textsuperscript{184} Unlike the general treatment provided in the federal statutes, New York deals specifically with the real estate syndicate.\textsuperscript{185} A special section\textsuperscript{186} established in the Bureau of Securities within the Department of Law is responsible for the enforcement of the act.\textsuperscript{187}

Section 352 of the General Business Law prohibits a public offering of the securities of a real estate venture, either in or from New York, until the attorney general issues a letter confirming registration of the offering statement or prospectus.\textsuperscript{188} The act does not however, give the attorney general the power to approve or disapprove an offering,\textsuperscript{189} but merely places the burden of full disclosure upon the issuer. One who is not primarily

\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid.
\textsuperscript{182} Ibid. See also SEC v. Ralston Purina Co., 346 U.S. 119 (1953), where the Court rejected the test of the number of offerees.
\textsuperscript{185} See N.Y. Attorney Gen. Reg. § 1(b) (1961).
\textsuperscript{186} N.Y. Attorney Gen. Reg. § 1(c) (1961).
\textsuperscript{187} Ibid.
\textsuperscript{188} N.Y. Gen. Bus. Law § 352e(2).
engaged in the business of buying and selling buildings, realty, or other interests therein, is not included within the definition of this act. Although prohibition is placed on public offers, the act does not forbid the circulation of non-firm offers or a preliminary prospectus which meet the requirements of Section 10(b) of the Securities Act of 1933.

The prospectus used for the general offering must contain all the elements prescribed in section 332e(1)(b) of the statute, and any additional information the attorney general may require to aid individuals in evaluating the investment. The cover of the prospectus must contain a statement, in bold print, to the effect that filing does not amount to approval of the issue by the attorney general. But yet, the statement itself probably induces public confidence in the issue. In addition to the other details, information on the cover must include the amount of money to be raised, and reference to the paragraph in the prospectus indicating the net proceeds to the issuer. All advertisements in connection with the offering must be consistent with the prospectus and must contain the following inscription:

This advertisement is not an offering. No offering is made except by a prospectus filed with the Department of Law of the State of New York. Such filing does not constitute approval of the issue or the sale thereof by the Department of Law or the Attorney General of the State of New York.

No offering or sale may be made except on the basis of the prospectus, and the expected purchaser must be given a true copy of it. In addition to the original filing, annual certified financial statements must be sent to the attorney general.

The statute provides for two exemptions from its provisions: (1) where the offering is made to persons not exceeding forty in number, and, (2) where the offering has been fully registered with the Securities Exchange Commission or has received an exemption therefrom for reasons other than that it is an intrastate issue.

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192. Among other things, it must include the profits and interest of the promoter. N.Y. Gen. Bus. Law § 352e(1)(b).
195. See 1 Loss, Securities Regulation 185 (1961).
200. N.Y. Gen. Bus. Law § 352e(8). In addition, where the venture is abandoned, form RS must be filed, giving an explanation for the failure and the disposition of the funds raised, N.Y. Attorney Gen. Reg. § 1(b) (1961), because any funds raised are held in trust for the participants until the consummation of the transaction. N.Y. Gen. Bus. Law § 352h.
202. Ibid.
The Real Estate Syndicate Act is part of the comprehensive Martin Act which makes it a misdemeanor to engage in fraudulent practices or deceptive acts with respect to securities. Under the Martin Act the attorney general has power to investigate and to subpoena witnesses and records, and to enjoin acts which violate or are about to violate the provisions of the statute.

V. REAL ESTATE INVESTMENT TRUST ACT

The trust form of syndication has been traditionally avoided because of the danger of corporate tax treatment. Recent revenue legislation, however, offers an inducement for syndicators to adopt this form. Compliance with the Real Estate Investment Trust Act results in the creation of a non-taxable entity. In effect, it renders the trust a conduit whereby the corporate tax is eliminated to the extent income is distributed. The act was added to the code to provide substantially the same tax treatment as is enjoyed by regulated trust companies.

Various opinions have been offered concerning the effect of the act on the more traditional forms of syndication. Divergent state trust laws combine with intricacies of the act to block a whole-hearted approval of its provisions. Whether or not the trust will experience new interest as an investment form depends upon the success or failure of real estate groups organized under its provisions.

VI. CONCLUSION

Whether or not the syndicate survives as a major form of real estate investment, its method will sustain the goals for which it was created. As long as the federal government continues its soft approach toward entity taxation, the financial feasibility of group real estate ventures is assured. As a result, both the "little fellow" and the "big fellow" are afforded a degree of equality in seeking good investment opportunities.

Individual investors, also, have prospered; federal and state regulation of the syndicate insures full disclosure to the investor. Caution is still required of the individual or institution however, for like all investments, real estate is subject to the changing economic scene.

206. Ibid.
209. Ibid.