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NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®

March 19, 2012

VIA E-MAIL [OIRA_Submission@OMB.EOP.GOV]

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Desk Officer for Treasury
New Executive Office Building, Room 10235
Washington, DC 20503

Re: Comments – Form 1120-REIT

Dear Sir or Madam:

The National Association of Real Estate Investment Trusts® (NAREIT) appreciates the opportunity, pursuant to a notice published Feb. 16, 2012, 77 F.R. 9301, to provide the following comments with respect to reducing the burden on taxpayers from the Form 1120-REIT. NAREIT is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

We request that the Department of the Treasury and the Internal Revenue Service modify the Form 1120-REIT and its instructions as follows:

1) Part III of Form 1120-REIT Should Be Modified Calculate a REIT's Gross Income For Purposes of Section 857(b)(5)[1] to Begin with Gross, Rather than Net, Income. Part III of Form 1120-REIT calculates the tax imposed by section 857(b)(5) for failure to meet the REIT gross income tests in sections 856(c)(2) and (c)(3). However, the 2011 version of Part III of Form 1120-REIT begins with net income from Part I of Form 1120-REIT. Part III should be modified so that its calculation is based on the REIT's gross income. For example, with respect to a REIT that is a partner in a partnership, Treas. Reg. § 1.856-3(g) provides that such REIT is deemed to own the assets and be entitled to the income of the partnership in accordance with its capital interest in the partnership.

[1] All section references herein are to the Internal Revenue Code of 1986, as amended (the Code) or to the Treasury Regulations issued under the Code.

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In other words, a REIT partner calculates its gross income from the partnership in proportion to its capital interest, rather than based on its Schedule K-1. Because the current Form 1120-REIT bases its calculation in Part III on net, rather than gross, income, it adds an additional burden on taxpayers attempting to comply with section 857(b)(5). Accordingly, it would be helpful to provide a separate line for gross income from partnerships, gross income from capital gains, etc.

2) Modification of Part III of Form 1120-REIT Should Exclude Income from Hedging Transactions under Section 856(c)(5)(G) For Purposes of Section 857(b)(5). Because income from hedging transactions referred to in section 856(c)(5)(G) are excluded from a REIT's gross income, Part III of Form 1120-REIT should not include such income in its calculation of whether the REIT failed to meet the REIT gross income tests of sections 856(c) and (c)(3).

3) Instructions to Form 1120-REIT Should Clarify How the Passive Loss Limitations of Section 469 and At Risk Limitations of Section 465 Apply to a REIT. The instructions to Form 1120-REIT provide as follows:

"Passive activity limitations. Limitations on passive activity losses and credits (for the first tax year as a REIT) under section 469 apply to REITs that are closely held (as defined in section 856(h)). REITs subject to the passive activity limitations must complete Form 8810 to compute their allowable passive activity loss and credit."

Because of slight variations between the "closely held" determinations under section 465 and 469, as well as the determination of "closely held" under section 856(h), it is possible that a REIT may be "closely held" under sections 465 and 496, but not under section 856(h). This result could occur due to the application of partnership attribution rules or the absence of a "look-through" in the case of certain pension shareholders under sections 465 and 469. The Form 1120-REIT instructions indicate that, in such case, a REIT could claim fully passive activity losses because the REIT is not "closely held" under section 856(h). If this result is not intended, the REIT would have inappropriately claimed such passive activity losses as a result of reliance on the Form 1120-REIT instructions. Accordingly, it would reduce the burden of compliance with Form 1120-REIT if the instructions would clarify the application of the passive activity loss and at-risk rules in the case of a REIT that is "closely held" under section 465 and 496, but not section 856(h).

Feel free to contact me if you would like to discuss these issues in greater detail.

Respectfully submitted,

Dara F. Bernstein

Dara F. Bernstein
Senior Tax Counsel

cc: Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 11020, Washington, DC 20220 (via U.S. mail and online)
Diana Imholtz, Esq.
David Silber, Esq.
Jonathan Silver, Esq.