

Officers

Chair

Bryce Blair
AvalonBay Communities, Inc.

President and CEO

Steven A. Wechsler

First Vice Chair

Donald C. Wood
Federal Realty Investment Trust

Second Vice Chair

W. Edward Walter
Host Hotels & Resorts, Inc.

Treasurer

Ronald L. Havner, Jr.
Public Storage

2011 NAREIT Executive Board

Debra A. Cafaro
Ventas, Inc.
Richard J. Campo
Camden Property Trust
Richard B. Clark
Brookfield Properties Corporation
Michael A. J. Farrell
Annaly Capital Management
Michael D. Fascitelli
Vornado Realty Trust
William P. Hankowsky
Liberty Property Trust
Rick R. Holley
Plum Creek Timber Company, Inc.
Constance B. Moore
BRE Properties, Inc.
David J. Neithercut
Equity Residential
Walter C. Rakowsky
ProLogis
Robert S. Taubman
Taubman Centers, Inc.

2011 NAREIT Board of Governors

Andrew M. Alexander
Weingarten Realty Investors
David M. Brain
Entertainment Properties Trust
Christopher H. Cole
Cole Real Estate Investments
James F. Flaherty, III
HCP, Inc.
Michael F. Foust
Digital Realty Trust, Inc.
Edward J. Fritsch
Highwoods Properties, Inc.
Lawrence L. Gellerstedt, III
Cousins Properties Incorporated
Jonathan D. Gray
Blackstone Real Estate Advisors
Randall M. Griffin
Corporate Office Properties Trust
Philip L. Hawkins
DCT Industrial Trust, Inc.
Thomas P. Heneghan
Equity Lifestyle Properties
David B. Henry
Kimco Realty Corporation
Andrew F. Jacobs
Capstead Mortgage Corporation
Thomas H. Lowder
Colonial Properties Trust
Peter S. Lowy
The Westfield Group
Craig Macnab
National Retail Properties, Inc.
Joel S. Marcus
Alexandria Real Estate Equities, Inc.
Dennis D. Oklak
Duke Realty Corporation
Jeffrey S. Olson
Equity One, Inc.
Edward J. Pettinella
Home Properties, Inc.
Steven G. Rogers
Parkway Properties, Inc.
Joseph D. Russell, Jr.
PS Business Parks, Inc.
David P. Stockert
Post Properties, Inc.
Jay Sugarman
iStar Financial Inc.
Gerard H. Sweeney
Brandywine Realty Trust
Steven B. Tanger
Tanger Factory Outlet Centers, Inc.
Lee M. Thomas
Rayonier, Inc.
Thomas W. Toomey
UDR, Inc.
Scott A. Wolstein
Developers Diversified Realty Corporation
Mark E. Zalatoris
Inland Real Estate Corporation
Mortimer B. Zuckerman
Boston Properties, Inc.



**NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®**

November 10, 2010

VIA INTERNET [<http://www.regulations.gov> (REG-142800-09)]

CC:PA:LPD: PR (REG-142800-09)

Courier's Desk

Internal Revenue Service

1111 Constitution Avenue, NW.

Washington, D.C. 20004

Re: Guidance Regarding Deferred Discharge of Indebtedness Income for Corporations

Dear Sir or Madam:

The National Association of Real Estate Investment Trusts® (NAREIT) appreciates the opportunity to provide comments with respect to proposed (and temporary) regulations (*REG-142800-09*) (COD regulations) under section 108(i)¹ of the Internal Revenue Code of 1986, as amended (Code), which primarily affect C corporations regarding, among other things, the acceleration of deferred discharge of indebtedness (COD) income (deferred COD income) under section 108(i)(5)(D), and the calculation of earnings and profits as a result of an election under section 108(i). Section 108(i) was enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA).

NAREIT is the worldwide representative voice for 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.

¹ Unless otherwise provided all "section" references herein shall be to a section of the Code.



I. EXECUTIVE SUMMARY

First, NAREIT welcomes the issuance of this guidance. NAREIT agrees with the IRS' conclusion both in this guidance and in Rev. Proc. 2009-37 that deferred COD income increases a REIT's earnings and profits in the taxable year or years in which the deferred COD income is includible in gross income and not in the year that the deferred COD income is realized.

Second, the legislative history concerning whether and when filing a bankruptcy petition will cause acceleration of deferred COD income is ambiguous. Accordingly, NAREIT recommends that the Treasury Department and IRS clarify that an electing taxpayer in bankruptcy proceedings will not accelerate deferred COD upon emerging from such proceedings.

II. DISCUSSION

A. Deferred COD and Effect on REIT Earnings and Profits

Again, NAREIT appreciates the Treasury Department and IRS' recognition of the unique tax attributes of REIT and the conclusion, contained in both Rev. Proc. 2009-37 and these COD regulations that a REIT's earnings and profits in the taxable year or years in which the deferred COD income is includible in gross income and not in the year that the deferred COD income is realized. The preamble to the COD Regulations states that this rule is in order "to ensure that a ... REIT has sufficient earnings and profits to claim a dividends paid deduction in the taxable year that the deferred COD income is included in taxable income." We believe that this rule also ensures that the REIT's shareholders will not face double taxation of the COD income under section 108(i), thereby making this new subsection more attractive to REITs and their investors.

B. Clarification of Effect of Bankruptcy Filing on Acceleration of Deferred COD

NAREIT recommends that the Treasury Department and IRS clarify in final regulations that emerging from a bankruptcy filing under Title 11 does not cause acceleration of deferred COD, consistent with the legislative history to ARRA. The Conference Report to this legislation states the following with respect to deferred COD:

In a case under title 11 or a similar case, any deferred items are taken into income as of the day before the petition is filed. Deferred items are accelerated in a case under title 11 where the taxpayer liquidates, sells substantially all of its assets, or ceases to do business, but not where a taxpayer reorganizes and emerges from the title 11 case.

H.R. Rep. No. 16, 111th Cong. 1st Sess. 565 (2009).

On the one hand, the Conference Report appears to indicate that filing a title 11 petition causes acceleration of deferred items, while on the other hand, it indicates that reorganization and emergence from a title 11 proceeding would not cause acceleration. It appears that these inconsistencies can be reconciled by clarifying that the former case involves the situation when a taxpayer with realized and deferred COD income enters bankruptcy proceedings, and the latter



involves the situation in which a taxpayer first enters bankruptcy proceedings, after which it realizes and defers COD income. Accordingly, we recommend amending the final regulations to clarify them accordingly so that a taxpayer in the latter situation is not forced to consider its newly realized COD income as having been incurred the day before it filed its bankruptcy petition.

Feel free to contact me or Dara Bernstein, NAREIT's Senior Tax Counsel, if you would like to discuss these issues in greater detail.

Respectfully submitted,



Tony M. Edwards

Executive Vice President & General Counsel

cc: Michael Mundaca, Esq.
Douglas Shulman, Esq.
Jeffrey Van Hove, Esq.
Robert Crnkovich, Esq.
Michael S. Novey, Esq.
Clarissa C. Potter, Esq.
William Alexander, Esq.
Stephen R. Larson, Esq.
Robert M. Rhyne, Esq.
Rubin B. Ranat, Esq.
Megan A. Stoner, Esq.
Joseph R. Worst, Esq.