



NATIONAL ASSOCIATION OF  
REAL ESTATE INVESTMENT TRUSTS®

April 19, 2004

**HAND-DELIVERED AND E-MAILED**

Mr. Glenn Kirkland  
Internal Revenue Service  
Room 6411, 1111 Constitution Avenue, NW  
Washington, DC 20224

Re: Form 8875, Taxable REIT Subsidiary (“TRS”) Election

Dear Mr. Kirkland:

This letter is submitted on behalf of the National Association of Real Estate Investment Trusts® (“NAREIT”) pursuant to a request by the Internal Revenue Service for comments on Form 8875, Taxable REIT Subsidiary (“TRS”) Election. NAREIT is the national trade association for U.S. real estate investment trusts (“REITs”) and other publicly traded real estate companies. Members include REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study and service those businesses.

Our comments are as follows:

1. Part I of Form 8875 should be amended to require contact information for the TRS.
2. Line 16 of Part III of Form 8875 should delete the words “Does the taxable REIT subsidiary own” and replace it with “During the period when the taxable REIT subsidiary election is in effect, will the taxable REIT subsidiary own or has the taxable REIT subsidiary owned directly or indirectly”. Also, the phrase “35%” should be replaced with “more than 35%”. Internal Revenue Code (IRC) § 856(l)(2) treats every corporation other than a REIT in which a TRS owns directly or indirectly securities possessing more than 35% of the total voting power or total value of the outstanding securities of such corporation as a TRS. Thus, it is not relevant to the TRS election whether a TRS owns an exactly 35% interest in a corporation.
3. Similarly, under “Line 16” in the instructions, the first paragraph of the text should be amended to state “A taxable REIT subsidiary that directly or indirectly owns **more than 35%....**”



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4. Additionally, the second paragraph of the text under Line 16 in the instructions should replace “owns less than 35% of the total voting power” with “owns 35% or less of the total voting power” as well as “an ownership interest of 35% or more” with “an ownership interest of more than 35%”. The instructions also should note that regardless of whether an entity in which a TRS owns a greater than 35% interest is listed as an “Automatic TRS” in a filing to the IRS, such an entity is treated as an “automatic TRS” under IRC § 856(l)(2). The instructions also should note that the REIT may wish to consider affirmatively making a taxable REIT subsidiary election with any “automatic” taxable REIT subsidiary to address any unforeseen change in circumstances.
5. The second paragraph of the instructions to Form 8875 under “Purpose of Form” should be amended to include the following: “Consider whether the election should be made by (a) every corporation more than 10 percent of the total voting power or total value of the outstanding securities of which is held by the REIT and (b) every REIT (including subsidiary REITs) within a corporate structure.” This reminder could result in fewer requests for relief under Treas. Reg. § 301.9100 for failure to timely file the TRS election.
6. The last sentence in the first paragraph of the instructions under “Revocation of Election” to Form 8875 should be revised to allow the REIT and TRS to provide a specific effective date on which a revocation to the TRS election would be effective. Cf. IRC § 1362(d) concerning revocation of the S corporation election (an election filed on or before March 15<sup>th</sup> of a specific year is effective on January 1<sup>st</sup> of such year, an election filed after March 15<sup>th</sup> of a specific year is effective the following January 1<sup>st</sup>, and a revocation can provide a prospective effective date). The instructions currently state that the revocation is effective on the date filed. However, if the REIT and TRS would like the revocation to be effective on a Sunday or holiday in a specific year, it would seem inappropriate to require the revocation to be filed on that Sunday or holiday, when no mail is picked up or delivered.
7. A sentence should be added to the first paragraph of the instructions under “Revocation of Election” to Form 8875 stating something to the effect that if a TRS election is revoked for a specific TRS, it is also revoked for all of the “automatic TRSs” (*i.e.*, subsidiaries of the former TRS that had not made affirmative TRS elections, but were treated as automatic TRSs of the former TRS under IRC § 856(l)(2)). As noted above, under IRC § 856(l)(2), a corporation more than 35% of the securities of which is owned by a TRS is itself treated as a TRS. If a parent TRS revokes its TRS election, these entities no longer can be treated as “automatic” TRSs, and a separate TRS election should be made for them within 75 days of the filing of the revocation. As long as a separate TRS election is made for them in a timely manner, there should be no loss of their status as TRSs for any period of time. Revocation of a TRS election should not affect any affirmative TRS elections previously made by these entities even if such entities would have been treated under IRC § 856(l) as “automatic” TRSs.



8. The second sentence in the second paragraph of the instructions under “Revocation of Election” in the instructions to Form 8875 should be revised to make clear that the TRS election applies to any entity that succeeds to the attributes of either the REIT or TRS under IRC § 381(a).
9. The second paragraph of the instruction under “Employer Identification Number” (“EIN”) currently states that if the EIN has been applied for, the Form 8875 should so state. Since an EIN may be obtained virtually immediately online, the IRS should consider deleting this sentence. NAREIT understands from its members that the IRS may reject a Form 8875 without an EIN. If that is in fact IRS procedure, the instructions should be amended to state that an EIN is required for processing of the Form.
10. The last sentence under “Line 11” of the instructions to Form 8875 should be deleted as it is no longer necessary.
11. Consideration should be given to permitting an automatic extension of time to file a TRS election of, for example, six months or one year, either through amending the regulations under § 301-9100-2 to include the TRS election as one of the elections eligible for an automatic extension of time or through issuing a revenue procedure that would provide the procedures for granting an extension of time in lieu of filing a private letter ruling request under § 301.9100-1 through §301.9100-3. Because the failure to file a timely TRS election could lead to REIT disqualification (if the REIT owns more than 10% of the purported TRS), a draconian punishment to a potentially publicly traded company for a possibly inadvertent oversight, allowing for an extension of time pursuant to a Revenue Procedure in certain cases would provide greater certainty to the capital markets.

See, e.g., Rev. Proc. 2002-59, 2002-39 I.R.B. 615, applicable in the case of failure to file timely a Form 8832 (concerning entity classification). So long as: (1) the relevant entity failed to obtain its desired classification solely because of the failure to file Form 8832 timely, (2) the due date of the federal tax return for the entity’s desired classification (excluding extensions) had not passed, and (3) the entity had reasonable cause for failure to file the Form 8832 timely, and (4) the entity files a completed Form 8832 with a statement explaining the reason for the failure to file a timely Form 8832, the IRS will determine whether the requirements for granting additional time have been satisfied and will notify the entity of the result of its determination, presumably in a more expedited manner than that which might apply in the context of a private letter ruling request. A similar procedure could apply in the case of the failure to file the TRS election in a timely manner.



Mr. Glenn Kirkland

April 19, 2004

Page 4

Thank you for the opportunity to submit NAREIT's viewpoints regarding Form 8875. Should you have further questions, please do not hesitate to contact me at (202) 739-9446.

Respectfully submitted,



Dara F. Bernstein

REIT Counsel

cc: Lon B. Smith, Esq.  
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