NATIONAL
ASSOCIATION
OF
REAL ESTATE
INVESTMENT
TRUSTS®

REITs:
BUILDING
DIVIDENDS
AND
DIVERSIFICATION®

September 28, 2017

VIA USPS AND E-MAIL

PRA@treasury.gov
Treasury PRA Clearance Officer
1750 Pennsylvania Ave. NW.
Suite 8142
Washington, DC 20220

Re: Comments – Forms 1120-REIT and 8875 and Instructions

Dear Sir or Madam:

The National Association of Real Estate Investment Trusts® (NAREIT)® appreciates the opportunity, pursuant to a notice published August 30, 2017, 82 F.R. 41310, to provide the following comments with respect to reducing the burden on taxpayers from Forms 1120-REIT and 8875.

NAREIT is the worldwide representative voice for REITs (real estate investment trusts) and publicly traded real estate companies with an interest in U.S. real estate and capital markets.

NAREIT believes that if adopted, the comments set forth below would enhance the quality, utility and clarity of the information to be collected, and would minimize the burden of the collection of information on respondents.

Please note that the comments set forth below are identical to those submitted on July 25, 2017, to Ms. Laurie E. Brimmer of the Internal Revenue Service in response to pursuant to a notice published May 26, 2017, 82 F.R. 24447.

Pursuant to the instructions in the August 30th notice, a separate copy of these comments is being sent to the Office of Information and Regulatory Affairs, Office of Management and Budget. These comments update prior submissions by NAREIT with respect to the Form 1120-REIT on November 22, 2016, December 23, 2013, and March 19, 2012, pursuant to notices published September 28, 2016, 81 F.R. 66743, October 25, 2013, 78 F.R. 64057, and February 16, 2012, 77 F.R. 9301; and with respect to the Form 8875 on August 29, 2013 and April 19, 2004, respectively.

I. Form 1120-REIT

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 I, Line 21 Should be Modified to Conform to the Statutory Ordering Rule for Net Operating Losses (NOLs). Section 172(d)(6)(B)[1] allows NOLs to be used only *after* taxable income is reduced as provided in section 857(b)(2). The instructions to Form 1120-REIT follow this ordering rule. NAREIT suggests a change in the order of Lines 21(a)-(c) to follow the same order as the statutory language. As a result, the NOL deduction, now shown on Line 21(a), should be moved to Line 21(c); the dividends paid deduction, now shown on Line 21(b), should be moved to Line 21(a); and the section 857(b)(2)(B) deduction, now shown on Line 21(c), should be moved to Line 21(b).

2) Part III of Form 1120-REIT Should Be Modified to Calculate a REIT's Gross Income for Purposes of Section 857(b)(5). 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 2016 version of Part III of Form 1120-REIT begins with the amount included on Line 8 of Part I of Form 1120-REIT, which, in certain cases, may not correspond with gross income as gross income is required to be calculated for purposes of sections 856(c)(2) and (c)(3), particularly for gross income earned through partnerships. For clarity, and to ensure greater uniformity in taxpayer reporting, Part III should be modified so that its calculation is based on the REIT's gross income as computed under Section 856(c)(2) and 856(c)(3), which is different from the computation of REIT taxable income in Part I.

For example, Line 7 of Part I (which is included in calculating Line 8 of Part I) includes ordinary income from the trade or business of a partnership set forth on a K-1. When a REIT 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 for purposes of applying the income qualification tests of section 856(c)(2) and section 856(c)(3). In other words, a REIT partner calculates its gross income from the partnership in proportion to its capital interest, which may be different from the amount set forth on its Schedule K-1 from the partnership for purposes of these income tests. As K-1 income is included in Line 8 of Part I, and the amount set forth on Line 8 is used as the starting point for Part III, the calculation for Part III may not properly include (or improperly omit) certain amounts. Similarly, Line 5 of Part I of the 1120-REIT requires the reporting of "capital gain net income." However, because Part III of the Form 1120-REIT calculates the failure to satisfy the REIT gross income tests, Part III should use gross income from capital gains, rather than capital gain net income.

These incongruities add an additional burden on taxpayers attempting to comply with section 857(b)(5) when completing the Form 1120-REIT. Many REITs must submit additional schedules. Accordingly, it would be useful to include in Part III a line that states "Adjustments to REIT Income, Part I, Line 8." The inclusion of this line will enable Part III of Form 1120-REIT to refer to the information included in Part I, but with appropriate adjustments. Thereafter, it would be helpful for Line 1a of Part III to refer to gross income as calculated for purposes of sections 856(c)(2) and (c)(3).

[1] All "section" references herein are to the Internal Revenue Code of 1986, as amended (the Code).

3) Modification of Part III of Form 1120-REIT Also Should Exclude Income from Hedging Transactions under Section 856(c)(5)(G) for Purposes of Section 857(b)(5). Income and gain from hedging transactions referred to in section 856(c)(5)(G) are excluded from a REIT's gross income for purposes of the gross income tests under sections 856(c)(2) and 856(c)(3). Income and gain from hedging transactions therefore are therefore excluded for purposes of section 857(b)(5). Line 2b of Part III of Form 1120-REIT excludes income and gain from these hedging transactions in calculating the amount at Line 2c of Part III (the 95% gross income requirement). However, Line 5 of Part III implies that income from these hedging transactions should be included in its calculation (the 75% gross income requirement). Specifically, section 856(c)(5)(G) income should be excluded from the calculation in Line 5 of Part III by replacing "1c" in Line 5, Part III with "2b." Alternatively, if the suggestion above regarding Line 1a of Part III to include only gross income for purposes of section 856(c)(2) and (c)(3) is adopted, we would suggest removing references to such hedging income altogether, as it is not included in calculating gross income for these purposes generally.

4) Part III Should Include a Line for Taxable Income that is Excluded from Gross Income. Section 856(c)(5)(J) grants the IRS authority to exclude certain taxable income from the REIT gross income tests. The IRS has issued a number of private letter rulings to taxpayers under this authority. *See*, e.g., PLRs 201418022 (patronage dividends excluded from the REIT gross income tests); 201418037 (certain amounts received in bankruptcy litigation excluded from REIT gross income tests); 201122016 (interest and costs recovered in eminent domain litigation excluded from REIT gross income tests). This category of income will appear in Part I of Form 1120-REIT, but it should be excluded from the calculation of gross income in Part III (similar to how Line 2a of Part III in the 2015 Form 1120-REIT excludes hedging income for purposes of the 95% gross income test calculation). Note that if the comment above regarding starting with gross income for purposes of the annual tests is accepted, this would not be relevant.

5) Suggested Modifications to the Instructions to Form 1120-REIT.

a. References to Taxable REIT Subsidiary (TRS) Limitation Should Be Updated. On page 2 of the Instructions to Form 1120-REIT, after "July 30, 2008," the following should be inserted: "and before December 31, 2017." This modification is necessary as a result of changes made in the Protecting Americans from Tax Hikes Act of 2015 (PATH Act) (that not more than 20% of the fair market value of a REIT's total assets may be securities of one or more TRSs).

b. Clarify How the Passive Loss Limitations of Section 469 and At Risk Limitations of Section 465 Apply to a REIT. The instructions to 2015 Form 1120-REIT provided 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.

Our prior comments have noted that because of slight variations between the "closely held" determinations under section 465 and 469 as well as the determination under section 856(h), it is possible that a REIT may be "closely held" under sections 465 and 469, but not under section 856(h). This result could occur due to the application of partnership attribution rules under section 544(a)(2) (which do not apply for purposes of the determination under section 856(h)) 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. We appreciate that the parenthetical "(as defined under section 856(h))" has been deleted in the 2016 instructions. However, 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 469, but not section 856(h).

c. Page 6 of Form 1120-REIT Instructions: Add Form 8937 Under "Other Forms that May be Required." Form 8937 may be required in connection with a return of capital distribution or an adjustment to the conversion ratio of convertible debt.

d. Modify Page 6, "Line 3. Gross Rents," Third Paragraph Regarding Rents from a Taxable REIT Subsidiary. NAREIT suggests using the statutory language of section 856(d)(8)(A) ("if at least 90[%] of the leased space of the property is rented to persons other than taxable REIT subsidiaries of such trust and other than persons described in [section 856(d)](2)(B))" instead of "where at least 90% of the space at issue. . .".

II. Form 8875

We request that the Department of the Treasury and the Internal Revenue Service modify the Form 8875 and its instructions as follows.

1) Part I of Form 8875 should be amended to require contact information of an officer or legal representative of the TRS. Including this information would facilitate the IRS' ability to contact the TRS for more information if necessary.

2) Section 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, Line 16 of Part III of Form 8875 should delete the words "Does this taxable REIT subsidiary own" and replace it with "During the period when the taxable REIT subsidiary election is in effect, will this taxable REIT subsidiary own or has this taxable REIT subsidiary owned directly or indirectly". Also, the phrase "35%" should be replaced with "more than 35%". It is not relevant to the TRS election whether a TRS owns an exactly 35% interest in a corporation. 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%. . .** " Correcting this language would enhance the quality, utility, and clarity of the information to be collected.

3) 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. Again, correcting this language would enhance the quality, utility and clarity of the information to be collected.

4) 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% 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 reduce the potential allocation of IRS and taxpayer resources by resulting in fewer requests for relief under Treas. Reg. § 301.9100 for failure to timely file the TRS election.

5) In order to improve the practical utility of the information provided regarding the revocation of a TRS' election, 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.* section 1362(d) concerning revocation of the S corporation election (an election filed on or before March 15th of a specific year is effective on January 1st of such year, an election filed after March 15th of a specific year is effective the following January 1st 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.

Additionally, NAREIT recommends that Line 11 of Part III be modified by having two check boxes, one for the Election and another for Revocation. To the right of the check boxes should be a field to enter the effective date for the election or revocation.

6) A sentence should be added to the first paragraph of the instructions to Form 8875 under "Revocation of Election" 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 section 856(l)(2)). As noted above, under section 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 section 856(l) as "automatic" TRSs. By making these changes, the IRS would provide additional clarity to taxpayers and would reduce the potential for subsequent private ruling requests in certain circumstances.

7) The second sentence in the second paragraph of the instructions to Form 8875 under "Revocation of Election" 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 section 381(a). This clarification would reduce potential burdens on the IRS and on taxpayers by eliminating a trap for a successor REIT or TRS that failed to make a TRS election, and could prevent the need to issue a private letter ruling granting an extension of time to make a new TRS election as in PLRs 201144022 and 200544015. A successor REIT could revoke its predecessor's TRS elections if desired.

8) Guidance should permit an automatic extension of time to file a TRS election of, for example, six months or one year, either through amending Treas. Reg. § 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. 2009-41, 2009-2 C.B. 439, applicable in the case of a failure to file a timely Form 8832 (concerning entity classification elections).

Rev. Proc. 2009-41 generally provides that so long as:

a) the relevant entity failed to obtain its desired classification solely because of the failure to file a timely Form 8832;

b) either the relevant entity has not filed a federal tax or information return for the first year in which the election was intended to be effective because the due date for such return has not passed, or the relevant entity has timely filed all required federal tax and information returns consistent with its requested classification for all of the years that the entity intended the requested classification to be effective;

c) the relevant entity had reasonable cause for failure to file a timely Form 8832, and three years and 75 days from the requested effective date of the relevant entity's classification have not passed; and

d) 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. *See also* Rev. Proc. 2013-30, 2013-36 I.R.B. 1 (setting forth the exclusive simplified methods for taxpayers to request relief for late S corporation elections, Electing Small Business Trust elections, Qualified Subchapter S Trust elections, Qualified Subchapter S Subsidiary elections, and late corporate classification elections which the taxpayer intended to take effect on the same date that the taxpayer intended that an S corporation election for the entity should take effect).

Similar simplified procedures in lieu of a private letter ruling could apply in the case of certain failures to file the TRS election in a timely manner, which would reduce the potential burdens on the IRS and taxpayers.

9) NAREIT also recommends that the retroactivity rules under Form 8875 (for TRSs) conform to those under Form 8832 (Entity Classification). Treas. Reg. § 301.7701-3 permits an up-to-75-day retroactivity period. Form 8875 permits a two month and 15-day retroactivity period. There does not seem to be a reason why the two periods could not be conformed. The mismatch between the two periods is a source for potential foot faults. Accordingly, NAREIT suggests clarifying that, when the Form 8832 and the Form 8875 are filed on the same date, (or the Form 8832 is effective on a prior date), a Form 8875 is not invalid if mailed prior to or on the same date as the Form 8832. Also, consider permitting the same mailing address for both the Form 8875 and the Form 8832, given that these forms often are mailed at the same time. As currently drafted, Form 8832 must be sent to Ogden or to Cincinnati, depending on the circumstances, while Form 8875 must be sent to Ogden.

10) Additionally, NAREIT recommends that the Form 8875 permit an electing entity to revoke its TRS election up to 75 days prior to the date of filing of the Form 8875. Currently, the a TRS election under Form 8875 cannot be revoked retroactively. On the other hand, Form 8832 does permit a subsequent change to an entity classification election to be made 75 days prior to the date of filing of Form 8832. Similarly, we suggest that a TRS be permitted to revoke its election under Form 8875 effective 75 days prior to the date of filing of Form 8875.

11) Finally, NAREIT recommends that an election on Form 8875 automatically effect (simultaneous with the chosen effective date for the TRS election) a “check-the-box” election for corporate entity classification. A similar concept applies for exempt organizations, REITs, and S corporations under Treas. Reg. § 301.7701-3. An alternate approach would be to create a separate section on Form 8875 in which a check-the-box election could be made.

We believe that the foregoing comments will assist the IRS in collecting the information necessary for the proper performance of the functions of the agency, will enhance the quality,

utility, and clarity of the information to be collected; and will assist in minimizing the burden of the collection of information on respondents.

Thank you for the opportunity to submit these comments.

Please feel free to contact me at 202-739-9446 or dbernstein@nareit.com if you would like to discuss these issues in greater detail.

Respectfully submitted,

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