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August 4, 2017

VIA ELECTRONIC SUBMISSION [Notice.Comments@irscounsel.treas.gov]

Internal Revenue Service
CC:PA:LPD:PR (REG-136118-15)
Room 5207
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: REG-136118-15: Proposed Regulations Implementing the New Partnership Audit Regime Enacted as Part of the Bipartisan Budget Act of 2015

Dear Sir or Madam:

The National Association of Real Estate Investment Trusts® (NAREIT) appreciates the opportunity to offer its comments on the proposed Treasury Regulations (REG-136118-15, the "Proposed Regulations") recently released in connection with the partnership audit rules enacted as part of the Bipartisan Budget Act of 2015 (the "BBA Rules").

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.

EXECUTIVE SUMMARY

NAREIT previously submitted comments to the Internal Revenue Service (IRS) in connection with IRS Notice 2016-23, which requested comments regarding the implementation of the BBA Rules.[1] In particular, NAREIT requested that implementing guidance establish the following:

1. A REIT may use existing "deficiency dividend" procedures in connection with adjustments made under the BBA Rules;

2. If a REIT pays a deficiency dividend in respect of an adjustment made under the BBA Rules, interest payable with respect to the adjustment is

[1] NAREIT, Notice 2016-23: Request for Comments Regarding Implementation of the New Partnership Audit Regime Enacted as Part of the Bipartisan Budget Act of 2015 (April 15, 2016) (the "Initial Letter").

determined under the deficiency dividend rules (and no duplicative interest is imposed under the BBA Rules);[2]

3. If a lower-tier partnership passes through adjustments to an upper-tier partnership by making an election under section 6226[3], then the upper-tier partnership may also pass through those adjustments to its own partners (and even if it may not, a REIT partner in the upper-tier partnership may use the deficiency dividend procedures with respect to its share of the adjustment); and,

4. A REIT's interest in a partnership will not cause that partnership to become ineligible to make an election under section 6221(b).

NAREIT recognizes and appreciates that the Proposed Regulations provide significant guidance on several of these items. However, as the remainder of this comment letter further explains, NAREIT believes that certain aspects of the Proposed Regulations require additional clarification. In particular, certain procedural aspects of the section 6225(c) reduction that may be made in respect of a REIT partner's deficiency dividends should be clarified to allow for extensions as a matter of course in certain situations and to resolve current ambiguities regarding when a "determination" occurs for purposes of section 860. In addition, this letter reiterates NAREIT's third request above (regarding tiered partnership arrangements) and provides additional discussion regarding the treatment of disregarded entities under the Proposed Regulations.

DISCUSSION

I. Section 6225(c) Reduction for Deficiency Dividends

Section 6225(c) authorizes the Secretary to promulgate regulations that allow taxpayers to reduce the amount of an imputed underpayment in certain circumstances. Pursuant to this authority, §301.6225-2(d)(7)[4] sets forth procedures that allow a partnership to reduce an imputed underpayment when one of its REIT partners makes an "adjustment" under section 860 and pays a corresponding deficiency dividend. § 301.6225-2(c)(3) requires that all information with respect to a request for modification (whether based on a deficiency dividend paid by a REIT partner or any other permissible reduction under §301.6225-2) must be submitted to the IRS on or before 270 days after the date the relevant notice of proposed partnership adjustment (NOPPA) is mailed, unless the IRS consents to an extension. These extensions should be granted to taxpayers as a matter of course where an issue relevant to the NOPPA is taken to Appeals, with the extension lasting until Appeals resolves the relevant issue (plus an additional grace

[2] NAREIT appreciates the discussion in the preamble to the Proposed Regulations that explicitly confirms the intent to avoid duplication of interest (see p. 121 of the preamble), and respectfully requests that similar language be included in the finalized regulations (or their preamble).
[3] Unless otherwise noted, "section" refers to the Internal Revenue Code of 1986, as amended.
[4] Except as otherwise noted, § references are to the Proposed Regulations.

period thereafter, such that a partnership can compile necessary materials). In addition, §301.6225-2(d)(7) should clarify that a partnership's receipt of a NOPPA is not a "determination" that begins the 90- or 120-day period for a REIT partner's issuance and claiming of a deficiency dividend deduction under section 860.

II. Tiered Partnership Arrangements

Section 6226 permits a partnership to make an election to flow through its imputed underpayments to its partners if certain procedural requirements are satisfied (a "Push-Out Election"). The Proposed Regulations describe the mechanics of a Push-Out Election, but reserve on the ability to make Push-Out Elections in tiered partnership arrangements – that is, whether a partnership can make a Push-Out Election with respect to an imputed underpayment that has been passed through to the partnership as a result of a Push-Out Election in a lower-tier partnership. NAREIT continues to respectfully request that a Push-Out Election be made available in this situation and reiterates its belief that, even if an adjustment originates at a lower-tier partnership, a REIT that is a partner in an upper-tier partnership should be permitted to use the deficiency dividend procedures with respect to the adjustment taken into account by the upper-tier partnership.

III. Section 6221 Opt Out

Section 6221(b) permits a partnership to elect out of the BBA Rules if, among other requirements, all of its partners are "an individual, a C corporation, any foreign entity that would be treated as a C corporation were it domestic, an S corporation, or an estate of a deceased partner" or another type of taxpayer approved by the Secretary. §301.6221(b)-1(b)(3) identifies "eligible partners" that will be treated as satisfying the foregoing classification requirements. The Proposed Regulations explicitly provide that a disregarded entity (DRE) is not an eligible partner. The preamble to the Proposed Regulations explains that this exclusion is based on administrative burden concerns, stating that "If [regulations] broaden the scope of the election out provisions to include additional types of partners or partnership structures, the IRS will face additional administrative burden in examining those structures and partners under the deficiency rules." NAREIT acknowledges the increased administrative burdens that could arise if eligible partners were expanded to include partnerships, but respectfully submits that the weighting of considerations may vary with respect to DREs.

NAREIT echoes the comments of the Texas State Bar[5] and requests "that the IRS simply look through the DRE and look at the sole owner to determine whether that owner is an eligible partner for the Election Out. As a legal matter, treatment of DREs as not separate from their owners for purposes of the Election Out would not represent an expansion of partnerships eligible for the Election Out. As a practical matter, the IRS could require a DRE to supply the applicable information with respect to the DRE's sole owner, similar to an S corporation. Any

[5] State Bar of Texas Tax Section, Comments on Proposed Regulations Regarding Implementing Centralized Partnership Audit Regime, August 1, 2017.

additional burden from allowing a partnership with DREs to elect out would fall on taxpayers and not on the IRS."

Thank you again for the opportunity to submit these comments. Please contact me at tedwards@nareit.com, Catherine Barré, NAREIT's SVP for Policy & Politics, at cbarre@nareit.com, or Dara Bernstein, NAREIT's SVP & Tax Counsel, at dbernstein@nareit.com if you would like to discuss these issues in greater detail.

Respectfully submitted,

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Executive Vice President & General Counsel

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