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March 23, 2016

The Honorable Jacob J. Lew
Secretary of the Treasury
U. S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable John A. Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, DC 20224

Re: Definition of "Congregate Care" for Purposes of Definition of "REIT Health Care Facility"/Notice 2016-26

Dear Secretary Lew and Commissioner Koskinen:

NAREIT appreciates the opportunity to submit these comments in connection with inclusion of a guidance item defining "congregate care facility" for purposes of the definition of a "health care facility" under sections 856(e)(6)(D)(ii) and (l)(4)(B) of the Internal Revenue Code of 1986, as amended (the Code)[1], on the Treasury Department and IRS' 2015-2016 Priority Guidance Plan, [2] as well as in response to Notice 2016-26's request for comments on recommendations for the 2016-17 Priority Guidance Plan.

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EXECUTIVE SUMMARY

NAREIT commends the IRS and the Treasury Department for its efforts and success in issuing private letter rulings (PLRs) over the past few years in the REIT area that effectuate Congressional intent and are consistent with current market practices in the health care industry. As a result, and, as further discussed below, we do not believe that additional guidance is needed or merits priority attention. Based on the ruling practices of the IRS in several private letter rulings dealing specifically with such facilities, health care REITs have developed a good working understanding that the IRS and the Treasury

[1] Unless otherwise provided, all "section" references herein shall be to a section of the Code.
[2] *See* 2015-16 Priority Guidance Plan, 2d Quarter Update (Feb. 5, 2016)

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Department currently interpret the definition of a "congregate care facility" as an age-restricted community, where, in addition to providing communal dining and living quarters, services are provided to advance the health and physical well-being of its residents. These rulings have provided sufficient guidance for health care REITs and advisors to determine whether a facility meets the definition or which additional health and wellness-related services should be provided to bring a facility within the definition.

If the IRS and the Treasury Department issue guidance of general application under this project, NAREIT requests that: 1) the IRS and Treasury be mindful not to expand (or otherwise change) the definition of a "congregate care facility" in a manner that would up-end the market by inadvertently including age-restricted or non-age-restricted apartments, student housing, typical children's summer camps, or other properties generally not considered health care facilities in the definition, 2) the guidance continues to treat independent living facilities similar to those described in PLRs 201147015, 201429017, and 201509019 as "health care facilities," and, 3) the guidance have a prospective effective date so that the new rule would apply only to properties contracted to be acquired after the date the change is effective.

DISCUSSION

I. Background: Health Care REIT Industry

Health care REITs are REITs that own and manage a variety of health care-related properties and collect rent from tenants. Health care REITs' property types include senior living communities, hospitals, life science buildings, medical office buildings and skilled nursing facilities. As of December 31, 2015, there were 17 health care REITs in the FTSE NAREIT All REITs Index,[3] with a combined market capitalization of $90.7 billion.

These REITs owned over 7,000 properties with an estimated value of nearly $90 billion. The number of properties increased 11% over the past year, and has risen 108% and 212% over the past five and 10 years, respectively. Net property investment increased 19% over 2015, and has risen 167% and 565% over the past five and 10 years, respectively.

Total Funds From Operations (FFO) of health care REITs was $4.9 billion in 2015. Net Operating Income (NOI) was $8.5 billion, and total dividends paid were $5.3 billion.

[3] NAREIT® REITWatch® (January 2016) (available at: https://www.reit.com/sites/default/files/reitwatch/RW1601.pdf). For additional background regarding the history of legislation applicable to Health Care REITs, *see* "Toward a Workable Definition of a REIT Healthcare Facility," by Paul W. Decker, Ameek Ashok Ponda, and Jonathan Stein, *Tax Notes*, December 5, 2011, at p. 1231, available at: http://www.sandw.com/assets/htmldocuments/B1362833.PDF.

II. Definition of Congregate Care Facility for Health Care REITs

The term "health care facility" was added to the Code as part of the REIT Modernization Act of 1999 (RMA)[4] (effective 2001). As further described below, the term was applicable at the time in two specific contexts. First, it was relevant as an expansion of the "foreclosure property" rule to terminations of health care property leases absent a formal default or imminent default. In addition, the RMA referenced the definition of "health care facility" in the context of taxable REIT subsidiaries (TRSs), entities which Congress created to provide non-customary services to REIT tenants, and are able to lease lodging properties directly from an affiliated REIT in exchange for qualifying rental income, but are prohibited from operating health care properties. In 2008, Congress enacted the REIT Investment Diversification and Empowerment Act of 2007 (RIDEA),[5] extending the TRS rule regarding the leasing of lodging facilities to the leasing of health care properties by TRSs.

A. Health Care Facilities and Foreclosure Property Rule

By way of background, qualifying REIT income for purposes of sections 856(c)(2) and (3) is either passive income or specific real estate-related income, including "rents from real property." The term "rents from real property" is a defined term and generally does not include tenant-specific or "non-customary" services. While the above is the general rule, there are cases in which a REIT must foreclose on a lease or a loan, and, as a result, the REIT will come into possession of property that generates otherwise non-qualifying income. In such a case, the Code permits the REIT to operate the property and earn qualifying REIT income for a specified period of time. Such property is termed "foreclosure property."

Income and gain from "foreclosure property" as defined in section 856(e) which would otherwise be nonqualifying REIT income (under sections 856(c)(2) and (3)) is qualifying REIT income under those sections if the REIT makes a foreclosure property election under section 856(e)(5). Section 856(e)(1) generally defines "foreclosure property" as:

> any real property (including interests in real property), and any personal property incident to such real property, acquired by the real estate investment trust as the result of such trust having bid in such property at foreclosure, or having otherwise reduced such property to ownership or possession by agreement or process of law, after there was default (or default was imminent) on a lease of such property or on an indebtedness which such property secured.

While the general definition of foreclosure property requires a default or imminent default, the RMA added section 856(e)(6)(A) to expand the term 'foreclosure property' to include any qualified health care property acquired by a real estate investment trust as the result of the termination of a lease of such property (other than a termination by reason of a default, or the

[4] Sections 541-71 of Pub. L. No. 106-170, the Ticket to Work and Work Incentives Improvement Act of 1999.
[5] P.L. 110-289, §§3031-3071.

imminence of a default, on the lease)." Thus, for example, in the "health care facility" context, the RMA expanded the "foreclosure property" rules to cover normal lease expirations or other non-default situations.

Section 856(e)(6)(D)(i) defines "qualified health care property" as a "health care facility" or property necessary or incidental to the use of a "health care facility." The term "health care facility" is defined in section 856(e)(6)(D)(ii) as:

> a hospital, nursing facility, assisted living facility, **congregate care facility**, qualified continuing care facility(as defined in section 7872(g)(4)), or other licensed facility which extends medical or nursing or ancillary services to patients, and which was operated by a provider of such services that is eligible for participation in the Medicare program under Title XVII of the Social Security Act [subchapter XVIII of chapter 7 of Title 42 (42 U.S.C.A. § 1395 et seq.)] with respect to the facility.(Emphasis added).

The RMA's extension of the foreclosure property rules to non-defaulting terminations of health care facility leases was explained in the relevant Senate Finance Committee report:

> The Committee believes that allowing operation of health care facilities directly by a REIT for a limited period of time is appropriate to assure continuous provision of **health care services** where the facilities are acquired by the REIT upon termination of a lease (as upon foreclosure) where there may not be enough time to obtain a new independent provider of such health care services.(Emphasis added).[6]

Thus, in the case of non-health care properties, a REIT can make a foreclosure property election only with respect to property acquired on foreclosure or after imminent default. Congress recognized that requiring such dire circumstances for the tenant or borrower in the context of health care properties could hurt the residents of these facilities. As a result, Congress authorized

[6] S. Rep. No. 201, 106th Cong, 1st Sess. 58 (1999). Available at: https://www.congress.gov/106/crpt/srpt201/CRPT-106srpt201.pdf. A similar provision extending the foreclosure property rule to termination of leases of health care facilities originally was part of H.R. 1150, the Real Estate Investment Trust Simplification Act of 1997 (REITSA). Notably, however, the definition of "health care facility" in H.R. 1150 **did not include a congregate care facility**. Almost all of the REITSA provisions were included in the Taxpayer Relief Act of 1997, signed by then President Clinton on August 5, 1997. However, the extension of foreclosure property rules to lease terminations of health care properties was not included apparently for procedural reasons. In his introductory remarks concerning REITSA, Congressman E. Clay Shaw, Jr. noted the concern with the REIT's "likely inability to simply close the facility due to **the nature of the facility's inhabitants**." 143 Cong. Rec. E559, 561 (Daily Ed. March 21, 1997) (remarks of the Honorable E. Clay Shaw, Jr.). (Emphasis added). Thus, it appears that the original concern with respect to this provision in 1997 was a general concern for "the nature of the facility's inhabitants," while the concern expressed with respect to this provision in 1999 was to the more specific "to assure continuous provision of **health care services.**"

a REIT to acquire a health care property by terminating a lease with a troubled operator even if not terminating due to default or imminent default.[7]

B. "Congregate Care" Facilities and TRSs: General Background

As noted above, "rents from real properties" under section 856(d) is a defined term and generally does not include tenant-specific or "non-customary" services. In fact, more than a *de minimis* amount of tenant-specific or non-customary services at a particular REIT-owned property will disqualify all of the otherwise qualifying rental income from that property from constituting "rents from real property." Because of the significant amount of services generally provided at health care properties (and similarly, at lodging facilities), income attributable to a REIT's direct ownership and operation of these facilities cannot constitute "rents from a real property."[8] Furthermore, absent a special statutory rule otherwise, REIT could not net lease to a related tenant who operated the property because the term "rents from real property" generally excludes rents from a related party.[9]

While a REIT historically could own and net lease (to an operator or a third party tenant that hired an operator) a lodging or health care facility, this arrangement creates complexity, inefficiencies and potential conflicts of interest. As a result, in 1999 Congress enacted the RMA, which, in addition to the modification of the foreclosure property rules described above, authorized lodging REITs to own and earn qualifying rental income from leases of lodging facilities to TRSs.

Specifically, the RMA exempts from the related party rent exclusion under section 856(d)(2)(B) rents from a TRS for the lease of a lodging facility so long as, among other things, the lodging facility is operated by an independent contractor that actively operates such facilities for unrelated third parties. Further, the RMA specifically excluded from the definition of TRS an entity that operates or manages a health care facility.[10]

The RMA's related party rent exemption that allowed hotel REITs to lease properties to their TRSs was not extended to health care REITs at the time of RMA enactment. However, over time, heath care REITs became more interested in the RMA's TRS structure because, as was the case in the lodging industry, health care property operators preferred not to bear the risks of a lease, and instead preferred to operate properties. In 2008, Congress enacted RIDEA, which, among other things, exempted from the related party tenant rules rent earned for the lease of

[7] For additional background, *see* "Toward a Workable Definition of a REIT Healthcare Facility," *supra* note 3 at 1231, available at: http://www.sandw.com/assets/htmldocuments/B1362833.PDF.
[8] *See* Section 856(d)(7); Rev. Rul. 98-60, 1998-2 C.B. 751.
[9] A related party tenant is a corporation in which the REIT owns shares comprising 10% or more of the total voting power or value of such corporation or an entity other than a corporation in which a REIT owns 10% of the interests or net profits. Section 856(d)(2)(B).
[10] Section 856(l)(3)(A).

"qualified health care property (as defined in section 856](e)(6)(D)(i))," provided that the property is operated by an eligible independent contractor.[11]

Since the time of RMA's enactment and as cross-referenced in RIDEA, section 856(e)(6)(D)(i) has defined qualified health care property to include any real property which is a health care facility. Furthermore, as noted above, one type of a facility specifically included in the "health care facility" as defined in section 856(e)(6)(D)(ii) is a congregate care facility.

C. "Congregate Care Facility" in Section 856(e)(D)(ii) Should Be Read in Context along with the Surrounding Words

"Congregate care facility" as used in the definition of "health care facility" in section 856(e)(6)(D)(ii) is not defined in the Code or the Treasury regulations promulgated thereunder or in the Investment Company Act of 1940, nor does any court decision or revenue ruling provide such a definition. However, as further described below, reading it as part of section 856(e)(6)(D)(ii) in its general historical context, in the context of the IRS ruling parameters, and interpreting the term under general rules of statutory construction, has yielded a manageable definition for the health care REIT industry.

1. Historical Context

At the time of the enactment of section 856(e)(6)(D)(ii) in 1999, the senior housing industry generally defined a congregate care facility as an age-restricted housing facility that provides residents with separate living quarters, but provides central dining facilities (congregate meals), housekeeping, transportation, and social and recreational activities. Subsequently, in 2004 the senior housing industry changed the name of congregate care facilities to independent living facilities.[12] The industry differentiated congregate care facilities from "senior apartments" in defining the latter as age-restricted multifamily residential rental properties that do not have central kitchen facilities and generally do not provide meals to residents, but may offer

[11] Section 856(d)(8)(B). RIDEA was intended to allow REITs to continue to participate in the ownership of congregate care facilities in a changing business environment. "Operators that now lease such facilities would rather have a REIT (through its TRS) assume any leasing risk and instead be hired purely to operate the facilities. Accordingly, this provision would extend the exception made in 1999 for lodging facilities to health care facilities. This change should make it easier for health care facilities to be provided to senior citizens and others in need of such services." 153 *Cong. Rec.* S10931 (introductory remarks by Senator Orrin G. Hatch). For additional background regarding RIDEA, *see* "REITs Empowered," by Tony M. Edwards and Dara F. Bernstein, *Tax Management Real Estate Journal*, at 1, Vol. 24, No. 11, 11/05/2008, available at: https://www.reit.com/sites/default/files/media/Portals/0/PDF/REITSEMPOWERED.pdf.

[12] In 2004, the senior housing industry, in a push for standardized data reporting and improved marketability of the congregate care industry segment, standardized the names and definitions of different senior housing facility types, and "[a]mong the most significant changes in specialized terms [was] the renaming of the property type "congregate care" to "independent living". "NIC and ASHA Announce Standardized Classifications For Seniors Housing Property Types," National Investment Center for the Seniors Housing and Care Industry (Press Release, April 2004).

community rooms, social activities, and other amenities.[13] Many facilities marketed as "independent living facilities" now provide some level of health care-related and wellness services as the health care/senior living industry has evolved. Also, it should be noted that the leading senior housing trade associations work with the health care industry not only in providing services and assistance in marketing independent living facilities, but also assisted living facilities. Indeed, a significant number of REITs' senior housing facilities are combined independent living/assisted living facilities.

The industry and tax practitioners believe that the existing ruling practice has created clarity that is working reasonably well and has addressed a significant number of fact patterns distinguishing between what is and is not a congregate care facility. While the ruling practice does not establish a fixed rule applicable to all fact patterns in a changing and constantly evolving industry, it has allowed the industry and its advisors to structure investments with considerable confidence. Any effort to provide more formal guidance, such as a list of required wellness programs or health care-related services, may create more uncertainty and may result in the need for more PLR requests to clarify different factual situations depending upon the nature of the guidance due to the nature of this evolving sector.

The health care business also is a highly regulated one, and rearranging existing leases, ownership, "business configurations" and contracts as a result of any new guidance may be not only expensive, but extremely disruptive and difficult to do, particularly with complex and various multiple state regulatory agency oversight, in the wake that any new Service guidance may require. Any new guidance therefore should include liberal transition rules due to the numerous potential unintended consequences that might ensue.

2. IRS Ruling Practice

a. *Pre-RIDEA*

Prior to RIDEA's enactment, the IRS ruled in PLR 200813005 that age-restricted residential "independent living facilities" with congregate dining and possible other services such as "exercise and wellness programs, medical alert systems, security services, and daily status checks," but at which the taxpayer expressly represented that there would be "no medical or nursing services, or skilled nursing licensed beds," was *not* a "qualified health care facility" within the meaning of section 856(e)(6)(D)(ii).

b. *"Mixed-Use Facilities"*

More recently, the IRS has issued a series of private letter rulings (PLRs 201104033, 201104023, 201125013 and 201250019) dealing with "mixed use" properties

[13] In the last few years, the REIT industry and its professionals have accepted and embraced the industry definition of congregate care facilities, now known as" independent living" facilities.

that included both "independent living" facilities, as well as "assisted living facilities." In all those cases, the IRS appropriately ruled that the facilities were "health care facilities."

In short, the IRS private letter rulings have, without exception, concluded that a mixed use facility (*i.e.*, one that combines independent living with assisted living) is a health care facility.

c. *Age-Restricted Residential Communities*

Furthermore, there have been several private letter rulings in the last four years that have provided that age-restricted independent living facilities are health care facilities. Specifically, in PLRs 201147015, 201429017, and 201509019, the IRS concluded that age-restricted, unlicensed facilities that provided "congregate care services," wellness-related services, and, in some cases, health care-related services, not commonly offered by a typical multi-family rental property, but limited true medical care *per se*, were "health care facilities."

The facts in those rulings encompassed age-restricted facilities with a) congregate dining facilities; b) "wellness" or similar preventive health care programs; and, c) health care-related services, such as the provision of emergency call assistance and advice and referral services regarding medical care of the residents. Although such "independent living" facilities vary somewhat in the degree to which such services and amenities are provided and by whom provided, the congregate services and amenities provided to tenants are invariably well beyond those provided to tenants in general multi-family housing. The extent to which significant congregate services and amenities are provided to tenants demonstrates that the provision of services to promote the **health and well-being** of the residents of such **age-restricted** facilities clearly distinguishes these facilities from the typical multi-family rental property.

3. **Statutory Construction: "Congregate Care" Should Be Interpreted Consistently with Surrounding Words**

The IRS also ruled in both PLRs 201317001 and 201320007 that correctional and detention facilities are not congregate care facilities because those facilities are not related to a health care facility and the medical care provided by such facilities is not part of the "primary function" of the facilities. In these rulings, the IRS noted that the term "congregate care facility" is not defined in the Code or regulations and that commonly used definitions of congregate care include "the sharing of living space, dining space, transportation, and group activities." However, the IRS stated that the meaning "congregate care facility" must be interpreted in the context of the definition of "health care facility," which describes various facilities that provide health care, not as an auxiliary function, but as part of the primary function (such as a hospital) or in connection with a facility that has the primary function of providing health care (such as assisted living facilities). The "primary focus" requirement is important. Without it, one could, patently contrary to legislative intent, argue that a correctional or detention facility is a "qualified health care facility," a fact that the IRS has rightly recognized in both PLRs 201320007 and 201317001.

The analysis in PLRs 201317001 and 201320007 follows a well-established maxim of statutory interpretation, *noscitur a sociis*, which provides that a word is known by the company it keeps.[14] NAREIT recognizes that the term "congregate care" has been used in non-REIT contexts, and its interpretation in those contexts may differ from its meaning in section 856(e)(6)(D)(ii). For example, the term has been used to describe group homes for foster children.[15] With that said, we believe that the term "congregate care facility" in section 856(e)(6)(D)(ii) should be read in context of the surrounding words in the statutory definition.

As noted above, Congress included the term in the definition of health care facility as part of the foreclosure property rules to ensure the continuous provision of **health care services** to residents in the event that a REIT terminated the lease of a property with respect to which such services were provided. Further, the surrounding words in section 856(e)(6)(D)(ii), hospital, nursing facility, assisted living facility, qualified continuing care facility(as defined in section 7872(g)(4)), or other facility operated by a Medicare-eligible provider, all relate to facilities which also provides for the wellness and/or health of their residents. Thus, it appears that some minimum level of health and wellness programming, beyond that which might be available at typical multi-family properties, was contemplated by Congress in connection with the definition of "health care facility," which includes a congregate care facility.[16]

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[14] *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 305–07 (1961) *(*"The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress") (which led to interpreting the word "discovery" in the list of items "resulting from exploration, discovery, or prospecting,'" as meaning only discovery of mineral resources, and not including the "development and manufacture of drugs and cameras" at issue in the case).

[15] Section 1103 of the Social Security Act (For purposes of [the relevant statutory provision], the child welfare program improvement policies described in this paragraph are the following: ….(E) The development and implementation of a plan that ensures **congregate care** is used appropriately and reduces the placement of children and youth in such care.")(Emphasis added). *See also* "A National Look at the Use of Congregate Care in Child Welfare," U.S. Department of Health and Human Services, Administration for Children and Families, and the Children's Bureau (March 30, 2015) ("For this analysis, **congregate care** is defined as a placement setting of group home (a licensed or approved home providing 24-hour care in a small group setting of 7-12 children) or institution (a licensed or approved child care facility operated by a public or private agency and providing 24-hour care and/or treatment typically for 1 or more children who require separation from their own homes or a group living experience). These settings may include child care institutions, residential treatment facilities, or maternity homes. Through …. research interviews with states, we found that although all states submit placement data gathered in accordance with Adoption and Foster Care Analysis and Reporting System (AFCARS) definitions, many have developed **their own levels of care within those categories**.") (Emphasis added).

[16] Note that the phrase in section 856(e)(6)(D)(ii) ", or other licensed facility which extends medical or nursing or ancillary services to patients, and which was operated by a provider of such services that is eligible for participation in the Medicare program under Title XVII of the Social Security Act [subchapter XVIII of chapter 7 of Title 42 (42 U.S.C.A. § 1395 et seq.)] with respect to the facility", when read in context and in connection with the punctuation of in section 856(e)(6)(D)(ii), is properly interpreted as applying Medicare participation eligibility only to "other licensed facilities" not otherwise a hospital, nursing facility, assisted living facility, congregate care facility, qualified continuing care facility(as defined in section 7872(g)(4)), for example, a private hospital.

4. Market Practice: Health Care REIT Industry

The development of the IRS ruling policy over the last several years has led industry and tax professionals at health care REITs and their advisors to a consensus view that age-restricted facilities with congregate dining (and possibly also housekeeping, transportation and a services to enhance the health and physical well-being of their residents) are "congregate care facilities" even though the provision of direct medical services at such facilities may be minimal and even though the facility may not be licensed in its state.[17]

Accordingly, the typical health care REIT structure today for a congregate care facility of the type under consideration in PLRs 201147015, 201429017 and 201509019 involves ownership of a specific age-restricted, residential facility by the REIT at which services are offered generally "targeted to monitor and help improve the health and well-being of the senior citizen residents,"[18] the lease of that facility from the REIT to a TRS, and the operation of the facility by an eligible independent contractor.

The current IRS ruling practice with respect to such facilities is a fair summary of how the industry and advisors generally interpret the current rules. Therefore, NAREIT does not believe that additional guidance is needed. However, if codified as regulations or other precedential guidance, these standards should be described in a general (and prospective) manner in order to avoid generating numerous questions regarding their precise meaning and application in a wide variety of highly factual circumstances in an industry which is constantly evolving.[19]

Further while the private letter rulings to date have been limited to age-restricted independent living communities, if the IRS is inclined to provide guidance that such facilities may include other types of residents or populations, we suggest that such guidance be crafted to ensure non-applicability to other communal living arrangements such as student housing or typical (age-restricted or non-age restricted) apartment properties in order to avoid interpretative issues like those which necessitated the requests to confirm that correctional and detention facilities are not congregate care facilities.[20]

Imagine the case, for example, of a REIT-owned university dormitory with a variety of dining facility options and a nurse on campus. Under current IRS ruling practice, most industry professionals would not consider this property a "congregate care facility" (and therefore a

[17] While we think that state licensing should clearly mean that a facility is a qualified health care facility, we do not believe that such state licensing is a *sine qua non* given that the Code does not expressly establish such a requirement.
[18] PLR 201429017.
[19] In lieu of regulatory guidance defining a "congregate care facility," an alternative may be a revenue procedure that summarizes the circumstances under which the IRS will not object to a property's classification as a "congregate care facility" or "health care facility" if a REIT owns the facility and leases it to a TRS; the TRS retains an eligible independent contractor to manage the facility; and the REIT consistently treats the facility as a health care facility.
[20] *See also supra* note 16 (noting that states have varied definitions of the requisite services for property to be considered "congregate care" in the foster care context).

health care facility) notwithstanding that there are living facilities, some form of explicit or implicit age restriction, communal dining and some "health care" provided. As a result, the REIT owner may use a TRS to provide amenities and services at this property without affecting the TRS' status as a TRS. However, if the ruling practice or guidelines were to be changed, and this property were considered a "congregate care facility", the TRS would be disqualified as such for providing such services and amenities at, with the result that the REIT might own more than 10% of a non-TRS corporation, and/or the result may cause the REIT to fail its 95% gross income test, thereby destroying its REIT status.

On the other hand, a REIT failure could occur if a REIT were to take the incorrect view that this property was in fact a congregate care facility. Thus, the REIT erroneously leases the property to a TRS which then hires an eligible independent contractor to operate the property, all of the rental income from the TRS would be "related party rent," potentially destroying the REIT's tax status.

Finally, if the IRS and the Treasury Department issue precedential guidance under this Priority Guidance Plan item, NAREIT respectfully reiterates that the guidance have a prospective effective date so that the new rule would apply only to properties contracted to be acquired after the date the change is effective. We would be pleased to further discuss these comments if you believe it would be helpful. Please feel free to please contact me at (202) 739-9408, or tedwards@nareit.com, Cathy Barré, NAREIT's Senior Vice President, Policy & Politics, at (202) 739-9422, or cbarre@nareit.com; or Dara Bernstein, NAREIT's Vice President and Senior Tax Counsel, at (202) 739-9446 or dbernstein@nareit.com.

Respectfully submitted,

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