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July 20, 2020

Via: www.regulations.gov (IRS-2020-0015)

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2020-47) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: [Notice 2020-47](#): Request for Comments Regarding Recommendations for Items that Should be Included on the 2020-21 Priority Guidance Plan (PGP)

Dear Sir or Madam,

In response to [Notice 2020-47](#), Nareit appreciates the opportunity to offer our suggestions regarding regulatory guidance to be placed on the 2020-21 Priority Guidance Plan (2020-21 PGP).

Nareit¹ is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. Nareit advocates for REIT-based real estate investment with policymakers and the global investment community.

Executive Summary

Nareit's recommendations are listed in order of priority.

First, Nareit again recommends the withdrawal of Notice 2007-55 concerning the Foreign Investment in Real Property Tax Act (FIRPTA) consequences of liquidating REIT distributions to non-U.S. investors. Withdrawing this notice would be in accord with [Executive Order 13924](#) (May 19, 2020) ("Regulatory Relief to Support Economic Recovery"). Nareit submitted written requests for withdrawal of Notice 2007-55 in [2019](#), [2018](#), [2017](#), [2012](#), [2011](#), and [2009](#).

Second, as requested in our [Feb. 27, 2020 letter](#), Nareit requests that the Treasury Department and IRS exercise their regulatory authority to prevent otherwise qualifying rent payments from becoming

¹ REITs are real estate working for you. Through the properties they own, finance and operate, REITs help provide the essential real estate we need to live, work and play. All U.S. REITs own approximately \$3 trillion in gross assets, public U.S. REITs account for \$2 trillion in gross assets, and stock-exchange listed REITs have an equity market capitalization of over \$1 trillion. In addition, about 87 million Americans invest in REIT stocks.

nonqualifying income under the “related party” rent rules, solely due to the “double downward” attribution rules in section 318².

Third, Nareit reiterates its recommendations in its [June 7, 2019 letter](#) to continue work on the revision of regulations under Treas. Reg. § 1.337(d)-7 regarding the treatment of certain foreign corporations. This request appears to fall within the scope of Item 2 under “Corporations and Their Shareholders” most recently in the [Third Quarter Update of the 2019-20 PGP](#) (“Revising regulations under §1.337(d)-7 regarding the treatment of certain foreign corporations”).

Recommendations

Withdraw Notice 2007-55/Treat REIT Liquidations and Redemptions as Sales/Exchanges of Stock for all Shareholders

As more fully presented in a comment letter by the American Bar Association Tax Section (the Tax Section) dated June 10, 2008, and as Nareit has requested in its 2019, 2019, 2018, 2017, 2012, 2011, and 2009 written submissions to the IRS and Treasury Department, Nareit recommends the withdrawal of Notice 2007-55, which holds that REIT liquidating distributions and redemptions should be treated as capital gain liquidations that are subject to FIRPTA if paid to foreign shareholders.³

Withdrawing Notice 2007-55 would be consistent with Executive Order 13924 (EO 13924), issued on May 19, 2020 in response to the COVID-19 public health and economic crisis. Section 1 of EO 13924 provides that “[a]gencies should address this economic emergency by **rescinding, modifying**, waiving, or providing exemptions from **regulations and other requirements that may inhibit economic recovery**, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility.” (Emphasis added). Section 4 of EO 13924 then provides:

Sec. 4. Rescission and waiver of regulatory standards. The heads of all agencies shall identify regulatory standards that may inhibit economic recovery and shall consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as

² Unless otherwise noted, references to “section” in this letter refer to sections of the Internal Revenue Code of 1986, as amended (the Code).

³ Nareit’s prior submissions stated that the withdrawal of Notice 2007-55 also should not apply if a REIT relies on the “cleansing exception” of section 897(c)(1)(B). However, this exception is no longer necessary because Congress clarified in the PATH Act that the cleansing exception does not apply to REITs and regulated investment companies (RICs).

provided for in enforceable agreements with respect to those requirements, for the purpose of promoting job creation and economic growth, insofar as doing so is consistent with the law and with the policy considerations identified in section 1 of this order.

Withdrawal of Notice 2007-55 would be consistent with EO 13924 and encourage additional foreign investment in U.S. real estate and infrastructure at this critical time when, due to COVID-19, many businesses and properties have had to close temporarily and could use additional capital to help them recover.

Withdrawal of Notice 2007-55 also would be consistent with the March 5, 2019, Treasury Department policy statement acknowledging that “[f]ailure to promulgate regulations previewed in notices on a timely basis can cause confusion or uncertainty for taxpayers,” and generally providing that, going forward, if regulations are not issued within 18 months of sub-regulatory guidance, the IRS will not apply the sub-regulatory guidance adversely to taxpayers. While not technically applying to Notice 2007-55, the policy behind this statement (eliminating confusion and uncertainty) would be relieved if Notice 2007-55 – sub-regulatory guidance issued over 12 years ago - were withdrawn.

Eliminate Inadvertent Application of “Double Downward” Attribution Rules for Purposes of “Related Party Rent”

Under the related party rent rules of section 856(d)(2)(B), any payments a REIT receives from an entity in which the REIT owns 10% or more of its equity is not considered qualified rents under the REIT income test rules. The 10% test is often impossible to apply or enforce because of “double downward” constructive ownership rules in section 318 that require a REIT to examine not only its own holdings, but also the holdings of its 10% or more stockholders, their 10% stockholders, and then pooling such holdings in other vehicles (often unrelated joint venture) and then applying the attribution rules again so that the pooled holdings then own each other. This pooling and reattribution, if the attribution rules are followed literally, can result in rent disqualification from a tenant the constructive ownership of which the REIT is not only completely unaware but also completely unable to determine, a result which is not intended by the related party rent rules.

As more fully discussed in Nareit’s Feb. 27, 2020 letter to Assistant Secretary Kautter, Nareit requests that the Treasury Department and IRS exercise regulatory authority, either under section 856(c)(5)(J), Treas. Reg. § 1.318-1 or otherwise, to eliminate the inadvertent constructive ownership in tenants due to the application of double downward attribution rules from disqualifying otherwise qualifying rental income.



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Exempt Transfers by a Foreign Corporation of Appreciated Assets to RICs and REITs from Treas. Reg. § 1.337(d)-7 if Such Foreign Corporation is Not Otherwise Subject to U.S. Tax

As Nareit discussed in its [June 7, 2019](#) and [June 14, 2018 letters](#) to the Treasury Department and IRS, Nareit encourages the Treasury Department and the IRS to finalize its work on the revision of Treas. Reg. § 1.337(d)-7 regarding the treatment of certain foreign corporations.

* * * * *

All of the suggested recommendations above would fulfill the goals and objectives set forth in [Notice 2020-47](#).

First, resolution of these issues would resolve significant issues relevant to the more than 1,000 entities that have elected REIT status and the millions of taxpayers who invest in REITs.

Second, the recommended guidance would reduce controversy and lessen the burden on taxpayers or the IRS.

Third, the recommended guidance involves regulations or other guidance that is outdated, unnecessary, ineffective, insufficient, or unnecessarily burdensome and that should be modified, streamlined, expanded, replaced, or withdrawn.

Fourth, the recommended guidance would be in accordance with Executive Order 13771 (82 F.R. 9339), Executive Order 13777 (82 F.R. 12285) or other Executive Orders. We would be happy to work with you to identify existing guidance with respect to which withdrawal may be appropriate in order to comply with Executive Order 13771. As noted above, we recommend withdrawal of Notice 2007-55.

Fifth, the recommended guidance promotes sound tax administration.

Sixth, the IRS can administer the recommended guidance on a uniform basis.

Seventh, the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance.



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We would be pleased to discuss these comments if you believe it would be helpful. Please feel free to contact me at (202) 739-9408, or tedwards@nareit.com; Cathy Barré, Nareit's Executive Vice President & General Counsel, at (202) 739-9422, or cbarre@nareit.com; or Dara Bernstein, Nareit's Senior Vice President and Tax Counsel, at (202) 739-9446 or dbernstein@nareit.com.

Respectfully submitted,

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Cc:

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