NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®

December 23, 2013

HAND-DELIVERED AND E-MAILED

Ms. Yvette Lawrence
Internal Revenue Service
Room 6129
1111 Constitution Avenue N.W.
Washington, D.C. 20224

Re: Comments – Form 1120-REIT

Dear Ms. Lawrence:

The National Association of Real Estate Investment Trusts® (NAREIT) appreciates the opportunity, pursuant to a notice published October 25, 2013, 78 F.R. 64057, to provide the following comments with respect to reducing the burden on taxpayers from the Form 1120-REIT. NAREIT is the worldwide representative voice for U.S. real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. Members are 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 these businesses.

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 substantially similar to those submitted by NAREIT on March 19, 2012, pursuant to a notice published February 16, 2012, 77 F.R. 9301.

We request that the Department of the Treasury and the Internal Revenue Service modify the Form 1120-REIT and its instructions as follows:

1875 I Street, NW, Suite 600, Washington, DC 20006-5413
Phone 202-739-9400 Fax 202-739-9401 REIT.com

1) Part III of Form 1120-REIT Should Be Modified to Calculate a REIT's Gross Income for Purposes of Section 857(b)(5)[1]. 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 2012 version of Part III of Form 1120-REIT begins with "real estate investment trust taxable income" from Part I of Form 1120-REIT, which may be based on net income, particularly from 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 than the computation of taxable income. For example, with respect to a REIT that 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.

In other words, a REIT partner calculates its gross income from the partnership in proportion to its capital interest, rather than based on its Schedule K-1. Because the current Form 1120-REIT appears to base its calculation in Part III on net, rather than gross, income, it adds an additional burden on taxpayers attempting to comply with section 857(b)(5). Accordingly, it would be helpful to provide a separate line for gross income from partnerships; gross income from capital gains; etc.

2) Modification of Part III of Form 1120-REIT Should Exclude Income from Hedging Transactions under Section 856(c)(5)(G) for Purposes of Section 857(b)(5). Because income from hedging transactions referred to in section 856(c)(5)(G) is excluded from a REIT's gross income for purposes of the gross income tests under Section 856(c)(2) and 856(c)(3), Part III of Form 1120-REIT similarly should exclude such income in its calculation of whether the REIT failed to meet the REIT gross income tests of sections 856(c)(2) and (c)(3). Specifically, section 856(c)(5)(G) income should be excluded from the calculation in Line 5 of Part III.

3) Instructions to Form 1120-REIT Should Clarify How the Passive Loss Limitations of Section 469 and At Risk Limitations of Section 465 Apply to a REIT. The instructions to Form 1120-REIT provide 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."

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 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

[1] All section references herein are to the Internal Revenue Code of 1986, as amended (the Code), or to the Treasury Regulations issued under the Code.

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. Accordingly, 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).

Thank you for the opportunity to submit these comments.

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,

Dara F. Bernstein
Senior Tax Counsel

cc: Helen Hubbard, Esq.
David Silber, Esq.
Jonathan Silver, Esq.
Julanne Allen, Esq.