NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®

June 10, 2010

VIA E-MAIL [Notice.Comments@irscounsel.treas.gov]

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2010-43)
Room 5203
1111 Constitution Avenue, N.W.
Washington, D.C. 20024

Re: Notice 2010-43: 2010-2011 Guidance Priority List Recommendations

Dear Sir or Madam:

The National Association of Real Estate Investment Trusts® (NAREIT) appreciates the opportunity, pursuant to Notice 2010-43, 2010-22 I.R.B. 716, to offer our suggestions regarding regulatory guidance to be placed on the 2010-11 Guidance Priority List. NAREIT is the representative voice for U.S. real estate investment trusts (REITs) and publicly traded real estate companies worldwide. 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.

We request that the Department of the Treasury and the Internal Revenue Service include in their 2010-11 Guidance Priority List the following five issues, listed in order of priority, with the first two items having the greatest priority:

1) clarifying certain regulatory provisions regarding the consequences to REITs to certain "distressed" debt, as discussed more fully in a letter dated August 12, 2009 from NAREIT to then-Deputy Assistant Treasury Secretary Mundaca and Commissioner Shulman;

2) allowing a safe harbor under which non-substantial mistakes and inadvertent errors in computing and making distributions, including potential rounding errors, are disregarded so that those distributions from a REIT are not considered as preferential dividends, consistent with an item on the 2007-2008 and 2008-2009 Priority Guidance Plans "addressing the correction of minor errors by RICs [regulated investment companies] and REITs;"

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3) clarifying that a REIT's investment in the shares of a money market fund constitutes an investment in a "cash item" for purposes of section 856(c)(4)(A), [1] consistent with an item in the 2009-10 Priority Guidance Plan and in accordance with the recommendations in an April 22, 2009 letter from the American Bar Association Section of Taxation (ABA Tax Section);

4) revising the regulations under section 337(d) concerning "built in gains" so that these regulations do not apply to exchanges of property from a C corporation to a REIT under section 1031 nor to transfers of property to a REIT from a corporation exempt from tax under section 501(a), consistent with an item in the 2008-09 and 2009-10 Priority Guidance Plans, and in accordance with recommendations in a May 1, 2008 submission by the ABA Tax Section; and,

5) interpreting and clarifying provisions of the REIT Investment Diversification and Empowerment Act of 2007 (RIDEA), which was included in the Housing and Economic Recovery Act of 2008 (2008 Act), consistent with an item included in the 2008-09 Priority Guidance Plan.

The reasons for the priority given to the above issues are as follows. First, because of the difficult economic climate, guidance regarding the consequences of distressed debt would help ensure that REITs can work out existing mortgage loans and participate in the market for distressed mortgage loans without jeopardizing their qualification as REITs for federal income tax purposes. Second, the issue regarding inadvertent errors in computing required REIT distributions had been on the Priority Guidance Plan for a number of years and continues to be important to the REIT industry, particularly during the current economic crisis. The other three issues would permit REITs to carry on their business with more certainty and consistent with Congressional intent.

DISCUSSION

I. <u>Distressed Debt</u>

As discussed more fully in the August 12, 2009 NAREIT letter, NAREIT requests guidance that would specifically provide that:

1. the "loan value" of the real property under Treas. Reg. Section 1.856-5(c) securing a mortgage loan held by a REIT is not re-tested upon a deemed exchange under Treas. Reg. Section 1.1001-3, so long as the "significant modification" occurs at a time when the mortgage loan is in default or default is reasonably foreseeable; and,

2. the "amount of the loan" under Treas. Reg. Section 1.856-5(c) for a mortgage loan acquired by a REIT with market discount is the REIT's highest adjusted tax basis during the year.

[1] For purposes of this letter, "section" refers to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

NAREIT has requested this guidance in order to clarify the treatment of distressed loans and to eliminate uncertainties that are particularly problematic for publicly traded REITs. Given the country's current economic crisis, issuance of this guidance would be particularly timely.

II. Preferential Dividends

There are situations in which a REIT inadvertently, through a "foot fault" such as a rounding error or similar situation, arguably could be viewed as having distributed a non-deductible, preferential dividend. Because these errors truly have no substantive meaning, we again respectfully recommend that the IRS issue guidance providing safe harbors as to these types of situations that will not be treated as preferential dividends, consistent with an item on the 2007-08 and 2008-09 Priority Guidance Plans addressing the "correction of minor errors by RICs and REITs."

Over the past few years, NAREIT and the trade association for mutual funds, the Investment Company Institute, have had a continuing dialogue with personnel from the Treasury Department, the IRS' Financial Institutions & Products group, and the IRS' Large and Mid-Size Businesses division regarding a mutually acceptable resolution to this difficult issue. To that end, in March 2007, we submitted a draft revenue procedure to the IRS. We are re-attaching that draft revenue procedure for your information. This issue remains of paramount importance, and we are hopeful that the IRS and Treasury Department will once again place it on the Guidance Priority List for 2010-2011 and issue guidance in this area in the next year.

III. Money Market Funds as "Cash Items" Under Section 856(c)(4)(A)

Section 856(c)(4)(A) requires that at the close of each calendar quarter of the taxable year at least 75% of the value of a REIT's "total assets" consist of real estate assets; government securities; and cash and cash items (the 75% asset test). On April 22, 2009, the ABA Tax Section submitted comments to the Internal Revenue Service requesting that the Treasury Department and the Service promptly issue guidance clarifying that a REIT's investment in the shares of a money market mutual fund (money market fund) constitutes an investment in a "cash item" for purposes of section 856(c)(4)(A).

As the ABA Tax Section noted:

> [Money market funds] play a pivotal role in the day-to-day operations of many companies, including [REITs], when cash must be readily available to meet the needs of their business. Money market funds are an attractive alternative to interest-bearing checking accounts due to the convenience they provide, their competitive returns, and their regulatory safeguards that are intended to provide liquidity and minimal risk to principal. In light of these features common to money market funds, industry practice for financial personnel and the accounting rules such personnel rely upon generally treat money market funds as "cash items."

NAREIT agrees with the ABA Tax Section's recommendation, especially since the Administration last year took extraordinary steps to assure the stability of money market funds. An item relating to this issue was included in the 2009-10 Priority Guidance Plan.

IV. <u>Revising Final Regulations Under § 337(d) Relating to Conversion Transactions Involving Tax-Exempt Entities</u>

NAREIT reiterates its request for a revision to the regulations under § 337(d) relating to conversions of entities from, and transfers of assets by, C corporations to REITs or regulated investment companies (RICs), in accordance with the May 1, 2008 submission by the ABA Tax Section. An item concerning these issues is contained in the 2008-09 and 2009-10 Guidance Priority Lists.

The regulations under § 337(d) implement Congress' directive as part of the repeal of the *General Utilities* doctrine in the Tax Reform Act of 1986 (the 1986 Act) to prescribe such regulations as may be necessary or appropriate to carry out the purposes of the amendments effected by the 1986 Act, including:

> …regulations to ensure that such purposes may not be circumvented through the use of … a regulated investment company, real estate investment trust, or tax exempt entity…

Section 337(d).

Prior to its repeal, the *General Utilities* doctrine allowed certain transfers of appreciated property to avoid corporate level tax. The 1986 Act eliminated those rules, effectively preventing the avoidance of corporate-level tax on the disposition of appreciated property.

We support the suggestions made in those comments, and respectfully request that the IRS and Treasury Department revise the regulations under § 337(d) relating to conversions of entities from, and transfers of assets by, C corporations to REITs or RICs, in accordance with those comments.

The ABA Tax Section comments address two specific issues:

First, the ABA Tax Section points out that the § 337(d) regulations technically apply to transfers from a C corporation to a REIT or RIC in an "exchanged basis" transaction and indicates that this treatment is inappropriate. "Exchanged basis" transactions include § 1031 like-kind exchange transactions. C corporations often transfer real property in like-kind exchange transactions when a REIT is the acquirer. These transactions are commonplace, non-abusive, and do not implicate any of the concerns that are properly addressed by the regulations.

Second, the ABA Tax Section states that the § 337(d) regulations improperly treat tax-exempt corporations as "C corporations" for purposes of the regulations. It follows from this treatment that a transfer of assets from a tax-exempt corporation to a REIT or RIC can result in the imposition of a C corporation level tax with respect to the property (under § 1374 principles if the property is sold by the REIT or RIC within ten years). As the ABA Tax Section points out, this treatment also applies in connection with a transfer of assets from a real estate partnership to a REIT when the partnership has partners that are tax-exempt corporations. Such transfers are undertaken all the time, and for the reasons given by the ABA Tax Section, NAREIT believes that the regulations should not be applied in these situations.

V. Post-RIDEA Guidance

As noted above, the 2008 Act contains several provisions the genesis of which was H.R. 1147 and S. 2002, RIDEA. NAREIT thanks the Treasury Department and IRS for the issuance of guidance thus far in response to both NAREIT's letter of August 13, 2008 requesting certain guidance under 2008 Act and an item contained in the 2008-09 Priority Guidance Plan concerning guidance for REITs under the 2008 Act. NAREIT reiterates its request for guidance relating to the following issues as further described in the August 13, 2008, letter and the follow up letter of Feb. 23, 2009:

1) confirming that dividend-like income such as Subpart F income either qualifies as "good income" under the REIT gross income tests or is excluded from the computation of such tests;

2) delineating how the modified REIT hedging rule in amended section 856(c)(5)(G)(ii) can apply to foreign currency risk management transactions that are not covered by the definition of a "hedging transaction" under section 1221(b)(2)(A), and

3) clarifying that section 856(c)(5)(G)(i) applies to hedging transactions to which the curative provisions of Treas. Reg. § 1.1221-2(g)(2)(ii) (failure to identify a hedging transaction due to inadvertent error) apply.

Furthermore, NAREIT requests that the Treasury Department and IRS issue guidance regarding the treatment of foreign currency gains for qualified business units (QBUs) of a REIT that: a) use a functional currency other than the U.S. dollar; b) but may not meet the quarterly REIT asset tests or the 75% REIT gross income test for a taxable year; and, c) otherwise could apply the principles of the proposed regulations under § 987 issued September 7, 2006 to determine whether that § 987 gain is derived from income that is described in § 856(c)(2) or § 856(c)(3), pursuant to Notice 2007-42, 2007-21 I.R.B. 1288.

Such guidance would be consistent with the legislative history to the 2008 Act, in which the Joint Committee on Taxation noted that that the 2008 Act's approach of excluding "qualified" foreign currency gains from the REIT gross income tests "supersede[s] Notice 2007-42 in the case of remittances from a QBU that uses a functional currency other than the dollar."[2] So long as the QBU meets the quarterly assets tests and the 75% income test for a taxable year, the new provisions exclude from the REIT income tests §987 gain on a remittance from the QBU to the

[2] Joint Committee on Taxation, *Technical Explanation of Division C of H.R. 3221, the "Housing Assistance Tax Act of 2008,"* (JCX-63-08), July 23, 2008, at 44.

REIT, and no tracing-type rules with respect to such §987 gain are imposed, as would have been the case under Notice 2007-42. The Joint Tax Committee then noted that "[i]t is expected that the Treasury Department will use its regulatory authority[3] to provide appropriate rules with respect to the treatment of §987 currency gain for purposes of the REIT gross income tests if a QBU does not meet the requirements of the provision."[4]

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All of the suggested projects above would fulfill the goals and objectives set forth in Notice 2010-43. First, resolution of these issues would resolve significant issues relevant to the more than 1,000 entities that have elected REIT status and the tens of thousands of taxpayers who invest in REITs.

Second, these projects would promote sound tax administration. Specifically, in the context of how to manage distressed debt, the requested guidance could relieve uncertainties that are potentially paralyzing and avoid the need of REITs to foreclose on a loan because of this tax uncertainty. Furthermore, the preferential dividend project would allow REITs and their taxpayers certainty that minor differences in dividend payments will not result in disproportionate penalties, while simultaneously relieving the Government with having to devote unwarranted resources in negotiating closing agreements to resolve these types of issues.

Third, these projects could clearly be drafted in a manner that would enable taxpayers to easily understand and apply the guidance. We have been working with, and would be pleased to continue to work with, with the IRS in discussing both how the distressed debt guidance and how the preferential dividend guidance could be drafted so as to apply to the most common types of non-consequential "foot faults."

Fourth, we believe that guidance under these projects easily could be administered on a uniform basis. Published guidance on what constitutes preferential dividends is far superior to having to negotiate closing agreements on a case-by-case basis.

Finally, guidance on the requested projects would reduce controversy and lessen the burden on taxpayers or the Service for the reasons stated above.

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[3] Section 989(c) grants the IRS authority to issue regulations under the foreign currency provisions of §§985-989.
[4] Joint Committee on Taxation, *Technical Explanation of Division C of H.R. 3221, the "Housing Assistance Tax Act of 2008,"* (JCX-63-08), July 23, 2008, at 45.

Feel free to contact me or Dara Bernstein, NAREIT's Senior Tax Counsel, if you would like to discuss these issues in greater detail.

Respectfully submitted,

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Enclosure

Rev. Proc. 2007-____

1. Purpose

This revenue procedure sets forth a safe harbor under which dividends from a real estate investment trust ("REIT") will not be construed as preferential dividends under § 562(c) of the Internal Revenue Code and will be deemed dividends for purposes of computing the dividends paid deduction.

2. Background

.01. Under § 857(a)(1), the REIT's deduction for dividends paid generally must equal or exceed: (A) the sum of (i) 90 percent of the REIT taxable income for the taxable year (determined without regard to the deduction for dividends paid (as defined in § 561) and by excluding net capital gain); and (ii) 90 percent of the excess of the net income from foreclosure property over the tax imposed on such income; minus (B) any excess noncash income.

.02. A distribution by a REIT is not considered as a "dividend" for purposes of computing the dividends paid deduction if it is treated as a "preferential dividend" under § 562(c). The failure of a REIT distribution to be considered as a "dividend" for purposes of computing the dividends paid deduction could cause the REIT to lose its status as such.

.03. Under § 562(c), a REIT dividend distribution is treated as a preferential distribution unless:

(1) the distribution is pro rata,

(2) the distribution is made with no preference to any share of stock as compared with other shares of the same class, and

(3) the distribution is made with no preference to one class of stock as compared with another class except to the extent that the former is entitled (without reference to waivers of their rights by shareholders) to such preference.

.04. The legislative history of the preferential dividend rule indicates that such rule was meant to prevent income shifting among shareholders of a personal holding company (as defined in § 542), which, by definition under § 542(a)(2), is closely held. *See* H.R. Rep. No. 1860, 75th Cong., 3d Sess. 23 (1938) ("No dividends-paid credit should be allowed in the case of a distribution not in conformity with the rights of shareholders generally inherent in their stockholdings, whether the preferential distribution reflects an act of injustice to shareholders or a device acquiesced in by shareholders, rigged with a view to tax avoidance. . . .The committee believes that no distribution which treats shareholders with substantial impartiality and in a manner consistent with their rights under their stock-holding interests, should be regarded as preferential by reason of minor difference in valuations of property distributed.") In contrast, a REIT, by definition under §§ 856(a)(6) and (h), cannot be closely held.

.05. Under § 1.562-2(a) of the Income Tax Regulations, specific illustrations of preferential dividends are set forth as follows:

(1) A corporation will not be entitled to a deduction for dividends paid with respect to any distribution upon a class of stock if there is distributed to any shareholder of such class (in proportion to the number of shares held by him) more or less than his pro rata part of the distribution as compared with the distribution made to any other shareholder of the same class.

(2) A corporation will not be entitled to a deduction for dividends paid in the case of any distribution upon a class of stock if there is distributed upon such class of stock more or less than the amount to which it is entitled as compared with any other class of stock.

.06. As a general matter, § 1.562-2(a) of the Income Tax Regulations provides that a preference exists if any rights to preference inherent in any class of stock are violated. The three Examples set forth in § 1.562-2(b) of the Income Tax Regulations reflect the focus of the preferential dividend concept on discrepancies in the treatment of different holders of the same class or financially advantaging holders of one class of stock to the detriment of holders of another class of stock. Thus, de minimis and inadvertent errors should not constitute preferential dividends. *See* Hanco Distributing, Inc. v. Commissioner, 32 AFTR 2d 73-5485 (D. Utah 1973).

.07. When a preferential dividend is found to exist, the entire amount of the REIT's dividend distribution that includes the preferential dividend is not entitled to the dividends paid deduction.

3. Scope

This revenue procedure applies to the situations listed below that are recognized as not constituting tax avoidance or other circumstances that the Congress intended to be considered as preferential dividends.

The following examples are illustrative of situations that the Service will not treat as involving preferential dividends as to REITs. The Service will supplement this list as it becomes aware of similar circumstances through private ruling letter requests, fact patterns that are the subject of closing agreements and other sources of information. The Service recognizes that the examples provided in this revenue procedure are not exhaustive. No inference is intended that REIT dividends that are not specifically described in this revenue procedure constitute preferential dividends.

.01. The REIT's charter requires that dividends on preferred stock be declared or declared and paid before any dividends are paid on common stock. However, the board of directors of the REIT declares and pays dividends on the preferred and common stock simultaneously. Alternatively, the REIT's charter provides that dividends with respect to a certain class of shares be paid on a specific date, and either: a) the dividend checks with respect to that class of shares are not all mailed on the correct day, but within several days of one another; or, b) the dividend checks with respect to that class of shares are not all mailed on the correct day, but as soon as the REIT realizes the error, the relevant dividend checks are mailed

(1) In this both situations, no share of stock and no class of stock has received more or less than the amount to which it is entitled as compared with any other share in the same class or any other class of stock. Moreover, the full amount of dividends distributable on the preferred shares, as well as on the common shares, has been distributed, although not in accord with the charter provisions.

(2) In both situations, the only question is timing, and the value of any timing differential is considered to be de minimis.

(3) Thus, there is no preferential dividend paid by the REIT with respect to this dividend.

.02. The REIT's charter provides that dividends on all classes of preferred stock shall be paid semi-annually and before any dividends are paid on the common stock. However, the board of directors adopts a practice of making distributions to the holders of all classes of preferred stock annually and to the holders of all common stock on a monthly basis.

(1) In this situation, no share of stock and no class of stock has received more or less than the amount to which it is entitled as compared with any other share in the same class or any other class of stock. Moreover, the full amount of dividends distributable on the preferred shares, as well as on the common shares, has been distributed, although not in strict accord with the charter provisions.

(2) In this situation, the only question is timing, and the value of any timing differential is considered to be de minimis.

(3) Thus, there is no preferential dividend paid by the REIT with respect to this dividend.

.03. The records of the REIT contain errors regarding share transfers or the identity of its shareholders, either because of internal record-keeping discrepancies or because the shareholders (or their agents or representatives) failed to furnish correct or updated information to the REIT on a timely basis. The REIT thus erroneously pays dividends to some persons who are not shareholders and fails to pay dividends to some other persons who are shareholders. As and when such errors are discovered, they are rectified to the extent practicable.

(1) In this situation, but for such errors no share of stock has received more or less than the amount to which it is entitled as compared with any other share in the same class. Moreover, but for such errors no class of stock has received more or less than the amount to which it is entitled as compared with any other share in any other class of stock. Furthermore, but for such errors the full amount of dividends distributable on the shares has been distributed.

(2) In this situation, such errors are, as and when discovered, rectified to the extent practicable.

(3) Thus, there is no preferential dividend paid by the REIT with respect to these dividends or with respect to any payment made to rectify the errors.

.04. The records of the REIT contain errors regarding the number of shares of one or more classes of stock that are outstanding because of internal record-keeping discrepancies. For example, this situation could occur if REIT employees vest in restricted stock on a certain date, but the REIT's transfer agent is unable to update its records in time to make the correct dividend payment. The REIT thus erroneously fails to pay dividends to some persons who are shareholders. As and when such errors are discovered, they are rectified to the extent practicable.

(1) In this situation, but for such errors no share of stock and no class of stock has received more or less than the amount to which it is entitled as compared with any other share in the same class or any other class of stock. Moreover, but for such errors the full amount of dividends distributable on the shares has been distributed.

(2) In this situation, such errors are, as and when discovered, rectified to the extent practicable.

(3) Thus, there is no preferential dividend paid by the REIT with respect to these dividends or with respect to any payments made to rectify the errors.

.05. The REIT has made all distributions with respect to its classes of stock in accordance with the terms governing the same. When the distributions are made with respect to the shares of stock, rather than any dividend ending up with one or more shareholders receiving a fraction of a cent, there was rounding either up or down to a whole cent.

(1) In this situation, some holders of stock may receive a dividend differential, due to such rounding.

(2) The rounding of a dividend to a whole cent is de minimis.

(3) Thus, there is no preferential dividend paid by the REIT with respect to these dividends.

.06 The REIT's charter provides for classes A, B, and C of preferred stock, as well as for common stock. Dividends on the preferred stock are to be paid before dividends are paid on the common stock. The REIT erroneously fails to pay any dividends on class C preferred stock, although it pays dividends on the other classes of preferred and on the common. The total amount of dividends paid by the REIT is 95% or more of the amount which would have been paid had the REIT paid dividends on the common and on all classes of preferred. As soon as the error is discovered, the REIT pays the amounts that it should have paid on the class C preferred stock, plus an amount in the nature of interest to compensate the Class C preferred stockholders for the delay in paying their dividend.

(1) In this situation, the amount of the errors was de minimis, and the errors are, as and when discovered, rectified. Moreover, the additional amount in the nature of interest payable as compensation for delay in payment of the dividend is intended to treat all stockholders with substantial impartiality.

(2) Thus, there is no preferential dividend paid by the REIT with respect to the dividends which were paid on the class A and class B preferred stock and the common or with respect to the payments made to rectify the error with respect to the class C preferred stock.

.07. The REIT acquires shares of its stock by purchasing them on the established securities exchange on which its stock is listed. Depending on the circumstances of the sellers of these shares, the purchases by the REIT will be treated either as dividends under § 301 or as distributions in redemption under § 302. In both cases, under § 562(b) a portion of the amounts paid by the REIT for the shares would constitute dividends for purposes of computing the dividends paid deduction.

(1) In this situation, only the shareholders who sold their shares to the REIT will be considered to have received dividends from the REIT.

(2) All purchases by the REIT were made on the exchange on which the stock is listed at the market price at the moment acquired.

(3) All shareholders of the REIT had an equal opportunity to sell their shares to the REIT at fair market value. Accordingly, all shareholders were treated with substantial impartiality.

(4) Thus, none of such purchases is considered to result in any preferential dividend.

.08. A REIT, the shares or beneficial interests of which are regularly traded on an established securities exchange ("Exchange"), creates a dividend reinvestment plan (DRIP) for its shareholders and a "cash option purchase plan" (COPP) for both shareholders and non-shareholders (together, the DRIP and the COPP constitute the "Plan"). Under the DRIP, which is available to all existing REIT shareholders of record, shareholders can elect to have the cash dividends that would otherwise be distributed to them automatically reinvested in shares of REIT common stock newly issued by the REIT. Both existing REIT shareholders of record and non-shareholders may participate in the COPP. The purchase date for shares acquired through the DRIP is the date the dividends are paid by REIT and the purchase date for the shares acquired through the COPP is the last business day of the month ("Purchase Date").

REIT regularly pays dividends quarterly. The purchase price of shares of REIT stock acquired under the Plan is determined by an objective multi-day pricing formula that applies equally to participants in both the DRIP and COPP. Under the formula, the purchase price is calculated by multiplying the average daily high and low trading prices (the "Average Price") of REIT's stock reported by the Exchange for a period from I to J business days preceding the applicable Purchase Date ("Pricing Period") less a discount of up to 5 percent that REIT's board of directors has determined to be reasonable. REIT's board of directors can adjust the discount applied to the Average Price in its sole discretion, provided that it cannot alter the discount for a particular Pricing Period after that period has begun. If a day's average high and low trading price of REIT's shares falls below a threshold price on any day of the Pricing Period, that day is ignored for purposes of the multi-day pricing formula. The multi-day pricing period is intended to minimize unwanted volatility in the purchase price of REIT's shares that might otherwise arise if a fixed-date pricing mechanism were used. Because the pricing formula is based primarily upon an average price that is determined over the multi-day Pricing Period, it is possible that on any given Purchase Date the purchase price of common shares under the Plan may be less than the average high and low trading prices of REIT's shares on such date by more than 5 percent. Conversely, on any given Purchase Date the purchase price of common shares under the Plan may exceed the average high and low trading prices of REIT's shares on such date.

DRIP participants do not have to participate in the COPP, and COPP participants do not have to participate in the DRIP. Participants in either or both portions of the Plan may terminate their participation at any time. Participants are aware of the fixed percentage discount determined by REIT before they agree to participate in the Plan. REIT pays all administrative costs of the Plan, including printing and distributing the Plan prospectus and reports, legal fees incurred in connection with the Plan's preparation, registration fees and transfer agency fees. Administrative costs do not include brokerage fees on common stock purchases because all purchases under the Plan are made directly from REIT. The Plan is designed to enable REIT to raise capital in a cost-efficient manner on a regular, recurrent basis directly from participants in the Plan. By issuing shares through the Plan, REIT is able to avoid investment banking, brokerage, distribution and other costs typically associated with a traditional underwritten equity offering. The Plan also diversifies REIT's shareholder base by enabling retail investors to invest directly alongside REIT's large, institutional investors on a cost-efficient basis. Further, REIT believes that raising capital through the Plan is advantageous as compared to a traditional underwritten equity offering because traditional underwritten equity offerings may be perceived by the market as an indication of REIT's belief that its shares are overvalued, whereas DRIPs and COPPs, because of their continuing, regular nature, minimize any such inference.

(1) In this situation, REIT is treating its shareholders with substantial impartiality, particularly in light of the fact that REIT is willing to sell its shares using the same formula price to non-shareholders under the COPP. In addition, because the pricing formula used to determine the purchase price of shares of REIT stock acquired through the Plan relies on a multi-day average, it is not possible to determine with certainty whether the purchase price will in fact be less than, equal to or greater than the price of the shares on the Exchange on the Purchase Date. If the pricing formula produces a discount of greater than 5 percent of the trading price of REIT's shares on the Purchase Date, such discount will result from market conditions beyond the control of REIT and the Plan participants, and will not be bargained for or intended by such parties. Any discount to participants in the Plan will not be treated as a preferential dividend, but will be a cost REIT would have incurred in issuing its stock under the Plan, and is intended to result in relatively minor differences in the amounts received by shareholders of the same class of REIT shares. The Plan treats all shareholders with impartiality by giving all shareholders an equal opportunity to participate, and any discount provided by the Plan is intended to result in relatively minor differences in the amounts received by shareholders of the same class of REIT shares.

(2) REIT's payment of the administrative costs of the Plan will not constitute a distribution of property to which section 301 applies. The amount of any discount shall not be considered an administrative cost or result in any preferential dividend.

4. Procedure

Dividend distributions made by a REIT that satisfy the safe harbor of Section 3 of this revenue procedure will not be treated as a preferential dividend for purposes of § 562(c).