Nareit

Real estate
working for you®

May 28, 2021

Via www.regulations.gov (IRS-2021-0004)

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-28) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Recommendations for 2021-22 IRS Priority Guidance Plan/Notice 2021-28

Dear Sir or Madam:

In response to Notice 2021-28, Nareit appreciates the opportunity to offer our suggestions regarding regulatory guidance to be placed on the 2021-22 Priority Guidance Plan (2021-22 PGP).

Nareit[1] 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 requests that the Treasury Department and IRS exercise their regulatory authority relating to the treatment of "related party rent": a) as requested in our Feb. 27, 2020 letter, to prevent otherwise qualifying rent payments from becoming nonqualifying income under the "related party" rent rules, solely due to the "double downward" attribution rules in section 318;[2] and, b) in the context of section 856(d)(8), which allows a REIT to treat rent from a "related party" taxable REIT subsidiary (TRS) as qualifying rental income so long as the TRS rents no more than10% of a property's "leased space" to the TRS, to define this 10% space limitation as equal to amount of comparable space available for lease at a property.

[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, more than 145 million Americans live in households that benefit from ownership of REITs through stocks, 401(k) plans, pension plans, and other investment funds.

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

1875 I Street, NW, Ste 500
Washington, D.C. 20006-5413
202-739-9400

reit.com

Second, Nareit requests that the IRS and Treasury Department extend for one year the provisions of Rev. Proc 2020-19, allowing REITs to distribute elective stock dividends comprised of up to 90% stock (and 10% cash) with respect to 2021.

Third, Nareit recommends that the IRS and Treasury Department codify the conclusions of several private letter rulings that section 562(c) regarding preferential dividends not apply to subsidiaries of publicly offered REITs if the financial data of such subsidiaries is required to be included in the parent entities' Securities and Exchange Commission (SEC) 1934 Act filings.

Fourth, 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. Nareit submitted written requests for withdrawal of Notice 2007-55 in 2020; 2019, 2018, 2017, 2012, 2011, and 2009.

Fifth, Nareit reiterates its recommendations in its July 20, 2020 letter to finalize 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 2020-2021 Priority Guidance Plan ("Revising regulations under §1.337(d)-7 regarding the treatment of certain foreign corporations").

"Related Party Rent" Clarifications

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

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, Nareit again 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.

Clarify that 10% of Leased Space Exception for Property Leased to a TRS Means Space Available for Lease

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 are not considered qualified rents under the REIT income test. A REIT can rent up to 10% of a property's "leased space" to its TRS with the rents still treated as good income even if it owns more than 10% of the REIT. Problems arose during the pandemic when tenants went out of business and the denominator of a property's leased space consequently was reduced.

Congress did not contemplate this outcome caused by factors out of the REIT's control. This result could be avoided if the IRS issues guidance that to interpret this 10% space limitation based on the amount of comparable space available for lease at a property. For example, if a REIT office building has 100,000 square feet that could be leased, the REIT had leased 9,000 square feet to the TRS within the 10% limit, but later other tenants did not renew or filed for bankruptcy so that only 55,000 square feet of a building was actually leased, the TRS' lease of 9,000 square feet would continue to meet the 10% limit.

Accordingly, Nareit requests that the Treasury Department and IRS issue guidance clarifying the definition of "leased space" accordingly.

Extend Elective Stock Dividend Guidance in Revenue Procedure 2020-19 for Distributions with respect to 2021

As a result of the COVID-19 pandemic, Nareit requested in a letter dated March 18, 2020 that the IRS permit a REIT to reduce the cash component of an elective stock dividend from prior guidance's requirement of 20% to 10% as a result of the COVID-19 pandemic. The IRS did so in in May 2020 by issuing Rev. Proc 2020-19 with respect to distributions declared by a "Publicly Offered REIT" or "Publicly Offered RIC" on or after April 1, 2020, and on or before December 31, 2020, noting that:

> [I]n recognition of the need for enhanced liquidity during the current period of economic disruption, this revenue procedure modifies the safe harbor provided in Rev. Proc. 2017-45, 2017-35 I.R.B. 216, by temporarily reducing the minimum required aggregate amount of cash that distributee shareholders may receive to not less than 10 percent of the total distribution in order for § 301 of the Code, by reason of § 305(b) of the Code, to apply to such distribution.

Because many REITs, particularly those with closed properties and/or whose tenants have deferred rent, are continuing to have liquidity concerns, Nareit requests that the IRS extend the guidance of Rev. Proc. 2020-19 for distributions made with respect to the 2021 year.

Confirm Preferential Dividend Rules Do Not Apply to Subsidiaries of Publicly Offered REITs

In 2015 as part of the PATH Act, Congress exempted publicly offered REITs under section 562(c)(2) from the antiquated preferential dividend rules of section 562(c)(1). The IRS has issued two private letter rulings[3] appropriately concluding that the preferential dividend rules do not apply to REIT subsidiaries that are consolidated for financial statement purposes with publicly offered REITs. Rather than requiring REITs to seek similar PLRs, Nareit requests that the Department of the Treasury and the IRS issue public guidance confirming this interpretation.

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 in its 2020; 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.[4]

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 July 20, 2020; 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, which continues to be included in the IRS' most recently issued Priority Guidance Plan.

All of the suggested recommendations above would fulfill the goals and objectives set forth in Notice 2021-28.

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.

---

[3] PLRs 202051005 and 201924003.

[4] 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).

Nareit
Real estate
working for you®

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 promotes sound tax administration.

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

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

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 Executive Vice President and General Counsel, at (202) 739-9422, or cbarre@nareit.com; or Dara Bernstein, Nareit Senior Vice President and Tax Counsel, at (202) 739-9446 or dbernstein@nareit.com.

Respectfully submitted,

Tony M. Edwards
Senior Executive Vice President

Cc:

The Honorable Mark J. Mazur	Kevin C. Nichols, Esq.
The Honorable William M. Paul	Michael S. Novey, Esq.
Peter H. Blessing, Esq.	Holly Porter, Esq.
Colin Campbell, Esq.	Krishna P, Vallabhaneni, Esq.
Michael Y. Chin, Esq.	Jeffrey Van Hove, Esq.
Grace E. Cho, Esq.	Robert H. Wellen, Esq.
Andrea M. Hoffenson, Esq.	Tom West, Esq.
Helen M. Hubbard, Esq.	Brett York, Esq.