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May 11, 2023

VIA ELECTRONIC SUBMISSION: <https://www.regulations.gov>

Mr. Frank Whelan
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-1785-P
P.O. Box 8013
Baltimore, MD 21244-8013

Re: Medicare Program; Proposed Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2024 Rates; Quality Programs and Medicare Promoting Interoperability Program Requirements for Eligible Hospitals and Critical Access Hospitals; Rural Emergency Hospital and Physician-Owned Hospital Requirements; and Provider and Supplier Disclosure of Ownership (File Code CMS-1785-P)

Dear Mr. Whelan:

Nareit appreciates the opportunity to offer comments on the proposed rule related to the disclosure of ownership requirements and additional disclosable parties information for all providers and suppliers that complete the Form CMS 855A (the Proposed Rule).¹ Nareit is the worldwide representative voice for real estate investment trusts (REITs) and the millions of Americans who invest in them. An estimated 150 million Americans live in households that own REITs through stocks, 401(k) plans, pension plans and other investment funds.²

Nareit supports the Centers for Medicare and Medicaid Services (CMS) goal of transparency and disclosure. However, when providers and suppliers complete the Form CMS-855A enrollment application, the proposed definition of a REIT set forth in the Proposed Rule, taken from a separate proposed rule issued in February³, would define a REIT as “a publicly-traded or non-publicly traded company that owns part or all of the buildings or real estate in or on which the provider operates.”

As we stated in our attached submission dated April 14, 2023,⁴ this proposed definition is inconsistent with the longstanding definition of a REIT under the U.S. Code and Treasury Department Regulations.

¹ 88 Fed. Reg. 26658 at 27190 (May 1, 2023).

² See, Nareit, 150 Million Americans Own REIT Stocks available at <https://www.reit.com/data-research/research/nareit-research/150-million-americans-own-reit-stocks>.

³ 88 Fed. Reg. 9820 (Feb. 15, 2023).

⁴ <https://www.regulations.gov/comment/CMS-2023-0031-0060> (attached).

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As detailed in greater detail in Nareit's earlier submission, the plain meaning of REIT is also consistently applied by the Securities and Exchange Commission, the Federal Trade Commission, the Commodity Futures Trading Commission, the Federal Reserve, and the North American Industry Classification System. We note that other commentators agreed that the tax code definition of REIT should be used for all CMS reporting purposes.⁵

We suggest that CMS conform its definition of a REIT to this longstanding term of art created by Congress in 1960 and define a REIT as an entity that qualifies as a REIT under the U.S. Code⁶ and annually files IRS Form 1120-REIT for tax purposes. In addition, we request that CMS adopt an existing statutory definition that distinguishes between publicly offered REITs and those REITs that are not publicly offered. The legal framework governing U.S. REITs has worked for over 60 years to maintain Congress' original purpose for creating REITs, and we request that CMS rely on that framework to ensure the clarity that will support its reporting objectives with the Proposed Rule.

Nareit appreciates the opportunity to participate in this rulemaking and would be pleased to discuss our comments or any questions CMS or its staff may have. Please do not hesitate to contact Steve Wechsler at swechsler@nareit.com or (202) 739-9406 or Nareit's executive vice president and general counsel, Catherine Barré, at cbarre@nareit.com or (202) 739-9422 if you would like to discuss these comments or related issues in greater detail.

Respectfully submitted,

Steven A. Wechsler
President & CEO

Attachment A

⁵ <https://www.regulations.gov/comment/CMS-2023-0031-0055> (The National Consumer Voice for Quality Long-Term Care); <https://www.regulations.gov/comment/CMS-2023-0031-0064> (the American Investment Council); <https://www.regulations.gov/comment/CMS-2023-0031-0042> (SEIU); https://downloads.regulations.gov/CMS-2023-0031-0054/attachment_1.docx (Center for Medicare Advocacy); <https://www.regulations.gov/comment/CMS-2023-0031-0063> (AFL-CIO) (Appendix).

⁶ 26 U.S.C. § 856(a).



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April 14, 2023

Attachment A

VIA ELECTRONIC SUBMISSION: <https://www.regulations.gov>

Frank Whelan
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-6084-P
P.O. Box 8010
Baltimore, MD 21244-8010

Re: CMA-6084-P: Medicare and Medicaid Programs; Disclosure of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities

Dear Mr. Whelan:

Nareit appreciates the opportunity to offer comments on the proposed rule related to the disclosure of ownership requirements and additional disclosure parties information for skilled nursing facilities and nursing facilities (the Proposed Rule).¹ Nareit is the worldwide representative voice for real estate investment trusts (REITs) and the millions of Americans who invest in them. An estimated 150 million Americans live in households that own REITs through stocks, 401(k) plans, pension plans and other investment funds.²

Executive Summary

Nareit supports the Centers for Medicare and Medicaid Services (CMS) goal of transparency and disclosure related to the ownership of skilled nursing facilities and nursing facilities. However, the proposed definition of a REIT set forth in the Proposed Rule is inconsistent with the longstanding definition of a REIT under the U.S. Code and Treasury Department Regulations. The plain meaning of REIT is also consistently applied by the Securities and Exchange Commission, the Federal Trade Commission, the Commodity Futures Trading Commission, the Federal Reserve, and the North American Industry Classification System. We suggest that CMS conform its definition of a REIT to this longstanding term of art created by Congress in 1960 and define a REIT as an entity that qualifies as a REIT under the U.S. Code³ and annually files IRS Form 1120-REIT for tax purposes. In addition, we request that CMS adopt an existing statutory definition that distinguishes between publicly offered REITs

¹ 88 Fed. Reg. 9820 (Feb. 15, 2023).

² See, Nareit, 150 Million Americans Own REIT Stocks available at <https://www.reit.com/data-research/research/nareit-research/150-million-americans-own-reit-stocks>.

³ 26 U.S.C. § 856(a).

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and those REITs that are not publicly offered. As discussed below, the legal framework governing U.S. REITs has worked for over 60 years to maintain Congress' original purpose for creating REITs, and we request that CMS rely on that framework to ensure the clarity that will support its reporting objectives with the Proposed Rule.

REIT Background

REITs provide the opportunity for everyday American investors to participate in owning the real estate that supports our communities and economy. Through the diverse array of properties they own, finance, and lease, REITs help provide the real estate that powers essential community services, revitalizes neighborhoods and builds the infrastructure of tomorrow while creating American jobs and economic activity. REITs of all types collectively own more than \$4.5 trillion in gross assets across the U.S., with public REITs owning over \$3 trillion in assets.⁴

Nareit's members include publicly offered REITs that own and lease a variety of healthcare-related real estate, such as skilled nursing facilities (SNFs), hospitals, senior living facilities, medical office buildings and life science spaces. Public REITs own the structures that house about 11% of U.S. SNFs. Nearly 95% of those REIT-owned properties are operated pursuant to triple net lease arrangements where the REIT is solely a landlord to a skilled nursing operator tenant.

Recent research finds that REITs, on average, invest in properties that house SNFs that have higher registered nurse (RN) staffing hours per resident day (staffing time); that REIT investment is associated with higher licensed practical nurse and certified nursing assistant staffing; and that there is no statistically significant change in RN staffing time following REIT investment.⁵

REIT Legal Framework and Definition

The term "real estate investment trust" means a corporation, trust, or association that satisfies all the specific requirements set forth in Section 856 of Title 26 of the United States Code and files a special tax return, IRS Form 1120-REIT.⁶ A REIT may be organized in several ways (corporation, partnership, LLC, trust), but it also affirmatively elects its specific REIT status on a REIT specific tax return.

⁴ <https://www.reitsacrossamerica.com/united-states>.

⁵ Robert Tyler Braun, Dunc Williams, David G. Stevenson, Lawrence P. Casalino, Hye-young Jung, Rahul Fernandez, and Mark A. Unruh, "The Role of Real Estate Investment Trusts in Staffing US Nursing Homes," *Health Aff (Millwood)*. 2023, VOL. 42, No. 2, 207-216. See also, Nareit, "REIT Investment Increases Staffing Time at Skilled Nursing Facilities," available at <https://www.reit.com/news/blog/market-commentary/reit-investment-increases-staffing-time-skilled-nursing-facilities>.

⁶ 26 U.S.C. § 856(c)(4).

The tax rules set forth in the statute which define and govern REITs are very detailed.⁷ Many of the numerous rules, restrictions and limitations under which REITs are required to operate are designed to ensure that REITs primarily limit their activities to the business of owning, leasing, and financing real estate. To qualify as a REIT and to maintain that status for purposes of U.S. corporate income tax, an entity must distribute at least 90% of its ordinary income each year⁸ and annually satisfy rigorous asset and income tests that require that:

- at least 75% of the value of a REIT's total assets must be represented by real estate assets, cash and cash items and government securities (so-called "qualifying assets");⁹
- no less than 75% of a REIT's income must be derived from such qualifying assets;¹⁰ and
- at least 95% of a REIT's income must be from income from assets that qualify under the 75% income test plus other passive assets.¹¹

In addition, a REIT must have more than 100 shareholders,¹² with no less than five individuals owning more than 50% of its stock.¹³

Proposed Rule Inconsistent with REIT Definition and Would Create Confusion

The CMS Proposed Rule would define a REIT as a "publicly-traded or non-publicly traded company that owns part or all of the buildings or real estate in or on which the provider operates."¹⁴ Under the proposed definition, CMS would likely collect data and information from non-REITs as well as REITs. The broad scope of this definition, in contrast to the precise definition set forth in the U.S. Code, has the potential to sweep in a large number of entities that are not REITs. As noted above, a REIT is a business organization (corporation, partnership, LLC, trust) that complies with the many requirements set forth in the U.S. Code and specifically elects REIT tax status. The use of the term "company" in the Proposed Rule could mean any of the entities otherwise defined in the rule. The definition of a REIT in the Proposed Rule would be inconsistent with the U.S. Code and would result in data collected pursuant to that definition that would likely be overinclusive of the longstanding, commonly accepted term of art, REIT, and would cause confusion for potential users of the data.

⁷ Similar to mutual funds, the tax structure of REITs is designed to impose a single level of tax at the shareholder level. This places the everyday investors who own REITs in relative tax parity with the wealthy private sources of capital that typically invest in real estate through partnerships that bear a single level of tax at the partner level.

⁸ 26 U.S.C. § 857(a).

⁹ 26 U.S.C. § 856(c)(4).

¹⁰ 26 U.S.C. § 856(c)(3).

¹¹ 26 U.S.C. § 856(c)(3).

¹² 26 U.S.C. § 856(a)(5).

¹³ 26 U.S.C. § 856(h).

¹⁴ 88 Fed. Reg. 9820 (Feb. 15, 2023).

Moreover, the definition of REIT, as proposed, could inadvertently co-mingle REIT data with data from companies that are owner-operators of the facilities because the definition includes all companies that own part or all of the buildings or real estate in or on which the provider operates, without regard to whether the owner of the real estate is an owner-operator or a lessor. If CMS seeks to define a category of owners of real estate that are not also the SNF providers, we respectfully suggest that the “additional disclosable” party section of the Proposed Rule, which references an “entity” that “[l]eases or subleases real property to the facility,” is clear and sufficient.¹⁵

We also note that other federal agencies, including the Securities and Exchange Commission,¹⁶ the Federal Trade Commission,¹⁷ the Commodity Futures Trading Commission,¹⁸ the Federal Reserve,¹⁹ and the North American Industry Classification System,²⁰ have used a definition of a REIT that is consistent with the definition in the Code.

In addition, as noted above, REITs are entities that may be organized as corporations, partnerships, LLCs, and trusts, that must also follow certain rules and make a tax election to be taxed as a REIT. So, REITs can be, for example, both a REIT and a corporation or a REIT and a partnership. The REIT tax treatment does not change the entity’s status as a corporation or partnership as it was formed under the applicable state law. Pursuant to section 1124(c)(5)(D) of the Social Security Act and the CMS Proposed Rule, the organizational structure definition varies depending on whether the entity is a corporation, LLC, partnership or trust. A REIT will also be one of these entity types. A REIT is distinctive due to the election it makes to be taxed under the restrictive REIT rules set forth in the code and by filing a REIT-specific tax return to affirm that election annually.

Recommendation on REIT Definition and Reporting Requirement

We recommend CMS use a definition of a REIT that is consistent with the definition of a REIT that Congress has codified rather than create a new definition for the Proposed Rule. Further, if CMS proceeds with this specific requirement for an entity to designate that it is a REIT, it should also adopt the definition of “Publicly Offered REIT” that is also already set out in the U.S. Code²¹ and also require that the entity designate whether or not it is a publicly offered REIT. For example, the current proposed definition could be revised as follows:

¹⁵ See also, 42 U.S.C. § 1320a-3(c)(5)(ii).

¹⁶ <https://www.sec.gov/files/reits.pdf>; <https://www.sec.gov/resources-investors/investor-alerts-bulletins/publicly-traded-reits>.

¹⁷ 61 Fed. Reg. 13666, at 13682-83 (March 28, 1996).

¹⁸ <https://www.cftc.gov/csl/12-13/download>.

¹⁹ <https://www.federalreserve.gov/apps/fof/TableDesc.aspx?t=F.129>

²⁰ <https://www.naics.com/sic-industry-description/?code=6798>.

²¹ 26 U.S.C. § 562(c)(2).



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A REIT is defined as: An entity that has identified itself as a REIT by filing IRS Form 1120-REIT for its last tax return and continues to qualify as such under 26 U.S.C. § 856, or if the REIT has not filed its first tax return, the entity has stated its intention to do so to its owners and effectuates its stated intention.

A Publicly Offered REIT is defined as: A REIT that is required to file annual and periodic reports with the SEC under the Securities and Exchange Act of 1934. See, 26 U.S.C. §562(c).

In addition, CMS should make clear that an entity that has elected to be taxed as a REIT should continue to be categorized for “organizational structure” purposes as would any other applicable entity organized under state law as a corporation, partnership, trust, LLC, etc., in accordance with the Social Security Act’s requirements for the REIT as a corporation, partnership, trust or LLC. The REIT would also be designated as either a Publicly Offered REIT or a REIT that is not publicly offered. This would appropriately identify REITs for the purposes of the Proposed Rule. As noted above, a REIT is distinguished from other types of entities by the election to comply with specific rules under the tax code, not by its organizational structure under state law.

Conclusion

Nareit supports the CMS goal of transparency and disclosure and appreciates the opportunity to comment on this Proposed Rule and, specifically, the REIT definition. We believe that the definition of REIT in the Proposed Rule should be modified to comport with the definition in the U.S. Code and to identify REITs more precisely as either Publicly Offered or not Publicly Offered. This would align CMS with other agencies and would also ensure that the proposed disclosure and transparency rules yield clear information for users.

Nareit appreciates the opportunity to participate in this rulemaking and would be pleased to discuss our comments or any questions CMS or its staff may have. Please do not hesitate to contact Steve Wechsler at swechsler@nareit.com or (202) 739-9406 or Nareit’s executive vice president and general counsel, Catherine Barré, at cbarre@nareit.com or (202) 739-9422 if you would like to discuss these comments or related issues in greater detail.

Respectfully submitted,

Steven A. Wechsler
President & CEO