Nareit
Real estate
working for you

June 7, 2019

Via: www.regulations.gov (IRS-2019-0019)

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2019-30) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2019-30: Request for Comments Regarding Recommendations for Items that Should be Included on the 2019-2020 Priority Guidance Plan

Dear Sir or Madam,

In response to Notice 2019-30, Nareit appreciates the opportunity to offer our suggestions regarding regulatory guidance to be placed on the 2019-20 Priority Guidance Plan (2019-20 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, as noted in our April 9, 2019 joint letter with the Investment Company Institute (ICI), Nareit appreciates the issuance of proposed regulations confirming that the section 199A[2] deduction added to the Internal Revenue Code as part of Pub. L. No. 115-97 (also known as the Tax Cuts and Jobs Act, or TCJA), applies to shareholders invested in REITs through a mutual fund (a regulated investment company or RIC), and encourages the Treasury Department and IRS to finalize these regulations as soon as possible.

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[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 80 million Americans invest in REIT stocks through their 401(k) 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).

Second, Nareit reiterates its recommendations included in its Feb. 25, 2019 letter regarding the proposed section 163(j) regulations, generally recommending that the final rules clarify the application of section 163(j) to REITs owning properties through partnership structures, and clarify the treatment of both qualified nonrecourse indebtedness and "incidental" services under the REIT election for real property trades or businesses (RPTOB).

Third, as Nareit mentioned in our April 4, 2018 meeting with Treasury Assistant Secretary for Tax Policy and then-Acting Commissioner of the IRS David J. Kautter, we again recommend 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 2018, 2017, 2012, 2011, and 2009.

Fourth, Nareit encourages the Treasury Department and the IRS to carry over to the 2019-20 PGP and 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 4 under "Corporations and Their Shareholders" in the Second Quarter Update of the 2018-19 PGP ("Revising regulations under §1.337(d)-7 regarding the treatment of certain foreign corporations").

Fifth, while Nareit appreciates that the May 1, 2019 proposed qualified opportunity zone regulations (2019 Proposed QOZ Regulations) confirm that section 1231 gains are eligible for deferral under the qualified opportunity zone rules, Nareit recommends, as described in our Dec. 26, 2018 letter regarding the 2018 proposed qualified opportunity zone regulations, that the IRS and Treasury Department provide clear guidance that partnerships can defer gain from section 1231 property and that the 180-deferral period for shareholders of REIT capital gain dividends begin at the date that is 30 days after the end of the REIT's tax year.

Sixth, Nareit also reiterates the following two requests (which were included in Nareit's June 14, 2018 submission regarding the 2018-19 PGP, and Nareit's May 30, 2017 submission to the Administration concerning recommendations for the 2017-18 PGP) relating to spin-offs under section 355 and which also have been included in prior Nareit submissions. Specifically, Nareit restates the recommendations included in its October 7, 2016 comments regarding the proposed regulations under section 355 concerning device and active trade or business (REG-134016-15) (the Proposed ATB Regulations) to narrow the application of those regulations. Additionally, Nareit reiterates the recommendations included in its 2018 comment letter; its May 16, 2016 comment letter regarding Notice 2016-26 and the 2016-17 PGP in connection with the tax-free distributions of the stock of one REIT by another REIT. Specifically, the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act), which was enacted as part of Pub. Law 114-113, the "Consolidated Appropriations Act, 2016," and signed into law on Dec. 18, 2015, generally prohibits tax-free distributions of REITs except in certain cases, such as when both the distributing and controlled corporations are REITs "immediately after" the distribution. Nareit requests that IRS and Treasury provide guidance recognizing Congressional intent that a newly electing REIT satisfies this "immediately after" requirement when it files its REIT election on Form 1120-REIT for that taxable year in a timely manner.

Finally, Nareit urges the Administration to confirm that a REIT capital gains dividend allocated to an "applicable partnership interest" retains long-term capital gains treatment to the extent attributable to the disposition of an asset by the REIT held for more than three years.

Recommendations

Finalize Proposed Regulations Confirming That Section 199A Deduction Applies to Shareholders Invested in REITs through Mutual Funds

The proposed section 199A regulations confirm that RICs may pass through to RIC shareholders qualified dividends from REITs so that RIC shareholders can take the 20% deduction under section 199A. As noted in our April 9, 2019 joint letter with the ICI, Nareit believes that the proposed regulations appropriately implement Congress' intent under the authority granted to the Treasury Department and the IRS in sections 7805(a) and 199A(f)(4) and urges you to finalize these recommendations as soon as possible.

Clarify Aspects of New Section 163(j) Regarding REITs Owning Properties Through Partnerships as well as Nonrecourse Indebtedness

Nareit reiterates its recommendations included in its Feb. 25, 2019 letter regarding the proposed section 163(j) regulations. First, for the benefit of common partnership structures such as "UPREITs," Nareit requests that Treasury and the IRS permit certain controlled partnerships to make the REIT RPTOB safe harbor election. Second, Nareit requests confirmation of the application of the interest limitation and RPTOB election for REIT (C Corporation) partners when the partnership holds real property but may not be engaged in a trade or business at the partnership level. Third, Nareit requests that the final regulations provide greater clarity regarding the application of the anti-abuse rule to both qualified lodging facilities and qualified health care properties owned through partnerships. Finally, Nareit requests clarification on the treatment of both qualified nonrecourse financing and incidental services under the RPTOB election.

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 in 2018, 2017, 2012, 2011, and 2009 written submissions to the IRS and Treasury Department, Nareit recommends that Notice 2007-55 should be withdrawn.[3]

Doing so 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 the Notice – sub-regulatory guidance issued over 12 years ago - were withdrawn.

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 14, 2018 letter with respect to the 2018-19 PGP, Nareit encourages the Treasury Department and the IRS to carry over to the 2019-20 PGP and to continue work on the revision of Treas. Reg. § 1.337(d)-7 regarding the treatment of certain foreign corporations (listed under Part 5, Corporations and Their Shareholders, on the May 9, 2018 update to the 2017-18 PGP).

Clarify Certain Qualified Opportunity Zone Rules Applicable to Partnership Deferrals and REIT Shareholders who Receive Capital Gain Dividends

Partnership deferral of gains from section 1231 property

By way of background, section 1400Z-2 allows for the deferral of "gain" if the gain is invested in a qualified opportunity fund (QOF). In addition, section 1400Z-2(e)(4) grants broad regulatory authority to the Treasury Department to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section." In Nareit's Dec. 26, 2018 letter to the IRS and Treasury Department with respect to the Oct. 29, 2018 proposed qualified opportunity zone regulations, Nareit requested

[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 RICs.

confirmation that gain eligible for deferral include section 1231 gain. In addition, Nareit's 2018 letter noted that real estate partnerships historically have recognized, and are likely to continue to recognize, a significant amount of section 1231 gains. Nareit recommended that the IRS and Treasury Department consider using a definition of eligible gain under Section 1400Z-2(a) similar to the definition of "qualified capital gain" under a similar provision meant to encourage investment, former section 1400B(e)(1): gain from the sale or exchange of a capital asset or property used in the trade or business (as defined in section 1231(b)).

Nareit appreciates that the 2019 Proposed QOZ Regulations confirm that:

> the only gain arising from section 1231 property that is eligible for deferral under section 1400Z–2(a)(1) is capital gain net income for a taxable year. This net amount is determined by taking into account the capital gains and losses for a taxable year on all of the *taxpayer's* section 1231 property. The 180-day period described in paragraph (b)(4) of this section with respect to any capital gain net income from section 1231 property for a taxable year begins on the last day of the taxable year.

Prop. Treas. Reg. § § 1.1400Z2(a)–1(b)(2)(iii) (emphasis added).

However, some advisors have expressed uncertainty regarding whether a partnership can defer gains from section 1231 property.

Nareit is aware that several government representatives have made unofficial statements at various public speaking engagements which confirm that partnerships can defer section 1231 gains. However, those officials have said that the Treasury Department is still thinking about how to handle situations when the partnership has section 1231 gains, but the partners have section 1231 losses. It would provide greater certainty to the investing community and assist in spurring investment in opportunity zones if the IRS and Treasury Department could provide greater clarity with respect to partnership deferral of gain from section 1231 property. This clarity could be provided by amending Form 4797 (Sales of Business Property) and/or its instructions as well as Form 8949 (Sales and Other Dispositions of Capital Assets) and its instructions to more closely align with the 2019 Proposed QOZ Regulations.

For example, the section of the instructions to both Form 4797 and 8949 could be amended in the section of both forms describing "special rules" for " . . . gains invested in qualified opportunity funds" to include the same title (e.g., "special rules for eligible gains invested in qualified opportunity funds") and a statement similar to the following:

> With respect to gains from a taxpayer's section 1231 property, a taxpayer (including a partnership) may defer capital gain net income for a taxable year determined by taking into account the capital gains and losses for a taxable year on all of the taxpayer's section 1231 property. The 180-day period with respect to the deferral of any capital gain net income from section 1231 property for a taxable year begins on the last day of the taxable year. An election to defer tax on eligible gain invested in a qualified opportunity fund should be reported on Form 8949.

Clarity also could be provided by including examples in the final regulations showing examples when a partnership is eligible, and is not eligible, to defer its capital gain net income arising from section 1231 property.

For REIT capital gain dividends, the 180-day deferral period should begin 30 days after the close of the REIT's taxable year

Nareit again recommends, as noted in our Dec. 26, 2018 letter, that the 180-deferral period for REIT capital gain dividends begin 30 days after the close of the REIT's taxable year, rather than on the date of the distribution. A REIT can only designate a capital gain dividend as such with certainty after the close of its taxable year; as a result, a shareholder cannot know on the date of a particular distribution whether that distribution is a capital gain dividend.

Spin-off Provisions

Proposed ATB Regulations concerning active trade or business requirement

The Proposed ATB Regulations would make significant changes to one of the factors to be taken into account in determining whether a distribution by a corporation of its subsidiary was used principally as a device within the meaning of section 355(a)(1)(B).

The Proposed ATB Regulations would introduce a distinction between "Business Assets" and "Nonbusiness Assets," with the former defined as gross assets used in one or more "Businesses," including cash and cash equivalents held as a reasonable amount of working capital for one or more "Businesses." A "Business," in turn, would be defined as an active trade or business, within the meaning of section 355(b) and Treas. Reg. § 1.355-3, without regard to, inter alia, the requirements relating to the active conduct throughout the five-year period preceding a distribution and acquisitions during such period (an ATB).

As more fully described in both Nareit's June 14, 2018 comment letter regarding the 2018-19 PGP, and our Oct. 7, 2016 comment letter regarding the Proposed ATB Regulations, Nareit again respectfully recommends the following:

First, Nareit recommends amending the Proposed ATB Regulations to revert to a "device" test based on "investment assets," rather than the new categories of "Business Assets" and "Non-Business Assets."

Second, Nareit recommends that the IRS and Treasury Department modify the Proposed ATB Regulations to exempt transactions described in section 355(h)(2)(A) (relating to distributions of REITs by REITs), from the application of the heightened scrutiny of Prop. Treas. Reg. § 1.355-2(d)(2)(iv) and the per se rule of Prop. Treas. Reg. § 1.355-2(d)(5).

Third, Nareit recommends that the IRS and Treasury Department expand the "Business Assets" test in the Proposed ATB Regulations for purposes of the "device" test under section 355 to include real estate owned by a REIT (and certain of its affiliates), without regard to whether such real estate would otherwise qualify as used in an active trade or business of the REIT.

Finally, Nareit recommends that the IRS and Treasury Department include an example in the final regulations to demonstrate the application of the "anti-abuse" rule of Prop. Treas. Reg. § 1.355-2(d)(2)(iv)(E).

Confirm that section 355(h)(2)(A) should apply, and section 856(c)(8) should not apply, when the effective date of the REIT election or elections—that is, the first day the entity or entities are treated as a REIT—coincides with or precedes the date of the distribution under section 355

Similarly, Nareit requests that IRS and Treasury provide guidance recognizing Congressional intent[4] that a corporation satisfies the "immediately" requirement of section 355(h)(2)(A) when the newly-electing REIT files its Form 1120-REIT for the taxable year in a timely manner.

Confirm that REIT Capital Gain Dividends Allocated to an "Applicable Partnership Interest" Retain Long-term Capital Gains Treatment to the Extent Attributable to the Disposition of an Asset Held by the REIT for More than Three Years

In connection with section 1061, and as more fully described in Nareit's June 14, 2018 comment letter with respect to the 2018-19 PGP, Nareit requests that the Treasury Department and IRS confirm that shareholders allocated REIT capital gain dividends through applicable partnership interests may continue

[4] *See* Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in 2015 (JCS–1–16), March 2016, footnote 896.

to treat such gains as long-term capital gains to the extent they are attributable to dispositions of assets held by the REIT for more than three years.

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All of the suggested recommendations above would fulfill the goals and objectives set forth in Notice 2019-30.

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 lessens 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.

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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